

**MODIFICATIONS TO THE APPENDICES TO THE AGREEMENT
JAPAN'S NOTIFICATION RELATING TO NTT**

Communication from Japan

With regard to the references made to Japan's notification relating to NTT in the minutes of the Committee meeting of 8 October 2002, as well as in the annotated agenda for the Committee meeting of 6 February 2003, Japan wishes to report to the Committee the result of the consultations with the European Community. Japan deeply regrets that it is not able to bring to this Committee meeting the report of an agreement with the European Community, despite the efforts made during consultations over the past three years. Japan thus realises that it shall be quite difficult to solve the matter bilaterally. The following report will enable other Parties to better understand the matter at issue between Japan and the European Community, regarding interpretation of the current Article XXIV:6. By submitting this communication to the Committee, Japan reserves its right to solve the matter through all procedures possible under the Agreement on Government Procurement.

Bilateral consultations

Since submission of the notification relating to NTT in September 1999, Japan has had a number of bilateral consultations with the representatives of the European Community in Geneva, Brussels and Tokyo. After withdrawal of the objection to the same notification by the United States in October 2001, Japan intensified bilateral contacts with the European Community with a view to solving the matter as soon as possible. Since October 2001 up until now, both delegations have conducted intensive consultations: three times in Geneva and once in Tokyo. In August 2002, Japan requested, by way of a letter from Ambassador Haraguchi to EC Ambassador Trojan, that the European Community present its position in writing, together with the reasons for maintaining its objection, should this be the case.

In October 2002, the European Community replied, by way of a letter from Ambassador Trojan, that the EC maintained for the time being its objection to Japan's notification. As for the reasons for its objection, the European Community raised the three issues: shareholding, the NTT law and the market situation (particularly its concerns on the independence of the telecom regulator in Japan and on the lack of dominant carrier regulations over NTT Communications Corporation).

In December 2002, Japan presented its positions on the issues addressed in Ambassador Trojan's letter and requested the European Community to review its position and to consider a way to withdraw its objection. It also called upon the European Community to present its final position by 25 January 2003 (*cf.* details in the attached letter).

In January 2003, both parties made additional efforts in order to explore ways for a mutually satisfactory solution. However, a deal did not prove possible due to the gap in the views regarding the level of market liberalization that should be proved by a Party wishing to withdraw an entity from its Appendix I. In the end, both Parties recognized that neither could accept the position of the other. On 30 January 2003, Japan received a reply, by way of a letter from Mr. Carl, Director General for Trade, European Commission, that the EC was obliged for the time being to maintain its objection, seeing as the concerns raised in its letter of October 2002 had not been satisfactorily addressed, despite the additional clarification provided by Japan in its letter of December 2002.

Issues for consideration

Japan wishes to propose that the Committee look at the following issues in order to clarify and improve the procedures under the current Article XXIV:6:

- an objecting Party should not prevent a proposed modification from becoming effective for reasons that are outside of the scope of the Agreement on Government Procurement;
- an objecting Party should not utilize its position to link the withdrawal of its objection to a solution or to progress in other trade issues;
- the Agreement on Government Procurement is not a sector-specific agreement, but a general agreement on procurement. All entities notified under Article XXIV:6 should be treated equally under the Agreement and examined under equivalent criteria (e.g. legal oversight, ownership of shares, voting rights, appointment of the managing board, financial support, special or exclusive rights). Therefore, an objecting Party should not place sector-specific requirements on any entity notified under Article XXIV:6, which are not equally applicable to entities in other sectors.

ATTACHMENT

MISSION PERMANENTE DU JAPON
AUPRÈS DES ORGANISATIONS INTERNATIONALES
Genève – Suisse
NK/se/D.447

Geneva 12th December 2002

Dear Ambassador,

With regard to your letter dated 22 October 2002, concerning Japan's modification with respect to the NTT Corporation in Appendix I of the Agreement on Government Procurement, I hereby transmit to you the points set out below, upon instructions from my Government.

First of all, Japan deeply regrets that all the written information and explanations provided by Japan over the past three years have not yet been deemed sufficient by the EC as proof that government control or influence over the NTT Communications Corporation has been effectively eliminated. As the EC is now the only Party objecting to the entry into force of Japan's modification since the withdrawal of the objections by the United States in October 2001 and by Canada in October 2002, Japan calls on the EC to expedite examination thereof, and to present its final position by 25 January 2003. With a view to facilitating the internal coordination in the European Commission and with the EU Member States, Japan attaches hereto its position regarding the issues addressed in the above EC letter.

Japan sincerely requests the EC to review its position and to consider a way to withdraw its objection. For example, with a similar reservation in paragraph 2 of both the US and Canada's respective Communications (documents GPA/W/166 and GPA/W/213), the EC's withdrawal of objection in this case would not prejudice or prejudice its position on any other proposal for modification in Appendix I. However, in the event of no reply, or of no change to the EC's position by the above date in January, Japan would be obliged to report to the Committee in February 2003 that the matter could not be solved bilaterally, despite the efforts made in consultations over the past three years, and Japan would seek other procedures for solving the matter; including those in accordance with provisions in paragraph 6 of Article XXIV of the Agreement on Government Procurement.

I would be appreciated if this letter could be duly forwarded to your competent authorities at your earliest convenience.

Yours sincerely,

Shotaro OSHIMA
Ambassador Extraordinary and Plenipotentiary
Permanent Representative of Japan

cc. Mr Jan Peter MOUT, Chairman of the Committee on Government Procurement

H.E. Mr Carlo TROJAN
Ambassador
Permanent Representative of the EC
37-39 rue de Vermont
Case postale 195
1211 GENEVA 20

**JAPAN'S POSITION REGARDING THE ISSUES RAISED IN
AMBASSADOR TROJAN'S LETTER (EC),
DATED 22 OCTOBER 2002¹**

1. Shareholding

As the Government of Japan (GOJ) has no shares in NTT Communications Corporation (hereinafter referred to as "NTT Communications"), it is not able to influence the company as a shareholder. Even though the GOJ holds 46 per cent of shares in NTT Holding Company, which currently holds 100 per cent of the shares in NTT Communications, the GOJ (i.e. the Ministry of Finance) only owns shares in NTT Holding Company for the sake of maintaining part of them as state property. The GOJ has neither exercised its shareholder's rights, nor has it been involved in the management of NTT Holding Company. The GOJ is not, therefore, in a position to exert control or to influence NTT Communications through its holding company. In addition, NTT Holding Company can now dispose of the shares in NTT Communications at will, without government approval after the last amendment to the NTT Law (effective as of 30 November 2001). (In this context, Japan wishes to point out that in several EU member States², the government has more than 50 per cent of shares in major telecommunication companies, and that such companies are not subject to the Agreement on Government Procurement (GPA), since the EC has not offered those state-owned companies in its Appendix I of the Agreement.)

2. NTT Law

NTT Communications is a fully private company, established in accordance with the procedures under Japanese Commercial Law. It is subject to the Telecommunication Business Law, which applies to all telecommunications companies. As no provisions of the NTT Law apply to NTT Communications since its last amendment, the GOJ has no legal authority to control or influence the company's business decisions, including those on procurement.

3. Market situation

In the long distance/international call services where NTT Communications provides its main services, there exist no laws or regulations to limit market access and national treatment for those domestic and foreign companies wishing to enter such markets. In fact, 35 licensed companies are currently providing long distance/international call services in Japan. Among them are 25 companies with substantial stock participation (more than 50 per cent) of foreign companies: one Canadian company, six European companies (two British, one French, one German, one Irish and one Dutch), two Singaporean companies, 14 US companies, as well as two Hong Kong-Australian Joint enterprises. In the long distance telecommunications market, the share of NTT Communications has fallen from 57.6 per cent (FY 1998) to 53.5 per cent (FY 2000). Its market share for international calls is only 4.6 per cent (FY 2000). In addition, the charges for long distance calls and international calls where NTT Communications provides its main services, have been decreasing since its establishment in 1999 (*cf.* Chart 5, GPA/W/160, p. 6). In view of the facts mentioned above, Japan is convinced that sufficient competition exists in these markets in Japan.

¹ Regarding shareholding, the NTT Law and the market situation, Japan has submitted detailed information in its documents (GPA/W/104, GPA/W/104/Add.1, GPA/W/104/Add.2/Rev.1, GPA/W/107, GPA/W/108, GPA/W/160 and GPA/W/199).

² Austria, Belgium, Finland, France, Greece, Luxembourg and Sweden (according the data as of December 2000 in the 2001 OECD Communications Outlook).

4. Independent regulator and dominant carrier regulations

As repeatedly stated by Japan since the EC first raised these issues in the bilateral consultations in May 2002, the issues of independent regulator and dominant carrier regulations are not relevant to the requirement in Article XXIV:6(b) of the GPA. The purpose and scope of the GPA is to liberalize the government procurement market of the scheduled procuring entities in each Party, while the issues raised by the EC relate to the domestic regulations over the telecommunications market in Japan in general, and are clearly beyond the scope of the issues raised by Japan's notification (i.e. the GOJ's control or influence over NTT Communications). Without any concrete stipulation regarding such regulations in the GPA, one can logically conclude that such rules are not incorporated in the GPA. Therefore, Japan believes that independent regulator and dominant carrier regulations are outside the scope of the GPA and Japan is not obligated to take such measures under its notification made in accordance with Article XXIV:6 of the GPA. In conclusion, Japan would like to stress that the GPA is not a sector-specific agreement, but a general agreement on procurement. In other words, all entities notified under Article XXIV:6 shall be treated equally under the GPA and examined under equivalent criteria (e.g. legal oversight, ownership of shares, voting rights, appointment of the managing board, financial support, and special or exclusive rights). Japan is, therefore, against any approach which would place such sector-specific requirements on any entity notified under Article XXIV:6 of the GPA, which are not equally applicable to entities in other sectors.
