Comments of the Government of Japan on 2004 National Trade Estimate Report

April 20, 2004
Overview

In the 2004 National Trade Estimate Report on Foreign Trade Barriers (hereinafter referred to as “the Report”), some parts describe actual circumstance in Japan accurately and provide fair assessment, and there are also positive expressions especially in the areas in which the Japan and United States are cooperating. For other parts, however, the Report regrettably includes one-sided accounts and does not correctly reflect the information that the Government of Japan has sincerely and repeatedly provided through constructive discussions with the U.S. Government in a variety of fora under “the U.S.-Japan Economic Partnership for Growth” established by the Prime Minister of Japan and the President of the United States in June 2001.

It should also be noted that in the Report there are references that the reform and improvement measures taken by the Government of Japan on its own initiative were realized as if they had been agreed bilaterally between Japan and the United States. The Governments of Japan and the United States are now actively engaged in regulatory reform as their own tasks, to which the exchange of views between the two countries under the Regulatory Reform and Competition Policy Initiative and other frameworks has been providing useful suggestions mutually. The Government of Japan requests the U.S. Government to correct those statements that regard Japan’s regulatory reform measures as the direct results of bilateral governmental negotiations, especially with a view to maintaining and further developing the current constructive economic relationship between the two countries.

The Government of Japan cannot agree with the Report in referring to, in a number of contexts, the low share of foreign-made products in Japan’s market and thus concluding in a sweeping manner that there are barriers hindering foreign access to Japan’s market. In reality, under market principles, market share is determined by a wide variety of factors, such as demand structures and suppliers’ marketing efforts. Accordingly, the Government of Japan points out that the level of market share of foreign products and whether the Japanese market is “closed” are not correlated.

As the latest information that is not in the Report, the Government of Japan adds that, on March 19, the Cabinet of Japan has decided on launching “The Three-year Program for the Promotion of Regulatory Reform” (hereinafter referred to as the “Three-Year Program”) for fiscal years 2004 to 2006, which embraces some issues of U.S. interest.

Upon this recognition, the Government of Japan submits to the U.S. Government the following comments on the Report. More detailed counter-arguments and comments on factual misunderstandings by the U.S. Government in the Report are listed in the attachment, which the Government of Japan also invites the U.S. Government to refer to. It should also be emphasized that our making no reference in this paper to certain elements of the Report, including those on which the Government of Japan does not repeat its comments hitherto made, does not necessarily mean that the Government of Japan shares understanding with the U.S. Government on them. The objective of the Government of Japan is not to make detailed comments for its own sake. Rather, it firmly believes that continued constructive dialogue between Japan and the U.S. in a variety of areas under the spirit of “Japan-U.S. Economic Partnership for Growth” will make a better contribution to the promotion of interests of the two countries.

Telecommunications
(1) The Government of Japan has elaborated a variety of procedures under the Telecommunications Business Law for the settlement of disputes concerning telecommunications business: opinion submitting procedure, petition to Minister for Public Management, Home Affairs, Posts and Telecommunications for orders and award (saitei), and mediation (asseii) and arbitration (chusai) by the Telecommunications Business Dispute Settlement Commission. The telecommunications carriers are encouraged to primarily exhaust these measures to the maximum extent to address individual business problems.

(2) Broadband services are available with the highest speed and lowest costs in the world in Japan, while Japan is also pioneering popular use of the 3G wireless communications. Both these developments would have not been achieved without effective competition policy. Fairness and neutrality are ensured in making and revising regulations, in course of which transparent processes such as public comment procedure are employed. Accordingly, the Government of Japan cannot share the views presented in the Report on Japan’s regulatory status.

