(Provisional Translation)

October 14, 2001

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

At the Japan-U.S. summit meeting held at Camp David on June 30, 2001, Prime Minister Koizumi and President Bush announced the establishment of the "U.S.-Japan Economic Partnership for Growth" with the aim to promote sustainable growth in both countries as well as the world, in which they agreed on the launch of the "Regulatory Reform and Competition Policy Initiative"("Reform Initiative"). Based upon the successful conclusion of the "Enhanced Initiative on Deregulation and Competition Policy" ("Enhanced Initiative") which continued for four years since 1997, this Reform Initiative is newly established, with the aim of maintaining a focus on key sectors and cross-sectoral issues in which important reforms are being undertaken.

The Deregulation Dialogue which continued for four years under the Enhanced Initiative has certainly achieved great success in clarifying regulatory and systemic problems of each country and in reducing unnecessary regulations, strengthening competition, and improving market access. It is also a fact, however, that there remain regulations and systems in the United States that are: 1) unique to the United States and not harmonized with international standards; 2) inconsistent with the idea of free trade; and 3) impeding fair competition. Many of them are imposing unreasonable burdens on Japanese companies conducting business in the United States, thus regarded as serious concerns by them. Various unilateral measures that the Government of the United States has employed are their typical examples, and questionable from the viewpoint of their consistencies with the WTO rules as well.

With these recognitions of the current situation, the Government of Japan (GOJ) presents its submission regarding regulatory reform and competition policy to the Government of the United States of America (USG) at the beginning of the Reform Initiative. GOJ intends to urge USG to improve its policy and further promote regulatory reform and competition policy by sufficiently reflecting this submission.

There has never been a time when such great importance is attached to the status of both economies in the world economy and to the potential role that their sound and stable relationship could play toward global economic growth and prosperity. Japan and the United States should fully recognize that they have leading roles to play in promoting global economic growth and economic harmonization, as well as in strengthening an open and multilateral trading system. The two countries should demonstrate a model of dialogue and cooperation in this globalized age.

GOJ strongly hopes that the frank and constructive dialogue with USG under this Reform Initiative will greatly contribute toward further strengthening and deepening of the Japan-U.S. relationship. And, in order to realize such a dialogue, GOJ expects that USG will seriously consider the items raised in this submission, based on the principle of two-way dialogue, and make positive commitments to producing tangible results.

I. CROSS-SECTORAL ISSUES CONCERNING REGULATORY REFORM AND COMPETITION POLICY

1. Trade/Investment Related Measures

(1) Anti-Dumping Measures

(a) Although anti-dumping measures may be proper trade remedies as far as they are operated in a manner consistent with the WTO agreements, there is a possibility that they might unduly limit trade and competition once operated in an arbitrary manner, for example, in determining if dumping exists or not. Furthermore, the commencement of anti-dumping investigations itself may become a disincentive to exporting companies. From these viewpoints, GOJ urges USG to operate its anti-dumping regime prudently, without abusing it for protectionist purposes.

(b) The United States is one of the major users of anti-dumping measures. A number of countries including Japan have been claiming that some of the US anti-dumping measures are inconsistent with the WTO agreements, because of, for example, the arbitrariness in determining if dumping exists or not. In several cases such as the "Anti-Dumping Act of 1916" case and the "Certain Hot-Rolled Steel Products from Japan" case, the DSB found that the US measures were inconsistent with the WTO agreements. GOJ requests USG to promptly bring those measures in conformity with

the WTO agreements.

(c) GOJ also requests USG not to apply, in its future anti-dumping investigations, the methods that have already been found to be inconsistent with the WTO agreements, such as those for anti-dumping margin calculations adopted by DOC and for injury determination adopted by USITC.

(d) The Byrd Amendment, which distributes revenues from anti-dumping and countervailing duties to US domestic producers claiming to have been injured by dumped imports or subsidies, is inconsistent with the WTO agreements, especially in that it may invite abusive use of anti-dumping and countervailing petitions. Since this provision is also regarded as problematic from the viewpoint of trade policy, GOJ requests USG to urge the Congress to voluntarily repeal the Byrd Amendment as soon as possible, before the deliberations under the WTO are completed.

(2) The U.S. Patent System

(a) The First to Invent System, Interference

The United States is the only country adopting the first-to-invent system. Under this system, when two or more people make inventions separately and file applications for each of them, an interference procedure is carried out in order to determine who receives patent rights.

