

*(Provisional Translation)*

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**RECOMMENDATIONS BY THE GOVERNMENT OF JAPAN  
TO THE GOVERNMENT OF THE UNITED STATES  
REGARDING REGULATORY REFORM  
AND COMPETITION POLICY**

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December 5, 2006

## **FOREWORD**

The first to fifth year dialogue of the Regulatory Reform and Competition Policy Initiative (“Regulatory Reform Initiative”) under the “Japan-U.S. Economic Partnership for Growth (“Partnership”)” established at the Japan-U.S. summit meeting on June 30, 2001, has deepened the bilateral economic relationship through harmonizing regulations and systems of the two countries. It has also contributed to the economic growth of both countries by reducing unnecessary regulations, strengthening competition, and improving market access.

The Government of Japan will continue to actively engage in regulatory reform on its own in order to achieve further economic growth.

The Government of Japan will also continue the dialogue with the Government of the United States under the Regulatory Reform Initiative, with a view to further deepening the economic relationship between the two countries, which account for some forty percent of the world economy, and to reinforcing the multilateral free trade system by demonstrating a model of dialogue and cooperation between the two biggest economies. This initiative is also a concrete effort for the economic cooperation of the “Japan-U.S. Alliance of the New Century” announced at the Japan-U.S. summit meeting on June 29, 2006.

The Government of Japan presents its recommendations regarding regulatory reform and competition policy to the Government of the United States upon the commencement of the sixth year dialogue of the Regulatory Reform Initiative.

In the United States, there remain regulations and systems that are: 1) inconsistent with the principle of free trade; 2) impeding fair competition; and 3) unique to the United States and not harmonized with international standards. Particularly, the United States should revise its regulations and systems that are inconsistent with the WTO agreement, on its own initiative to maintain the multilateral free trade system. The United States should revise these regulations on its own initiative to maintain the multilateral free trade system. Also, some investment-related measures of the United States are imposing unreasonable burdens on Japanese companies conducting or attempting to conduct business in the United States, thus being their serious concerns.

The Government of Japan also apprehends that the series of changes in policies and reinforcement of regulations by the Government of the United States in areas such as logistics and consular affairs might impede active and smooth trade as well as movement of people between the two countries and mutual visits by both nationals. While the Government of Japan understands the necessity of the measures for national security, it believes that these measures should not adversely affect the economic ties between the two countries.

In course of the dialogue, the Government of Japan will keep urging the Government of the United States to improve its policy and further promote regulatory reform and competition policy by reflecting these recommendations sufficiently. The Government of Japan strongly hopes that the frank and constructive dialogue with the Government of the United States under the Regulatory Reform Initiative based on the principle of two-way dialogue will greatly contribute to further strengthening and deepening the bilateral economic relationship.

**Recommendations by the Government of Japan to the Government of the  
United States Regarding Regulatory Reform and Competition Policy**

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## I. ANTI-DUMPING MEASURES

Although anti-dumping measures are considered proper trade remedies as long as they are operated in a manner consistent with the World Trade Organization (WTO) Agreement, they may unduly limit trade and distort competition once used in an arbitrary manner, for example, in determining whether dumping exists or not. Furthermore, the initiation of anti-dumping investigations itself may discourage foreign exporting companies.

The United States is one of the world's most frequent users of anti-dumping measures. A number of countries including Japan have been claiming that some of the U.S. anti-dumping measures are inconsistent with the WTO Agreement due to, for example, arbitrary judgments in determining whether dumping exists or not. In several cases such as “United States – Certain Hot-Rolled Steel Products from Japan (DS184),” the Dispute Settlement Body (DSB) of WTO found that the U.S. measures were inconsistent with the WTO agreement.

From these viewpoints, the Government of Japan urges the Government of the United States to operate its anti-dumping mechanism in a prudent manner fully consistent with the WTO Agreement without abusing it for protectionist purposes.

Specific requests are as follows:

### **1. The Byrd Amendment**

The Byrd Amendment, which stipulates the distribution of revenues generated through anti-dumping and other duties to the petitioners and the U.S. domestic producers who supported the petition for anti-dumping and other measures, was found to be inconsistent with the WTO Agreement in January 2003, and was finally repealed in February 2006. However, revenues from anti-dumping duties on goods imported to the United States before October 1, 2007, would continue to be distributed among the relevant parties under the transitional provision of the Deficit Reduction Act of 2005. This means that although the Byrd Amendment was nominally repealed, it continues to stay in effect. Therefore, the inconsistency with the WTO Agreement remains. The Government of Japan strongly urges the Government of the United States to promptly halt the distribution of revenues under the Byrd Amendment and resolve the inconsistency with the WTO Agreement.

### **2. Zeroing**

The United States applies “zeroing methodology” in anti-dumping procedures whereby the authority compares the price of a product exported to the United States with the normal domestic (export country) value, and regards the difference as zero when the export price is higher than the normal domestic value, thereby artificially inflating the overall dumping margin of the product and impermissibly raising the anti-dumping duty rates. In cases respectively filed by the EC and Canada to the WTO, the Appellate Body clearly determined this year that the “zeroing methodology” in the original investigations and those used in the administrative review of individual dumping cases were in violation of the WTO Agreement. The Government of Japan is of the view that any use of “zeroing” in anti-dumping procedures is prohibited, and urges the Government of the United States to completely abolish the use of “zeroing” in anti-dumping procedures under any circumstances.

### **3. Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (DS184)**

With regard to the dispute on anti-dumping measures on certain hot-rolled steel products from Japan, the measures taken by the United States were found to be inconsistent with the WTO Agreement in August 2001. However, the Government of the United States has not made the necessary legislative amendments, and therefore has not yet fully implemented the DSB recommendations and rulings. In other words, the United States' Tariff Act of 1930 still requires the inclusion of dumping margins concerning the companies under investigation established based in part on "facts available" to be used in calculating "all-others rate". The Government of Japan urges the Government of the United States to amend the provision in question in order to promptly implement the DSB recommendations.

### **4. Anti-Dumping Measures for Large Newspaper Printing Presses**

The Government of Japan has strong concerns about the manner in which the U.S. trade laws have been operated with regard to the following issues related to anti-dumping measures on large newspaper printing presses from Japan, and urges the Government of the United States to make improvements on the situation.

#### (1) Issue Related to the Anti-Dumping Act of 1916

The Anti-Dumping Act of 1916, ruled inconsistent with the WTO Agreement, was repealed in December 2004. However, since its effects did not apply for pending trial cases, a certain Japanese company lost a case in June 2006 and was held liable for damages. In addition, the Federal District Court issued a preliminary injunction that enjoins the Japanese company from filing a lawsuit under Japan's Special Measures Law, which entitles the Japanese company to seek the recovery of the above damages (now a pending trial case in the appeal court). The Government of Japan finds this situation regrettable, and urges the Government of the United States to remedy it.

#### (2) Issues Regarding the Reconsideration of Sunset Review and Retroactive Application of Anti-Dumping Measures as a result of Changed Circumstances Review

Regarding the anti-dumping measures on large newspaper printing presses originating in Japan, the measure against a certain Japanese company was revoked as a result of the administrative review in January 2002, and all the anti-dumping measures were terminated pursuant to the sunset review in February 2002.

However, in May 2005, the U.S. Department of Commerce self-initiated the Changed Circumstances Review regarding the Japanese company and the following final decisions were made in March 2006: (1) to set the anti-dumping duty rates on the company for 1997-1998 at 59.67%; (2) to rescind the decision to revoke anti-dumping measures against the company in January 2002; and (3) to reconsider the sunset review in February 2002.

In response to this final decision, the Department of Commerce began in April 2006 to reconsider the sunset review of 2002, and made a preliminary decision on November 6, 2006 to affirm the likelihood of continuation or recurrence of dumping. However, in the sunset review in 2002, anti-dumping measures were terminated due to withdrawal of participation in the review by the domestic U.S. industry. Therefore, it lacks reasonable grounds and harm legal stability to reconsider the sunset review based on the result of the abovementioned Changed Circumstances Review to restore and continue the anti-dumping measures and make them retroactively applicable. Furthermore, the preliminary decision is applied to all large newspaper printing presses originating

in Japan, and has unreasonably resulted in also restoring anti-dumping measures against those companies not subject to the Changed Circumstances Review. Therefore, this decision seriously harms not only legal stability, but also predictability for companies. Hence, the Government of Japan is deeply concerned about this case, and urges the Government of the United States not to reconsider the sunset review and restore the anti-dumping measures.

Moreover, in response to the Changed Circumstances Review decisions made by the Department of Commerce, a bill to retroactively impose anti-dumping duties (59.67% plus interest) has been submitted to Congress. The Government of Japan urges the Government of the United States not to undermine legal stability and predictability with such retroactive application.

#### **5. Sunset Review**

U.S. sunset review procedures, by their related legislations, regulations, policy bulletins and in their actual implementations, maintain anti-dumping measures in principle and terminate them only in exceptional cases. The Government of Japan deems that U.S. sunset review procedures are not consistent with the WTO Agreement. Indeed, some U.S. anti-dumping measures are not terminated in five years and remain in force for a longer time, in some cases for 30 years or longer. In addition, the U.S. sunset review puts burden of proof on respondents (exporters or producers), rather than on petitioners (U.S domestic industry) who prefer continuation of anti-dumping measures, thus resulting in promoting continuation. Furthermore, some user's industries in the United States also find the continuation of anti-dumping measures problematic. For example, major automobile makers of both Japan and the United States manufacturing in the United States are jointly requesting the termination of the anti-dumping duties on some iron and steel products, from the viewpoint of promoting international price competitiveness of automobiles manufactured in the United States. Thus, the unfairly long-term anti-dumping measures would have an adverse effect on the interest of the United States as well.

The Government of Japan urges the Government of the United States to make it clear that it will terminate anti-dumping measures within five years in principle, and to amend the system to put the proof of burden on those who call for the continuation of the measures, regardless of whether or not progress is made in the anti-dumping rule negotiations under the Doha Development Agenda (DDA) negotiations. It also urges the Government of the United States to examine closely the necessity to continue anti-dumping duties by conducting sunset reviews in a manner appropriate and consistent with the WTO Agreement, and to terminate long-term anti-dumping measures as soon as possible.

#### **6. Model-Matching**

In calculating dumping margins, the Government of the United States classifies different models of export products in question and their domestic "like product" in the exporting country according to individual characteristics, and then determine domestic products that are "identical" to or "closely resembling" the exported products ("model-matching"). In the annual administrative review of anti-dumping measures on ball bearings imported from Japan in FY2003/2004, the Department of Commerce made a final decision without any convincing reasons to change the model matching methodology that had been used in past anti-dumping reviews, which strictly lays down items for comparison survey, to a methodology that is more disadvantageous to the petitioner than before.

The new methodology proposed by the Department of Commerce compares prices of dissimilar products, and therefore will reduce the predictability of the results of anti-dumping investigations. It will also impose excessive burdens on Japanese exporters to submit an enormous amount of

domestic sales and price data. In addition, the Government of Japan is concerned that the new methodology will in effect be applied retroactively to import transactions prior to the introduction of the methodology.

The case involving ball bearings is currently being disputed at the U.S. Court of International Trade (CIT), and the Government of Japan urges the Government of the United States to fully recognize the unfairness of the new methodology that causes the problems mentioned above, and to rescind the revision of methodology.

### **7. The Definition of “Affiliated Parties”**

In anti-dumping investigations, how to define “affiliation” to or “affiliated companies” of exporters becomes an issue in calculating the normal value in domestic market and the constructed export price. The Department of Commerce deems respondents to be “affiliated” with suppliers or purchasers simply if the former owns five percent or more of stocks issued by the latter or has family relationships with the latter, regardless of whether respondents have control over suppliers or purchasers. The authorities require exporters to submit data such as cost related to all “affiliated parties” in principle.

This requirement imposes tremendous burden on “affiliated companies,” especially when they are small- and medium-sized and therefore not fully equipped with adequate electronic data-processing systems. It is also difficult for the company under investigation to request companies that own around five percent of its stocks to provide cost and other data.

The Government of Japan therefore urges the Government of the United States to prevent anti-dumping investigations that cause excessive burdens on the subject company by reconsidering the scope that determines whether a certain entity is an “affiliated company” and by limiting the requested data to those that are truly necessary.

## **II. INVESTMENT-RELATED REGULATIONS**

Further increasing mutual investments between Japan and the United States will lead to reinforcement and deepening of the economic relations between the two countries. Recently, there have been some moves to reconsider regulations related to foreign direct investments in the United States. It is important to ensure that such regulatory changes will not block any direct foreign investments to the United States.

In promoting foreign investments, it is desirable that countries accepting investments provide transparency of their regulations and national treatment to the overseas investors, in the pre-investment stage. Viewed from the standpoint of an overseas investor, the investment conditions of the United States lack sufficient transparency and predictability, in particular, in the regulations on investments related to national security. When an investment that in principle is not prohibited comes under investigation by the authorities, or investment cannot be made or is forced to change due to an investigation, private companies suffer heavy losses. Therefore, the United States should adopt a standard with a high level of transparency and predictability that is easy for foreign investors to understand.

Specific requests are as follows:

### **1. Exon-Florio Amendment**

The Exon-Florio amendment (Section 721 of the Defense Production Act of 1950) provides a mechanism to review and, if the President finds necessary, to restrict foreign direct investment that might threaten the national security of the United States. In general, the Government of Japan fully understands the necessity of regulations for national security. The Government of Japan has concerns, however, about the provision from the following viewpoints: (1) the lack of predictability for investors due to the ambiguous definition of “national security”; (2) the lack of legal stability due to the possibility that completed transactions can also be subject to future investigation; and (3) the lack of due process, illustrated by the fact that even the parties concerned cannot be notified of the reasons for the commencement of investigation, nor the final decisions by the President. The Government of Japan also has concerns that this provision could impede investment activities of Japanese companies beyond the extent necessary for its original purpose. Transparency and predictability of government regulations are key elements in determining investment. They are also prerequisites for competitive businesses to conduct their business under fair conditions.