(3) “U.S. interconnection rates” cannot simply be compared with those of NTT, since the U.S. has diverse rates. If any comparison is to be made, more accurate description is necessary including the fact that U.S. intrastate access charges are higher than NTT’s interconnection rates. Also, the Government of Japan cannot help being perplexed by the Report stating that the “fundamental flaws of the methodology” to calculate NTT’s interconnection rates should be corrected. The rates are the costs calculated in accordance with the long-run incremental costs (LRIC) model divided by traffic, and, in terms of the reference by the Report, the increase of one rate in fiscal year 2003 is a result of the decrease of traffic over fixed lines due to the changes of market environments.

(4) NTT DoCoMo’s interconnection rates are publicized on the Article of Agreement Concerning Interconnection and among the lowest in comparison with corresponding figures of other developed countries.

Information Technologies

(1) The Government of Japan has explained sincerely and sufficiently to the U.S. Government that Japan has appropriately addressed the issues of copyright protection on the internet by the Law concerning the liability of Internet Service Providers and its related measures, and that it therefore does not find the necessity to amend the Law at present. The Report nevertheless repeats the indication the U.S Government so far has made that these measures are unclear and lack balance among parties concerned, which is really regrettable for the Government of Japan.

(2) The Government of Japan has conducted adequate public information activities in a variety of forms on the definition and scope of temporary storage, to which no indication so far has been made that the sphere of protection is unclear except those made by the U.S. Government as done in the Report. The Government of Japan therefore questions the grounds of the description in the Report.

Medical Devices and Pharmaceuticals

2
(1) The re-pricing rules for pharmaceuticals aim to rectify divergences when there turns out to be remarkable differences between the presumed factors, such as market volume and usage, on which the official price of pharmaceuticals was decided before their distribution and the realities of the factors after they appear on the market. The re-pricing rules for medical devices have been implemented to correct differences in medical devices’ prices between domestic and overseas markets. Either of these rules does not intend to “penalize the value of innovation.”

(2) In the Demand and Supply Plan for blood products, imported blood products are treated equally to those produced by domestic manufacturers.

Transparency and Other Government Practices

As regards the transparency of decision-making on regulations, the Government of Japan requests the U.S. Government to note that the “Three-year Program” contains the following measures: solicitation of public comments for 30 days in principle, while providing, to the largest possible extent, the result of the cost-benefit analysis on the proposed regulations.

Distribution and Customs Clearance

(1) Airport Landing Fees

(a) The airport landing fees are determined through consultations between airport administrators and airlines. The Narita Airport Authority (present Narita International Airport Corporation) and the Kansai International Airport Co., Ltd have negotiated and decided landing fees with airlines in an open and transparent manner that is consistent with recommendations by the International Civil Aviation Organization (ICAO), providing information on calculation grounds to carriers. Hence, the Report is inappropriate in describing the process of deciding landing fees as not transparent. Also, the Ministry of Land Infrastructure and Transport has not “opposed” to lowering of landing fees.

(b) Landing fees directly paid by airlines are just a part of the entire costs that airport users pay. Therefore it is not appropriate to focus on landing fees alone, which are directly linked to airlines’ profit. Rather, due consideration should be given to all the costs that passengers eventually have to pay.

(c) The former Narita Airport Authority was privatized on April 1, aiming at more efficient management and increased competitiveness of the Airport. It is regrettable that the Report does not at all mention the endeavor for rationalizing airport management made by the Government and the Airport itself, about which the Government of Japan has repeatedly explained to the U.S. Government.

(2) The Government of Japan is certain that the U.S. Government showed its understanding that there is no governmental regulations on interline contracts in Japan through bilateral consultations under the Regulatory Reform and Competition Policy Initiative. It is therefore inappropriate that the Report nevertheless refers only to the original recommendations by the U.S. made in last October without touching upon the above-mentioned development since then.
Import Policies on Agricultural Products (Rice, Wheat, Corn for Industrial Use, Pork, Beef, Citrus, Dairy), Wood Products and Leathers

(1) Import policies on these products were agreed at and introduced as results of the Uruguay Round negotiations with countries concerned including the U.S. itself. The Government of Japan has faithfully observed these measures and decided tariff rates and prices within the scope of tariff schedules. Quotas are calculated automatically under publicized formulae without arbitrariness. The related references in the Report are therefore regrettably one-sided without paying sufficient attention to those international agreements and the consistency of Japan’s measures with the WTO rules. The Government of Japan therefore cannot share views with the U.S. Government on these points.