From the point of view of patent applicants, this procedure has some problems including: (i) 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, (ii) the interference procedures requires long periods of time and money; and (iii) there is a danger of leakage of the contents of inventions contained in applications filed or of know-how contained in patents during the interference period. In addition, in cases where multiple inventors have independently made the same invention and multiple patents have been granted to some of these inventors (double patent), there is a possibility that a third person will suffer an unreasonable loss in that he/she may be forced to pay redundant royalties to each right holder because there is no method for third persons to invalidate double patents by themselves.

Therefore, GOJ requests USG to switch to the first-to-file system, which is the international *de facto* standard. GOJ requests USG to simplify its interference procedures as a provisional measure until such a switch is made.

(b) The Early Publication System with Exceptions

The US early publication system, introduced by the revised patent law of November 1999, has exception that allow applicants, by their request, not to publicize US applications not filed overseas as well as contents of US applications not included in corresponding foreign applications.

Since the contents of applications remained unpublicized by request are not laid open to other persons until publication of the patent gazette after granting of the right, there is a possibility that a *bona fide* third person may invest redundantly, in research and development or to put to practical use an invention identical to that is written in the specification. From the viewpoint of the predictability of profits and losses in business, this is a considerable problem.

In cases where the patent examination term has been lengthened, there is a possibility that the patent right is established after a third person has independently put the developed technology to practical use in the meantime and sufficiently expanded the market scale of a product conflicting with the invention of the pending application. A large license fee may then be demanded of the third person. This is known as a "submarine patent."

Therefore, GOJ strongly requests USG to abolish an article for exceptions included in the early publication system and to implement the contents of the 1994 U.S.- Japan agreement in which USG agreed to lay open all applications, excluding those under secret order and those non-pending, within 18 months after the first date of application.

(c) The Reexamination System

In the United States a reexamination system is provided as a means to review the validity of patent rights after granting. In this system, *inter partes* reexamination is introduced as an option of the appeal reexamination by the revised patent law of November 1999.

However, in the reexamination system in the United States, reexamination is limited to items whose reason for reexamination request is the existence of prior art documents. It is not allowed to apply for reexamination on the grounds of not meeting the enablement requirement or the description requirement of the specification.

Although the new system has been introduced to expand opportunities for third persons to participate in *inter partes* reexamination, they cannot appeal against a decision by the Board of Patent Appeals and Interference of reexamination affirming a patent right to Court of Appeals for the Federal Circuit (CAFC). Therefore the system is not practical.

Therefore, GOJ strongly requests USG to accept to all of the requirement inadequacies of the US Patent Law Article 112, excluding the best mode requirement, as reasons for reexamination request and to allow appeals by third party applicants to CAFC.

(d) 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 file only one invention by selecting claims in order to maintain unity of invention (only one independent invention should be included in an application).

US standards of decision for unity of invention are more stringent than those of the Patent Cooperation Treaty (PCT). Even if an invention fulfills the unity of invention requirements as a PCT application filed in the US, it may be judged as not meeting the requirement if the same application is filed claiming priority rights based on the Paris Convention for the Protection of Industrial Property.

It is practically difficult for applicants filing applications in multiple countries to carry out application preparations (consideration of claims) in compliance with unique US standards concerning requirements for unity of invention.

When a request for restriction is received and the claim is decided, claims that were not chosen are excluded from examination. Therefore, if the applicant wants to maintain the claims that were not chosen, it is necessary to file a divisional application before the patent is issued for the original application. Filing a divisional application requires further time and expense on the part of the applicant.

Furthermore, it is burdensome to third persons monitoring the patent for the purpose of avoiding conflict as well as to applicants and right holders that inventions, for which unity of invention would be allowed in other countries, exist in the US as multiple applications.

Therefore GOJ requests USG to ease the requirements for unity of invention.

(e) The Hilmer Doctrine

Article 119 of the US Patent Law introduces the priority rights system provided by Article 4 of the Paris Convention. Namely, an application filed in the US within 12 months from the first date of the overseas application have the same effect as an application filed in the US on the same day as the first date of the overseas application.

However, in US precedents and practice based on the Hilmer Doctrine, the effect of the items of the specification comes into being as prior art to eliminate subsequent

applications by third persons is not retroacted to the first date of application in the first country to receive the application. It is only retroacted to the date of filing in the US.