The Government of Japan urges the Government of the United States, in implementing the Exon-Florio amendment, not only to ensure consistency with WTO rules but also to take necessary measures to ensure transparency and fairness, to the maximum extent possible, in the process, from the notification to the Committee on Foreign Investment in the United States (CFIUS) to the final decision by the President.

Further, the Government of Japan understands that bills to revise the Exon-Florio amendment have been submitted to Congress, and it urges the Government of the United States to ensure that the revision not inhibit investments to the United States from allied nations including Japan.

## **III. DISTRIBUTION AND CUSTOMS PROCEDURES**

### **1. Maritime Transport Security**

As part of initiatives for counter-terrorism, the United States has enforced the regulations implementing the advance electronic presentation (hereafter referred to as “advance presentation rules”) of cargo information under the Trade Act of 2002, and obligated the submission of manifests of international containerized sea cargoes bound for the United States to the U.S. customs authorities no later than 24 hours prior to loading. As a result, the deadline for delivery of containers to the container yard, which had been commonly set around 24 hours prior to loading, has been moved up by some 48 hours. This has considerably decreased the efficiency of distribution and is imposing no small burden on businesses, including those with excellent track records of compliance.

The Government of Japan has established a Promotion Council under the “Policy Package to Promote the Security and Efficiency of International Distribution,” and has been making maximum efforts to strengthen security measures and at the same time to shorten the lead time of exports to the United States, but efforts on the part of Japan alone have their limits.

The Government of Japan urges the Government of the United States to take measures for the easing of the advance presentation rules (such as extension of the deadline for the manifest submission) and the expansion of benefits for participants in the Customs-Trade Partnership

Against Terrorism (C-TPAT), such as their exemption from the advance presentation rules and a further reduction in the number of inspections, in consideration of achieving a balance between thorough security measures and efficient distribution. In addition, with regard to the benefits of participation in C-TPAT, the Government of Japan urges the Government of the United States to enhance transparency by implementing and publicizing a policy evaluation based upon the C-TPAT participants' comments. Further, the Government of Japan urges the Government of the United States, with greater understanding of efforts being exerted by the government and private sectors of Japan toward secure and efficient international distribution, to make efforts to increase efficiency in customs clearance for Japanese companies not participating in C-TPAT as well.

## **2. Measures against Bioterrorism**

Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 ("Bioterrorism Act"), the Government of the United States publicized two Interim Final Rules of "Registration of Food Facilities" and "Prior Notice of Imported Food Shipments" and has been implementing them since December 2003.

The Government of Japan welcomes the fact that the Food and Drug Administration (FDA), in part based on comments filed by the Government of Japan, has decided in its "Compliance Policy Guide" that FDA and the Customs and Border Protection (CBP) will not regulate in principle food imported into the United States or offered for import for non-commercial purposes from non-commercial shippers even without prior notice. The Government of Japan strongly hopes that any final rules to be established will not impose excessive burdens on exporters or individual senders of food beyond the level required by the purpose of the Bioterrorism Act, that is, the protection of the United States from the threat of bioterrorism, and thereby hinder the flow of goods to the United States.

Furthermore, several problems have been raised regarding the actual administration of the Bioterrorism Act, including that information about the act is not readily available in Japanese and that some information about export of food for which prior notice is required under the act is not made available until immediately before the deadline and, as a consequence, considerably limits the time allowed to take necessary procedures.

Besides, the Government of Japan has received: (a) complaints that many regulations related to the shipment of food to the United States, including the Bioterrorism Act, are complex and hard to understand; (b) opinions that it takes so much time to receive import licenses or go through customs procedures for imports of food that business activities of Japanese companies are negatively influenced; and (c) requests for easier regulations for food for personal consumption.

Based on the recognition above, the Government of Japan urges the Government of the United States to:

- (1) Continue not to require non-commercial senders of food for non-commercial purposes to provide prior notice under the forthcoming final rule on prior notice on the sending of food for imports to be adopted in the future, and exempt food shipped by retail stores or other commercial shippers on behalf of non-commercial individuals if the non-commercial nature of the shipped food is clearly declared on the parcel;
- (2) Establish a contact point at the U.S. establishments in Japan at which Japanese nationals, particularly small- and medium-sized food processors and individuals, can inquire in Japanese about the latest status of related rules and procedures to be taken on the registration of food facilities and sending of food, and inform Japanese food processors, the Japan Post, commercial

transport service providers and Japanese nationals in general of any future changes in the rules without delay through appropriate means including the website of the United States Embassy in Japan; and

(3) Improve the implementation of food import procedures according to the Bioterrorism Act and other rules, by shortening the time required for the issuance of import licenses and customs clearance procedures for food and by easing regulations on food for personal consumption.

### **3. Merchandise Processing Fee (MPF)**

When goods are imported into the United States from foreign countries, all merchandise is subject, in principle, to the processing fee equivalent to 0.21% of the customs value of the merchandise entered (with a maximum of 485 dollars) as “Merchandise Processing Fee (MPF).”

Under the WTO Agreement, Article 2.2 (c) of GATT permits imposing fees other than bound customs duties, but Article 8.1 (a) of GATT provides that all fees “shall be limited in amount to the approximate cost of services rendered.” The interpretation of this article established by precedents, including the case in which the MPF of the United States (without an upper limit then) was found inconsistent with GATT in 1987, is that fees or charges on an *ad valorem* basis is inconsistent with GATT to the extent that it is levied in excess of the approximate cost of the services rendered to the individual entry in question.

Although the MPF sets an upper limit, since it is an *ad valorem* fee, it increases as the price of the merchandise and therefore may exceed the cost of the customs processing for the individual entry in question, thus raising a doubt about its consistency with the WTO Agreements.

Accordingly, the Government of Japan urges the Government of the United States to modify the MPF system in an appropriate manner so that the MPF will not exceed the approximate cost of the customs processing for the individual entry in question.

### **4. Regulations on Alcoholic Beverages**

#### (1) Regulations on the Standard of Fill for Bottled Distilled Spirits

According to the U.S. regulations on the capacity of containers for distilled alcoholic beverages under Part 5 Section 45 and Part 5 Section 47 of the Code of Federal Regulation, Title 27, no person engaged in business as a distiller, rectifier, importer, wholesaler, or warehouseman and bottler, shall sell, ship, deliver for sale or shipment, otherwise introduce in interstate or foreign commerce, receive therein, or remove from customs custody any distilled spirits in bottles unless they are bottled and packed in containers with the prescribed capacity such as 500 milliliters, 750 milliliters, 1 liter, 1.75 liters, etc.

The regulations make it difficult to export from Japan to the United States *shochu* and other distilled spirits in 720-milliliter and 1,800-milliliter containers commonly used in Japan. As those containers are in wide use in Japan, it is extremely difficult to manufacture containers that conform to the U.S. regulations due to cost and other problems, except for a handful of Japanese companies.

Therefore, the Government of Japan urges the Government of the United States to abolish the regulations or take some special measures to make it possible to export *shochu* and other distilled spirits to the United States in 720-milliliter and 1,800-milliliter containers commonly used in

Japan.

(2) Certificate of Label Approval on Alcoholic Beverages Imported into the United States

According to the Part 4 Section 40, Part 5 Section 51, and Part 7 Section 31 of the Code of Federal Regulation, Title 27, no imported alcoholic beverages in containers shall be released from the United States Customs custody for consumption unless there is a certificate of label approval (ATF Form 5100.31). Due to the regulations, even the alcoholic beverages intended for use as samples for tasting must have the certificate of label approval prior to the import into the United States, which stands as a high barrier for Japanese people to conduct promotion campaigns of Japanese alcoholic beverages in the United States.

In the Fifth Report to the Leaders, the Government of the United States pointed out that exemptions from the regulations are available. However, the extent of the exemptions available is quite limited, providing no viable solution to the problem.

(3) On-Sale Licenses for Alcoholic Beverages

(a) In the States of California and New York, on-sale licenses which permit the sale of wine for consumption on the premises where sold also authorizes the sale of *soju*, an imported Korean alcoholic beverage with no more than 24% alcohol content by volume that is derived from agricultural products, whereas the sale is not permitted for *shochu*, a Japanese alcoholic beverage, though it is also derived from agricultural products, even with no more than 24% alcohol content by volume. As this different treatment raises concern from the standpoint of the WTO's principle of most-favored-nation treatment, the Government of Japan urges the Government of the United States to permit the sale of *shochu* for consumption on the premises where sold with the on-sale license.

In the State of California, it is possible to sell Japanese-produced *shochu* with no more than 24% alcohol content by volume with the on-sale license in case it is labeled as "*soju*." However, since "*soju*" is the name of the Korean alcoholic beverage, indicating this name on Japanese-produced *shochu* would make the distinction between Japanese *shochu* and Korean-produced *soju* unclear and put the sale of *shochu* at a disadvantage, and therefore, it does not provide any solution to this issue.

Further, it is pointed out in the Fifth Report to the Leaders that the Government of Japan is free to petition the state governments for exemptions from and changes in their regulations. However when regulations of state governments are inconsistent with the WTO agreement, the Government of the United States has an obligation, according to the Article 24.12 of GATT 1994, to take such reasonable measures as may be available to it to ensure the observance of GATT by state governments. From this standpoint, the Government of Japan urges the Government of the United States to work on the State governments of California and New York to permit the sale of *shochu* for consumption on the premises where sold with the on- sale license.

(b) The Government of Japan also urges the Government of the United States to permit the sale of *shochu* with alcohol content by volume of 24% or more but no more than 26% with on- sale licenses which permit the sale of wine for consumption on the premises where sold.

## IV. CONSULAR AFFAIRS

The relationship between Japan and the United States continues to deepen, with a great number of Japanese nationals visiting and staying in the United States. The fundamental basis of the close bilateral relationship between Japan and the United States is that all Japanese nationals are smoothly enter the United States and stay there without significant inconvenience.

In recent years, regulations concerning consular operations of the Government of the United States have been made stricter, in order to prevent illegal immigration and residence in the United States. These reinforced regulations have resulted in delays in consular procedures. In addition, there have been repeated changes to the regulations, and there have been numerous cases in which there has been inconsistency among officers involved. While recognizing the necessity of preventing illegal immigration and residence, the Government of Japan urges the Government of the United States to take remedial action, including the expediting of consular procedures, to reduce obstructions to the legal movement of persons or to legal corporate activities. The Government of Japan also urges the Government of the United States to accurately and promptly inform immigration officers, visa inspection officers and other relevant federal institutions of the content of such regulations.

In consideration of the above, the Government of Japan requests the following:

### **1. Visa Processing**

#### (1) Efficiency in Visa Revalidation Procedures

The Government of the United States suspended the revalidation of visas at the State Department on July 16, 2004. Applicants for visa revalidation residing in the United States need to either return to Japan or visit a third country. In particular, holders of E visas cannot revalidate their visas in third countries, and have no choice but to return to Japan for visa revalidation. In addition, there are a variety of circumstances that are causing obstacles to the smooth revalidation of visas, including: (a) the fact that revalidation applicants are unable to make an appointment for an interview at a convenient time; (b) the uncertainty and the length of time it takes to have visas revalidated; and (c) the fact that in June 2006, the method of payment for visa application charges was changed, and it is no longer possible to make direct payment from the United States. As a result, Japanese companies operating in the United States have to bear huge expenses in connection with visa revalidation for their employees and their families, including costs for travel and accommodation. Moreover, Japanese companies must sometimes send substitute employees to the United States, since the "original" employees must come back to Japan for several weeks for visa revalidation, and substitutes are required to ensure that there is no hindrance to business operations. There are even cases where the absence of original workers causes a complete suspension of business operations. In addition, there are concerns about the education of children of Japanese employees working in the United States, who have to leave the country with their parents for visa revalidation.

The Government of Japan therefore urges the Government of the United States to:

- ( a ) Resume all visa revalidation procedures at the State Department;
- ( b ) Immediately commence the revalidation of E visas in third countries as a temporary

measure, until the measure in (a) is implemented; and

- (c) Make visa revalidation procedures more efficient and smooth, regardless of whether procedures are being performed in Japan or in a third country. This can be done, for example, by shortening the time required for visa revalidation, clarifying how long it takes to revalidate visas, and making it possible once again to pay the visa application fee directly from the United States.

## (2) Expansion of Visa Services in Japan

The Government of Japan welcomes the pilot program that was launched by the Government of the United States in April 2006, whereby application procedures for non-immigrant visas are undertaken monthly at the Consulate-General in Sapporo. However, the only U.S. overseas establishments in Japan where it is possible to submit visa applications on a daily basis are the Embassy in Tokyo and the Consulates-General in Osaka-Kobe and Okinawa. In particular, applicants residing in Kyushu therefore must visit Tokyo or Osaka to apply for visas, incurring expensive travel and accommodation costs. It also increases the cost for those who return from the United States to revalidate their visas, who may, for example, be required to travel to an alternate establishment if they cannot acquire an appointment for an interview at their preferred U.S. overseas establishment.

The Government of Japan urges the Government of the United States to continue the pilot program for visa application procedures that has been launched in Sapporo. In addition, the Government of Japan urges that the Sapporo pilot program be expanded to include visa application procedures at the Consulates-General in Nagoya and Fukuoka.

## (3) Visa Issuance and Terms of Validity

- (a) The current visa revalidation procedure imposes a huge burden on Japanese nationals, and from the standpoint of reducing demand for revalidation, extending the original terms of validity of visas would contribute to resolving the problem. Currently, L visas are valid only for two or three years, while intra-company transferees to Japan are provided with five-year visas. Accordingly, from the viewpoint of reciprocity, the Government of Japan urges the Government of the United States to issue five-year visas.
- (b) L visas may be revalidated on a maximum of two occasions and H-1b visas may only be revalidated once. This limitation means that companies cannot utilize human resources for long-term projects, and this is creating an obstacle to the implementation of ongoing projects. Given that Japan imposes no limitations on the number of renewals of intra-company transferee visas, from the viewpoint of reciprocity the Government of Japan urges the Government of the United States to increase the number of times these visas may be revalidated.
- (c) The Government of Japan urges the Government of the United States to ease visa inspection standards, including easing of the requirements for the issuance of E visas, and further increasing the number of H-1b visas issued annually.

