

*(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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October 18, 2007

## FOREWORD

The Government of Japan has engaged in comprehensive economic and social structural reform, and will actively continue the reform on its own in order to achieve further economic growth.

The first to sixth 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 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 seventh year dialogue of the Regulatory Reform Initiative.

This recommendation compiles U.S. regulations and systems that the Government of Japan believes need to be improved for the advancement of the Japan-U.S. economic relationship, incorporating views of Japanese private companies.

Specific items of this recommendation can be broadly classified into the following three categories: 1) Recommendations calling for the abolishment or improvement of regulations or measures that are inconsistent with the principle of free trade or impeding fair competition; 2) Recommendations urging that reinforced regulations in areas such as logistics and consular affairs not unduly impede smooth trade as well as movement of people between the two countries; or 3) Recommendations calling for the improvement of State-based regulations or regulations inconsistent with international standards, which are creating burdens on Japanese companies operating in the United States.

In particular, 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.

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 companies to export to the United States.

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 careful 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 at present even after the transition clause has expired. 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 value (in the exporting country), and regards the difference as zero when the export price is higher than the normal value, thereby artificially inflating the overall dumping margin of the product and impermissibly raising the anti-dumping duty rates. In the case filed as complaint of Japan to the WTO, the Appellate Body Report was adopted in January 2007 ruling that “zeroing” violates the WTO Agreement throughout anti-dumping procedures, and recommending that the United States correct violations. In response to the request by the United States, the reasonable period of time in which to do so was set at eleven months from the date of adoption of the recommendation, expiring on December 24, 2007. However, in light of that the recommendation, in the WTO Agreement, requires prompt compliance in principle, the Government of Japan urges the Government of the United States to promptly abolish the use of “zeroing” in all anti-dumping procedures including administrative reviews.

### **3. Treatment of “All-others rate” in Anti-dumping Investigations**

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". Since the provision in question could be applied to new anti-dumping investigation in the future, the Government of Japan urges the Government of the United States to amend such provision in order to promptly implement the DSB recommendations.

#### **4. 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 such as the automobile industry in the United States also find the continuation of anti-dumping measures problematic. 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.

#### **5. Model-Matching**

In calculating dumping margins, the Government of the United States classifies different models of export products under investigation 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 15<sup>th</sup> and 16<sup>th</sup> reviews), 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 respondents than before.

The "sum of the deviations methodology" introduced by the Department of Commerce as the new methodology compares prices of dissimilar products and therefore hampers fair comparison between domestic prices and export prices. It also lacks the predictability for Japanese companies regarding the results of anti-dumping investigations and brings unfair results determining dumping margins exist, which would have not been resulted from the traditional "family methodology". In addition, the Government of Japan finds it unsatisfactory that the new methodology was retroactively applied to the import transactions before the introduction of the new method in the administrative review in FY2003/2004.

The Government of Japan and Japanese companies have serious concerns about these situations, and have repeatedly urged the Government of the United States to remedy them, but to no avail.

Therefore, the Government of Japan again strongly urges the Government of the United States to repeal such methodology.

#### **6. 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 them. The authorities require exporters to submit data such as cost related to all “affiliated parties” in principle.

Submitting data such as cost in electronic form 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, and it would be impossible in some cases. It is also difficult for exporters who own around five percent of the stocks of their “affiliated parties” to request them 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. DISTRIBUTION AND CUSTOMS PROCEDURES**

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

#### (1) 100 Percent Scanning Requirement for U.S. Bound Cargo Containers

“Implementing Recommendations of the 9/11 Commission Act” enacted on August 3, contains provisions that require scanning of all U.S. bound cargo container in principle before loading on a vessel at foreign ports on or after earlier of July 1, 2012. The Government of Japan has concerns that the provisions, depending on how it would be implemented, could severely disrupt the flow of goods into the United States from the rest of the world including Japan, and may cause a tremendous damage on international economic activities as a whole.

In addition, the Framework of Standards to secure and facilitate global trade adopted by the World Customs Organization (WCO) espouses the risk management approach, which aims to identify and target high-risk containers, rather than conducting 100 percent inspection. The Government of Japan deems that the 100 percent scanning requirement is inconsistent with the risk-management approach upheld in the Framework.

While the Government of Japan fully understands the importance of counter terrorism measures, it is important to implement security measures in a way that does not undermine the smooth flow of goods. Therefore, the Government of Japan urges the Government of the United States to ensure that the aforementioned requirement does not disrupt smooth trade.

#### (2) Customs-Trade Partnership Against Terrorism (C-TPAT)

Customs-Trade Partnership Against Terrorism (C-TPAT) is supposed to provide benefits, such as reduced number of inspections, to those participants who have high-level security measures in

place. Japanese participants, however, claim that they have not been enjoying sufficient benefits in a tangible manner.

Therefore, the Government of Japan urges the Government of the United States to take appropriate measures to improve the benefits provided to C-TPAT participants through discussions between the two governments.

### (3) 24-hour Rule on Advance Manifest Presentation

As part of initiatives for counter-terrorism, the United States has enforced the regulations implementing the advance electronic presentation 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.

Furthermore, as the United States is considering introducing so-called “10 plus 2 “ rules to require importers and ocean carriers to file in advance 10 data elements and 2 data sets respectively, in addition to the advance cargo information required under the existing rules, even longer lead time may be induced.

The Government of Japan urges the Government of the United States to take appropriate measures to improve the lowering efficiency of trade caused by the 24-hour rule, bearing in mind the perspective to provide clearer benefits to C-TPAT participants as mentioned above through discussions between the two governments.

## **2. 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 1988, 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.

In the Sixth Report to the Leaders, the Government of the United States stated that the MPF of the United States is limited in amount to the approximate cost of services rendered and that it takes note of the request by the Government of Japan. However, as long as MPF is on an *ad valorem* basis, there remains a possibility that it may exceed the cost of the customs processing for the “individual entry” in question and the doubt about its consistency with the WTO Agreements would not be eliminated.

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.

### **3. 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.

(1) 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 senders even without prior notice. The Government of Japan again recommends that the final rule of “Prior Notice of Imported Food Shipments” will continue not to require non-commercial senders of food for non-commercial purposes to provide prior notice and will 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 declared on the parcel.

(2) 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. In the Sixth Report to the Leaders, the U.S. Embassy in Japan committed itself to providing necessary information on its website and to providing assistance to the public in Japanese including advice over the telephone. But, these commitments have not been materialized.

Therefore, the Government of Japan again urges the Government of the United States to:

- (a) Establish a contact point at the U.S. establishments in Japan as soon as possible 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
- (b) Inform Japanese food processors, Japan Post Service, 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 U.S. Embassy in Japan.

### **4. Increase in U.S.-Mexico Customs Clearance Lanes**

Some Japanese makers based in the United States establish factories in the industrial area in Tijuana, Mexico, and are shipping products produced there to the United States through the U.S.-Mexico border.

However, the customs gate for entry from Mexico to the United States (Otay 1st Gate) has only 8 lanes, some of which are always closed, and the customs procedures are slow. It has been reported that it takes 30-60 minutes for commercial trucks to cross the border, and 2-3 hours in the peak season (from September to November). Furthermore, the customs clearance office does not open 24 hours a day, but 13 hours at the longest.

The lack of smoothness in customs clearance between the United States and Mexico increase the transportation and other costs for Japanese makers based in the United States but producing in Tijuana.

Therefore, the Government of Japan requests the Government of the United States to make the customs procedures expeditious and smooth, including by: opening all 8 lanes of Otay 1st Gate at all times or extending the opening hours; fully automating the customs process; and increasing the number of lanes.

## **5. Regulations on Alcoholic Beverages**

### (1) On-Sale Licenses for *Shochu* at Retail for Consumption on the Premises

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 spirits 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 spirits, 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 mislead consumers with regard to the characteristics and the origin of *shochu*. Therefore, it does not provide any solution to this issue.