As regards subsequent applications from third persons, while applications whose first country of filing is the US have the elimination effect provided by articles 102(e) and 102(g) of the Patent Law, US applications based on the priority rights of overseas applications are only afforded article 102 (g) as an effect to eliminate subsequent applications within the term of the priority right.

In Japan and Europe, domestic applications based on priority rights of overseas applications are retroacted to the first application date in the first country, and the effect to eliminate subsequent applications applies to all items of the specification. It is unfair that the same treatment is not guaranteed by the US.

Therefore, regarding precedents and practice based on the Hilmer Doctrine, GOJ requests USG to improve the system to ensure that all items of the specification are retroacted to the first date of filing in the first country and that they have the effect of eliminating subsequent applications by third persons.

(3) Exon-Florio Provision

The Exon-Florio provision (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 threatens the national security of the United States. In general, GOJ fully understands the necessity of regulations for national security reasons. GOJ has concerns, however, from the viewpoint of ensuring legal stability of investment and due process, that this provision could impede investment activities of Japanese companies to the extent beyond necessary for its original purpose. Transparency and predictability of the government regulations are key elements in business's determining investment. They are also prerequisites for competitive businesses to conduct their business under fair conditions. GOJ requests USG, in the operation of the Exon-Florio provision, to refrain from expanding the concept of "national security" excessively, and to take measures to ensure, to the maximum extent possible, the transparency and fairness of the process from the notice to the CFIUS (The Committee on Foreign Investment in the United States) to the final decision by the President.

(4) Metric System

Based on the dialogue under the Japan-U.S. Enhanced Initiative on Deregulation and Competition Policy, GOJ continues to be strongly interested in the progress that has been made toward the adoption of the metric system in the United States. In view of

the significant impact that the U.S. market has on world trade, GOJ continues to urge USG to ensure that the metric system (the SI Unit), which is the global standard, is adopted more broadly by the U.S. public and private sector.

2. Sanctions Acts

(1) Iran and Libya Sanctions Act of 1996 (ILSA)

Sanction measures based on the Iran and Libya Sanctions Act of 1996 (ILSA) could constitute an extraterritorial application of domestic laws which is not permissible under general international law, and they may cause a problem in relation to the WTO agreements. It is greatly regrettable that, despite GOJ repeatedly pointing out the above-mentioned problems on various occasions, USG approved the extension of the Act for another 5 years without resolving them on August 3, 2001. GOJ urges USG to exercise prudence in implementing the Act, ensuring consistency with international law, and especially to avoid applying the Act to enterprises of third countries.

USG decided in May 1998 that the investment contracts in gas exploitation by three foreign companies would be exempted from the application of the Act, which practice has basically continued in relation to other projects in gas and oil exploitation by foreign companies.(Their current status is 'under examination' as for the application of the Act.) To ensure that these treatments are non-discriminative, GOJ requests USG to confirm that investments made by enterprises of any other country including Japan are exempted from the application of the Act.

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

Sanction measures based on the Cuban Liberty and Democratic Solidarity Act of 1996 (Helms-Burton Act) could constitute an extraterritorial application of domestic laws which is not permissible under general international law, and may cause a problem in relation to the WTO agreements.

GOJ appreciates USG's decision on July 16, 2001, to extend the suspension of the implementation of Title 3 of the Act for another 6 months, and continues to request USG to exercise prudence in implementing the Act, ensuring consistency with international law, and especially to avoid applying the Act to enterprises of third countries.

(3) Sanctions Acts instituted by local governments

GOJ appreciates the unanimous decision by the U.S. Supreme Court on June 19,

2000, which found that the Myanmar Sanctions Act of the Commonwealth of Massachusetts was unconstitutional, in the sense that it removed entry barriers for private firms facing trade-related legislation instituted by individual states. During the dialogue of the fourth year of the Japan-U.S. Enhanced Initiative on Deregulation and Competition Policy, USG explained to GOJ the efforts it had taken to talk with the local governments where sanctions acts that are in consistent with foreign policy of the federal government still exist. GOJ therefore requests USG to illustrate the concrete results and progress made by these efforts.

GOJ also urges USG to take concrete actions such as issuing documents to all states and other local governments which state that:

(i) Sanctions acts at the local level should be consistent with the foreign policy of the federal government in accordance with the above-mentioned U.S. Supreme Court decision.