## **2. Driver's Licenses**

### (1) Real ID Act

The Real ID Act, which goes into effect in 2008, stipulates that a Federal agency may not accept, for any official purpose, a driver's license issued by a State to any person unless the State is meeting the requirements prescribed in the Act. One of these requirements is that a temporary driver's license issued to a foreign national shall be valid only for the period of the applicant's authorized stay in the United States or, if there is no definite end to the period of authorized stay, a period of one year. If, in accordance with this Act, driver's licenses issued to foreign nationals in each State are valid only for the duration of the applicant's authorized stay, Japanese people residing in the United States will have to renew their driver's licenses more frequently than currently required. In fact, without waiting for the Act to take effect, many States such as California have revised their regulations, limiting the period of validity for driver's licenses to the period of authorized stay (I-94). Moreover, if driver's licenses are not accepted for any official purpose, then Japanese nationals will always have to carry their passports for identification, which raises the possibility of having their passports stolen or lost, and also considerably increases the risk of stolen or lost passports being used for crimes or terrorism.

The Government of Japan therefore urges the Government of the United States to:

- ( a ) Regard the term of validity of non-immigrant visas, which are valid for a relatively long period, as the "period of time of applicant's authorized stay," so that an excessive burden will not be placed on Japanese nationals when States implement the Act. In addition, the Government of Japan urges the Government of the United States to request States that have limited the period of validity of driver's licenses to the authorized period of stay to lengthen the period of validity, at the very least for legal residents;
- ( b ) Limit the "official purposes" in the Act to the minimum that are genuinely necessary, and clarify it so that foreigners do not always need to carry passports with them for identification purposes with regard to the handling of driver's licenses in States that do not comply with the stipulations concerning the validity period in the Act; and
- ( c ) Issue detailed Federal regulations as soon as possible in order to alleviate the concerns among Japanese nationals which arise from uncertainty regarding the actual impact of the Act, and to avoid confusion as to the implementation of the Act in each State.

### (2) Improvement of State Rules

With regard to the issuance of driver's licenses, some States impose an excessive burden on Japanese nationals residing in the United States by requiring many documents and by making them wait for a long time. The Government of Japan urges the Government of the United States to request each State Government not to impose an excessive burden on Japanese people, and make requests of the State Governments in question regarding the following points:

#### (a) Improvement of Handling of International Driver's Licenses

In many States limitations are placed on driving with an international driver's license. These include the obligation for foreign nationals whose residence in the State in question has been

approved to acquire a State driver's license, regardless of whether their international driver's license is still valid. In other cases, international driving licenses lose their validity in a short period of time. The Government of Japan urges the Government of the United States to request relevant State authorities to recognize the one-year term of validity of international driver's licenses issued by Japanese authorities, in accordance with the spirit of the Convention on Road Traffic, to which the United States is also a signatory.

(b) Seizure of Driver's Licenses in the State of Georgia

In the State of Georgia, State law requires that the Japanese driver's licenses and international driver's licenses of Japanese nationals shall be surrendered upon receipt of a State driver's license, and that surrendered licenses shall be disposed of and not returned to their owners. This places a burden upon Japanese nationals in terms of time and money, due to the fact that when they return to Japan temporarily (on business trips, etc.) they are forced to acquire an international driver's license issued in Georgia. In addition, it is also necessary for these people to reapply for a Japanese driver's license once they have returned to Japan on a permanent basis. The Government of Japan urges the Government of the United States to request the State authorities to return the surrendered licenses, as was previously the case.

(c) "Sponsor" Requirement in Driving Test in the State of Massachusetts

The regulations of the State of Massachusetts stipulate that an applicant for a driver's license be accompanied for a driving test by a "sponsor" who is 21 years or older with a valid driver's license issued in the United States, and with a minimum of one year of driving experience. It is often difficult to find an appropriate sponsor for a foreigner immediately after his or her arrival in the country, and therefore this requirement in Massachusetts has been causing inconvenience for Japanese nationals in obtaining driver's licenses in the State. The Government of Japan urges the Government of the United States to request that the State authorities abolish the rule, or otherwise mitigate the requirement to avoid excessive burden being imposed upon foreigners.

(d) Issuance of "Driver's Certificate" in the State of Tennessee

Driver's Certificates issued in Tennessee do not function as photo IDs, unlike driver's licenses, and therefore cause inconvenience to Japanese people in their day-to-day lives by making it necessary for them to carry their passports every day for identification purposes. The Government of Japan urges the Government of the United States to request that the State authorities abolish the Driver's Certificate, and issue instead a driver's license that functions as a photo ID.

### **3. Immigration Control**

There are occasions when immigration procedures into the United States take a tremendous amount of time, resulting in cases where Japanese people are unable to catch connecting flights. In particular, recently not only has the time taken for immigration procedures increased due to anti-terrorism measures and the prevention of illegal immigration, but restrictions have also been placed on systems that were originally designed to facilitate immigration. For example, the Immigration and Naturalization Service Passenger Accelerated Services System (INSPASS) that was utilized by passengers who frequently enter and depart the United States has been halted, and the Secure Electronic Network for Travelers Rapid Inspection (SENTRI) application procedures on the U.S.-Mexico border have also lengthened. While recognizing the necessity for measures designed to tackle terrorism and prevent illegal entry, the Government of Japan also points out the necessity of ensuring that the legal movement of persons is also implemented. For this purpose the Government of Japan urges the Government of the United States to:

- (1) Collect information on the time required for passengers to go through immigration control, and take necessary measures to reduce this time;
- (2) Resume the INSPASS to facilitate immigration procedures; and
- (3) Accelerate procedures for SENTRI in order to shorten the time required for immigration.

#### **4. Handling of Emergency Passports and Travel Documents for Return to Japan Without Biometric Identifiers**

The Government of the United States has announced that if passports issued on and after October 26, 2006, do not carry biometric identifiers, then the holder of that passport is not eligible for the Visa Waiver Program (VWP). On the other hand, those who have emergency passports issued at overseas establishments of Japan (valid for one year) or travel documents for return to Japan without biometric identifiers are still currently eligible under the VWP and are granted a parole. However, there are concerns about the possibility that the Government of the United States may change current regulations that would result in emergency passports and travel documents for return to Japan also being excluded from the VWP.

The Government of Japan urges the Government of the United States to continue to waive visa requirements under the VWP for Japanese travelers with emergency passports or travel documents for return to Japan.

#### **5. Permission to Stay**

##### (1) Expeditious Extension of Permission to Stay

At present, it takes two to three months to extend Permission to Stay (I-94), and in the mean time, it is virtually impossible for Japanese workers in the United States to leave and re-enter the country, which creates impediments to their business. The Government of Japan urges the Government of the United States to expedite the extension process.

##### (2) Extension and Automatic Renewal of Validity of Permission to Stay

The I-94 period of validity is short, and, in particular, the term of validity of I-94s issued to E visa bearers (valid five years) is a maximum of two years. This requires Japanese employees residing in the United States to frequently renew their I-94, raising the concern from Japanese companies and their employees that a burden is being imposed on Japanese nationals in terms of time and money. The Government of Japan urges the Government of the United States to extend the terms of I-94s issued to E visa bearers in particular, and to permit automatic renewal of I-94s throughout the validity of the visa.

#### **6. Social Security Number**

##### (1) Expeditious Issuance of Social Security Number

Local officials of the Social Security Administration (SSA) issue a Social Security Number (SSN) after confirming that an applicant is eligible to obtain a SSN by checking his or her entry record on the database provided on-line by the Department of Homeland Security. Though the Government of Japan is aware that the SSA and the Department of Homeland Security continue efforts to expedite the process to verify immigration status, it still takes approximately two months for the SSA to issue a SSN for foreigners. Since SSNs are required as identification on a variety of occasions when Japanese nationals start living in the United States (for example, when opening bank accounts or applying for credit cards), the delay in issuing SSNs causes them significant inconvenience.

The Government of Japan urges the Government of the United States to take necessary measures to expedite the issuance of SSNs. In addition, the Government of Japan urges the Government of the United States to clarify the measures that it has already taken, including the current status of deliberations on the expansion of the Enumeration at Entry Program that was mentioned in the previous Report to the Leaders.

#### (2) Issuance of Social Security Numbers to Dependents of Employment Visa Holders

Although foreigners are often required to present their SSN in their daily lives in the United States, as holders of non-working visas are not eligible for SSNs, dependent family members of foreign workers cannot obtain SSNs, and the Government of Japan has been urging that SSN issuance be approved for such family members. In response to this, in the previous Report to the Leaders the Government of the United States indicated that it recognizes an individual as eligible for an SSN if they have Department of Homeland Security (DHS) work authorization or if they have a valid non-work reason for an SSN. However, reports have been received that it continues to be impossible for family dependents to obtain an SSN, causing inconvenience in daily life for Japanese nationals.

The Government of Japan urges the Government of the United States to recognize an individual as eligible for an SSN if they have DHS work authorization or if they have a valid non-work reason for an SSN, as was indicated in the previous Report, and to make efforts to inform them of such measures.

#### **7. Individual Taxpayer Identification Number**

It is now only possible to acquire an Individual Taxpayer Identification Number (ITIN) in principle once a year at the time of Federal tax return filing (from February to April). Japanese nationals residing in the United States who are not eligible for an SSN are forced to use their ITIN as an alternative means of personal ID, and the lack of an ITIN means that they face a number of difficulties, including in the acquisition of driver's licenses and in filing tax returns.

The Government of Japan urges the Government of the United States to reconsider the rule to enable the application for an ITIN at any time before the Federal tax return filing.

## **V. PATENT SYSTEM**

By international standards, the United States possesses a unique patent system. For example, it is

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the only country adopting the first-to-invent system. When foreign patent applicants wish to file an application in the United States, they must go through a process that differs from that of their own country, having to bear unnecessary additional costs. The same is true for U.S. applicants who wish to file an application overseas. The Government of Japan firmly believes that it would be beneficial for applicants from the United States as well as other countries if the Government of the United States modified its unique patent system so that it is consistent with international standards.

### **1. First-to-Invent System and Interference**

Under the first-to-invent system adopted by the United States, when two or more people make inventions separately and file applications respectively, an interference procedure is carried out in order to determine who invented first to receive the patent rights.

From the point of view of patent applicants, this procedure has problems as follows: (a) There is little certainty and predictability in that the position of the right holder may be imperiled *post factum* by the appearance of a prior inventor; (b) Interference procedures require a lengthy process and tremendous cost; and (c) There is a danger of leaking the contents of inventions contained in applications filed or of know-how contained in patents during the interference period.

Yet another problem arises when multiple inventors make the same invention independently and multiple patents are granted to some of these inventors. In such cases, there is a possibility that a third person is forced to pay redundant royalties to each rights holder and suffers an unreasonable loss, since the third person has no means to invalidate the multiple patent status.

The Government of Japan, taking into account the international trend toward harmonization of patent systems, urges the Government of the United States to switch at an earliest date to the first-to-file system, which is the international standard. As a provisional measure until such a switch is made, the Government of Japan continues to request that the Government of the United States simplify its interference procedures.

### **2. Early Publication System with Exceptions**

The U.S. early publication system, introduced by the revised Patent Act in November 1999, has an exception that allows applicants, by their request, not to publish applications made in the United States that are not filed overseas, as well as contents of applications in the United States that are not included in corresponding foreign applications.

The contents of applications unpublished by request remain undisclosed until the granting of patent rights is announced in an official patent publication. In the meantime, *bona fide* third persons may redundantly invest in research and development for or in putting to practical use an invention identical to the one in the unpublished application. This presents a grave issue from the standpoint of predictability of profits and losses in business.

In addition, when a patent examination of an unpublished application is prolonged, *bona fide* third persons may put into practical and extensive use in the market an invention identical to the one in the unpublished application under examination. If a patent is granted to the invention under examination after that, those third persons can be required to pay huge royalties for the “submarine patent.”

The Government of Japan continues to strongly request the Government of the United States to abolish the provisions of the Patent Act regarding exception in the early publication system, and to

implement the 1994 agreement between the two governments under the Japan-U.S. Framework for New Economic Partnership, in which the Government of the United States agreed to disclose all applications after 18 months since the first date of application, except for those non-pending and those under secret order.

### **3. Reexamination System**

In the United States patent system, a reexamination system is established to review the validity of patent rights after granting. The revised Patent Act enacted in November 1999 introduced the *inter partes* reexamination as an alternative to the existing *ex parte* reexamination. In addition, the reexamination system was further improved by the revision of the Patent Act in November 2002.

In the U.S. reexamination system, however, reasons for reexamination requests are limited to those based on the existence of prior art documents. It is not allowed to request reexamination on the grounds of not meeting the enablement requirement or the description requirement of the specification, as agreed upon between Japan and the United States.

Therefore, the Government of Japan continues to strongly request the Government of the United States to accept all requirement inadequacies prescribed in Article 112 of the Patent Act, excluding the best mode requirement, which is a requirement unique to the United States, as reasons for reexamination requests.

### **4. Restriction Requirement due to Non-fulfillment of Unity of Invention**

When two or more separate inventions are contained in one application, the applicant is requested to select and file only one invention from the contents of the application in order to maintain unity of invention (only one independent invention should be included in one application).

The U.S. standards of decision for unity of invention are more stringent than those of the Patent Cooperation Treaty (PCT). An invention that satisfies the requirement of unity of invention when filed in the United States under the PCT may not meet the requirement if the application is filed as claiming priority rights under the Paris Convention for the Protection of Industrial Property.

It is practically difficult for those applying for patents in multiple countries to prepare a different application (and consider the specified scope of patent contents) in accordance with the peculiar U.S. standards on unity of invention.

When an applicant specifies a claim to be filed in response to a request for division of application, other claims are automatically opted out from the scope of examination. Therefore, if the applicant wants to maintain a non-specified claim, he or she needs to file a divisional application before the patent is issued for the remaining claim. Filing divisional applications requires additional time and expenses, thus imposing an excessive burden on applicants.

Furthermore, some inventions that are regarded as single in other countries are filed as multiple inventions in the United States. This is burdensome to all parties concerned, namely, applicants and right-holders as well as third persons who need to monitor patents to avoid infringement of existing patents.