(2) Some point out that U.S. rice has been losing competitiveness to rival Chinese rice in Japan in terms of quality and price. Moreover, Japan’s proposals on minimum access aim at reflecting current market situation more correctly onto access volume through the revision of the base period and to improve the present system that still calls for extra access volume despite tariffication. It is therefore inappropriate to assert that Japan’s proposals are “counter” to a principal aim of the Doha Development Agenda (DDA).

(3) The Government of Japan made a decision to accept the voluntary tariff reduction of beef and pork below the bound rate in spite of severe situations facing domestic producers during the Uruguay Round negotiations. The tariff emergency measures for beef and pork were introduced in a package as an indispensable compensation for the voluntary tariff reduction on them, also as a result of multilateral talks. It is therefore inappropriate that the Report criticizes the tariff emergency measures without paying due attention to these backgrounds. The Government of Japan also adds that the tariff emergency measures on pork and fresh and chilled beef were lifted on March 31, 2004.

(4) Japan’s average tariff rate on wood products (2.1 percent) is not absolutely higher than those of other developed countries (1.2 percent for the U.S. and EC; 1.3 percent for Canada and 2.3 percent for New Zealand). As regards the reference to tariff escalation, the Government of Japan has argued that flexibility should be ensured in reducing tariff rates on individual wood products in the discussions at WTO, from the perspectives of global environmental protection and effective use of limited natural resources. The Government of Japan requests the U.S. Government not to view Japan’s import policy of wood products as inadequate only from the tariff levels aspect.

Standards, Testing, Labeling and Certification

There are descriptions in the Report which give readers impression that the Government of Japan has taken unilateral and excessive measures on standards, testing, labeling and certification without considering international standards and scientific findings. In this regard, it should be articulately noted that the Government of Japan has made decisions on related measures after going through necessary procedures including notification to the WTO, solicitation of public comments and consultation with interested countries, based on considerations at third-party institutions that contains scientists as their members. An overseas performance evaluation body has also been recognized for building materials and
other items.

As regards the BSE case in the U.S., the Government of Japan will also continue consultations with the U.S. Government, while making risk communications with consumers, on the premise that food safety and consumers confidence are secured.

**Government Procurement**

(1) The Government of Japan has established and implemented a series of measures on government procurement that provide non-discriminatory business opportunities to both domestic and foreign enterprises on its own initiative, in accordance with the WTO Agreement on Government Procurement as well as taking into consideration the outcomes of related Japan-U.S. consultations. However, they do not ensure results such as an increase in volume of procurement (in terms of value or number of procurement) of certain foreign products and services. It depends on the efforts made by foreign suppliers.

(2) The Report is inappropriate in giving one-sided descriptions that disregard the measures Japan has taken concerning construction, architecture and engineering, including the explanations Japan has provided to the U.S. Government at the Trade Forum and other bilateral consultations, especially those references regarding the U.S. recognition of Japanese public construction works market, joint ventures, the qualifications and evaluation criteria, the structuring of individual procurement.

(3) It should be considered between Japan and the U.S. in the preparation process of each individual meeting of the Trade Forum whether construction, architecture and engineering should be placed on the agenda. The format of expert-level consultations on these issues is still to be discussed bilaterally. The U.S. Government is also strongly requested to fully recognize that the Government of Japan has addressed many respective inquiries from the public and private sectors of the U.S. in a prompt and adequate manner.

