

AGREEMENT BETWEEN
THE GOVERNMENT OF JAPAN
AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA
CONCERNING
COOPERATION ON ANTICOMPETITIVE ACTIVITIES

The Government of Japan and the Government of the United States of America (hereinafter referred to as "Parties"):

Recognizing that the world's economies are becoming increasingly interrelated, in particular the economies of Japan and the United States of America;

Noting that the sound and effective enforcement of competition laws of each country is a matter of importance to the efficient functioning of their respective markets and to trade between them;

Noting that the sound and effective enforcement of competition laws of each country would be enhanced by cooperation and, where appropriate, coordination between the Parties in the application of those laws;

Noting that from time to time differences may arise between the Parties concerning the application of the competition laws of each country;

Noting their commitment to give careful consideration to the important interests of each Party in the application of the competition laws of each country; and

Having regard to Article XVIII of the Treaty of Friendship, Commerce and Navigation between Japan and the United States of America signed on April 2, 1953, to the Recommendation of the Council of the Organization for Economic Co-operation and Development Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, as revised July 27 and 28, 1995, and to the Recommendation of the Council of the Organization for Economic Co-operation and Development Concerning Effective Action Against Hard Core Cartels adopted on March 25, 1998;

Have agreed as follows:

Article I

1. The purpose of this Agreement is to contribute to the effective enforcement of the competition laws of each country through the development of cooperative relationships between the competition authorities of each Party. The competition authorities of the Parties shall, in accordance with the provisions of this Agreement, cooperate with and provide assistance to each other in their enforcement activities, to the extent compatible with their respective Party's important interests.

2. For the purposes of this Agreement,

(a) the term "anticompetitive activity(ies)" means any conduct or transaction that may be subject to penalties or relief under the competition laws of either country;

(b) the term "competition authority(ies)" means:

(i) for the United States of America, the United States Department of Justice and the Federal Trade Commission, and

(ii) for Japan, the Fair Trade Commission;

(c) the term "competition law(s)" means:

(i) for the United States of America, the Sherman Act (15 U.S.C. 1-7), the Clayton Act (15 U.S.C. 12-27), the Wilson Tariff Act (15 U.S.C. 8-11), and the Federal Trade Commission Act (15 U.S.C. 41-58) to the extent that it applies to unfair methods of competition, and their implementing regulations; and

(ii) for Japan, the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No.54 of April 14, 1947) (hereinafter referred to as "the Antimonopoly Law") and its implementing regulations.

- (d) the term "enforcement activity (ies)" means any investigation or proceeding conducted by a Party in relation to the competition laws of its country. However, (i) the review of business conduct or routine filings and (ii) research, studies or surveys with the objective of examining the general economic situation or general conditions in specific industries are not included.

Article II

1. The competition authority of each Party shall notify the competition authority of the other Party with respect to the enforcement activities of the notifying Party that the notifying competition authority considers may affect the important interests of the other Party.

2. Enforcement activities that may affect the important interests of the other Party include those that:

- (a) are relevant to enforcement activities of the other Party;
- (b) are against a national or nationals of the other country, or against a company or companies incorporated or organized under the applicable laws and regulations within the territory of the other country;
- (c) involve anticompetitive activities, other than mergers or acquisitions, carried out in any substantial part in the territory of the other country;
- (d) involve mergers or acquisitions in which
 - one or more of the parties to the transaction, or
 - a company controlling one or more of the parties to the transaction,

is a company incorporated or organized under the applicable laws and regulations within the territory of the other country;

- (e) involve conduct considered by the notifying competition authority to have been required, encouraged or approved by the other Party;

or

- (f) involve relief that requires or prohibits conduct in the territory of the other country.

3. Notification pursuant to paragraph 1 of this Article shall be given as promptly as possible when the competition authority of a Party becomes aware that enforcement activities of its Party may affect the important interests of the other Party, and in any event in accordance with paragraphs 4 and 5 of this Article.