Therefore, the Government of Japan continues to request the Government of the United States to ease the requirements for unity of invention.

## **5. Hilmer Doctrine and Language Discrimination**

Article 119 of the Patent Act of the United States provides the priority rights system prescribed in Article 4 of the Paris Convention. Under the provision, an application filed in the United States within twelve months from the first date of corresponding overseas application has the same effects as one filed in the United States on that day.

However, the United States has a legal principle called “Hilmer Doctrine,” which has been established by precedents. According to the Hilmer Doctrine, among the effects provided under Article 119, the effect of eliminating subsequent applications by third persons on the ground of items on specification being prior art retroacts only to the filing date in the United States, not to the filing date in the first-filing country other than the United States.

Also, Article 102 (e) of the Patent Act provides that international applications have the prior art effect since the international filing date only when the application primarily designates the United States and is published in English internationally. When international applications are published in other languages internationally, however, they do not have the prior art effect. Thus, Article 102 (e) is discriminatory against other languages than English.

In Japan and Europe, domestic applications based on priority rights of overseas applications retroact to the filing date in the first-filing country, and the prior art effect applies to all items of the specification. And the prior art effect does not change by language of international publication. By contrast, it is unfair that the same treatment is not guaranteed in the United States.

The twelve-month period of priority prescribed by Article 4 of the Paris Convention and the period given for submitting the translation of international applications are very meaningful for applicants preparing to file overseas. Notwithstanding, the limitation of prior art effect by the Hilmer Doctrine and Article 102 (e) narrows the effect of priority right system under Article 4 of the Paris Convention and PCT rules, and is significantly disadvantageous to Japanese applicants.

The Government of Japan therefore continues to request the Government of the United States to improve the system based on the Hilmer Doctrine to ensure that all items of the specification are effective in eliminating subsequent applications by third persons, retroacting to the date of first filing overseas. In addition, the Government of Japan requests the Government of the United States to abolish the language discrimination based on Article 102 (e).

## **6. Reducing Information Disclosure Statement Requirements of Prior Art Documents**

All applicants for the U.S. patents are obligated to disclose all important prior art documents to the U.S. Patent and Trademark Office (USPTO) as far as they know until issuance of the patent (IDS Requirements). While the applicants must submit a list as well as photocopies of the documents, they do not have to submit photocopies of U.S. patents or U.S. patents application publications. In addition, if the prior art documents are written in a language other than English, they are required to submit “a concise explanation of the relevance.” Furthermore, if applicants are judged in infringement procedure not to have met the information disclosure statement requirements during patent examinations, they are given a heavy penalty that renders patent rights to all of their claims unenforceable.

For that reason, every time Japanese applicants for U.S. patents find new relevant prior art documents by receiving a notice of rejection for a corresponding application, they need to submit information on the prior art documents to the USPTO. In doing so, if any of the cited references

were official patent publications of Japan, the applicants must submit a copy of the reference document, creating more burden on the applicants, even though the USPTO already possesses data found in the official patent publications of Japan and Europe through exchange of data among patent offices. Furthermore, the applicants must add “a concise explanation” to each document, and in many cases partial translations or abstracts in English are submitted, which creates burden on the applicants including deciding which parts need translation, judging whether an English abstract is sufficient, checking the translations, and paying translation fees.

Furthermore, a proposed rule change related to the IDS requirements submitted by the USPTO in July 2006 forces further burdens on the patent applicant. Regarding non-English documents in particular, the USPTO requires that the applicants identify the specific features of the document and its correlation to the components of their claims, even if the application is submitted before the start of examination, creating a great deal more burden for these applicants in comparison to those documents in English.

The Government of Japan, therefore, continues to request the Government of the United States to take measure to relax the requirements related to the information disclosure statement, including eliminating the requirement to submit “a concise explanation,” and not requiring the applicants to submit copies of official patent publications that the USPTO already possesses. Moreover, with regard to the proposed rule change of the IDS requirement announced in July 2006, the Government of Japan requests the Government of the United States to reduce burdens on those submitting non-English documents, burdens that are becoming heavier compared to those submitting English documents.

## **7. Plant Patent**

The International Convention for the Protection of New Varieties of Plants (UPOV Convention) provides that the “novelty” requirement needed for a new variety of plants to be protected can be satisfied for a certain variety in one country within four years (six years for trees and vines) after the start of sale in another country, even when the variety has already been sold in another country. The Seeds and Seedlings Law of Japan conforms to this provision.

However, the Patent Act of the United States provides that, with regard to vegetatively propagated plants except tuberous plants, novelty is recognized only within one year since the date when the new variety was patented or described in a printed publication in the United States or a foreign country, or when it went into public use or on sale in the United States.

To satisfy the novelty requirement under the Patent Act, an application for patent must be made within one year after the publication of application in a foreign country, even if the new variety is not sold generally in the United States. Accordingly, Japanese companies have no choice but to file an application for plant patent in the United States in order to meet the U.S. novelty requirement even when it is unclear whether they will sell the variety in the United States, which incurs unnecessary costs on them.

The Government of Japan, therefore, continues to request the Government of the United States to modify the novelty requirement for plant patent under the Patent Act to provide that, it can be satisfied within four years (six years for trees and vines) since the start of sale in another country even if the plant in question has been sold in another country and not in the United States, in accordance with the provisions of the UPOV Convention.

## VI. GOVERNMENT PROCUREMENT

The Government of Japan has continuously requested the Government of the United States to make improvements with regard to the Federal Buy American Act and other rules for the same purpose. However, as Buy American laws are still applied in a broad range of areas, the Government of Japan once again urges that improvements be made.

The Government of Japan has concerns about the tendency in budget-related laws of U.S. Federal government institutions to place limits on government procurement of foreign products and services, and about the clearly discriminatory regulations at the State level and other provisions, in light of their impact on free trade. The Government of Japan urges the Government of the United States to ensure equal business opportunities for both U.S. and foreign suppliers, from the viewpoint of the principle of non-discriminatory treatment in government procurement.

In particular, the Government of Japan urges improvements of the following laws and regulations.

### **1. The 2006 National Defense Authorization Act and Department of Defense Regulations**

While there are many business deals between U.S. companies and Japanese companies in procurement by the Department of Defense, the Defense Federal Acquisition Regulation Supplement (DFARS) includes regulations that are not in accordance with the principles of free trade, including that of non-discriminatory treatment. The National Defense Authorization Act for Fiscal Year 2006, which was enacted in January this year, also includes Buy American provisions, though the article limiting the purchase of foreign products in general for Defense Department procurement has been deleted.

In addition, due to the complexity of DFARS, there are cases in which Japanese companies are excluded from engaging in procurement only because products are Japan-made, although the same types of products from European and other competitor countries are accepted for procurement. Such regulations are causing confusion among Japanese companies, and it has been reported that, even when they asked for clarification, they have not received clear answers from U.S. companies that are engaged in procurement, or from the relevant authorities of the Department of Defense.

The Government of Japan therefore requests the Government of the United States to take appropriate measures to ensure that the abovementioned regulations not restrict the activities of Japanese companies.

### **2. The Safe, Accountable, Flexible, Efficient Transportation Equity Act**

The Safe, Accountable, Flexible, Efficient Transportation Equity Act includes two Buy American Rules. The first is that the Federal Transit Administration is required to buy steel produced in the United States to obtain federal financial aid to buy machines for mass transport. In addition, the rule provides that at least 60 percent of the total cost of parts constituting rolling stock must be of those manufactured in the United States. Specifically, in order to receive federal financial aid, it is required that 60 percent or more of the total production cost of a car manufacturer and the cost of every component, including wheel and axle platforms, motors, brakes, air-conditioning units, doors, and seating, etc. purchased from sub-contractors must be of those manufactured in the United States.

The second rule is that the Federal Highway Administration is required to buy only steel produced in the United States to obtain Federal financial aid to build highways.

These requirements impose indirect obligations for the prioritized use of domestic products and hence raise concerns that they pose an obstacle to free trade. The Government of Japan therefore urges the Government of the United States to revise the Buy American provisions such as the minimum threshold for U.S.-made parts and the restriction on procurement items.

## VII. STANDARDS AND CRITERIA

### **1. Weight Limit for Containers**

A large number of countries, including Japan, approve the gross weight of containers of up to 30.48 metric tons in container transportation, in line with the international cargo container standard provided by the International Organization for Standardization (ISO).

In contrast, the U.S. federal weight laws set weight standards not for cargoes or containers that contain cargoes to be moved, but for the entire vehicle carrying cargoes or such containers and related axles. The maximum gross vehicle weight on interstate highways is 80,000 pounds (36.3 metric tons), except where lower gross vehicle weights are dictated by bridge structure specifications.

A rough deadweight tonnage can be calculated by subtracting (1) the weight of the tractor (the average weight is from 9 to 12 metric tons), (2) the weight of the container trailer (the average weight is from 4 to 6 metric tons), and (3) the weight of the container itself (the average weight is around 3 metric tons) from the maximum gross vehicle weight. This calculation puts the remaining weight at from 15 to 20 metric tons, which is below the maximum container deadweight tonnage (30.48 metric tons) under the ISO standards by as much as 10 to 15 metric tons (22 to 33 thousand pounds).

The Fifth Report to the Leaders mentions that under the current system, in some states, permission for the movement of overweight cargoes may be obtained from state governments. But, since regulations vary from state to state and permission must be obtained from each state, this has not eliminated the burden on transportation service operators.

The Government of Japan urges the Government of the United States to recognize that the container weight limit set by the federal weight laws is inconsistent with the ISO standard, hampers the efficiency of logistics, causes a delivery delay by U.S. transportation service operators, and pushes up unit prices of merchandise through increased transportation costs. It also urges the Government of the United States to raise the upper limit on the maximum gross vehicle weight concerning the regulation of vehicle weight from the current 80,000 pounds to over 100,000 pounds, in order to conform to the international cargo standard. Further, the Government of Japan requests that the Government of the United States, as a tentative measure pending the acceptance of the international standard at the federal level, takes measures to help mitigate the burden on transportation service operators, including a one-stop service at the federal government for procedures to obtain permission for the movement of overweight cargoes from state governments.

## **2. Promotion of the Metric System**

The metric system is adopted as the international standard unit system by the International Organization for Standardization (ISO) and other international standard-setting organizations, in developing international standards and specifications. While most countries have adopted the metric system as the international system of units, the United States continues to use the units of the yard and pound, despite its accession to the Meter Convention. This not only causes inconveniences in daily life but also poses obstacles in international trade.

While the Government of Japan welcomes efforts by the National Institute of Standards and Technology (NIST) of the U.S. Department of Commerce as described in the Fifth Report to the Leaders, it believes that not only permission for labeling in the metric system alone, but also measures to actually disseminate the metric system to the public, are necessary.

Given that the Agreement on Technical Barriers to Trade (TBT) recommends reducing technical barriers to trade by adopting international standards, that the United States is not taking necessary measures to promote the metric system is not in accordance with the WTO agreements, including the TBT Agreement.

Consequently, the Government of Japan urges the Government of the United States to ensure thorough adoption of the metric system in both the government and private sectors of the United States. It also urges the Government of the United States to provide information on its effective policy measures to promote the adoption of the metric system.

## **3. Harmonization of Environmental Regulations on Industrial Products**

Against the backdrop of increasing public awareness about the environment, various states in the United States are beginning to strengthen their regulations for the protection of the environment. The Government of Japan does not oppose to the reinforcement of environmental regulations. However, as various states in the United States are strengthening regulations in an inconsistent manner and at a varying speed, both Japanese and U.S. companies are bearing a heavy burden in conducting business operations across the United States or in multiple states. Furthermore, if more states introduce environmental regulations with differing extent and contents, it will become extremely difficult for companies, particularly foreign companies, to ascertain whether products they are planning to put on the market meet the relevant environmental regulations of all of the states where they plan to sell these products.

Consequently, the Government of Japan requests the Government of the United States, through such means as the enactment of federal laws, to harmonize the regulations and laws of each state related to the recycling of waste electronic equipment, the regulation of mercury, the regulation on energy efficiency, and the regulation of the labeling of hazardous substances. Should this prove difficult, the Government of Japan urges the Government of the United States to take federal-level measures to ensure that companies are not subjected to excessive burdens, including: (a) presenting guidelines for state governments for the harmonization of regulations by respective states; (b) compiling information in an easy-to-understand fashion about standards which individual industrial products must meet in respective states, the scope of regulations, and enforcement dates; (c) establishing a one-stop service; and (d) making implementation guidelines for manufacturers.

In the Fourth Report to the Leaders, the Government of the United States stated that it would support efforts by the federal Environmental Protection Agency (EPA) and State Governments to

cooperate in harmonizing state environmental regulations. The Government of Japan urges the Government of the United States to report on specific measures taken since then and the progress in harmonization.

#### **4. Measures against Bovine Spongiform Encephalopathy (feed regulation, enhanced surveillance)**

The U.S. Food and Drug Administration (FDA) on October 6 last year publicized a draft to amend its feed regulations so as to prohibit the use of high risk materials for bovine spongiform encephalopathy (BSE), such as brains and spinal cords from cattle 30 months of age and older, in feed for all animals. However, the amended regulations have not been put into force as of present.

The U.S. Department of Agriculture had enhanced its BSE surveillance since June 2004, including an increase in the number of cattle tested. However, based on the results of the surveillance, it shifted the enhanced surveillance to a new ongoing surveillance in August 2006.

Meanwhile, the Food Safety Commission of Japan pointed out the following as the supplementary items for the conclusion of the Food Safety Risk Assessment on the beef and beef offal imported from the U.S. released in December 2005:

(1) To prevent BSE exposure and propagation in the United States and Canada, ban on the use of SRMs (specified risk materials), which account for 99.4% infectivity of BSE prion, is essential. The use of SRM must be banned not only in feed for cattle but also in feed of other animals, which might cause cross-contamination.

(2) To accurately comprehend the BSE contamination status in the United States and Canada, and to implement proper management measures, sufficient surveillance of cattle, including healthy animals, must be expanded and maintained. Even if the management measures become effective to some extent, and the epidemic becomes discontinued and localized, or sporadic, at least continuous surveillance of all high-risk cattle must be maintained.