**Intellectual Property Rights Protection**

(1) The Government of Japan has implemented all patent-related measures confirmed by both Governments at the Intellectual Property Working Group meeting under the Japan-U.S. Framework for New Economic Partnership in 1994. The U.S. Government still remains halfway in this regard, except for improvement in patent period. The Government of Japan requests the U.S. Government to implement the measures promptly in line with confirmation at the Framework Talks, especially the abolition of the exception clauses for early publication system as well as the acceptance of all the requirement inadequacies listed in Article 112 of the U.S. Patent Act, except for the best mode requirement, as reasons for reexamination request.

(2) In response to the reference in the Report to the “slow process of patent litigation in Japanese courts,” the Government of Japan would like to point out that it has taken necessary measures for the revision of relevant laws and the reinforcement of institutional setups to realize reinforcement and speeding up of the litigations concerning intellectual property rights (IPRs), including: exclusive jurisdiction of Tokyo and Osaka District Courts over litigations regarding patents and utility models; creation of a system under which courts can hear from experts in course of trials; and
the increase of the number of judges in charge of IPR-related and other cases.

(3) The range of devices to be regulated against under the Copyright Law and Unfair Competition Prohibition Law of Japan and those under the U.S. Copyright Act are actually the same. The Government of Japan recognizes that the U.S. Government has shared such understanding.

(4) The Government of Japan has implemented all the obligations concerning well-known marks provided in the Paris Convention and the TRIPS Agreement. The revision of the Trademark Law in 1996 reinforced the protection of well-known marks, and therefore the Report is inaccurate in describing that the protection in Japan “remains weak.”

(5) Japan has implemented all the obligations regarding geographical indications (GI) provided by Articles 22 to 24 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). The 2003 revision of the Law concerning Liquor Business Associations and Measures for Securing Revenue from Liquor Tax further reinforced countermeasures against illegal use of GIs. Also, the Government of Japan does not maintain any undisclosed list of protected GIs against which applications for trademark registration are reviewed.

(6) With regard to the protection of trade secrets in certain civil litigation concerning IPRs including those on the infringement of trade interests caused by unfair competition, the Government of Japan has submitted a bill to amend the Unfair Competition (Prohibition) Law and other related laws. When enacted, revised laws will articulate the conditions by which examination of parties or witnesses will be closed to the public in trials related to trade secrets, unless this is contrary to existing constitutional requirements. The concern shown in the Report will therefore be significantly addressed.

(As regards temporary storage, please refer to “Information Technology” above.)

**Insurance**

(1) As regards postal life insurance (Kampo), the whole-life insurance product was introduced through a revision of stipulations that is within the scope of insurance products and policy amount limits set by the Postal Life Insurance Law. In this process, due consideration was paid to the understanding confirmed between the United States and Japan in 1994 in “Measures by the Government of the United States and the Government of Japan regarding Insurance,” which provides that “limited alteration within the scope of the insurance products and riders authorized in the law (Postal Life Insurance Law)” does not require approval from the Diet. Also, the Government of Japan recognizes that the Japan Post does not now have any plans to introduce other new products or riders.

(2) Insurance Cooperatives (Kyosai) services are different from private insurance services. Kyosai is provided as mutual assistance within cooperatives composed by those tied regionally or vocationally, whereas private insurance industry operates nationwide for the general public. It is therefore not adequate to apply regulations, inspection and burden to kyosai that are equal to those imposed on private insurance.
Civil Aviation

It should be noted that the US carriers' share of the slots at Narita is approximately 30 percent, which is considerably large in comparison with other cases in the world. In terms of cargo flights, the number of slots used by U.S. carriers is larger than that for Japanese carriers by more than 50 percent. Thus, there is a gap between Japanese and U.S. carriers in the number of slots they respectively use at Narita. It is regrettable that the Report describes as if U.S. carriers were in a disadvantageous position, disregarding the above-mentioned fact.