The Government of Japan made this request to the State Governments of California and New York and received official responses, both stating that the State Governments are not authorized to give permission for Japanese-produced *shochu* to be treated in the same way as Korean-produced *soju*.

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. Therefore, the Government of Japan again 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.

### (2) 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 Sections 45 and 47a 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.

In the Sixth Report to the Leaders, the Government of the United States stated that the amendment of relevant rules may be possible if interested persons file a petition under Title 27 Code of Federal Regulations § 70.701(c). The Government of Japan requests the Government of the United States to appropriately handle such petition concerning this request if it is submitted in the future.

### (3) 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 Sixth Report to the Leaders, the Government of the United States reported that it issued the March 29, 2007, Alcohol and Tobacco Tax and Trade Bureau (TTB) notice "Importing Samples for Trade Shows and/or Soliciting Orders" that under certain conditions allows samples of alcohol beverages to be imported for the purpose of trade shows or to be used as trade samples, by licensed importers, without a certificate of label approval and stated that "this notice is not an amendment but only clarification of long-standing practice".

It is expected that measures will be implemented based in this notice, but the Government of Japan is still concerned whether or not they will be enforced in an appropriate manner. It therefore requests the Government of the United States to ensure that samples of alcohol beverages will be handled properly at customs clearance.

## **III. 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. That all Japanese nationals are able to smoothly enter the United States and stay there without significant inconvenience is a fundamental basis of the close bilateral economic relationship between Japan and the United States. 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.

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

### **1. Visa Processing**

#### (1) "Visa Waiver Program Modernization" Provision

Section 711 of the "Implementing Recommendations of the 9/11 Commission Act" enacted in August 2007 provides for review of the visa waiver program of the United States. Since details of the new regulations including Electronic Travel Authorization (ETA) system and exchange of passenger information are unknown, it is unclear whether Japan needs to take any measures in order to remain to be eligible for the visa waiver program and what changes will be made to the

immigration procedures as a result of the review in question.

Also, there is a concern that the review in question may impede free movement of persons. For example, it is stipulated that those who are rejected to travel under the visa waiver program must apply for visas, but given that over four million Japanese travel to the United States every year, it is feared that if only a few percent of them were rejected to travel under the visa waiver program, visa applications would increase sharply to exceed the visa processing capacity.

The Government of Japan therefore urges the Government of the United States to provide detailed information on the review of conditions for the visa waiver program, and to ensure that the review in question will not impede free movement of persons.

### (2) 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 Treaty Trader/ Investor Visa (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 factors that hinder smooth revalidation of visas, including the uncertainty and the length of time in having visas revalidated. As a result, Japanese companies operating in the United States have to bear a large amount of expenses for visa revalidation for their employees and their families, including costs for travel and accommodation. Moreover, there are cases where the absence of workers who must return to Japan for several weeks for visa revalidation causes a hindrance to business operations in their sections, and in some cases, even to entire company operations. In addition, there are concerns about 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 if the measure in (a) cannot be promptly implemented; and
- (c) Make visa procedures more efficient and smooth, whether in Japan or in a third country, including by shortening the time required for visa procedures, and clarifying how long it takes to issue visas.

### (3) Improvement of Visa Services in Japan

The Government of Japan welcomes that Government of the United States started to process non-immigrant visa applications at the Consulate in Fukuoka following the Consulate-General in Sapporo, though once a month, in May 2007. 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. Therefore, it 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. At those establishments that accept visa applications, applicants have to wait in line outside the building for a long time for visa procedures, which imposes a heavy burden on them.

The Government of Japan urges the Government of the United States to continue and expand visa processing operation in Sapporo and Fukuoka, and start accepting visa application at the Consulate

in Nagoya, as well as making efforts to shorten the time required for visa procedures at other U.S. overseas establishments.

#### (4) Visa Issuance and Term of Validity

- (a) The current visa revalidation procedure imposes a huge burden on Japanese nationals. From the standpoint of reducing demand for revalidation, extending the term of validity of visas would contribute to resolving the problem. Currently, Intra-Company Transferee Visas (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 L visas.
- (b) L visas may be revalidated on a maximum of two occasions and Specialty Occupation Visas (H-1b visas) may only be revalidated once. This limitation creates obstacles for companies to utilize human resources for a long term, and to implement continuous 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) Considering that the current criteria of visa issuance is hindering not only dispatch of employees by Japanese companies to the United States but also dispatch of teachers to private schools where children of Japanese companies' employees study, the Government of Japan urges the Government of the United States to take appropriate measures, including shortening the length of service required for E visas, and expanding the annual quota for Temporary Workers Visas (H visas).
- (d) When Green Card holders are transferred to the United States accompanied by their family members who are Japanese nationals, those family members can obtain only tourist/visitors visas for the time being. Because of the visa category, they have to be put to inconvenience in staying in the United States. The Government of Japan urges the Government of the United States to create a new visa category for the convenience of family members of employees working in the United States.
- (e) Applicants of E visas are required to submit the organization chart of their companies specifying the names of employees, their titles and salaries. Requiring the document including names and salaries of individuals who are unrelated to the applicant is problematic from the viewpoint of privacy protection. The Government of Japan urges the Government of the United States to reconsider the documents required for E visa application.

## **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 increases the risk of having their passports stolen or lost, and also 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.” 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, taking into consideration the above-mentioned requests and the comment on the proposed Federal rule submitted by the Government of Japan in May 2007, in order to alleviate the concerns among Japanese nationals which arise from uncertainty regarding the actual impact of the Act, and to avoid confusion about the implementation of the Act in each State.

### (2) Improvement of Handling of International Driver’s Licenses

Many States obligate a foreign national to acquire a State driver’s license within a certain period of time since the person begins to reside in the State in question, even if his or her international driver’s license is still valid. There are also State regulations which provide that international driving licenses lose their validity in a short period of time. Thus, many states place limitations on driving with an international driver’s license. The Government of Japan urges the Government of the United States to request relevant State authorities to respect 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.

### (3) Improvement of State Rules

With regard to the issuance of driver’s licenses, some States such as Michigan, Illinois, Mississippi, and California impose an excessive burden on Japanese nationals residing in the United States in terms of documents required, the length of time, and a limited period of time available for the procedures. The Government of Japan urges the Government of the United States to request each State Government not to impose an excessive burden in this regard.

It also urges the Government of the United States to request the State Governments in question to remedy the following problems:

- (a) 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 they are forced to acquire an international driver’s license issued in Georgia or to reapply for a Japanese driver’s license. 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.
- (b) “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." 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.

(c) Procedures for Issuance and Renewal of Driver's Licenses in the State of Kentucky

In the State of Kentucky, procedures for issuance and renewal of a driver's license for foreign nationals are burdensome in that they need to first apply to the Division of the Driver Licensing regional office for approval of issuance or renewal and then apply to the Circuit Court Clerk's office for issuance of a driver's license. The Government of Japan urges the Government of the United States to request the State authorities to simplify the procedures for issuance and renewal of a driver's license for foreign nationals.

(d) Information Appearing on Driver's Licenses in the State of New York

In the State of New York, the period of authorized stay (I-94) appears on the driver's license of a foreign national in addition to the period of validity of the driver's license. As a result, the judgment on which period should have precedence differs by each police officer. The Government of Japan urges the Government of the United States to request the State authorities to standardize the handling of the period of validity or change information appearing on driver's licenses to avoid the confusion.