(ii) GOJ has been concerned about the sanctions acts concerning government procurement at the local level from the viewpoint of the loss of business opportunities of private firms; and

(iii) It is necessary to ensure that local legislation concerning government procurement to which the WTO Agreement on Government Procurement (GPA) applies is consistent with GPA.

3. Distribution

(1) Customs Clearance

GOJ requests USG to finalize, by the end of 2001, the work on a methodology for implementing a Time Release Survey based on the World Customs Organization (WCO) Guidelines and to notify GOJ of its outcome as promptly as possible thereafter.

(2) Merchant Marine Act of 1920 (The Jones Act)

(a) The Federal Maritime Commission (FMC) is authorized by sec. 19 (1)(b) of the Merchant Marine Act of 1920 (The Jones Act) to make rules and regulations affecting shipping in foreign trade.

FMC started a unilateral sanction against Japanese carriers in September 1997. Although the sanction was removed in May 1999, FMC still requires carriers to report to FMC on the situation of the ports in Japan. The rule (repealed in May 1999) which provided the grounds for unilateral sanctions was a violation of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, which provides for

national treatment and most-favored-nation treatment.

GOJ requests USG to ensure that such unilateral measures will not be taken by FMC by working even more closely with FMC.

(b) Since the repeal of the above-mentioned rule, FMC has required Japanese and US related carriers to report to FMC on the progress of the situation of the ports in Japan.

Signs of progress have been seen on the situation of the ports in Japan, as a result of the efforts by the people concerned, such as significant improvement and steady implementation of "the prior consultation system," realization of new entries into port transport business as a result of the revision of the Port Transportation Business Law that abolished the supply-demand adjustment restriction, and steady progress toward the introduction of 24-hour/day port terminal service operation. GOJ strongly urges FMC to have correct understanding of these positive developments.

Despite this significantly improved situation of the ports in Japan described above, FMC introduced 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 going beyond the extent that is deem appropriate, such as directly requiring Japanese carriers to submit translated copies of the Japanese laws and instructions concerned, thus causing unfair and excessive burdens on them.

It is regrettable if FMC decided to expand the range of the reporting requirements in order to judge whether or not it should impose unilateral sanctions that would violate the Treaty of Friendship, Commerce and Navigation between the United States and Japan. GOJ recognizes that in such a case, this order would constitute a serious abuse of FMC's mandates.

GOJ therefore strongly requests USG to withdraw the order, which requires carriers to submit the report.

(3) Abolition of Maritime Security Program

GOJ requests USG to abolish the program which annually provides 100 million dollars of maritime subsidy for ten years, since it is obvious that a provision of such an enormous amount of subsidy distorts conditions for free and fair competition in the international maritime market.

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

GOJ requests USG to abolish the Cargo Preference Measures, such as the

requirement to use U.S. vessels for the exports of Alaskan oil which is commercial cargo. These protectionist measures are inconsistent with the principle of national treatment, and are also against the Ministerial Decision on Negotiations on Maritime Transport Services of WTO, which prescribed that the participants should not apply any protectionist measures during the negotiations.

(5) Ocean Shipping Reform Act of 1998

The Ocean Shipping Reform Act of 1998 includes a provision allowing discriminatory treatment of Japanese and other foreign shipping firms by making it possible to institute unilateral regulations on pricing and other practices. As the pricing practice is the foundation of free shipping activity on a commercial basis, unilateral regulations by FMC on the pricing practice are obviously intervention in the free shipping activity which is discriminatory against foreign firms. Furthermore, the amendment to the Act in 1998 explicitly stipulates the right of the federal government to intervene in pricing practice. GOJ requests USG to affirm that FMC should not impose unilateral regulations on shipping activities on a commercial basis by Japanese and other foreign shipping firms in the future, without considering the reality of the market.

4. Competition Policy

GOJ urges the Department of Justice to continue to review and express its views on the appropriateness of existing antitrust exemptions from the viewpoint of active promotion of competition policy, and abolish the exemptions that have no rationale for their existence. GOJ requests USG to actively cooperate with the states concerned in the review process of the antitrust exemptions at state level as well. Any public documents related to the work mentioned above should be made available to GOJ.