Accordingly, the Government of Japan urges the Government of the United States to strengthen the feed regulations and to conduct sufficient BSE surveillance.

### **VIII. EXTRATERRITORIAL APPLICATION**

There is concern that the U.S. implements certain measures based on domestic U.S. legislation, such as U.S. re-export controls and sanctions laws, which may constitute an extraterritorial application of U.S. domestic laws, which is not permissible under general international law. These measures may also cause problems in terms of consistency with WTO agreements. While the Government of Japan will continue to work with the Government of the United States in securing a robust framework for export controls, it cannot overlook instances where the extraterritorial application of U.S. domestic laws puts Japanese companies in a disadvantageous position. Therefore, the Government of Japan urges the Government of the United States to make improvements as described below.

## **1. Re-export controls**

Japan not only participates in all international export control regimes, but also enforces strict export controls, including the introduction in 2002 of a catch-all system for weapons of mass destruction and their delivery means. Since cooperation from export counterpart countries is imperative in order to strengthen and maintain export controls, Japan has also been involved in efforts to reinforce regional export control regimes, including, for example, active outreach activities primarily targeting Asian countries. And as Japan has implemented strict export controls, it finds little reason for the Government of the United States to place restrictions upon Japanese importers (re-exporters) for re-exports from Japan. The Government of Japan therefore urges the Government of the United States to exempt Japanese importers (re-exporters) from application of the U.S. re-export controls.

In addition, the fact that Japanese importers (re-exporters) cannot receive sufficient information on items of U.S. origin from U.S. exporters remains a serious problem. These Japanese importers are forced to then bear the burden of correctly identifying items and determining whether they are subject to U.S. regulations when re-exporting items of U.S. origin, thus hampering healthy trade and transactions. As a transitional measure pending formal exemption from U.S. re-export controls, the Government of Japan once again strongly urges the Government of the United States to require U.S. exporters to provide Japanese importers (re-exporters) with sufficient information on items of U.S. origin, including their Export Control Classification Numbers (ECCNs), when export licenses issued by the U.S. export control authority are required.

## **2. Sanctions Acts**

The sanctions measures taken by the Government of the United States based on related acts discourage, significantly and unreasonably, investment into and establishment of economic relations with the countries targeted by those acts, affecting not only U.S. private enterprises but also those all over the world. In legal terms, they constitute an extraterritorial application of domestic laws, which is not permissible under general international law and may cause a problem in terms of consistency with the WTO agreements. Moreover, fairness, transparency and predictability have not been observed in the application of individual sanction acts. Although the Government of Japan has taken every opportunity, including those available under the Regulatory Reform Initiative, to urge the Government of the United States to improve the situation from all these perspectives, the latter has not taken sufficient measures so far.

The Government of Japan therefore requests the Government of the United States to ensure consistency of these acts with international laws and implement them cautiously. In particular, it urges the Government of the United States to refrain from applying these acts to enterprises of third countries.

### **(1) Iran Freedom Support Act (IFSA)**

It is a matter of fact that the Iran and Libya Sanctions Act of 1996 (ILSA) has not been applied to a number of investments in Iran by third countries' companies. The Government of Japan has expressed its concern that, under these circumstances, application of ILSA to Japanese companies' investments alone, or higher probability of its application to them in comparison to other countries' cases, would clearly constitute a double standard.

In September 2006, amending ILSA, the Iran Freedom Support Act (IFSA) was passed in the

United States. Under the new law, the different treatment in its application on the basis of nationality remains a matter of concern. The Government of Japan urges the Government of the United States to guarantee to Japanese companies the level of treatment tantamount to what has so far been provided to EU enterprises under the ILSA, and to clarify the intention.

(2) Helms-Burton Act (Cuban Liberty and Democratic Solidarity Act of 1996)

The Government of Japan appreciates that the Government of the United States has extended the suspension of the implementation of the Cuban Liberty and Democratic Solidarity Act of 1996 every six months, but it urges the Government of the United States to fully recognize the fact that the United Nations General Assembly has resolved in November 2006 to express its concern about the Act supported by an overwhelming number of the Member States, and to continue to suspend the implementation of the Act.

(3) Sanctions Acts Instituted by Local Governments

The Government of Japan appreciates that the Government of the United States has made considerable efforts over the years to reach out to state and local authorities to help ensure that initiatives at the State or local level support U.S. foreign policy. The Government of Japan requests the Government of the United States to continue to work on respective States and local governing bodies which enforce sanctions acts that are not consistent with the general international law and the WTO Agreement, such as the Alameda County in the State of California, to abolish those sanctions acts or to suspend their enforcement.

## IX. COMPETITION POLICY

Active promotion of competition policy facilitates entrepreneurs' new entry into markets and innovation and creates efficient economic circumstances. In light of the recent globalization of the world economy, further promotion of competition policy in the United States will stimulate both Japanese and the U.S. States economy and bring various benefits to entrepreneurs and consumers.

While the Government of Japan recognizes that the Government of the United States has actively promoted its competition policy, such as the review process of antitrust laws including antitrust exemptions by the Antitrust Modernization Commission (AMC) and the enforcement activities including exposure of international cartels, the Government of Japan still urges the Government of the United States to make further efforts, in particular on the review of antitrust exemptions.

The specific requests are as follows:

### **1. Antitrust Exemptions**

The Government of Japan urges the Government of the United States to continue to review and express its views on the appropriate scope and reach of limitations and exemptions of the application of the federal antitrust laws from the viewpoint of active promotion of competition policy, and abolish the limitations and exemptions that have no rationale for their existence.

The Government of Japan also urges the Government of the United States to actively cooperate with the state governments concerned in the review of antitrust exemptions at the state level as well.

Furthermore, the Government of Japan urges the Government of the United States to make available to the former any public documents relating to the abovementioned work, and to explain the progress that has been achieved with regard to the work.

## X. LEGAL SYSTEM

As international trade and exchange of people across borders deepen, legal services are becoming increasingly globalized. However, some regulations in the legal system of the United States place an excessive burden on businesses, compared to global standards. Although the Government of Japan has discussed with the Government of the United States these points under the Regulatory Reform Initiative, sufficient progress has not been made. The Government of Japan therefore continues to urge the Government of the United States to improve the situation.

Based on the above understanding, the Government of Japan requests the following:

### **1. Product Liability Law**

Product liability law in the United States constitutes a heavy burden for Japanese and U.S. companies doing business in the United States, because of the large amount of damages and the soaring liability insurance premium. The Government of Japan welcomes the efforts made by the Government of the United States to achieve tort reform. The Government of Japan also welcomes that some of the State Governments have amended their laws to tackle product liability, and that State Governments are making efforts to shorten the statute of limitations and to place certain limits on the amount of damages for non-economic damage.

However, the tort reform focuses only on several specific areas such as asbestos litigation reform, medical liability reform, and Protection of Lawful Commerce in Arms, and no tangible progress has been made on the reform of product liability, which brings the majority of lawsuits.

The Government of Japan therefore continues to urge the Government of the United States, as part of the tort reform, to support and encourage the reform currently underway in many states to limit product liability, and to promote the reform of product liability law at the federal level, by placing limits on the amount of damages and by shortening the statute of limitations, which have already been attempted by relevant bills submitted to Congress.

### **2. Punitive damages**

Unpredictable punitive damages awards can be of such a large amount that they sometimes threaten the existence of the companies upon which the damages are imposed. Although the Supreme Court ruled in the past in the State Farm case that punitive damages shall be limited by federal law, the ruling has not had a substantial effect on other judgments in terms of either the amount of damages or their predictability. The Government of Japan urges the Government of the United States to legislate for the following elements at the federal level, which have been realized in some states: (1) limitation of the level of punitive damages awards in relation to actual damages; (2) a clear and restrictive definition of the types of conducts to which punitive damages are awarded; and (3) requirement of a strict burden of proof standard to establish punitive damages

liability.

### **3. Jury trial and discovery**

Lawsuits relating to legislation on anti-trust and securities exchange, and other business activities are relatively complicated and technical, leading to doubts often being raised about the validity of judgment by jury. In the fourth-year dialogue, the Government of Japan therefore requested the Government of the United States to take improvement measures, such as exemption of lawsuits concerning business activities from jury trial.

Under the broad discovery rule in the United States, consumers can file lawsuits against companies without good evidence, while the defendant companies have to pay a large amount of attorney fees only for dealing with the discovery process, which often has an immense impact on business management. In the fourth-year dialogue, the Government of Japan therefore requested the Government of the United States to amend the rule to interpret the validity of the discovery request strictly.

In the Fourth Report to the Leaders, the Government of the United States stated that the present administration deemed legal reform a cornerstone to a comprehensive economic expansion program, and was firmly committed to alleviating the undue burden on the business community. The Government of Japan therefore urges the Government of the United States to explain its progress on the above matters and to take improvement measures to alleviate the undue burden on the business community.

## **XI. SERVICES**

### **1. Maritime Transportation Business**

#### (1) Sanctions under the Merchant Marine Act of 1920 and Reporting Requirement on the Situation of Japanese Ports

The Federal Maritime Commission (FMC) is authorized by Section 19 (1) (a) of the Merchant Marine Act of 1920 (the Jones Act) to make rules and regulations affecting ocean-going shipping.

The FMC imposed a unilateral sanction against Japanese carriers in September 1997. Although the sanction was removed in May 1999, the FMC still requires Japanese carriers to report to it on the situation of ports in Japan. The rule that provided the grounds for the unilateral sanction was in violation of the Treaty of Friendship, Commerce and Navigation between Japan and the United States, which provides each other's ships with the national treatment and most-favored-nation treatment (The rule was repealed in May 1999). Consequently, the Government of Japan strongly urges the Government of the United States to ensure that such unilateral measures not be taken any more by strengthening its convincing efforts on the FMC.

In addition, even after the repeal of the above-mentioned rule, the FMC has continued to require Japanese carriers and affiliated U.S. carriers to report to it on the improvement in the situation of ports in Japan.

The situation of ports in Japan has been improved through efforts made by the parties concerned:

the "prior consultation system" has improved significantly and the improved system has been implemented steadily; the revised Port Transportation Business Law abolished the supply-demand adjustment restriction and thereby realized new entries into port transport business; and port terminal service operation on the 24-hour, 364-day basis has been introduced.

Despite the significant improvement of the port situation in Japan as described above, the FMC introduced, in August 2001, a new order which not only increased the number of items to be reported, but also expanded the scope of carriers subject to the reporting requirement. The order includes requirements that are beyond the extent deemed appropriate to impose upon carriers, such as directly requiring Japanese carriers to submit translated copies of the Japanese laws and instructions concerned. Thus the order has been causing unfair and excessive burdens on Japanese carriers.

If it is the case that the FMC decided to expand the scope of the reporting requirements in order to judge whether or not it should impose in the future unilateral sanctions that would violate the Treaty of Friendship, Commerce and Navigation between the United States and Japan, it would be a serious abuse of the FMC's mandates, which the Government of Japan finds extremely regrettable.

Consequently, the Government of Japan strongly urges the Government of the United States to repeal the order, which provides a basis for the reporting requirement.

#### (2) Intervention in Freight Setting by the Ocean Shipping Reform Act of 1998

The Merchant Marine Act of 1920, in Section 19 (1) (b) as amended by the Ocean Shipping Reform Act of 1998, includes a provision allowing discriminatory treatment of Japanese and other foreign shipping companies by making it possible to impose unilateral regulations on ways of setting freight and other practices. As the freight setting provides the foundation of free shipping activity on a commercial basis, unilateral regulations by the FMC on the freight setting practices are obvious intervention against free shipping operations and discriminatory intervention against foreign shipping firms.

Since the amendment to the act in 1998 explicitly stipulates the authority of the Federal Government to intervene in freight setting practices, the Government of Japan urges the Government of the United States to ensure that the FMC not impose unilateral regulations on commercial shipping activities conducted by Japanese and other foreign shipping firms without taking into account the actual situation of the market.

#### (3) Abolition of the Maritime Security Program

The Maritime Security Program (MSP), which provides over 100 million dollars of maritime subsidy annually for ten years, was extended for another ten years in October 2005, with the increased amount of subsidies and the increased number of ships subsidized. As it is obvious that a provision of such an enormous amount of subsidies distorts conditions for free and fair competition in the international maritime transport market, the Government of Japan urges the Government of the United States to abolish the MSP.

If the abolition is difficult, the Government of Japan urges the Government of the United States to:

- (a) Take measures, in implementing the MSP, to minimize the distortion of the free and fair playing field of the international maritime transport market caused by the MSP, including by

limiting its application only to cases where genuine security interests require requisition; and

- (b) Inform the Government of Japan surely and without delay of any changes and developments in the MSP and the scope of ships to which the MSP is applied, to which the Government of the United States committed in the Fifth Report to the Leaders.

#### (4) Abolition of Cargo Preference Measures including the Law Lifting the Ban on the Export of Alaskan Crude Oil

Cargo preference measures such as the requirement to use U.S.-registered vessels for exports of Alaskan crude oil, which is commercial cargo, are protectionist measures that are inconsistent with the principle of national treatment and also run counter to the Ministerial Decision on Negotiations on Maritime Transport Services under the WTO, which prescribed that the participants should not apply any new protectionist measures during the negotiations.

In the Fifth Report to the Leaders, the Government of the United States "took note of the opinion of the Government of Japan that measures such as cargo preferences may distort conditions for free and fair competition in the international maritime market." The Government of Japan continues to urge the Government of the United States to abolish cargo preference measures.

#### (5) Requirement for Domestic Building of Domestic Merchant Vessels

The Merchant Marine Act of 1920 stipulates that vessels for the domestic shipping service shall be built in the United States. The Act represents the unfair regulation symbolic of the closed nature of the U.S. shipbuilding market, and it is obviously disadvantageous to foreign shipbuilders and distorts fair competition conditions in the global shipbuilding market. The Government of Japan urges the Government of the United States to allow vessels built in foreign shipyards also to be used for the domestic shipping service within the United States.