### **3. Immigration Control**

(1) Expediting Immigration Procedures

There are occasions when immigration procedures into the United States take a tremendous amount of time. For example, the time required for the Secure Electronic Network for Travelers Rapid Inspection (SENTRI) application procedures on the U.S.-Mexico border has lengthened. Recognizing the necessity to strike a balance between measures against terrorism and illegal entry, and smooth movement of legitimate people, the Government of Japan urges the Government of the United States to take necessary measures to further expedite the immigration inspection procedures including increasing the number of immigration inspectors, immigration inspection counters, and lanes available for SENTRI participants, and expanding the processing capacity.

(2) Consistency of Immigration Inspection Procedures

Immigration inspection procedures for passengers entering the United States sometimes vary by individual inspector and impose psychological and physical burden on companies and their resident employees in the United States. For example, in order to get revalidation of blanket L visas issued for employees of companies that have many employees transferred to reside in foreign countries, the applicant submits two copies of the necessary document to the immigration officer when reentering into the United States, and one copy is supposed to be kept by the immigrant inspector and the other is supposed to be returned to the applicant. In many cases, however, no document has been returned to the applicant. The Government of Japan urges the Government of the United States to fully inform all immigration inspectors of the contents of relevant regulations so that correct procedures will be followed in accordance with the established system.

### **4. Permission to Stay**

(1) Expeditious Extension of Permission to Stay

At present, it takes several 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. As pointed out in the Sixth Report to the Leaders, it is possible to use the “Premium Processing” in which the application result is notified by the competent authorities within 15 days after the acceptance of application for a fee of 1,000 dollars for each application, but it costs too much. The Government of Japan continues to urge 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. As pointed out in the Sixth Report to the Leaders, Japanese employees residing in the United States may have an opportunity to depart from the country on business trip within 2 years. However, it is not necessarily the case with their accompanying family members and they are required to frequently renew their I-94, raising concerns from Japanese companies 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.

### **5. 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, including introduction of the electronic additional verification (EAV) process, it still takes approximately one or two months for the SSA to issue a SSN for foreigners. Since SSNs are in actuality required as identification on a variety of occasions when Japanese nationals start living in the United States (for example, when acquiring driver’s licenses or opening bank accounts), 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 possible expansion of the Enumeration at Entry Program that was mentioned in the Sixth Report to the Leaders.

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

Although the system was revised to allow spouses of foreign workers to obtain SSNs without obtaining work authorization, the revised system has not been widely known and some Social Security Offices rejected applications for SSNs by spouses of Japanese workers. In addition, with regard to the interpretation of the “Marriage Certificate” which is required to be submitted for application of SSNs by spouses of foreign workers, it is unclear whether the translation of the Japanese family register is acceptable as a substitute and the handling differs depending on the office.

The Government of Japan urges the Government of the United States to fully inform all Social Security Offices of the revised system of issuing SSNs to spouses of foreign workers including the necessary documents, and to ensure standardized operation and application of the system.

## **6. Residency Certification**

In the United States, it usually takes as long as two to three months to issue residency certifications. As the residency certification is required to be submitted to be eligible for the benefits as provided in Article 22 of Japan-U.S. Income Tax Convention, for example, there are some cases where the benefits were not granted because the residency certification was not issued in time. Thus, this issue could become a factor impeding smooth trade relations between the companies in Japan and the United States.

The Government of Japan urges the Government of the United States to expedite the process of issuing residency certifications.

## **IV. 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 appreciates that the Government of the United States stated in the Sixth Report to the Leaders that it recognizes Japan’s concern and that it is committed to maintaining an open economic system that welcomes foreign investment. But, the Government of Japan again

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.

In addition, Congress passed a bill to revise the Exon-Florio amendment in July 2007, which provides: a) clarification of review and investigation process (adding “impact on critical infrastructure and critical technology” as a criteria); and b) increased oversight by Congress (requiring notification of results of individual investigations to Congress). The Government of Japan pays a close attention to how the revision will affect investments to the United States, and urges the Government of the United States to ensure that it does not inhibit investments to the United States from allied nations including Japan.

## V. PATENT SYSTEM

By international standards, the United States possesses a unique patent system. For example, it is 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. From these viewpoints, the Government of Japan requested the Government of the United States in the past dialogues to switch from the first-to-invent system to the first-to-file system and to abolish the provisions of the Patent Act regarding exception in the early publication system, but these requests have not been realized. Therefore, the Government of Japan continues to strongly urge the Government of the United States to carry out these recommendations.

Specific requests are as follows.

### **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 in Japan, they need to submit information on the prior art documents to the USPTO. Furthermore, submitting “a concise explanation” of each document creates huge burden on the applicants such as 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.

If a potential prior art is found after the patent issuance fee has been paid, the applicant must decline issuance of the patent, file a Petition and a Request for Continued Examination of the patent application in question, and then submit an Information Disclosure Statement. The procedures of filing a Petition and a Request for Continued Examination impose heavy burden on the applicant in terms of cost and time.

The Government of Japan requests the Government of the United States to modify the system so that if an applicant finds a prior art, the applicant can request patent examination taking into account such prior art only by submitting an Information Disclosure Statement without being required additional cost and documents (Petition, Request for Continued Examination, etc).

## **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 again 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. 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 in order 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, 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 in order to obtain Federal financial aid to build highways.

In the Sixth Report to the Leaders, the Government of the United States reported that Note 5 in the U.S. Annex 2 to Appendix I of the GPA states that: "The Agreement shall not apply to restrictions attached to Federal funds for mass transit and highway projects." However, the Government of Japan believes that these rules hamper free trade as well as efficient and optimum procurement of

product components by U.S. companies, and thus increase the procurement cost for the Government of the United States. It therefore urges the Government of the United States to abolish the Buy American provisions such as the minimum threshold for U.S.-made parts and the restriction on procurement items.

## **2. Defense Federal Acquisition Regulation Supplement**

The Defense Federal Acquisition Regulation Supplement (DFARS) can create cases in which Japanese companies are excluded from procurement only because products are Japan-made, although the same types of products from European and other competitor countries are eligible for contracts. Such regulations are causing confusion among Japanese companies and their U.S. trading partners, and it has been reported that, even when they asked for clarification, they have not received clear answers from the relevant authorities of the Department of Defense that are specified as primary contacts for any questions in the Sixth Report to the Leaders. In the case of procurement of specialty metals, only those molten in the United States or several specified countries are eligible for procurement in principle. It is also stipulated that even the specialty metals made in other countries such as Japan can be eligible in such cases as when they have been processed into components or when they are used in very small amount, though the application criteria are unclear. This situation imposes restrictions on business activities of Japanese companies. Therefore, the Government of Japan requests the Government of the United States to take appropriate measures including clarifying the application criteria of the stipulation that the products of non-specified countries can be eligible for procurement by the Department of Defense so that Japanese products will be treated in the same way as the specified countries and that activities of Japanese companies will not be restricted.

## **3. Regulations Concerning Construction of U.S. Military Bases**

The current Defense Federal Acquisition Regulation Supplement (DFARS) includes regulations that could pose barriers for Japanese construction industry to participate in the construction of U.S. military bases. With regard to the relocation of the U.S. Marine Corps Unit from Okinawa to Guam, it is confirmed that Japan will make a reasonable financial contribution for the construction of U.S. military-related facilities in “Japan-U.S. Roadmap for Realignment Implementation”, a Japan-U.S. Security Consultative Committee document agreed on in May 2006. Therefore, the Government of Japan urges the Government of the United States to take appropriate steps concerning the following regulations in connection with the participation of Japanese construction and related companies in the construction work in question.

### (1) Discrimination against Foreign Companies in Tender Evaluation for Military Base Construction

It is stipulated that military construction contracts to be performed in the U.S. territories in the Pacific and on Kwajalein Atoll, or in countries bordering the Persian Gulf shall be awarded only to U.S. companies unless the lowest tender offer of a foreign company is below the lowest tender offer of a U.S. company by more than 20 percent (DFARS 236.273). This stipulation makes it extremely difficult for Japanese companies to be awarded the contract for the construction work specified above.