Sea Transport / Ports

(1) The sanction that the Federal Maritime Commission (FMC) unilaterally took against Japanese carriers in 1997 violates the Treaty of Friendship, Commerce and Navigation between Japan and the United States (the Treaty), which provides national treatment and most-favored-nation treatment. The situation of ports in Japan has significantly improved, through such measures as the revision of the Port Transport Business Law that provided for significant deregulation in 2000 as well as the realization of full 24-hour/day, 364-day/year (excluding January 1st) operation of terminals. The Government of Japan urges FMC to acknowledge these positive developments correctly.

(2) FMC introduced a new order that requires carriers to submit a report of improved situation of the ports in Japan, in order to judge whether or not it should impose unilateral sanction that is in violation of the Treaty. The Government of Japan recognizes that this order constitutes a serious abuse of FMC’s mandates and strongly requests the U.S. Government to withdraw the order.
Antimonopoly Law and Competition Policy (Fair Trade Commission) 

(1) The Fair Trade Commission (JFTC) has been actively filing criminal accusations against evil and serious price fixings and bid riggings which are thought to give broad effects on people’s lives, when the JFTC finds concrete facts which deserve criminal prosecution.

Since 1999, the JFTC filed three criminal accusations against bid rigging and other cases, including one concerning petroleum products for the Procuring Department of the National Defense Agency in November 1999. The description “The JFTC has initiated only one new criminal prosecution against AMA violators since 1999, in July 2003” is therefore not correct.

(2) The description “This task force … has been hampered…as well as by the need to coordinate bureaucratically with ministries having jurisdiction over the sectors in question.” is not true, because the task force is able to handle cases without coordinating with other ministries.

Rice (Ministry of Agriculture, Forestry and Fisheries) 

(1) Rice import system

Experiences show that a large part of U.S. rice imported to Japan has been used for processing purposes and for industrial purposes after being mixed with domestic rice, and not been usually retailed for households as a single item. The main reason is that the quality of U.S. rice falls relatively below that of domestic one. Consumers’ and rice processors’ access opportunity to minimum access rice has been fully provided. U.S. medium grain rice imported to Japan under the ordinary tender, carried out by Japanese Ministry of Agriculture, Forestry and Fisheries (MAFF), has been mainly used for rice processing purpose. The MAFF sells U.S. medium grain rice to rice processors and holds the remainder as stockpile. In the event of requests from international organizations or aid-recipient countries, The MAFF supplies a portion of stockpile of U.S. medium grain rice for food aid in accordance with international rules of food aid.

The Government of Japan has introduced simultaneous-buy-sell (SBS) system, a highly transparent tender system based on a fair and free competition principle, upon request from the United States. In operating this system, the Japan Food Department of MAFF has never treated U.S. rice in a discriminatory manner. Furthermore, the mark-up, agreed in the Uruguay Round (UR), is consistent with WTO agreements, setting fair conditions within the limit of the agreed concessions.

If U.S. rice is sluggish in SBS tender, it is because U.S. rice is less chosen from bidders in comparison with Chinese rice. In order to rival Chinese rice in SBS tender system, U.S. rice is required to improve its competitiveness in quality and...
In December 2002, the Government of Japan laid down a comprehensive rice policy reform, which underlined the importance of consumers and market orientation, and made necessary amendments to the Staple Food Law and decisions on the budget to put the policy reforms into practice. The reforms have been implemented since the beginning of FY2004 (i.e. this April).

(2) Japan's Proposal on Minimum Access

The Japan's proposals on minimum access include revision of base period in domestic consumption so that the current situation can be more reflected in the access volume, and improvement of the current system that continues to impose extra penalty in spite of tariffication. The Government of Japan has advocated the tariff reduction through UR formula, with average and minimum tariff reduction of 36 percent and 15 percent, respectively. With this formula, Japan intends to realize substantially improved market access as a whole. Therefore, it is not appropriate to assert that Japan's proposal is “counter” to DDA's goal.