## **2. Legal Services**

### (1) Acceptance of Foreign Lawyers

As international trade and exchanges of people across borders deepen, legal services are increasingly globalized. However, the acceptance of foreign lawyers is still insufficient in the United States. Although the Government of Japan has addressed these problems in discussions with the Government of the United States under the Regulatory Reform Initiative, sufficient progress has not been made. The Government of Japan therefore urges the Government of the United States to make continued efforts to improve the situation.

- (a) Acceptance of Foreign Lawyers as Foreign Legal Consultants in Every State

In the United States, only twenty five States and the District of Columbia accept foreign lawyers as foreign legal consultants (FLCs), but all other states do not allow foreign lawyers to practice therein. According to the explanations provided by the Government of the United States, the above twenty six jurisdictions that accept foreign lawyers as FLCs account for approximately 85 percent of the total legal services market in the United States. However, in Japan, foreign lawyers that are qualified as Gaikokuho-Jimu-Bengoshi practice nationwide, and therefore the openness of the legal service market is equivalent to 100 percent. While the Government of Japan welcomes the efforts made by the Government of the United States, together with the American Bar Association (ABA), to increase the number of States that accept foreign lawyers

as FLCs, it urges the Government of the United States to continue to take positive actions toward the acceptance of foreign lawyers as FLCs in all States.

(b) Period of Practicing Experience Required for Acceptance of Foreign Lawyers as FLCs

Regarding the period of practicing experience that is required for foreign lawyers to be qualified as FLCs in every jurisdiction that accepts foreign lawyers as FLCs, the Government of the United States reported in the Fifth Report to the Leaders that the State of Texas had shortened the required period of practicing experience from five to three years and accepts the practicing experience in any country including third countries. While the Government of Japan welcomes such an improvement in the situation in the United States, problems regarding the period of practicing experience remain unresolved in many States. The Government of Japan therefore urges the Government of the United States to continue its efforts to realize the following:

(i) Reduction of the Period of Practicing Experience

A certain period of practicing experience is required for foreign lawyers to be qualified as FLCs in every jurisdiction that accepts foreign lawyers as FLCs, except for the District of Columbia, and a number of those states require no less than five years of experience, whereas only three years of experience is required in Japan in the same regard. The Government of Japan therefore urges the Government of the United States to reduce the period of practicing experience required to three years in every state.

(ii) Abolition of the Requirement for Practicing Experience in the Period Immediately Preceding the Date of Application

As far as the Government of Japan has confirmed, every state where foreign lawyers are accepted as FLCs allows only the period immediately preceding the date of application to be counted as practicing experience. The corresponding system in Japan does not impose such a limitation. Consequently, the Government of Japan urges the Government of the United States to eliminate this requirement in qualifying foreign lawyers as FLCs in every state.

(iii) Inclusion of Practicing Experience in Third Countries

As far as the Government of Japan has confirmed, there are only three States among those accepting foreign lawyers as FLCs, namely the States of Texas, New York and Indiana, which allow the inclusion of practicing experience in third countries into the required period of practicing experience. The corresponding system in Japan allows the period of practicing experience in third countries to be included in the required practicing experience. The Government of Japan therefore urges the Government of the United States to allow the period of practicing experience in third countries to be counted as the period of required to be FLCs in every state.

(2) Regulation on Alternative Dispute Resolution (ADR) Proceedings by Foreign Lawyers

Since regulations in each state about alternative dispute resolution (ADR) proceedings (including arbitration proceedings) presided over as a neutral or conducted as proxy by foreign lawyers or FLCs are not clearly confirmed, foreign lawyers or FLCs are experiencing problems in their practices. Consequently, the Government of Japan urges the Government of the United States to clarify the details of the regulations on ADR proceedings.

### **3. Construction Business**

#### (1) Harmonization and Unification of State-based Construction Business Licenses

In the United States, while construction companies need to obtain business licenses in each State, the requirements for obtaining the licenses vary from State to State. The varying requirements in each State create obstacles to business activities and new business development by companies intending to do business in more than two States.

In the Fifth Report to the Leaders, the Government of the United States made a reference to efforts by the National Association of State Contracting Licensing Agencies (NASCLA) to introduce the national examination for construction business licenses by the end of 2006. The Government of Japan hopes to see the early introduction of such national examination.

The Government of Japan urges the Government of the United States to take measures toward the harmonization and unification of the State-based regulations on the construction business, including utilization of the above-mentioned national examination, in terms of both procedural and substantial requirements, through such means as the authorization of the validity of a business license issued by one State in other States, and issuance of federal guidelines for all States to follow for the sake of harmonization of State-based licensing procedures.

### **4. Insurance Business**

Although the Government of Japan has discussed with the Government of the United State for improvement of the latter's regulatory system on insurance through bilateral insurance consultations, there still remain a number of regulations that obstruct foreign insurers' business operations in the United States. Taking the opportunity of sixth-year dialogue under the Regulatory Reform Initiative, the Government of Japan raises the following priority issues and urges the Government of the United States to take necessary measures for improvement.

#### (1) Harmonization and Unification of State-Based Regulatory Systems or Transition to the Federal Regulatory System

Due to the State-based insurance regulation and supervision in the United States, foreign insurers who wish to conduct insurance business in the United States are required to obtain business licenses in each State where they wish to operate. Moreover, foreign insurers are required to apply for approvals of products and premium rates and notify important matters in each supervisory authority of the States in which they wish to sell insurance products.

As a result, insurers are obliged to go through examinations in every single State in compliance with the laws of each State to obtain licenses and approvals. In addition, there still are cases where Japanese insurers operating in some States have been faced excessively longer licensing and approval procedures than the standard period. These regulations cause unfair business burdens on insurers and prevent them from responding to customer needs in a timely manner.

Under these circumstances, the Government of Japan in its Fourth and Fifth Recommendations requested the Government of the United States to realize the harmonization and unification of the State-based regulatory and supervisory systems in terms of both procedural and substantial requirements, and also requested to expedite examinations and enhance their transparency in each State. In addition, in order to resolve these problems, the Government of Japan also presented its demand that not only the National Association of Insurance Commissioners (NAIC) but also the

Federal Government to take actions for reviewing the current regulatory system and provide the Government of Japan with information on the progress they achieved in a timely and appropriate manner.

To our disappointment, however, the harmonization and unification of the State-based insurance regulations have not been realized. There has not been any progress in harmonization or unification of State-based procedure of license and approval. Examinations of these licenses and approvals also have not been expedited.

On the other hand, the Government of Japan is aware that even in the United States, problems with the current State-based regulations are being pointed out and there are growing voices in Congress (the Senate and the House of Representatives) for introducing the federal regulatory system by establishing the Optional Federal Charter.

Therefore, the Government of Japan urges the Government of the United States to take the following measures in cooperation with NAIC:

- (a) To effectively promote the harmonization and unification of the State-based insurance regulations, or to introduce the Optional Federal Charter (in the harmonization and unification of the State-based regulations, for instance, including a measure under which an insurer who has obtained license of a particular line of business or approval of a new product in one State is deemed authorized to conduct the same line of business in other States);
- (b) To play a role in promoting the effective harmonization and unification of the State-based regulations or the shift to the federal regulatory system, to actively work on the State insurance regulatory authorities, and to present the Government of Japan with a practical timeline of these reforms; and
- (c) To provide the Government of Japan in a timely and appropriate manner with information about the progress of the harmonization and unification of the State-based regulations or the shift to the federal regulatory system in order to ensure transparency in these processes.

## (2) Elimination of Reinsurance Collateral Requirement

Under the current reinsurance regulations of the United States, foreign (re)insurers are, without any exception, required to post a trust account equivalent to 100 percent of credit amount within the country, or to submit a letter of credit for collateral, when they conduct reinsurance businesses with U.S. ceding companies on a cross-border basis. These requirements incur tremendous burden on overseas insurers in reinsurance business in the United States. The Government of Japan is aware that the revision of this requirement has been discussed in the United States by reinsurance taskforce of NAIC in response to the concern raised by European insurers. However, it seems that a substantial plan of taking measures to abolish these collateral requirements has not been presented by NAIC yet.

Consequently, the Government of Japan urges the Government of the United States to take the following measures in cooperation with NAIC:

- (a) To eliminate these collateral requirements that impose unfairly heavy burdens on overseas insurers in order to ensure that Japanese (re)insurers not be discriminated against; and
- (b) To present a practical timeline for a review of the existing collateral requirements, to pay due

attention to ensuring that Japanese insurance companies not be discriminated against under the revised system, and to provide the Government of Japan with information on the review process in a timely and appropriate manner to ensure transparency in the process.

### (3) Abolition of Trusteed Surplus Requirement

Under the State-based insurance regulatory system, the Trusteed Surplus Requirement is imposed on foreign insurance companies' branches in the United States. This regulation requires the branches of foreign insurers to hold their major assets, which consist of deposits to the State authorities and Trusteed Assets, exceeding their net liability at banks or trust companies within the United States.

However, this requirement virtually means that the branches of foreign insurance companies have to deposit enormous proportion of their assets within the United States, raising concerns that the requirement would significantly hamper their flexible fund investment and cause a loss of many of their investment opportunities to gain profits.

The Government of Japan thus urges the Government of the United States to abolish, in cooperation with NAIC, the Trusteed Surplus Requirement discriminatory to foreign insurance companies.

## **XII. FINANCIAL SERVICES**

For further development of the close economic relationship between Japan and the United States, the Government of Japan recognizes the importance of promoting economic activities between the two countries by improving market access for Japanese financial service providers in the United States.

The Government of Japan has continued discussions with the Government of the United States, including at the Japan-US Financial Dialogue. However, there remain in the United States regulations that obstruct the activities of Japanese financial service providers. The Government of Japan urges the Government of the United States to ease or abolish such regulations.

Specific requests are as follows:

### **1. The Issue of Samurai bond accompanied with the book-entry transfer system**

Of the approximately seven trillion yen of yen-denominated bonds issued by international organizations, non-Japanese governments and non-Japanese companies (a.k.a. Samurai bond), nearly half of them are issued by U.S. companies. This means that U.S. companies are one of the most important issuers on the Samurai bond market. Also, Samurai bond is a very popular financial product for institutional investors and individual investors in Japan. Thus, Samurai bonds bring benefits both to U.S. companies which would like to raise funds in yen and to Japanese investors. Therefore, the sound development of Samurai bond market is desirable.

In January 2006, the book-entry transfer system of corporate bonds began to work in Japan, and the system made it possible to manage Samurai bonds in a paperless environment. Under the U.S. taxation rules, U.S. companies issuing Samurai bonds were previously exempted from withholding tax duties on interests since all Samurai bonds had been issued as bearer bonds. However, bonds

managed under the book-entry transfer system are treated as registered bonds under the U.S. taxation rules, and U.S. companies issuing Samurai bonds are to be assigned to bear the withholding tax duties. In order to exempt from the duties, U.S. companies issuing Samurai bonds need to get certificates which verify that claimers of Samurai bonds are non-U.S. citizens.

For these reasons, the U.S. companies which had already issued Samurai bonds and the financial institutions managing Samurai bonds began to raise serious concerns about the burdens of works on withholding taxes, such as getting certificates to verify that claimers of Samurai bonds are non-U.S. citizens. And all U.S. companies stopped the new issuance of Samurai bonds since March 2006, putting negative influence on the sound development of the Samurai bond market. In order to deal with such situation, the relevant Japanese market participants and the Government of the United States have had several discussions.

Based on the prior discussions, the Government of Japan believes that the most practical way to go forward is to apply the handling policy “Foreign-targeted Registered Obligation”, stipulated in the U.S. Treasury Department Rules 1.871-14(e), to Samurai bond managed under the book-entry transfer system. If those rules are applied, U.S. companies issuing Samurai bonds would be exempted from withholding tax duties by achieving the necessary reporting requirements, making it possible to encourage them to resume the issuance of Samurai bond and relieving the concerns for the burdens accompanied with withholding taxes among U.S. companies and financial institutions.

Therefore, the Government of Japan, for the sound development of the Samurai bond market and to secure U.S. companies the means to raise funds in Japan, urges the Government of the United States to apply the handling policy “Foreign-targeted Registered Obligation” to Samurai bonds managed under the book-entry transfer system.

## **2. Regulations on Sales and Offers of Foreign Investment Trusts**

In the fourth and fifth sets of recommendations, the Government of Japan requested the Government of the United States not to apply section 7 (d) of the Investment Company Act of 1940 and SEC Rule 7d-1 entitled "Specification of Conditions and Arrangements for Canadian Management Investment Companies Requesting Order Permitting Registration" to non-Canadian foreign investment trusts which publicly offer their shares within the territory of the United States. If not, the Government of Japan requested the Government of the United States to abolish the following three conditions:

- (1) At least half a dozen of directors of investment trusts must be American citizens and reside in the United States.
- (2) Assets of investment trusts are required to be entrusted to banks in the United States; and
- (3) Investment trusts are required to use United States Certified Public Accountants.

The Government of Japan recognizes that this rule is still applied to other foreign investment trusts besides Canadian ones, places excessive burden on foreign investment trusts, and substantially limits foreign investment trusts' entry to the U.S. capital market.

In the reports issued previously, the Government of the United States answered that the SEC had issued the orders to investment trusts from five countries, Canada, Australia, Bermuda, South Africa and the United Kingdom, and had also granted limited exemptive relief from the rule to a Canadian investment trust, and remained willing to consider applications for this rule.

The Government of Japan, however, is aware that these are just rare and exceptional measures

during the period between the 1950s and 1970s and most of past applicants were not given such orders and relief. It is difficult for the Government of Japan to understand that the Government of the United States ensures enough opportunities for foreign investment trusts to enter into the US investment trust business by citing a very few exceptional measures. In addition, even though the government of the United States answered that the SEC remains willing to consider applications for 7 (d) orders, it is still difficult for the Government of Japan to interpret that the government of the United States fully understood the need of exceptional relief for foreign investment trusts.

Furthermore, in terms of costs, it is also a very heavy burden for investment trusts of foreign companies, which are geographically distant from the United States, to fulfill all of the three conditions listed above.