The Government of Japan understands that this stipulation does not apply to the construction work associated with the relocation of the U.S. Marine Corps Unit from Okinawa to Guam for which Japan provides financial support, because it is different from ordinary military construction covered by the federal budget under the Military Construction Appropriations Act. If it should apply, the Government of Japan urges the Government of the United States to promptly take corrective measures.

## (2) U.S. Products Purchase Regulation

In a usual contract for construction of U.S. military bases, etc., the contractor is obliged to use U.S. products only, in principle, unless the specific offer by the contractor is approved (DFARS 252.225-7001).

It means that the contractor is not allowed to use Japanese products even though they are superior to U.S. products in terms of quality, price, etc., which could be an obstacle for effective and efficient performance of the construction. Due to the obligation to use U.S. mainland products whose information on delivery date, quality, etc. is limited, Japanese companies have to spend extra time and labor to obtain information on U.S. mainland companies, confirm estimates, and secure high quality products. As a result, they are put at a disadvantage in tendering.

The Government of Japan understands that the Buy America Act does not apply to the construction work associated with the relocation of the U.S. Marine Corps Unit from Okinawa to Guam for which Japan provides financial support, because the construction contract amount of the construction work is expected to exceed the minimum amount to be waived from the Buy American Act under the Trade Agreements Act, as specified in Federal Acquisition Regulation (FAR25.402). If it should apply, the Government of Japan urges the Government of the United States to promptly take corrective measures.

## (3) Requirement to Use U.S.-Flag Vessels for the Transportation of U.S. Products

In construction operations administered by the Department of Defense, U.S.-flag vessels must be used for the transportation of supplies and materials by sea (DFARS 247.572). This regulation may result in excessive cost due to the limited number of U.S.-flag vessels available for transportation to Guam. Furthermore, it poses barriers to entry for Japanese companies which, in effect, have fewer choices than U.S. companies, putting them at a disadvantage in tendering.

The Government of Japan urges the Government of the United States to promptly take corrective measures in order to avoid unnecessary increase in cost and not to pose barriers to entry for Japanese companies (including subcontractors) in the construction work associated with the relocation of the U.S. Marine Corps Unit from Okinawa to Guam for which Japan provides financial support.

## (4) Requirement of Performance Bond and Payment Bond

Federal Acquisition Regulation obliges the contractor of the construction work ordered by the Federal Government to furnish bond for 100 percent of the contract price as performance guarantee and payment guarantee (FAR 28.1). When entering into the contract, it is stipulated that the bond issued by the institutions authorized by the Secretary of Treasury is acceptable. In Japan, guarantee for 100 percent of the contract price is not required usually. In addition, Japanese guarantor institutions are not authorized by the Secretary of Treasury. Therefore, this requirement makes it extremely difficult for Japanese companies to be awarded the contract.

The Government of Japan urges the Government of the United States to promptly take corrective measures in order to avoid unnecessary increase in cost and not to pose barriers to entry for Japanese companies in the construction work associated with the relocation of the U.S. Marine Corps Unit from Okinawa to Guam for which Japan provides financial support.

## **4. Expansion of Opportunities for Japanese Companies to Participate in Federal Government Projects**

The National Industrial Security Program (NISP) of the United States sets very stringent requirements for Japanese companies to contract for federal government projects involving

classified information, including the requirement that all of the board members of the U.S. subsidiary of such Japanese company must be citizens of the United States, making it practically difficult for Japanese companies to participate in the federal government projects. Therefore, Japanese companies that wish to contract for federal government projects involving classified information have to do so via U.S. companies and therefore bear extra cost required for education and outsourcing to the partner U.S. companies. As a result, Japanese companies have given up participating in U.S. government projects. On the other hand, when the products and technology of Japanese companies are superior to similar ones of U.S. companies, the Government of the United States loses an opportunity to procure products of better quality with a limited budget, due to the severe requirements of NISP.

Therefore, the Government of Japan requests the Government of the United States to take appropriate measures including easing the requirement concerning board members under NISP so that participation of U.S. subsidiaries of Japanese companies in federal government projects will not be excessively restricted.

## **VII. EXPORT-RELATED REGULATIONS**

### **1. Ensuring Prompt Procedures and Transparency for Export Licenses**

Recently, the examination period for the export of U.S. products requiring export licenses issued by the Department of State tends to be longer than before. The criteria for examination are still unclear in that more detailed and different data are required to be submitted even for the same products or applications as the ones that have been approved for and licensed before.

Also, there are situations where the person in charge of examination is not decided for several months after the application, or new materials are required to be submitted several months after the application. In this way, examination is not conducted promptly, which results in significant negative impact on the activities of Japanese companies, including delay in delivery.

Therefore, the Government of Japan urges the Government of the United States to enhance transparency of the operation of the system, including by setting a period for examination, and to shorten the examination period in view of the close bilateral relationship between Japan and the United States.

### **2. 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 again 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. While the Government of Japan welcomes the measures by the Government of the United States reported in the Sixth Report to the Leaders, it once again urges the Government of the United States, as a transitional measure pending formal exemption from U.S. re-export controls, 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.

Furthermore, in the Sixth Report to the Leaders, the Government of the United States reported that it “started exploring the possibility of adding a field to its electronic Classification Request form that would ask applicants for permission to publish the ECCN on the Bureau's website.” The Government of Japan requests information on the development in this regard.

## VIII. STANDARDS AND CRITERIA

### **1. 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.

Given that the Committee on Technical Barriers to Trade (TBT Committee) recommends reducing technical barriers to trade by adopting international standards, it is necessary to take measures to promote the use of the metric system from the viewpoint of following the spirit of the TBT Agreement.

Therefore, the Government of Japan, while welcoming the efforts by the National Institute of Standards and Technology (NIST) of the U.S. Department of Commerce as described in the Sixth Report to the Leaders, continues to urge 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.

### **2. 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 and Sixth Reports to the Leaders mention 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 the Government of the United States, as a tentative measure pending the acceptance of the international standard at the federal level, to take measures to help mitigate the burden on transportation service operators, including: one-stop service at the Federal Government for procedures to obtain permission for the movement of overweight cargoes from State Governments; promotion of introduction of the regional permission which is valid in any State in the region once issued by one State; or provision of information on interstate transportation routes or a database that makes it easier to efficiently select travelable routes from the aspect of the limit level.

### **3. Equivalence Determination on Organic Crop Products**

Japan has been actively promoting a project to expand agricultural, forestry and fishery product exports. For this reason, increasing access for Japanese organic foods to overseas markets, especially to the U.S. market, is one of Japan's priority issues. The U.S. Government's National Organic Program regulates the production, handling, and labeling of agricultural products to be sold or labeled as organic in its market. For Japanese organic products to have an access to the US market, the equivalent status of the Organic Certification System of the Japanese Agricultural Standard (JAS) to the U.S. National Organic Program needs to be recognized by the Government of the United States.

The Government of Japan requested an equivalence determination on the Organic JAS system in January 2002, and provided all required materials in February 2006. However, the examination by the Government of the United States has not made progress. On the other hand, the Government of Japan has already approved the equivalence of the U.S. National Organic Program to the Organic JAS system in March 2002, which allows U.S. organic crop products to access the Japanese market. As a matter of reciprocity, the Government of Japan urges the Government of the United States to recognize the equivalence of the Organic JAS system to the U.S. National Organic Program, and provide Japanese organic crop products with an equal opportunity of access to the market.