5. Legal Services and Other Legal Affairs

(1) Acceptance of Foreign Lawyers as Foreign Legal Consultants (FLC)

(a) Acceptance of Foreign Lawyers as FLC in Every State

In the United States, only 23 states and the District of Columbia accept foreign lawyers as FLC. In all other states, foreign lawyers are not allowed to practice. This situation restricts the provision of diverse legal services in the United States. USG supports the adoption of foreign legal consultant rules by states that do not have such

rules. From such viewpoints as facilitating international business, GOJ continues to welcome this position of the USG and requests USG to take further positive actions so that all states will accept foreign lawyers as FLC.

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

As far as the GOJ is aware, in every state and the District of Columbia where foreign lawyers are accepted as FLC, practicing experience is a necessary qualification to become a Foreign Legal Consultant. Most states require five years of practicing experience. This constitutes a barrier for foreign lawyers to practice in the United States. The Japanese system only requires three years of practicing experience for acceptance as a foreign lawyer in Japan. GOJ requests USG to take necessary measures, such as offering suggestions to the relevant state governments, in order to reduce the period of practicing experience requirement to three years in every state.

(c) Abolition of the Requirement that Only Practicing Experience in the Period Immediately Preceding the Date of Application can be Considered as Practicing Experience

As far as the GOJ is aware, in every state and the District of Columbia where foreign lawyers are accepted as FLC, only the period immediately preceding the date of application is allowed to be considered as practicing experience. Such a requirement is not imposed in the Japanese system of accepting foreign lawyers. In order not to limit the practicing experience that can be considered as practicing experience for qualification as FLC to the period immediately preceding the date of application, GOJ requests USG to take necessary measures, such as offering suggestions to the relevant state governments.

(d) Inclusion of Practicing Experience in Third Countries into the Practicing Experience Requirement for Acceptance of Foreign Lawyers as FLC

Among the states and the District of Columbia where foreign lawyers are accepted, there are only two States (New York and Indiana) which have been confirmed to allow the inclusion of practicing experience in third countries into the practicing experience requirement. In Japan, the amendment of the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers in 1998 has enabled foreign lawyers to include the period of time engaged in legal services in third countries as practicing experience. In order to allow the inclusion of the practicing experience in third

countries into the practicing experience requirement in every state, GOJ requests USG to take necessary measures, such as offering suggestions to the relevant state governments.

(e) The Fourth Joint Status Report on the US-Japan Enhanced Initiative on Deregulation and Competition Policy states that the American Bar Association has been informed of the requests of the GOJ with respect to this issue. GOJ therefore requests USG, concerning these requests, to explain the details and current status of the dialogue and consultation between USG and ABA and what the ABA's response is in such talks.

(2) Product Liability Law

Product Liability law in the United States compels companies conducting business in the United States to bear excessive expenses for lawsuits. This constitutes a heavy burden for Japanese companies doing business in the United States. It also affects international competitiveness of the United States industries. GOJ requests USG to encourage the reforms currently underway in various states to limit product liability, and to promote reform of product liability law at the federal level such as putting certain limits to the amount of damages and shortening the statute of limitations.

6. Consular Affairs

(1) Social Security Numbers (SSN)

The amendment of the rule of the Social Security Administration (SSA) in February 1996 made it impossible to issue SSN to alien residents without employment-based visas. This change of the rule has caused inconvenience to dependents of Japanese staff working for Japanese firms in the United States, as presenting SSN is required on various occasions in daily life in the United States; i.e. applying for a driver's license or a credit card, opening a bank account, and signing a lease contract for housing. GOJ therefore requests SSA; (i) to amend the rule again so that these legal residents can obtain SSN, or (ii) in the case where the amendment of the rule is not feasible, to fully inform private enterprises of the amended rule limiting the issuance of SSN, and to instruct them to ensure that legal residents who cannot obtain SSN are not given discriminatory treatment. (iii) GOJ also requests SSA to establish a contact point to register and respond to complaints from legal residents regarding SSNs immediately.

(2) Permission for Stay (I-94)

As GOJ pointed out in its submission to USG in October, 2000, the system of application for the extension of I-94 is not functioning properly and imposing unreasonable burdens on legal alien residents. In the belief that the system requires fundamental improvement, GOJ requests the Immigration and Naturalization Service (INS) to establish and announce a standard processing period for the procedure of the extension of I-94, which should be uniformly applied in all INS offices. This would help to reduce the processing period, to streamline the procedure, and to enhance predictability and transparency of the procedure. GOJ also requests USG to explains the concrete progress that has been male with regard to measures that will enable applications for extension of I-94 to be accepted one year before its expiration and thereafter, to which USG committed itself in the Fourth Joint Status Report.