The Government of Japan requests that it become possible for Japanese located investments to be brought in to the United States and made available for subscription, rather than being required that a Japanese investment company must register in the United States as an investment adviser and constitute a "mirror fund" in the United States, or must act as a private fund enlisting only "eligible subscribers", as the Government of the United States replied in their previous reports.

Therefore, the Government of Japan urges the Government of the United States not to apply Rule 7 (d) 1 to Japanese investment companies or at least, to abolish these three conditions.

### **3. Licensing New York Branches of Japanese Banks to Conduct Stock Futures and Commodity Futures Trading on Their Own Account**

New York branches of Japanese banks are under the jurisdiction of the New York State Banking Department ("NYSBD") and must obtain approval from the NYSBD to commence trading in products such as stock futures, commodity futures and ETFs. However such products are not included within the list of financial products accepted under the Banking Act (96-1) and so such approval cannot be granted. The NYSBD allows trading of stock futures and commodity futures for the purpose of hedging for a client's trades, but does not allow trading for investment or a bank's own trading in purely financial markets.

Ordinary asset management companies and individuals have become able to use a variety of futures instruments, and even US futures funds have expanded their operations to include the commodities futures markets and ETFs in their operations in order to diversify their investments. Under these conditions, for the following reasons, it is not desirable for a bank branch comprehensively involved in risk management using futures techniques to be unable to handle a variety of futures instruments and ETFs as an end-user.

- It is incompatible with the Federal Reserve system.
- Not being able to use commodities futures and stock futures inhibits a bank from achieving the effects of diversification in the risk management market and actually has the effect of heightening risk.
- It creates a disparity with other management entities (asset management companies, individuals, pension funds).
- It may inhibit the development of the US futures markets and the US ETF market, causing concern of a hollowing out of the New York market in comparison to the London market.

Accordingly, the Government of Japan urges the Government of the United States to work on the NYSBD, to relax the regulations governing the handling of products such as stock futures, commodities futures and ETFs in order for branches of Japanese banks to handle these trading for their own account or for investment purposes.

### XIII. TELECOMMUNICATIONS

In the area of telecommunications, structural changes to the network, such as broadband diffusion and IP-migration, and subsequent rapid environmental changes in the telecommunications market point to the need for appropriate and timely regulations and policies.

The Government of Japan recognizes that ensuring equal opportunity for entry and foreseeability for all carriers including Japanese carriers and implementing regulations and policies in a transparent and fair manner will lead to the promotion of further technological innovation, investment and market competition, and will also contribute to the protection of consumer benefits in both Japan and the United States.

From these viewpoints, the Government of Japan has requested improvements in the past dialogues under the Regulatory Reform and Competition Policy Initiative, but the Government of the United States has not responded adequately to these requests. In addition, the Government of Japan considers that it is increasingly necessary, in the United States as well, to respond rapidly to issues arising from technological innovation and market structural changes, evidenced for example in the increased usage of cellular telephones and IP-migration of networks.

Based on the recognition above, the Government of Japan requests the following:

#### **1. Elimination of Entry Barriers**

##### (1) Restrictions on Foreign Investment in the Licensing of Radio Stations

Section 310 (b) (3) of the Communications Act of 1934 (hereinafter referred to as "the Communications Act") stipulates, as a criterion of licensing, that the ratio of direct foreign investment in radio stations shall be limited to not more than 20 percent. This restriction makes it impossible for Japanese carriers to directly obtain licenses to establish earth stations in the United States to provide services such as international communications between Japan and the United States via satellite. As a result, Japanese carriers face difficulties to establish flexible networks.

With regard to indirect investment in radio stations, Section 310 (b) (4) of the Communications Act stipulates the ratio of indirect foreign investment in radio stations shall be limited to not more than 25 percent. Although the "Foreign Participation Order" (November 25, 1997, FCC97-398) stipulates that the Federal Communications Commission (FCC) will make a rebuttable presumption that a foreign investment beyond 25 percent fulfills public interest if a foreign investor is from a WTO member country, this regulation has not been abolished in relation to indirect foreign investment.

In the Fifth Report to the Leaders, the Government of the United States offered to provide information to the Government of Japan concerning the division between a common carrier and a non-common carrier, however the Government of Japan believes that such regulation itself should be abolished. The Government of Japan urges the Government of the United States to abolish the regulations on both indirect and direct foreign investment in relation to the establishment of a radio station established for the purpose of telecommunications business as covered in Section 310 of the Communications Act..

##### (2) Certification and Licensing Criteria for Foreign Carriers' Entry into the Telecommunications Market of the United States

Section 214 and Section 310 (b) (4) of the Communications Act provide several certification and licensing criteria for foreign carriers' entry into the telecommunications market of the United States (November 25, 1997, FCC97-398, FCC97-399). Among them, the criteria of "trade concerns" and "foreign-policy" are unclear and have nothing to do with telecommunications policy. Nevertheless, they could be applied to refuse issuance of certification or licenses. These criteria are, therefore, significant barriers preventing foreign carriers from entering the market of the United States. The criterion of "very high risk to competition" could be also applied to refuse the issuance of a license. However, this criterion is ambiguous and as a result, it undermines the foreseeability for foreign carriers to develop their business plans.

The Government of Japan therefore urges that:

- (a) The Government of the United States abolish the criteria of "trade concerns" and "foreign policy", which have nothing to do with telecommunications, for ex-ante certifications;
- (b) The Government of the United States abolish the criterion of "very high risk to competition", or, if it is not possible, that the Government of the United States clarify and make public the conditions for its application, as the second-best measure.
- (c) The FCC make specific and tangible proposals, based on the recommendations from the Government of Japan, for the abolition or improvement of the regulations in the process of the biannual reviews which are stipulated in Section 11 of the Communications Act.

## **2. Regulatory Reform in the Broadband Era**

The Government of the United States implements and explores various regulatory reforms and new policies, including a review of competition policy, in order to enable all consumers to enjoy the benefits of broadband and to respond to structural changes in the telecommunications market such as IP-migration. These actions being taken by the Government of the United States are understood as including both initiatives by the regulatory authority to undertake reforms including revision of the unbundled network elements (UNE) rule and determination of the regulatory framework for new services under the current Telecommunications Act, and attempts by legislature to revise the Communications Act. While these reforms would be beneficial to consumers if implemented appropriately, it is important that the reforms do not hinder market competition, technical neutrality, consumer benefits, and free entry, in the process or as a result. The Government of Japan therefore urges that:

(1) Unlike other major countries, the Communications Act of the United States classifies services into "telecommunications services" and "information services". "Telecommunications services" are subject to a set of regulations including provision of UNE, contribution to the universal service fund and price regulations, while "information services" are not subject to such a set of regulations. However, as technology development progresses, it is becoming difficult to tell what specific services are classified as telecommunications services or as information services. Regarding a variety of new services including VoIP, which have been emerging following broadband diffusion and IP migration, it is understood to be the actual situation that the FCC determines which type of service a new service falls into, and what regulations are applied to it on a case-by-case basis, thus hindering the foreseeability for service providers. In this context, the Government of Japan urges the Government of the United States to:

- (a) Provide consistent criteria on what kind of services are classified as "telecommunications services" or "information services";

(b) Prevent the dichotomous classification of "telecommunications services" and "information services" of the Communications Act from hindering implementation of appropriate and reasonable regulations based on bottleneck and market dominance; and

(c) Consider revising the dichotomy of the current service classification in the process of the revision of the Communications Act unless both (a) and (b) above are satisfied at the same time under the current framework of the Communications Act.

(2) As the rapid development of IP-based networks promotes separation of service supply functions, various new business models have also emerged, such as a model in which only specific or partial service is supplied by one company. On the other hand, vertically integrated services, which are supplied by one single company that controls their own network and also supplies content and applications, are prevailing. One example is the tripleplay, that is, one single company supplies video, voice and data services altogether. Under these circumstances, with a view to promoting fair competition, the Government of Japan urges the Government of the United States to ensure that consumer benefits not be hindered by an abuse of cross-layer dominant power, such as manipulation of an advantageous position as a bottleneck infrastructure holder.

In particular, the Government of Japan urges the Government of the United States to ensure that (a) consumers be entitled to connect any legal devices to networks; (b) consumers be entitled to access any lawful Internet content; and (c) consumers be entitled to select any application, as stated in the "Policy Statement" (August 5, 2005, FCC05-151) adopted by the FCC, no matter which broadband service provider consumers choose, as long as their actions do not cause any harm to networks.

### **3. Competition in the Navigation Devices Market in the Process of Transition to Digital Television**

The Government of Japan understands that for adequate services that meet consumer requirements to be provided in the process of transition to digital television, it is of particular importance to ensure new entry and fair competition in the navigation devices market. Section 629 of the Communications Act stipulates that the FCC shall ensure that consumers get converter boxes and other equipment for multichannel video programming from manufacturers, etc. which are not affiliated with any multichannel video programming distributor. The Government of Japan urges the Government of the United States to continuously maintain and enforce this section of the Act in order to ensure consumer benefits in the navigation devices market in the process of transition to digital television and the revision of the Communications Act.

### **4. Unified Regulations to Reduce Unreasonable Burdens**

#### (1) State-Level Regulations

In the United States, the federal institutions delegate implementation of various kinds of regulations on telecommunications to states' decisions. The differences in implementation of regulations among states create obstacles to the development of the inter-state telecommunications business. The Government of Japan therefore urges the FCC to explore ways that enable states to swiftly and efficiently implement and amend the federal regulations and their amendments to ensure smooth management of inter-state businesses by an effective use of the newly established "Office of Interstate Affairs".

Specifically, in the United States, carriers are obliged to file reports on business information including their earnings to all individual states where they are providing services. As there is no standardized filing form that is common among states, an excessive burden has been placed on carriers operating across many states in reporting to all these state governments in different forms.

Accordingly, the Government of Japan urges the Government of the United States to continue to communicate these concerns to the National Association of Regulatory Utility Commissioners (NARUC), and to work on NARUC in a tangible managed to make achievements.

## (2) Access Charges

There are three different kinds of access charges in the United States: reciprocal compensation, intra-State access charges and inter-State access charges, which are imposed depending on, for instance, the types of accessing carriers. The Government of Japan requests the Government of the United States to implement the ongoing process of notice of proposed rulemaking (NPRM) of access charges reform in a transparent manner, establish a unified intercarrier compensation regime, and eliminate disparity and inconsistencies among the three kinds of access charges.

Further, the Government of Japan urges that measures be implemented to secure transparency of the implementation of the current system in the interim until a unified intercarrier compensation regime is established.

In particular, on the issue of inter-State access charges, it is unclear whether the Coalition of Affordable Local and Long Distance Service (CALLS) plan still remains in effect. The Government of Japan urges that the legal stability with regard to the current system on inter-State access charges be ensured.

## **5. Development of UNE Regulations**

In the United States the unbundling obligation imposed on incumbent local exchange carriers (ILECs) is established by Section 251 of the Communications Act, and under the "Triennial Review" (August 21, 2003, FCC03-36) ILECs did not have to provide unbundled access to such broadband services as FTTH. Federal Court of Appeals vacated, however, the decision including that forbearance in March 2004, and directed that the FCC should make granular judgments on competitive impairment of regulations based on the evaluation of the degree to which intermodal competition had developed or promotion of investment in broadband deployment. Accordingly, the FCC, under its "UNE Final Order" (March 11, 2005, FCC04-290), adopted such measures as to forbear the unbundling regulations on wireless and inter-LATA telecommunications carriers. The unbundling obligation on ILECs, however, was not abolished; rather, the FCC, based on Section 10 of the Communications Act, judges whether or not to forbear the regulation on ILECs in a case-by-case manner.

Regarding the unbundling regulations applied to Regional Bell Operating Companies (RBOCs) under Section 271 of the Communications Act, the obligation on broadband loops was forbore based on Section 10 of the law in October 2004, and that decision was upheld by the Federal Court of Appeals on August 15, 2006.

Regarding the UNE regulations in the United States, the fact that FCC regulations have been thus changed by court decisions and that the FCC makes respective decisions upon request whether or not to forbear the unbundling regulation on ILECs hampers the foreseeability for companies engaging in communications business, which requires a long-term investment plan. Therefore, the

Government of Japan urges the Government of the United States to promptly clarify the list of UNE in order to ensure maximum foreseeability by taking into account public comments from industry and by paying due consideration to the burden on new carriers and end users.

## **6. Universal Service**

According to the universal service mechanism in the United States, the amount of disbursement continues to increase since multiple eligible telecommunications carriers, including wireless service providers, can be designated in a single region. The amount of contributions however is decreasing due to a decrease in the traffic carried by long-distance fixed phone operators. Due to an imbalance between expenditures and revenues in recent years, the financial condition of the universal service fund has deteriorated, raising concerns among the parties in the United States about the stability and sustainability of the funds.

The FCC introduced regulations for performing a tentative review of the universal service mechanism on June 21, 2006, and implemented system reforms to increase contribution base of the universal service funds including by making VoIP service companies subject to contributions. However, the FCC acknowledges that long-term fundamental reforms on the method of revenue-based contributions are still necessary, in order to maintain stability and sustainability of the system over the long term.

As the system is in an unstable condition at present, the Government of Japan has concerns that it is reducing the foreseeability in business in a medium to long term for operators engaged in the telecommunications business in the United States. The Government of Japan therefore urges the Government of the United States to conduct a review of the mechanism including disbursement and contributions as well as to make policies for improving the efficiency of the operation of the system in order to ensure that the universal service mechanism of the United States be operated in a stable manner.

## **7. Procedures for Export Licenses, Approval of Technical Assistance Agreement and Other Measures concerning Commercial Satellites**

### (1) Ensuring Prompt Procedures and Transparency for Export Licenses

The examination procedures and the operation thereof by the Government of the United States with respect to export licensing for commercial communications satellites are unclear, and the standard processing time required has not been made public. Therefore, satellite makers need to bear risks in applying for the approval and suffer from delays in procuring parts in the production process, which reduces foreseeability in the commercial satellite business. Further, the operation of the licensing procedures is subject to change without notice, causing the situation where operators are unable to respond swiftly to changes in application procedures, and therefore it takes a long time to obtain a license.