### **4. Mitigation of Export Quarantine Requirements for Japanese-Produced *Unshu* Orange**

For the export of *Unshu* orange produced in Japan to the United States, due to the presence of citrus canker (a plant disease) in Japan, stringent quarantine conditions are required including: 1) designation of citrus canker-free export areas; 2) establishment of 400m-wide buffer zones around the canker-free export areas; 3) orchard inspection; 4) conducting a test to ensure that the fruit surface is free of *Xanthomonas axonopodis* pv. *citri*, the cause of citrus canker; 5) export inspection; and 6) fruit surface sterilization.

Meanwhile, due to the occurrence of citrus canker in the State of Florida, United States and the Government of the United States put into effect the regulations on the movement of citrus fresh fruits from Florida in August 2006. The main points of the movement regulations adopted by the

Government of the United States are: 1) orchard inspection; 2) packing house inspection; and 3) fruit surface sterilization. As the establishment of buffer zones and a test to ensure that the fruit surface is free of *Xanthomonas axonopodis* pv. *citri* are not required, these regulations are less stringent than those for Japanese-produced *Unshu* orange.

Therefore, the Government of Japan, as a matter of the non-discrimination principle, requests the Government of the United States to abolish the requirements for the designation of citrus canker-free export areas, the establishment of buffer zones and a test to ensure that the fruit surface is free of *Xanthomonas axonopodis* pv. *citri* that are applied to Japanese-produced *Unshu* orange, so that the same level of phytosanitary measures as the current measures for Florida-produced citrus will apply.

#### **5. Measures Against Bovine Spongiform Encephalopathy (feed regulation, surveillance)**

The U.S. Food and Drug Administration (FDA) on October 4, 2005 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, the enhanced surveillance was modified to a new ongoing surveillance in August 2006.

Meanwhile, the Food Safety Commission of Japan (FSC) 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 U.S. and Canada, it is essential to ban the use of SRMs (specified risk materials), which account for 99.4% infectivity of BSE prion. 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 comprehend the BSE contamination status accurately in the U.S. and Canada, and to implement proper management measures, it is necessary to expand or maintain surveillance of cattle, including healthy animals. 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.

Concerning surveillance, the FSC reported that “the reduced number of samples in this context will not always pose a problem by itself” in “the Prion Expert Committee’s Views On the Revised BSE Surveillance Program In the United States” published in December 2006. However, considering the supplementary items mentioned above, the Government of Japan believes it necessary to continue sufficient surveillance in the United States.

In addition, while the World Organization for Animal Health (OIE) certified the United States as “Controlled BSE Risk” country in this May, the OIE Scientific Committee advised the United States on the need of SRM exclusion from use in animal feed and stated that the retention of the status depends in part on the continuing accumulation of surveillance points.

Accordingly, the Government of Japan urges the Government of the United States to strengthen the feed regulations and to continue sufficient BSE surveillance, taking into consideration the points made by the FSC and the OIE Science Committee.

## **IX. STANDARDIZATION OF STATE-BASED REGULATION**

In the United States, States sets different standards in environmental and other regulations, and States issue separate business licenses in construction, insurance, and other services, hindering smooth business operations in the United States.

The current situation requiring different measures to meet the regulations of each State and separate State business licenses impedes efficient business activities, and can have negative impact on the U.S. economy through increased costs and limited services. Therefore, the Government of Japan requests the Government of the United States to harmonize different State-based regulations.

In particular, the Government of Japan makes requests in the following areas.

### **1. Environmental Regulations**

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 understands the reinforcement of environmental regulations for human health and environmental protection. 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 of each state related to recycling of waste electronic equipment, regulations on mercury, regulations on energy efficiency, and regulations on labeling of hazardous substances. Should this prove difficult, the Government of Japan urges the Government of the United States to take corrective measures so that companies do not need to deal with the situation in an inefficient manner. While the Government of Japan welcomes the efforts by EPA mentioned in the Sixth Report to the Leaders such as the provision of access to information of state regulations on the website of EPA, it is still difficult for companies to access to the website of each State, fully understand the wide-ranging contents of regulations and take prompt steps. Therefore, the Government of Japan urges the Government of the United States to take measures, including: (a) presenting federal 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 Sixth Report to the Leaders, the Government of the United States reported that “the EPA will also continue to explore the possibility of improving access to state-level regulations through its web site based on a request by the Government of Japan to create a single portal web page to facilitate comparisons of state-level environmental regulations.” The Government of Japan requests information on the progress in this regard.

### **2. Harmonization of State-based Construction Business Licenses**

In the United States, construction companies need to obtain business licenses in each State. The requirements for obtaining the licenses vary from State to State, which is creating obstacles to business activities and new business development by companies intending to do business in multiple States. In the Sixth 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 a national examination for construction business licenses available by the end of 2007, which is delayed from the original schedule mentioned in the Fifth Report to the Leaders that planned to conduct the examination by the end of 2006. The Government of Japan hopes to see the early introduction of such a national examination.

Therefore, The Government of Japan urges the Government of the United States to take measures and provide support to facilitate early and proper implementation of the above-mentioned examination by NASCLA and the expeditious construction of a database which will help speed up the licensing process. Also, 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 in terms of both procedural and substantial requirements, including by accepting the validity of a business license issued by one State in other States, and by issuing federal guidelines for harmonization of State-based licensing procedures.

### **3. Harmonization of State-based Insurance Regulations**

*For recommendations with regard to State-based insurance regulations, please refer to XIV. 1. (1).*

### **4. Container Weight Limit**

*For recommendations with regard to State-based container weight limit, please refer to VIII. 2.*

## **X. EXTRATERRITORIAL APPLICATION**

### **1. Sanctions Acts**

The unilateral sanctions measures taken by the Government of the United States based on related acts may 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 secured 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, including the WTO agreements, 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 Sanctions Act**

The Government of Japan is implementing measures such as freezing of assets of persons engaged in nuclear activities by Iran under the Foreign Exchange and Foreign Trade Control Law in accordance with the UN Security Council Resolutions. On the other hand, the Government of Japan is concerned that the sanctions stipulated in under the Iran Sanctions Act of the United States could, if actually acted on, constitute extraterritorial application of domestic law that is not permitted under general international law. It is also concerned that such measures as prohibition of issuance of export licenses to the subject of the sanctions by the Government of the United States, and prohibition of government procurement from the subject could be inconsistent with the WTO

agreements, i.e., GATT Article 11, WTO Government Procurement Agreement Articles 3 and 8, while they may not meet the exemption provision of GATT Articles 20 and 21 and WTO GPA Article 23.

Recently, in particular, the Government of Japan has strong concern that the possibility of extraterritorial application impermissible under general international law is increasing, as the House of Representative passed bills to strengthen sanctions against Iran such as “Iran Counter-Proliferation Act” (H.R.1400), which includes a provision to repeal the power of the President to waive sanctions against Iran.

The Government of the United States stated in the Sixth Report to the Leaders that there is no distinction by nationality in applying the law. Given that a number of investment activities in Iran by foreign companies have not been subject to the Iran Sanctions Act up to now, the Government of Japan strongly urges the Government of the United States not to apply the Act to Japanese companies and further clarify the intention.

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

The Government of Japan is concerned that the Cuban Liberty and Democratic Solidarity Act of 1996 could constitute extraterritorial application of U.S. domestic laws, which is not permitted under general international law. As mentioned in the Sixth Report to the Leaders, the Government of the United States has extended the suspension of the implementation of every six months. The Government of Japan urges the Government of the United States to fully recognize the fact that the United Nations General Assembly has resolved 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 is concerned that sanctions acts instituted by local government such as the Alameda County in the State of California that contain sanction provisions to place restrictions on government procurement from companies that have business relations with the target country are not consistent with general international law. The Government of Japan urges the Government of the United States to ensure that initiatives at the state or local level support U.S. foreign policy as mentioned in the Sixth Report to the Leaders and to work on respective States and local governing bodies 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 U.S. economy and bring various benefits to companies and consumers.