(3) Driver's Licenses

GOJ urges SSA to continue dialogue with GOJ and to provide necessary information in order to address requests from legal residents who have difficulties in obtaining or renewing their driver's licenses due to the requirement of having I-94 or SSN. In view of the fact that there have been some cases in which trouble was caused by the police's ignorance of the system of international driver's licenses, GOJ requests USG to fully inform all the states and other local governments about international driver's licenses.

II. TELECOMMUNICATIONS

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

Section 310 of the Communications Act of 1934 stipulates that foreign direct investment in the licensing of radio stations shall be limited to 20%. This restriction makes it impossible for Japanese carriers to directly obtain licenses to establish earth stations in the United States for providing services such as international communications between Japan and the United States by satellite, as a result of which they are faced with difficulties in creating flexible networks.

GOJ has already abolished the restriction on foreign investment in the licensing of radio stations for the purpose of conducting telecommunications activities, and thus continues to request USG to take the same action on the restriction on foreign investment stipulated in Section 310 of the Communications Act of 1934.

(2) Certification and Licensing Criteria for Foreign Carriers' Entry into the US

Telecommunications Market

Among the certification and licensing criteria for foreign carriers' entry into the US telecommunications market with regard to Section 214 and Section 310(b)(4) of the Communications Act of 1934, GOJ requests USG to abolish the criteria of "trade concerns" and "foreign policy" which could be invoked to refuse issuance of certification or licenses for reasons that are irrelevant to telecommunications policy.

GOJ also requests USG to clarify and publish guidelines under which the criteria of "very high risk to competition" would be invoked.

GOJ further requests USG to clarify guidelines under which the dominant carrier regulation in 47 C.F.R. Part 63 is applied to carriers providing international communications services.

(3) State-Level Regulations

In the United States, carriers are obliged to file reports to the states on information such as their earnings where they are providing services. The differences in the filing forms among states have placed excessive burdens on carriers.

GOJ requests USG to actively encourage the NARUC to take appropriate measures, such as the simplification and standardization of the filing forms so that such burdens will be removed.

(4) Access Charges

GOJ requests FCC to ensure that the level of the inter-state access charge always falls within the range of the rate calculated by the most up-to-date Long Run Incremental Cost (LRIC) model. GOJ also requests USG to introduce an LRIC model to the calculation of an intra-state long distance access charge and to eliminate or reduce the gap between the inter-state access charge and the intra-state long distance access charge.

GOJ further asks USG to establish a legal foundation for the LRIC model adopted in the United States, as GOJ has already done regarding the Japanese model.

(5) Procedures for Processing Export Licenses and TAA Approval of Commercial Satellites

As a result of the transfer of jurisdiction over the export of commercial satellites from the Department of Commerce to the Department of State (DOS) in March 1999, DOS's approval is currently required for the export of commercial satellites and transfer of technical information concerning these satellites. This transfer of jurisdiction has

resulted in a lengthy time being required for Japanese satellite communications carriers to obtain technical information on the satellites that they order, which has become a lasting concern into the future as the delay could affect their satellite-launching schedules.

GOJ requests USG to further shorten the processing period for export licenses and TAA approval of commercial satellites.

III. INFORMATION TECHNOLOGY (IT)

COPYRIGHT PROTECTION IN THE US COPYRIGHT ACT

With regard to the following items, GOJ requests USG to revise, and/or clarify the legal interpretation of, the relevant articles of the US Copyright Act.

(1) Clear Stipulation of the Right of Making Available

In December 1996, the World Intellectual Property Organization (WIPO) adopted "new WIPO treaties" (namely the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)). These treaties stipulate international rules for copyright protection that will respond to the development of information and communication technology, such as Internet, and rapid social changes in recent years. These two treaties approve authors, performers or producers of phonograms of their exclusive rights of "authorizing the making available to the public of their works, performances or phonograms, in such a way that members of the public may access these works from a place and at a time individually chosen by them" (right of making available, or, so-called right of uploading), in such ways as to upload these works to computer servers in order to distribute them through Internet (WCT article 8, WPPT articles 10 and 14).

The Copyright Law of Japan and the EU Copyright Directive stipulate the contents of the right of making available, which the US Copyright Act does not clearly stipulate, despite the United States has ratified these two treaties. In the "Napster case," which examined the legality of the exchange between users of music files stored in their computers via Internet without the consent of their right holders, the Circuit Court did not make any reference to the violation of the right of making available. It is ambiguous how the US Copyright Act deals with this right of making available.

This situation could be regarded as a violation of the provisions of WCT (Article 8)

and WPPT (Articles 10 and 14), and could cause serious problems in relation to proper distribution of Japanese works and phonograms in the United States and to violation of the exclusive right of Japanese copyright holders, as Internet is rapidly spreading. GOJ therefore requests USG to establish the right of making available by creating a provision on the right of making available in the US Copyright Act and clearly stipulating the contents of the right.

(2) Expansion of the Subjects Protected by Performers' Right

WPPT and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS agreement) stipulate the protection of all live performances. However, the US Copyright Act protects only live sounds or sounds and images of "musical" performances; the US Copyright Act does not provide any protection for live performances other than musical ones (Article 1101). Thus, when a Japanese actor performs a play or "rakugo," a Japanese traditional performance, in the United States, these types of performances are not protected under the US Copyright Act. This could be a violation of the provisions of WPPT (Article 6) and TRIPS agreement (Article 14). GOJ therefore requests USG to extend its protection of live performance to all live performances including oral performances along with musical performances and, also to separately protect performers' right as "neighboring right," as these types of performances are expected to be performed more frequently in the United States along with the development of information and communication technology.

(3) Expansion of the Subjects Protected by Moral Rights

The authors' and performers' moral rights are protected under Article 6 bis. of the Bern Convention and Article 5 of WPPT. The US Copyright Act however does not provide any protection for the author's and performer's moral rights, except author's moral right of "work of visual art" under Article 106A. This could be a violation of the provisions of the Bern Convention and WPPT. Since the development of digitalization has made it possible for people to easily modify original works, the lack of sufficient protection for moral rights in the US Copyright Act might affect the protection of moral rights of Japanese authors and performers in the United States. GOJ therefore requests USG to stipulate moral rights of all the authors and performers in its Copyright Act, and to strengthen the protection of their moral rights.

(4) Clear Stipulation of the Rights of Broadcasting Organizations

The rights of broadcasting organizations, such as those of fixation, reproduction and

broadcasting, are not stipulated in the US Copyright Act, although the TRIPS agreement (Article 14), to which both Japan and the United States are parties, has relevant provisions of these rights. Since trans-boundary broadcasting has become wide-spread along with the development of information and communication technology, the sounds and images of Japanese broadcasting organizations are increasingly diversified, and, without the protection of the rights of broadcasting organizations, their live programs are not protected in the United States. GOJ therefore requests USG to clearly stipulate these rights in its Copyright Act and to separately protect those rights as neighboring rights. GOJ also requests USG to ratify the International Convention for the Protection of Performances, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) as soon as possible in order to strengthen the protection of the rights of broadcasting organizations.

(5) Protection of the Unfixed Works

The US Copyright Act only stipulates protection for fixed works, but does not provide any protection for unfixed works. Thus, lectures or speeches delivered in Japan that are broadcasted simultaneously through wire or wireless means in the United States are not protected under the present US Copyright Act. Along with the development of information and communication technology, it is expected that the distribution of Japanese unfixed works through such means will further increase. GOJ therefore requests USG to extend the protection of copyright works to cover unfixed works and strengthen the author's copyright in order to promote proper protection of Japanese unfixed copyright works in the United States.

IV. ENERGY

In the electricity and gas sectors, the United States has been one of those countries that have initiated reforms for the purpose of benefiting the industry and consumers, although progress and results have varied greatly in each state. GOJ appreciates the willingness of USG to share its experiences with other countries which help deepen their understanding of designing complex electricity markets. GOJ also hopes that mutual expansion of investment and trade flows, which have contributed to economic prosperity in other sectors, will be useful in these two sectors as well.

It is against this background that GOJ submits the following requests to USG.

These requests aim to contribute to greater economic benefits by advancing further electricity and gas market reforms which will be enjoyed by US consumers and industry users, as well as by a wide range of market players including foreign companies.

ELECTRICITY

GOJ recognizes that comprehensive bills on energy, which include the strengthening of the FERC's authority on the construction of new transmission lines, are under deliberation in Congress. While GOJ welcomes these initiatives, these bills have not yet been approved by Congress. Also, the case regarding the FERC's regulatory authority on inter-state transmission lines has been brought before the court and no ruling has been made.

To realize a vibrant electricity market in the United States by reducing business risks and barriers while taking into account the lessons learned in California, GOJ believes that it is beneficial for USG to take the following measures under the initiative of the federal government as soon as possible.

(1) Improving the Overlapping Structure of Federal and State Regulations and Different Regulations among States

In the United States, both the Federal and state governments regulate the electricity sector, therefore new entrants need to research on the regulations of each state in addition to the federal regulation. In some cases, the difference in extent and structure of liberalization among states impedes market participants from expanding their businesses smoothly. GOJ requests USG to take measures to improve the difference in regulations that exist among different states. Moreover, in case where a state's environmental regulatory requirements for siting are so strict as to make it impossible to construct new generating units and transmission lines, such regulations should be deregulated.

(2) Clarifying the Schedule of Liberalization

In the United States, unlike many other countries that have initiated regulatory reforms, the approach toward liberalization and its schedule vary greatly in each state. GOJ urges USG to take measures promptly to clarify the extent of liberalization and its schedule all over the United States.

(3) Conducting a Review of the Public Utility Holding Company Act

The Energy Policy Act of 1992 exempted independent power producers from the regulation in the Public Utility Holding Company Act, while retail suppliers are still regulated under the latter Act. GOJ requests USG to conduct a review of the PUHCA in order to exempt retail supply companies from the regulation by the act which has imposed on them complicated approval procedures for doing their businesses in more than one state.

(4) Conducting a Review on Publicly Owned Entities

Along with the development of competition in the electricity market, it is necessary to examine the need of existence of the publicly owned entities (POEs). GOJ urges USG to assess the POEs' impact on fair competition in the liberalized market and examine the need of a public policy desired for POEs. GOJ also requests USG to draft a proposal of their future direction and make it public.

(5) Price Cap Regulation in Wholesale Market

Some states have price-cap regulations on the wholesale trade of electricity, which occasionally prevent market participants from recovering their investment costs. GOJ therefore urges state governments to take appropriate measures that carefully consider the predictability for market participants when they set price-cap regulations in the wholesale market, so that the market participants can smoothly frame their business plans.

V. MEDICAL DEVICES AND PHARMACEUTICALS

(1) Mutual Recognition on Good Manufacturing Practices of Phrmaceutical Products and Medical Devices

In December 2000, the Ministry of Health, Labour and Welfare (MHLW) and the Food and Drug Administration (FDA) exchanged letters regarding cooperation on the exchange of pharmaceutical inspection reports and other pharmaceutical surveillance information. GOJ requests USG to enhance this cooperative relationship and to launch a more substantial consultation between the two governments toward realizing the Mutual Recognition of Good Manufacturing Practices (GMPs) of pharmaceutical products which will facilitate procedure to ensure the quality management of production as well as reduce the burden of inspections conducted by USG to the Japanese

manufacturers exporting products to the United States. Along with this, GOJ also requests USG to launch a more substantial consultation toward realizing the Mutual Recognition on GMPs of medical devices.

(2) Mutual Recognition on Good Clinical Practices

GOJ requests USG to promote the exchange of information on GCP inspection and to launch a more substantial consultation between the two governments toward realizing the Mutual Recognition on Good Clinical Practices (GCPs) which will facilitate the procedures of GCPs conformity assessment of application dossiers, thus leading to the reduction of MHLW's New Drug Application review period.

(3) Export Certification Requirements for Anabolic Steroids

GOJ requests USG to improve the procedures in exporting to Japan the product regulated by the Drug Enforcement Agency (DEA) of the United States but granted an approval as a drug by the Minister of Health, Labour and Welfare of Japan, so that the exporters are not required to submit GOJ's certificate which guarantees that the related product is not prohibited under Japanese laws.

(4) Batch Certification Requirements on Cosmetic Color Additives

GOJ requests USG, giving due consideration to the manufacturer's quality assurance based on their own responsibility, to review the batch certification requirement imposed directly by the FDA on each batch of the color (tar color) additives used in cosmetic products that are exported to the United States.

(end)