4. Where notification is required pursuant to paragraph 1 of this Article with respect to mergers or acquisitions, such notification shall be given not later than:

- (a) for the competition authorities of the United States of America, the time either one seeks information or documentary material concerning the proposed transaction pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. 18a(e)), the Federal Trade Commission Act (15 U.S.C. 49, 57b-1) or the Antitrust Civil Process Act (15 U.S.C. 1312).

- (b) for the competition authority of Japan, the earlier of

- (i) the time it seeks production of documents, reports or other information concerning the proposed transaction pursuant to the Antimonopoly Law; or

- (ii) the time it advises a party to the transaction that the transaction as originally proposed raises serious questions under the Antimonopoly Law; provided, however, that if at the time of such advice the transaction has not been publicly disclosed by a party to the transaction, notification shall be made as soon as possible after the time at which the transaction or proposed transaction is publicly disclosed by a party to the transaction.

5. Where notification is required pursuant to paragraph 1 of this Article with respect to matters other than mergers or acquisitions, notification shall be given as far in advance of the following actions as is practically

possible:

- (a) for the Government of the United States of America,
 - (i) the initiation of criminal proceedings;
 - (ii) the initiation of a civil or administrative action, including the seeking of a temporary restraining order or preliminary injunction;
 - (iii) the entry of a proposed consent decree or a proposed cease and desist order; and
 - (iv) the issuance of a business review or advisory opinion that will ultimately be made public by the competition authority.
- (b) for the Government of Japan,
 - (i) the filing of a criminal accusation;
 - (ii) the filing of a complaint seeking an urgent injunction;
 - (iii) the issuance of a recommendation or the decision to initiate a hearing;
 - (iv) the issuance of a surcharge payment order when no prior recommendation with respect to the payer has been issued;
 - (v) the issuance of a reply to a prior consultation that will ultimately be made public by the competition authority; and
 - (vi) the issuance of a warning.

6. The competition authority of each Party shall also notify the competition authority of the other Party if it initiates a survey which the notifying competition authority considers may affect the important interests of the other Party.

7. The competition authority of each Party shall also notify the competition authority of the other Party whenever the notifying

competition authority publicly participates, in connection with the competition laws or policy issues, in an administrative, regulatory or judicial proceeding in its country that is not initiated by the competition authority, if the notifying competition authority considers that the issue addressed may affect the important interests of the other Party. Such notification shall be made at the time of the participation or as soon thereafter as possible.

8. Each Party shall notify the other Party if it initiates a civil action in the courts of the other country against a private party for monetary damages or other relief based on a violation of the competition laws of the other country.

9. Notifications shall be sufficiently detailed to enable the notified competition authority to make an initial evaluation of the effect on its Party's important interests.

10. (a) The competition authority of each Party shall promptly notify the competition authority of the other Party of any amendment to the competition laws of its country

(b) The competition authority of each Party shall provide the competition authority of the other Party with copies of its publicly-released guidelines, regulations or policy statements that it issues in relation to the competition laws of its country.

(c) The competition authority of each Party shall provide the competition authority of the other Party with copies of its proposed guidelines, regulations or policy statements in relation to the competition laws of its country that are made generally available to the public, and, when it provides the general public with opportunities to submit comments on such guidelines, regulations or policy statements, receive and pay due consideration to the comments submitted by the other Party prior to finalizing such guidelines, regulations or policy statements.

Article III

1. The competition authority of each Party shall render assistance to the

competition authority of the other Party in its enforcement activities to the extent consistent with the laws and regulations of the country of the assisting Party and the important interests of the assisting Party, and within its reasonably available resources.

2. The competition authority of each Party shall, to the extent consistent with the laws and regulations of its country and the important interests of its Party:

- (a) inform the competition authority of the other Party with respect to its enforcement activities involving anticompetitive activities that the informing competition authority considers may also have an adverse effect on competition within the territory of the other country;
- (b) provide the competition authority of the other Party with any significant information, within its possession and that comes to its attention, about anticompetitive activities that the providing competition authority considers may be relevant to, or may warrant, enforcement activities by the competition authority of the other Party; and
- (c) provide the competition authority of the other Party, upon request and in accordance with the provisions of this Agreement, with information within its possession that is relevant to the enforcement activities of the competition authority of the other Party.