While the Government of Japan recognizes that, as reported in the Sixth Report to the Leaders, the Government of the United States has actively promoted its competition policy, such as the submission of the Report and Recommendations to the Congress and to the President on the review of the federal antitrust law including antitrust exemptions by the Antitrust Modernization Commission (AMC) in April 2007 and the enforcement activities including exposure of international cartels, the Government of Japan continues to urge 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 review and express its views, on the basis of the Recommendations by AMC in April 2007, with respect to 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.

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 information on the progress that has been made in this regard.

## **XII. LEGAL SYSTEM / LEGAL SERVICES**

As international trade and exchange of people across borders deepen, legal services are becoming increasingly internationalized. However, some regulations in the legal system of the United States place an excessive burden on businesses, compared to global standards. In addition, the acceptance of foreign lawyers is still insufficient in the United States. 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, Punitive Damages, Jury Trial and Discovery**

In the past dialogues, the Government of Japan requested the Government of the United States to: mitigate product liability by placing limits on the amount of damages and shortening the statute of limitations; place reasonable limitations on the scope of permissible punitive damages awards; exempt complicated and technical lawsuits concerning business activities from jury trial; and place reasonable limitations on the scope of discovery. However, sufficient progress has not been made. From the viewpoint of ensuring that companies will not be imposed undue burden and liability as a result of unreasonable lawsuits, the Government of Japan continues to urge the Government of the United States to take measures to improve the legal system of the United States including legislation at the federal level.

### **2. Legal Services**

#### **(1) Acceptance of Foreign Lawyers**

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

In the United States, only twenty six States and the District of Columbia accept foreign lawyers as foreign legal consultants (FLCs), including the State of New Hampshire which established a new rule regarding the acceptance of FLCs in January 2007, and 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 seven 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* can practice nationwide, and therefore the openness of the legal service market is equivalent to 100 percent. While the Government of Japan welcomes the move to increase the number of States that accept foreign lawyers as FLCs, including the initiatives by the American Bar Association (ABA) to encourage all States to adopt FLC system based on the Model Rule, and the resolution adopted at the Conference of Chief Justices in August 2006, 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, the ABA amended the Model Rule in August 2006 to abolish the requirement for practicing experience in the period immediately preceding the date of application, to shorten the required period of practicing experience to five years, and to accept the practicing experience in any country including third countries. While the Government of Japan welcomes such move toward 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 most of those states require no less than five years of experience. Under the corresponding system in Japan, the period of practicing experience required for acceptance was reduced from five years to three years as early as nine years ago in response to the request by the Government of the United States. 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 based on the revised model rule.

(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 required to be FLCs in every state based on the revised model rule.

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

Since regulations in each state on foreign lawyers or FLCs acting as a neutral or a proxy in alternative dispute resolution (ADR) proceedings (including arbitration proceedings) are not clearly confirmed, foreign lawyers or FLCs are experiencing problems in their practices. Consequently, the Government of Japan continues to urge the Government of the United States to

clarify the details of the regulations on ADR proceedings.

### **XIII. 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, but since it was not because the FMC acknowledged the violation of the treaty, Japan's concern that the FMC might impose similar unilateral sanction measures still remains. 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: Despite the apparent improvement of the port situation in Japan including the improved "prior consultation system" and the revised Port Transportation Business Law, 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, and imposes unfair and excessive burdens on Japanese carriers. There is also a suspicion that the FMC introduced the order in order to gather information for imposing unilateral sanction measures again.

The Government of the United States stated in the Sixth Report to the Leaders that it "will continue to consult and exchange information with the Government of Japan in order to remain informed of the situation of Japanese ports and any positive developments, and will keep the FMC informed of the situation of Japanese ports." However, these explanations do not provide a rational basis for imposing reporting requirements on Japanese carriers.

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, and making it possible to impose unilateral regulations on ways of setting freight rates and other practices. As the freight rates setting provides the foundation of free shipping activity on a commercial basis, unilateral regulations by the FMC on the freight rates

setting practices are intervention in free shipping operations and discriminatory intervention against foreign shipping firms.

With regard to the amendment to the act in 1998 which explicitly stipulates the intervention in freight rates setting practices, the Government of the United States commented in the Sixth Report to the Leaders that “it merely clarified the pre-existing authority of the Federal Maritime Commission to address discriminatory and unfair competitive practices of carriers in U.S. trade.” However, it is unclear as to why those regulations, which ought to be highly exceptional measures upon freight rates set on a commercial basis, are really necessary, and as to whether there is a system to ensure fair enforcement of those regulations. Thus there remains a strong concern that unilateral regulations might be imposed without regard to the market situation. Therefore, 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. 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. It has been explained that the subsidy in question is provided as part of national security measures, but no reasonable explanation has been provided on the amount of subsidy and other points. Thus, there still remains suspicion that it is de facto subsidy for the operation cost in the name of national security. Therefore, 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 competition in 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 Sixth 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.-flag vessels for exports of Alaskan crude oil, which is commercial cargo, are measures of highly protectionist nature and inconsistent with the principle of national treatment. They 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 Sixth Report to the Leaders, the Government of the United States stated that it 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 and also explained that United States Government-owned cargoes covered by cargo preference laws represent less than one percent of the United States' total ocean borne foreign trades. However, it does not justify these anticompetitive measures. Therefore, the Government of Japan continues to urge the Government of the United States to abolish cargo preference measures.

## XIV. FINANCIAL SERVICES

For further development of the close economic relationship between Japan and the United States, the Government of Japan recognizes that it is important to promote economic activities in the financial service sector between the two countries by improving market access for Japanese financial service providers in the United States.

With regard to the financial service sector, the Government of Japan has maintained continuous discussions with the Government of the United States, including at the Japan-US Financial Dialogue and Insurance Consultations. However, there still remain in the United States regulations that cause obstacles to 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. Insurance Business**

#### (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 are cases where the delay in administrative procedures dealing with approval applications is causing business burdens on insurers and preventing them from responding to customer needs in a timely manner.

Under these circumstances, the Government of Japan 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 in the fourth- to sixth-year dialogue under the Regulatory Reform Initiative. In addition, in order to resolve these problems, the Government of Japan requested that not only the National Association of Insurance Commissioners (NAIC) but also the Federal Government should take initiatives in improving the current regulatory system and provide the Government of Japan with information on the progress in each State in a timely and appropriate manner.

To our disappointment, however, the harmonization and unification of the State-based insurance regulations including procedures for license and approval has not been realized.

On the other hand, the Government of Japan is aware that even in the United States, the U.S. Chamber of Commerce and insurance organizations such as American Insurance Association (AIA) and American Council of Life Insurers (ACLI) are pointing out problems with the current State-based regulations. In addition, there is an initiative in Congress (in both houses) to promote National Insurance Act of 2007, which introduces the Optional Federal Charter.

Based on these developments, the Government of Japan urges the Government of the United States to take the following measures in cooperation with NAIC:

- (a) 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) 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) 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 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 impose unfairly heavy burden on overseas insurers in reinsurance business in the United States. The Government of Japan is aware that the introduction of a system which determines collateral requirements according to the company's credit rating has been discussed by NAIC, but the discussion has not made much progress.

In the rapidly globalizing reinsurance market, Japan and EU countries do not impose collateral requirements on overseas insurers, and the United States is recognized as the only developed country where such practice exists.

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

(a) Eliminate or relax 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) Present a practical timeline for a review of the existing collateral requirements, pay due attention to ensuring that Japanese insurance companies not be discriminated against under the revised system, and 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.

This requirement means that the branches of foreign insurance companies have substantial portion of their assets held under deposit, hampering their expeditious fund investment and causing a loss of investment opportunities to gain profits. This is a discriminatory regulation in that it imposes greater burden on the branches of foreign insurance companies than on the State-based insurance companies. There is no such regulation in Japan as to impose disadvantageous conditions on foreign insurance companies compared to domestic ones.