Accordingly, the Government of Japan urges the Government of the United States to continue its efforts to maximize transparency by making public export licensing procedures and their operation, and to shorten the length of the examination period including by analyzing its actual length.

### (2) Ensuring Prompt Procedures and Transparency for Technical Assistance Agreement (TAA)

Regarding TAA, the criteria determined by the Government at the United States for information disclosure and TAA approval are not clear. Therefore, commercial satellite makers do not disclose

technical information at their own risk and they bring into the licensing process information not required for the application. As a result, the unclear criteria of the TAA approval need additional time before a satellite maker acquires the approval. Foreign satellite communications companies cannot access indispensable information such as test procedures, reports on non-performance of the manufacturing process, and reports on problems in assembly or the ex-ante test. Moreover, foreign satellite communications companies need to shoulder additional costs due to undisclosed essential information. Consequently, Japanese satellite communications companies have long-term concerns over business activities.

Concerning the insurance TAA required in connection with the launch insurance contract for a communications satellite, the length of the required processing time is becoming longer due to insufficient examination staff and concentrations of applications. This inhibits the smooth conduct of business due to difficulties faced by satellite companies attempting to respond appropriately to technical questionnaires from insurance companies.

The Government of Japan therefore urges the Government of the United States to minimize delays in procedures, continue making efforts to maximize transparency in the export licensing and TAA approval processes, and minimize the items of undisclosed information in accordance with the United States laws, regulations and policies.

In addition, in order to prevent commercial satellite makers from being daunted and keeping information secret, the Government of Japan urges the Government of the United States to specify and exemplify information which is able to be disclosed as far as possible and draw up guidelines for information disclosure as soon as possible.

### (3) Ensuring Fair Procurement Conditions

The government of the United States restricts disclosure of certain types of information in satellite trades. As a consequence, when a United States satellite purchaser puts out a tender, Japanese satellite makers obtain related documents later than United States makers. The Government of Japan is concerned that Japanese makers are put at a competitive disadvantage, and therefore urges the Government of the United States to ensure fair competition for the satellite communications businesses in the procurement of satellites.

## **XIV. INFORMATION TECHNOLOGY (IT)**

Along with the wider use of the Internet and development of digital technologies it has become necessary for each country to effectively align their measures with measures being adopted internationally.

Even though the United States is an advanced IT country, there continue to be some aspects of its efforts to protect copyright that are thought to be inadequate or inappropriate, therefore the Government of Japan urges the Government of the United States to improve its measures to secure the protection of rights and to enforce proper mechanisms in this regard. It also urges the Government of the United States to establish and enforce the system devised with adequate consideration paid to an appropriate balance between the right of copyright holders and that of copyright users, without hurting the benefits of smoother use of copyrighted works made available by the development of Information Technology.

At the same time, Japan and the United States need to lead the international efforts against spam. The Government of Japan urges the Government of the United States to closely cooperate with Japan in this field.

Specific requests are as follows.

## **1. Legal Systems of the Government of the United States Covering Copyright and Neighboring Rights**

### (1) Protection of Copyright and Neighboring Rights

Given the current situation that copyrighted works are freely distributed across borders due to wide use of the Internet and the development of digital technologies, it is vital to ensure protection of copyright and neighboring rights in an internationally harmonized manner. In order to cope with this situation, international rules for the age of digitization and networking are currently being formulated at the World Intellectual Property Organization (WIPO). To facilitate such discussions the government of the United States is urged to provide legal systems that are not unnecessarily complex for foreign rights holders in order to ensure clear and reliable protection of the following items which are not fully protected in the United States.

#### (a) Protection of Live Performances

According to the provisions of TRIPS Article 14 and WPPT Article 6 it is not just live performance music only that is protected and protection is required for live sound performance in general, however protection is only provided for live music performances under the live performances as covered in the U.S. Copyright Act. The government of the United States is urged to provide protection not only for live performance music but in respect of unfixed live performance works in general as required under TRIPS14 and WPPT6. Further, if the government of the United States continues to interpret the provisions of TRIPS14 and WPPT6 as providing protection only for musical performances from among live sound performances, we request clear and concrete verification of the interpretation of the provisions of these treaties that indicates it is limited to music so long as there are no limitations that it is limited to music according to the wording of these treaties.

#### (b) Protection of Rights of Unfixed Works

The U.S. Copyright Act does not provide protection for unfixed works, and the Government of the United States has adopted the position that such works shall be protected by States' laws, however it is hardly acceptable from the point of view of maintaining transparency, that it is not possible to determine whether or not such protection is provided without viewing the laws of all the States. Although the U.S. federal constitution may limit the protection of copyright through federal law to fixed works only, in the same manner as Section 1101 of the U.S. Copyright Act protects musical performances that are live (i.e. unfixed), we believe that it is also possible to accommodate the protection to all unfixed works by prescribing legal remedies against unauthorized acts. Accordingly, the Government of Japan urges the Government of the United States to provide clear protection for unfixed copyrighted works under Federal law.

#### (c) Protection of the Moral Rights of Authors and Performers

Under U.S. laws, there is no provision providing clear protection in general for the moral rights of authors and performers. The position of the Government of the United States is that these moral rights are comprehensively protected by a combination of Section 106A of the U.S. Copyright Act, the Lanham Act, contract law and common law; however doubts remain as to whether such protection is actually being maintained. Especially as concerns the Lanham Act,

because cases have become established indicating that there is no function for protection of moral rights there are problems with the explanation provided by the Government of the United States that this law does protect moral rights. Further, the situation in which composite protection is provided through a plurality of legislation and common law means that for a foreign rights holder it could be said to be a complex legal system to the extent that in practice works cannot be used, thus infringing the principle of transparency. Thus, from the point of view of promoting transparency, clear protection under the U.S. Copyright Act should be provided for moral rights.

(d) Protection of Right of Rental concerning Video Games

The provisions of WCT Article 7 and TRIPS Article 11 require that a right of rental be provided concerning computer programs. Although Section 109 (b) of the U.S. Copyright Act purports to prescribe rental rights for computer programs, Section 109 (b) (B) (ii) of that Act excludes right of rental from the ambit of computer programs related to video games. Thus, U.S. Copyright Act needs to provide right of rental as required under WCT Article 7 and TRIPS Article 11 in respect of video games.

(2) Response to Digitization and Networking

In order to cope with new copyright-related issues that arise from the wider use of the internet and development of digital technologies, the Government of Japan urges the Government of the United States to explore and study a desirable nature of copyright protection system in the future through active exchange of information toward deregulation, taking account of the necessity of smooth innovation as well as consumers' convenience. Specifically, the Government of Japan urges the following:

(a) Considerations from the Perspective of Free Interoperability for Access Control

Presently, strengthened protection has been provided under Section 1201 of the U.S. Copyright Act for Digital Rights Management (DRM) for access controls and copy controls; however, the access controls under that section, especially the triennial review conducted by the Government of the United States covering these access controls, should be conducted from a viewpoint of avoiding any adverse effects on interoperability of software and hardware and on free competition rather than just on non-infringing uses of copyright protected works, such as fair use of copyrighted works. Further, in respect of copy controls under that Section rather than just access controls, the Government of Japan urges the Government of the United States to consider the international discussions concerning the free competition, fair use and interoperability of DRM.

(b) Facilitating Smooth Online Usage of Copyrighted Works

The position of the Government of the United States is that where copyrighted works are used online the copyright rights are protected by the combination of right of reproduction, right of performance and right of distribution. However, the relationship of these rights is complicated by this overlapping application of multiple rights causing concern that the smooth usage of copyrighted works online is being impeded. Accordingly appropriate measures, including establishing laws that ensure and promote smooth usage of such rights, should be adopted, and the possibility of overlapping application of multiple rights should be abolished.

(c) Considerations of Fair Use in the Establishment of New Laws in the Age of Digitization and Networking

When new laws are enacted as required to cope with the demands of the age of digitization and networking, it is important to pay consideration to the usage of copyrighted works held not to

constitute any infringement of rights in the past in order to achieve fair use. In this regard, Section 115 of the Reform Act of 2006 (H.R. 5553) discussed by the U.S. Congress as a legal measure to promote the smooth usage of copyrighted works online and its follow on the Copyright Modernization Act of 2006 (H.R. 6052) have been subject to criticisms voicing concern that the ambit of fair use is unnecessarily constrained. The Government of Japan seeks appropriate information disclosure of the contents of those laws and future developments.

Further, on the same theme, concerning the Audio Broadcast Flag Licensing Act (H.R. 4861), Platform Equality and Remedies for Rights Holders in Music Act (S.2644) and Digital Transition Content Security Act of 2005 (H.R. 4569) discussed by the U.S. Congress as legal measures to preserve copyright rights in digital broadcast, the Government of Japan seeks appropriate information disclosure of the content of those laws as well as information on present and future developments.

### (3) Other Requests

- (a) Orphan Works Act of 2006 (H.R. 5439) and the Copyright Modernization Act of 2006 (H.R. 6052)

The Orphan Works Act of 2006 that enables effective usage of orphan works without authorization of copyright and its follow on the Copyright Modernization Act of 2006 should be subject to considerations of how to maintain compatibility with international treaties covering copyright rights such as fulfilling the standards of off the Three Step Test of the Berne Convention, while appropriate information disclosure should be provided on future developments.

- (b) Legal Amendments to Title 17, United States Code, to Provide Protection for Fashion Design (H.R. 5055)

In Japan fashion design is only subject to copyright law when it can be said to be a work of artistic craftsmanship, delineating the ambit of protection offered by the Design Law. As the fashion industry is crossing borders as it develops internationally, it is highly undesirable that substantial differences arise in the requirements and ambit of protection offered fashion design in the United States and Japan. Accordingly, when laws are established such as the legal amendment Title 17, United States Code to Provide Protection for Fashion Design (H.R. 5055) debated in the United States as an amendment to bring fashion design within the ambit of protection, it is important that consideration be paid to international compatibility so that no impediments are created to inhibit the fashion industry from developing as a cross-border international industry.

- (c) Considerations on International Protection of Rights of Broadcast Organizations

Under U.S. domestic law, neighboring rights are not provided for broadcast organizations. In the light of treaties concerning protection for broadcast organizations handled by the WIPO at present, this creates impediments to the form of agreement between the U.S. and those countries that do recognize neighboring rights for broadcast organizations, creating concern that obstacles may arise to providing protection internationally for rights to broadcast organizations. Accordingly, the Government of Japan urges the Government of the United States to consider appropriate measures giving consideration to providing international protection to rights or broadcast organizations to alleviate this present condition.

## **2. SPAM**

Spam has become a worldwide problem in the Information and Communications Technology

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(ICT) field. While it is acknowledged that the Government of the United States is taking measures against spam, the United States continues to be recognized as the largest spam-sending country in the world.

Therefore, the Government of Japan urges the Government of the United States to further promote comprehensive anti-spam measures such as strict enforcement of the CAN-SPAM Act, support for technical measures taken by the private sector, and international cooperation with other governments. In addition, the Government of Japan requests the Government of the United States to continue to explore and consider measures to combat spam between the two countries.

## **XV. MEDICAL DEVICES AND PHARMACEUTICALS**

In recent years, Japanese pharmaceutical and medical device industries have been actively expanding overseas operations, with an increased number of Japan-originated pharmaceuticals on a list of biggest global sales. With these developments, Japanese companies have strong interest in raising the transparency of related regulations in the United States and in ensuring their appropriate implementation.

The Government of Japan is convinced that it is beneficial to both Japan and the United States, including patients in the United States, that the Government of the United States provides meaningful opportunities to have dialogue with Japanese companies and industry groups in order to enhance communication between both sides, and that, as a result, pharmaceuticals and medical devices developed by Japanese companies are introduced smoothly into the U.S. market.

Accordingly, the Government of Japan continues to urge the Government of the United States to make reforms to alleviate problems faced by Japanese companies.

Specific requests are as follows:

### **1. Regular Meetings with Japanese Companies Operating in the United States**

It is extremely important that there is mutual understanding between a company and the U.S. Food and Drug Administration (FDA) when an examination for approval for medical devices or of pharmaceuticals is performed, and we recognize this as being conducive to the speedy and smooth approval procedures.

In the Fifth Report to the Leaders, the FDA commits to continuing to provide opportunities for meetings with Japanese companies operating in the United States, but the Government of Japan requests that, in addition to providing such opportunities as much as possible, appropriate measures should be taken to ensure a more practical exchange of views, such as having appropriate U.S. expert officials present when such meetings take place.

### **2. Facilitation of Worldwide Simultaneous Development**

When a U.S. pharmaceutical company or medical device maker applies for approval of a new pharmaceutical or medical device, it normally develops and applies for approval of a new product first in the United States, and later in Japan, resulting in a situation where new pharmaceuticals and medical devices are introduced late to the Japanese market.

From the viewpoint of the need to provide patients with earlier access to safer and more effective pharmaceuticals and medical devices and of the social responsibility of pharmaceuticals and medical device makers, the Government of Japan has prompted those makers to facilitate worldwide simultaneous development.

In the Fifth Report to the Leaders, the U.S. Department of Commerce commits to encouraging U.S. industry to work with the Japanese regulatory authorities to facilitate worldwide simultaneous development of pharmaceuticals, including in Japan, but the Government of Japan continues to request the Government of the United States to take concrete measures toward realizing this goal.

### **3. Dispatch of Establishment Inspection Reports For FDA Inspections**

The FDA inspects manufacturing sites to verify the function of quality control systems of a site, for example, and it conducts thorough inspections of the sites of Japanese companies as well. The Establishment Inspection Reports (EIR) that compile the results of these inspections are important documents for the companies to maintain and improve their quality control systems. However, these EIRs do not necessarily reach the Japanese establishment that has undergone the inspection in cooperation with the FDA.

The fact that EIRs are not delivered to the companies in question not only means that such companies cannot utilize the results of the inspection for their quality control systems, but also is a problem from the viewpoint of the governing authorities' transparency and accountability.

Accordingly, the Government of Japan urges the Government of the United States to ensure that EIRs are definitely delivered to all establishments that undergo inspections.