Article IV

1. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, they shall consider coordination of their enforcement activities.

2. In considering whether particular enforcement activities should be coordinated, the competition authorities of the Parties should take into account the following factors, among others:

- (a) the effect of such coordination on their ability to achieve the

objectives of their enforcement activities;

- (b) the relative abilities of the competition authorities of the Parties to obtain information necessary to conduct the enforcement activities;
- (c) the extent to which the competition authority of either Party can secure effective relief against the anticompetitive activities involved;
- (d) the possible reduction of cost to the Parties and to the persons subject to the enforcement activities; and
- (e) the potential advantages of coordinated relief to the Parties and to the persons subject to the enforcement activities.

3. In any coordinated enforcement activity, the competition authority of each Party shall seek to conduct its enforcement activities with careful consideration to the objectives of the enforcement activities by the competition authority of the other Party.

4. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, the competition authority of each Party shall consider, upon request by the competition authority of the other Party and where consistent with the important interests of the requested Party, inquiring whether persons who have provided confidential information in connection with those enforcement activities will consent to the sharing of such information with the competition authority of the other Party.

5. Subject to appropriate notification to the competition authority of the other Party, the competition authority of either Party may, at any time, limit or terminate the coordination of enforcement activities and pursue their enforcement activities independently.

Article V

1. If the competition authority of a Party believes that anticompetitive activities carried out in the territory of the other country adversely

affect the important interests of the former Party, such competition authority, taking into account the importance of avoiding conflicts regarding jurisdiction and taking into account that the competition authority of the other Party may be in a position to conduct more effective enforcement activities with regard to such anticompetitive activities, may request that the competition authority of the other Party initiate appropriate enforcement activities. The request shall be as specific as possible about the nature of the anticompetitive activities and their effect on the important interests of the Party of the requesting competition authority, and shall include an offer of such further information and other cooperation as the requesting competition authority is able to provide.

2. The requested competition authority shall carefully consider whether to initiate enforcement activities, or whether to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the request. The requested competition authority shall inform the requesting competition authority of its decision as soon as practically possible. If enforcement activities are initiated, the requested competition authority shall inform the requesting competition authority of their outcome and, to the extent possible, of significant interim developments.

Article VI

1. Each Party shall give careful consideration to the important interests of the other Party throughout all phases of its enforcement activities, including decisions regarding the initiation of enforcement activities, the scope of enforcement activities and the nature of penalties or relief sought in each case.

2. When either Party informs the other Party that specific enforcement activities by the latter Party may affect the former's important interests, the latter Party shall endeavor to provide timely notice of significant developments of such enforcement activities.

3. Where either Party considers that enforcement activities by a Party may adversely affect the important interests of the other Party, the Parties should consider the following factors, in addition to any other factor that

may be relevant in the circumstances in seeking an appropriate accommodation of the competing interests:

- (a) the relative significance to the anticompetitive activities of conduct or transactions occurring within the territory of the country of the enforcing Party as compared to conduct or transactions occurring within the territory of the other country;
- (b) the relative impact of the anticompetitive activities on the important interests of the respective Parties;
- (c) the presence or absence of evidence of an intention on the part of those engaged in the anticompetitive activities to affect consumers, suppliers, or competitors within the territory of the country of the Party conducting the enforcement activities;
- (d) the extent to which the anticompetitive activities substantially lessen competition in the market of each country;
- (e) the degree of conflict or consistency between the enforcement activities by a Party and the laws of the other country, or the policies or important interests of the other Party;
- (f) whether private persons, either natural or legal, will be placed under conflicting requirements by both Parties;
- (g) the location of relevant assets and parties to the transaction;
- (h) the degree to which effective penalties or relief can be secured by the enforcement activities of the Party against the anticompetitive activities; and
- (i) the extent to which enforcement activities by the other Party with respect to the same persons, either natural or legal, would be affected.

Article VII

1. The Parties may hold, as necessary, consultations through the diplomatic

channel on any matter which may arise in the implementation of this Agreement.