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

## **2. Issue of Samurai Bonds Accompanied with the Book-Entry Transfer System**

Yen-denominated bonds issued by international organizations, non-Japanese governments and non-Japanese companies (a.k.a. Samurai bonds) bring benefits both to U.S. companies which raise funds in yen and to Japanese investors. Therefore, the sound development of Samurai bond market is desirable.

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. But in January 2006, the book-entry transfer system of corporate bonds began to operate in Japan, which made it possible to manage Samurai bonds in a paperless environment. 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 obtain a certificate which verifies that the claimer of Samurai bonds is a non-U.S. citizen. Hence, 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 the work involved with withholding taxes such as obtaining the certificates, and all U.S. companies stopped the new issuance of Samurai bonds.

Given this situation, the Government of Japan have urged the Government of the United States to apply the “foreign-targeted registered obligations”, stipulated in the U.S. Treasury Department Rules, to Samurai bonds managed under the book-entry transfer system, thereby exempting U.S. companies issuing Samurai bonds from withholding tax duties as long as they implement the necessary reporting duties. In response, the Government of the United States issued guidance in October 2006 which provides that bearer bonds issued under a certain requirement by the end of 2006 would be treated as bearer bonds until their maturity. However, the guidance also stipulates that the Government of the United States intends to issue regulations providing that the foreign-targeted registered obligations will not apply, except as to bonds issued after December 31, 2006, and before January 1, 2009, with a stated maturity of no more than 10 years from the date of issuance.

The restriction on the application of the foreign-targeted registered obligations does not meet the needs of the Samurai bond market players, and might become an obstacle in maintaining and promoting the sound development of the market. Therefore, the Government of Japan urges the Government of the United States to relax the above-mentioned restriction, sufficiently reflecting the needs of the Samurai bond market players.

## **XV. 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, in order to ensure open opportunities of market entry and promote fair competition, it is increasingly necessary, in the United States as well, to respond rapidly and properly to issues arising from technological innovation and market structural changes, evidenced for example in the increased usage of cellular telephones as well as IP-migration, broadbandization, and digitalization of networks.

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

### **1. Elimination or Improvement of Discriminatory Treatment to Foreign Corporations**

#### (1) Revision of Entry Barriers and Criteria Applied Only to Foreign Carriers

##### (a) Restrictions on Foreign Investment in the Licensing of Radio Stations for the Purpose of Telecommunication Business

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 Sixth 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 again 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.

##### (b) 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 little 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 also ambiguous and, as a result, undermines the foreseeability for foreign carriers to develop their business plans.

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

- (i) Abolish the criteria of "trade concerns" and "foreign policy", which have nothing to do with telecommunications, for ex-ante certifications;

- (ii) Abolish the criterion of "very high risk to competition", or, if it is not possible, clarify and make public the conditions for its application, as the second-best measure.

## (2) Procedures for Export Licenses, Approval of Technical Assistance Agreement and Other Measures concerning Commercial Satellites

### (a) 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 have to wait for a long time to obtain a license.

In this respect, although the Government of the United States has stated in the Sixth Report to the Leaders that it will continue its efforts to minimize delays and maximize transparency of procedures in export licensing, sufficient progress has not been made yet. Accordingly, the Government of Japan urges the Government of the United States again 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 conducting a survey on its actual length.

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

Regarding TAA, the criteria determined by the Government of 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 apply for the approval on the information for which approval is not required, thereby prolonging the time for obtaining the approval. Furthermore, 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 concerns over current and future business activities.

Concerning the insurance TAA required in connection with the insurance contracts for the launch of communications satellites, the length of the required processing time is becoming longer due to insufficient examination staff and concentrations of applications. This makes it difficult for satellite companies to respond appropriately to technical questionnaires from insurance companies, thus inhibiting the smooth conduct of business.

The Government of Japan therefore urges the Government of the United States again 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.

### (c) Ensuring Fair Procurement Conditions

When a U.S. satellite purchaser puts out a tender, Japanese satellite makers obtain related documents later than U.S. makers, due to the regulation by the U.S. Government on information disclosure. The Government of Japan is concerned that Japanese makers are put at a competitive

disadvantage, and therefore urges the Government of the United States again to ensure fair competition for the satellite communications businesses in the procurement of satellites.

### (3) Local Contents Requirement for Federal Government Loans

The loan program for telecommunications equipment provided by the Rural Utilities Service (RUS) of the United States Department of Agriculture contains local contents requirement under which the loan must be expended for the products of the United States or “eligible countries”. The criteria for “eligible countries” are unclear, and such local contents requirement creates unfair competitive conditions in the procurement of telecommunications equipment by companies eligible for the loan in question. The Government of Japan urges the Government of the United States to abolish such local contents requirement and ensure fair treatment of telecommunications equipment procured by the borrowers of RUS’s loans by not discriminating between U.S.-made and Japanese-made telecommunication equipment.

## **2. Ensuring Consumers choice through Market Competition**

### (1) 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.

- (a) 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 again 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.

At the same time, concerning the process of policy deliberation based on FCC’s Further Notice of Proposed Rulemaking (FNPRM) of June 2007 (FCC07-120), the Government of Japan urges the Government of the United States to consider measures to ensure that consumers are provided with choices in the navigation devices market in the process of transition to digital television such as early introduction of two-way security functions.

- (b) The National Telecommunications and Information Administration (NTIA) of the U.S. Department of Commerce is planning to introduce the Digital-to-Analog Converter Box Coupon Program for the completion of transition to digital terrestrial broadcasting scheduled for 2009. There is concern with regard to this program that, if the information on the products that consumers can purchase with the coupon and the information on its distribution and public relations is not disclosed sufficiently in advance, fairness of competition in the market of eligible products might not be ensured because of the time required for product development. The Government of Japan requests the Government of the United States to provide information on how to enter the market and disclose such information sufficiently in advance.

### (2) Policies Concerning Establishment of Advanced Information Communication Infrastructure

Broadband communications services provide the basis for activities of companies and individuals. In the United States, however, the high-speed broadband communications network available for companies and individuals to send and receive high quality data graphics and images is not extensive enough as compared with other advanced countries, which could reduce the flexibility in activities of companies and individuals in the United States. Given that Section 706 of the Telecommunications Act of 1996 requires the Government of the United States to encourage the deployment of advanced telecommunications capability in a reasonable and timely manner, the

Government of Japan requests the Government of the United States to consider and promptly implement policies and measures to encourage expansion of the high-speed broadband communications network through market competition.

### (3) Network Neutrality

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 again 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. Promotion of Information Communications Policy in a Timely and Transparent Manner**

### (1) Policy Making Process

The Government of Japan urges the FCC to: ensure transparency and swiftness in policy making by improving predictability in the handling of public comments received on the information communications policy; and ensure predictability for companies doing business in the United States.

### (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 again urges the Government of the United States to implement the following:

- (a) Unlike in 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 those regulations. However, as technology develops, 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 followed broadband diffusion and IP migration, 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:

- (i) Provide consistent criteria on what kind of services are classified as "telecommunications services" or "information services";
- (ii) 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
- (iii) Consider revising the dichotomy of the current service classification in the process of the revision of the Communications Act unless both (i) and (ii) above are satisfied at the same time under the current framework of the Communications Act.

### (3) 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 again 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.

### (4) 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. As reported in the Sixth Report to the Leaders, the FCC issued a Notice of Proposed Rulemaking seeking comment on the recommendation of the Federal-State Joint Board on Universal Service that the FCC take immediate action to rein in the growth in high-cost universal service support disbursements. 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 continues to have a concern 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 again 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.

#### **4. Facilitation of International Roaming**

Currently, cellular phone terminals purchased in Japan are required to obtain certification by the United States in order to be able to receive international roaming services in the United States. This situation constitutes an obstacle in developing a wide variety of mobile handsets and in providing services to consumers, corresponding to the increase in the number of visitors from Japan to the United States. The Government of Japan requests the Government of the United States to establish rules aimed at the facilitation of international roaming, for example, by making it possible for mobile handsets that are sold in Japan to be temporarily brought into and used in the United States, to the extent that it does not hinder U.S. frequency administration. It also requests the Government of the United States to exchange opinions between the two countries as necessary.

## **XVI. 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 affecting 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 cooperate more closely 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, various issues in regard to the age of digitization and networking are currently being considered at many forums including the World Intellectual Property Organization (WIPO). To facilitate such discussions, the Government of Japan continues to urge the Government of the United States 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

Article 14 of the Treaty on Trade Related Aspects of Intellectual Property Rights (TRIPS) and Article 6 of World Intellectual Property Organization Performances and Phonograms Treaty (WPPT) require not just live music performances but live sound performances in general be protected. However, protection under the Copyright Act of the United States is provided only for live music performances among live performances. The U.S. Government's position is that live sound performances that are not protected under the Copyright Act are protected under States' laws. However, it is not possible to confirm whether or not such protection is provided without viewing the laws of all the States, which is hardly desirable from the viewpoint of maintaining transparency. Therefore, the Government of Japan urges the Government of the United States to clearly stipulate the protection of not just live music performances but live sound performances in general as required by relevant treaties.

(b) Protection of Unfixed Works

The U.S. Copyright Act does not provide protection for unfixed works, and the U.S. Government's position is that such works are protected by States' laws. However, it is not possible to confirm whether or not such protection is provided without viewing the laws of all the States, which is hardly desirable from the viewpoint of maintaining transparency. Although the U.S. federal constitution may limit the protection of copyright through federal law to fixed works only, the Government of Japan believes that it is possible to accommodate the protection to all unfixed works by prescribing legal remedies against unauthorized acts in the same manner as Section 1101 of the U.S. Copyright Act protects live music performances (i.e. unfixed). Accordingly, the Government of Japan continues to urge the Government of the United States to provide clear protection for unfixed copyrighted works under the U.S. Copyright Act.

(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 U.S. Government's position 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. With regard to the Lanham Act, in particular, since cases have been established indicating that there is no function for protection of moral rights, the U.S. government's explanation that this law does protect moral rights has problems. In the first place, a legal system which protects moral rights through a plurality of legislation and common law is too complex for foreign rights holders to utilize, and is against the principle of transparency. Thus, from the point of view of promoting transparency, the Government of Japan continues to urge the Government of the United States to provide clear protection for moral rights under the U.S. Copyright Act.

(d) Protection of Right of Rental concerning Video Games

The provisions of World Intellectual Property Organization Copyright Treaty(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. Therefore, the Government of Japan continues to urge that the U.S. Copyright Act provide right of rental as required under WCT Article 7 and TRIPS Article 11 in respect of video games.

(e) Clear Stipulation of the Rights of Broadcasting Organizations

The Copyright Act of the United States does not clearly stipulate the rights of broadcasting organizations, and the way to protect the rights relating to fixation, reproduction, etc. by broadcasting organizations is unclear. In addition, protection of broadcasting organizations is not sufficient in that neighboring rights are not provided to broadcasting organizations. Given the present situation where right infringements such as distribution of pirated copies of broadcasted contents and illegal uploading frequently occur beyond national borders, clearly stipulating the rights of broadcasting organizations has the merit of enhancing effectiveness of

countermeasures against right infringements both at home and abroad. Therefore, the Government of Japan urges the Government of United States to grant clearly stipulated rights to broadcasting organizations.

## (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 such as the problem of copyright infringements, 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, taking account of the necessity of smooth technological development as well as consumers' convenience. Specifically, the Government of Japan urges the following:

### (a) Ensuring Free Competition and Interoperability in Access Control and Copy Control

Currently, Digital Rights Management (DRM) for access controls and copy controls has been provided with strengthened protection under Section 1201 of the U.S. Copyright Act. The Government of Japan continues to request that the access controls and copy controls under that section will not have adverse effect not only on non-infringing uses of copyrighted works such as fair use but also on free competition and interoperability of software and hardware, taking into consideration the development of international discussion on this issue.

### (b) Review of the Relationship between Relevant Rights for Ensuring Smooth Online Usage of Copyrighted Works

The Government of the United States takes a position that copyrighted works used online are protected by the combination of right of reproduction, right of performance and right of distribution. However, the relationship between these rights is complicated by this overlapping application of multiple rights, which could impede the smooth usage of copyrighted works online. Accordingly, the Government of Japan continues to urge the Government of the United States to take appropriate measures including establishing laws that ensure and promote smooth usage of copyrighted works, such as a measure to eliminate the possibility of overlapping application of multiple rights.

### (c) Copyright Infringement on Video-sharing Sites and Peer-to-Peer Networks

A large number of Japanese copyrighted works such as animation are illegally copied and distributed on the Internet via U.S. video-sharing sites, peer-to-peer networks, and other systems. Illegal distribution of copyrighted works in the United States causes enormous damage to Japanese content industry. In particular, Japanese organizations of rights holders frequently request U.S. video-sharing sites to remove illegal copies of copyrighted works, but the fundamental solution of the problem is far from being provided. With respect to copyright infringement on peer-to-peer networks, high cost and complicated procedures for lawsuits have become an issue in the United States.

In light of the fact that the issue of copyright infringement associated with the advancement of digitization and networking is a common issue of significance to Japan and the United States, the Government of Japan requests that information be exchanged between the two countries.

## **2. SPAM**

Spam has become a worldwide problem in the Information and Communications Technology (ICT) field. While it is acknowledged that the Government of the United States is taking multilateral measures against spam including the enactment of U.S. SAFE WEB Act as mentioned in the Sixth Report to the Leaders, 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.

## **XVII. MEDICAL DEVICES AND PHARMACEUTICALS**

In recent years, Japanese pharmaceutical and medical device industries have been actively expanding overseas operations. With these developments, Japanese companies have strong interest in increasing the transparency of related regulations in the United States and in ensuring their appropriate implementation.

Also, 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 request the following.

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

When a Japanese company applies for approval of a new pharmaceutical or medical device, it is particularly important that the company and the U.S. Food and Drug Administration (FDA) have a frequent exchange of information and mutual understanding, which leads to the speedy and smooth approval procedures.

Therefore, the Government of Japan requests the FDA to: 1) provide Japanese pharmaceutical and medical device industries with continuous opportunities for exchange of opinions and various guidance documents regarding regulations on pharmaceuticals and medical devices; and 2) continue to ensure the meetings held in a proper manner, including having appropriate U.S. expert officials present at such meetings.

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

Since U.S. pharmaceutical companies or medical device manufacturers develop and apply for approval of innovative pharmaceuticals or medical devices first in the United States and later in Japan, the supply of new pharmaceuticals and medical devices to patients is delayed in Japan, thus creating so-called “drug lag”.

The Government of Japan is encouraging pharmaceutical companies to facilitate simultaneous global development and making various efforts to eliminate the drug lag from the viewpoint of providing effective and safe pharmaceuticals promptly. Yet, the drug lag still exists, and the disadvantages it causes to patients are considered a serious problem in Japan. Although there are other remaining causes for the drug lag, the environment in Japan for simultaneous global development is improving significantly in recent years due to the recently published draft guidelines for global clinical trials and other efforts.

The Government of Japan believes that it is import for the U.S. Department of Commerce to encourage the U.S. companies to cooperate in order to eliminate the drug lag in Japan. It therefore requests the Department to continuously encourage, recommend, and give guidance to the U.S.

companies.