Wheat (Ministry of Agriculture, Forestry and Fisheries)

The sale prices of import wheat have been set based on its quality and other characteristics within the framework of the agreed concessions, thus the mechanism is consistent with the WTO agreements. The sale prices of import wheat have been decreased by 40 percent since 1986, while wheat consumption per capita in Japan has been at almost the same level. It should be noted that Japan depends on foreign countries for greater amount of wheat for domestic consumption, in which import from the United States occupies a significantly high percentage.

Corn for Industrial Use (Ministry of Agriculture, Forestry and Fisheries)

The bound tariff rate on import corn for cornstarch is 50 percent or 12 yen per kilogram, whichever is higher. However, the tariff is zero under the tariff quota system on the condition that the importers purchase Japanese potato starch with a view to assuring demand of Japanese potato starch. This measure is more favorable for importers than choosing the bound tariff rate. The importers are free to choose the rate they prefer.

Standards, Testing, Labeling and Certification (Ministry of Agriculture, Forestry and Fisheries)

(1) With regard to the resumption of import of U.S. beef, the Government of Japan has provided thorough explanation to the U.S. on the views of Japanese consumers about safety of and confidence in foods as well as the safety measures taken for Japanese beef, in the course of several Japan-U.S. consultations at both ministerial and administrative levels. MAFF will continue dialogue with the U.S. in accordance with the basic policy that the U.S. should take the same measures for its exported beef as those which Japan takes for Japanese beef.

(2) As regards the outbreak of avian influenza in the U.S., the import ban on live poultry and poultry products is applied:
(a) only to affected state(s) if it is low pathogenic one; and

(b) to all over the U.S. if it is highly pathogenic one, and import ban remains in effect until ninety days passes after the U.S. status is confirmed to be free from the disease.

These measures are taken in conformity with the animal health requirements confirmed between Japanese and the U.S. animal health authorities.

**Professional Services (Certified Professional Accountant) (Financial Services Agency)**

The Report points out that on May 30, 2003 the Diet passed legislation introducing a new sales agent system to permit certified public accountants (CPAs) and others to sell corporate stocks to investors as agents of security brokerage houses. However, the descriptions are based on misunderstandings of facts, for it was a proposed amendment to the CPA Law that the Diet passed on May 30, which does not contain any legislative revision as mentioned in the Report.

**Anticompetitive Practices (Fair Trade Commission)**

The Law Against Unjustified Premiums and Misleading Representations aims to secure fair competition by preventing inducement of consumers by means of excessive premium offers and misleading presentations, and thereby to protect the consumers’ interests. It just prohibits excessive premiums and misleading representations which cannot be considered to be fair competing methods and does not impose overly restrictive restriction on marketing techniques.

The JFTC authorizes only those codes which are appropriate for the purpose of preventing unjustified inducement of customers and securing fair competition as “fair competition codes”. Moreover, the levels of almost all the regulations of the codes concerning premiums have accommodated the same standard as the general regulation. Accordingly, the description “Trade associations often use the cover of these codes to adopt the additional standards that are stricter than required by JFTC regulations under the Premiums Law” is not true.

**Civil Aviation (Ministry of Land Infrastructure and Transport)**

Market access, pricing and operational flexibility at Narita Airport have been improved for both Japanese and U.S. carriers under the 1998 Memorandum of Understanding and with the opening of a provisional parallel runway (B runway).

With respect to slot usage at Narita, it should be noted that the US carriers’ share is approximately 30 percent, which is considerably large in comparison with other cases in the world. In terms of cargo flights, the number of slots used by U.S. carriers is larger than that for Japanese carriers by more than 50 percent. For further liberalization, it is essential to equalize the competitive conditions and to maintain the balance of traffic rights between Japanese and U.S. carriers. The Government of Japan will continuously request the U.S. Government to ensure the proper usage of slots, and to agree to eliminate the imbalance of the slot share between Japanese and US carriers at Narita.