2. A request for consultations under this Article shall be communicated through the diplomatic channel.

Article VIII

1. The competition authorities of the Parties shall consult with each other, upon request of either Party's competition authority, on any matter which may arise in connection with this Agreement.

2. The competition authorities of the Parties shall meet at least once a year to:

- (a) exchange information on their current enforcement efforts and priorities in relation to the competition laws of each country;
- (b) exchange information on economic sectors of common interest;
- (c) discuss policy changes that they are considering; and
- (d) discuss other matters of mutual interest relating to the application of the competition laws of each country.

Article IX

1. (a) Information, other than publicly available information, communicated by a Party to the other Party pursuant to this Agreement shall only be used by the receiving Party for the purpose specified in Article 1, paragraph 1 of this Agreement, unless the Party providing the information has approved otherwise.
- (b) Information, other than publicly available information, provided by a competition authority or a relevant law enforcement authority pursuant to this Agreement shall not be communicated to a third party or other authorities, unless the competition authority or the relevant law enforcement authority providing the information has

approved otherwise.

2. Notwithstanding paragraph 1(b) of this Article, unless otherwise notified by the competition authority providing the information, the competition authority receiving the information communicated pursuant to this Agreement may provide the information to its Party's relevant law enforcement authorities, for the purpose of competition law enforcement, which may use such information under the conditions stipulated in Article X of this Agreement.

3. Each Party shall, consistent with the laws and regulations of its country, maintain the confidentiality of any information communicated to it in confidence by the other Party pursuant to this Agreement, unless the latter Party consents to the disclosure of such information.

4. Each Party may limit the information it communicates to the other Party when the latter Party is unable to give the assurance requested by the Party with respect to confidentiality or with respect to the limitations of purposes for which the information will be used.

5. Notwithstanding any other provision of this Agreement, neither Party is required to communicate information to the other Party if such communication is prohibited by the laws or regulations of the country of the Party possessing the information or such communication would be incompatible with its important interests.

6. This Article shall not preclude the use or disclosure of information to the extent that there is an obligation to do so under the laws and regulations of the country of the Party receiving the information. Such Party shall, wherever possible, give advance notice of any such use or disclosure to the Party which provided the information.

Article X

1. Information communicated by a Party to the other Party pursuant to this Agreement, except publicly available information, shall not be presented to a grand jury or to a court or a judge in criminal proceedings.

2. In the event that information communicated by a Party to the other Party

pursuant to this Agreement, except publicly available information, is needed for presentation to a grand jury or to a court or a judge in criminal proceedings, that Party shall submit a request for such information to the other Party through the diplomatic channel or other channel established in accordance with the law of the requested Party. The requested Party will make, upon request, its best efforts to respond promptly to meet any legitimate deadlines indicated by the requesting Party.

Article XI

1. This Agreement shall be implemented by the Parties in accordance with the laws and regulations in force in each country and within the available resources of their respective competition authorities.
2. Detailed arrangements to implement this Agreement may be made between the competition authorities of the Parties.
3. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other bilateral or multilateral agreements or arrangements between the Parties.
4. Nothing in this Agreement shall be construed to prejudice the policy or legal position of either Party regarding any issue related to jurisdiction.
5. Nothing in this Agreement shall be construed to affect the rights and obligations of either Party under other international agreements or under its laws.

Article XII

Unless otherwise provided in this Agreement, communications under this Agreement may be directly carried out between the competition authorities of the Parties. Notifications under Article II (except paragraph 8) and requests under Article V, paragraph 1 of this Agreement, however, shall be confirmed in writing through the diplomatic channel. The confirmation shall be made as promptly as practically possible after the communication concerned between the competition authorities of the Parties.

Article XIII

1. This Agreement shall enter into force upon signature.
2. Either Party may terminate this Agreement by giving two months written notice to the other Party through diplomatic channel.
3. The Parties shall review the operation of this Agreement not more than five years from the date of its entry into force.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

DONE at Washington, this seventh day of October, 1999, in duplicate, in the Japanese and English languages, both texts being equally authentic.

FOR THE GOVERNMENT OF JAPAN:

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA: