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LEGAL IMPLICATIONS ON SATELLITE PROCUREMENT AND TRADE ISSUES BETWEEN JAPAN AND THE UNITED STATES

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* Abstract

As a result of discussions in June 1990 concerning the satellite R&D/procurement issue between the Government of Japan and the Government of the United States, the two governments finally confirmed the policies and procedures regarding satellite R&D/procurement by Japan and the U.S. did not impose sanctions on Japan for unfair trade further to the so-called "Super 301 provision" of the 1988 *U.S. Omnibus Trade Act*. Although the outcome of these discussions is not regarded as a bilateral legally binding agreement, in performing R&D and the procurement of satellites, Japan has conformed substantially to the terms agreed in these discussions, which have thereby gained significant influence over Japanese space activities in this decade.

As a result of the discussions above, the Government of Japan and any entities whose satellite procurement procedures are subject to direct or indirect government control, including NTT (the Nippon Telegraph and Telephone Corporation), are obligated to procure all satellites, other than

R&D satellites, in accordance with open, transparent and non-discriminatory procedures. This means that any procurement of satellites by Japanese public entities shall be subject to open bidding in the international market. Considering that Japanese satellite manufacturers are not currently internationally competitive, this restriction provides U.S. manufacturers with greater access to Japanese contracts, while excluding Japanese satellite manufacturers from the international satellite market.

In this paper, we will summarize the practical impact on the Japanese aero-space industry as a result of the 1990 Japan-U.S. discussions, and analyze and evaluate the legal implications of the Super 301 provision and its essential Section 301 themselves, for the purpose of reviewing the future of R&D and procurement of satellites in Japan in the new century.

1. SECTION 301 AND SUPER 301 OF *THE US TRADE ACT*⁰

(1) INTRODUCTION

Section 301 of the *U.S. Trade Act* of 1974 permits the United States Trade Representative (USTR) to investigate and impose sanctions on countries whose trade practices are found to be unfair to U.S. interests. It reaches beyond the *General Agreement on Tariffs and Trade* (GATT), and grants the U.S. unilateral power to penalize countries that threaten American interests. Section 301 can be used to enforce

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U.S. rights under multilateral and bilateral trade agreements, as well as to remedy unreasonable, unjustifiable or discriminatory foreign trade practices that restrict or burden U.S. trade. It contains both mandatory and discretionary provisions and specific timetables for action by the USTR.

With increasing frequency, the U.S. has used the extra-GATT power of Section 301 to impose sanctions on other countries whose trade practices are unfavorable to U.S. interests. Since 1974, 98 cases have been investigated under Section 301. The majority have been settled through negotiation; sanctions, however, were imposed in 15 of those cases.¹ Although Section 301 appears to have achieved its goal of empowering the U.S. to take action in trade disputes, it has not achieved this goal without costs. Those costs have included global contempt and retaliatory trade sanctions.

(2) A BRIEF HISTORY OF SECTION 301

Section 301 was designed to give the President greater flexibility in resolving trade disputes. It became law as an amendment to section 252 of the *Trade Expansion Act* of 1962, which allowed the President to restrict imports from countries that unjustifiably or unreasonably restricted U.S. exports. The President's authority was discretionary and no time limits were imposed. The only procedural requirement imposed on the President was that he was required to provide the opportunity for a public hearing upon requests from interested parties.

The President's retaliatory authority under section 252 was limited in form and scope, with clear deference given to international norms and rules. Except in cases involving agricultural products, the President was only empowered to impose tariff restrictions in the form of tariff increases no greater than the applicable rate.

Section 301 of the *Trade Act* of 1974 strengthened the President's authority to

impose sanctions unilaterally by eliminating the requirement that the president observe international obligations before taking action against unfair trade practices. Section 301 also expanded the President's authority to impose tariff and nontariff import sanctions.

Amendments to Section 301 in 1979 established specific time lines for investigations and the final resolution of disputes. Although these amendments created a more elaborate regulatory framework for dispute settlement, they did not deprive the President of discretion in dealing with the government named in the petition.

Further amendments in 1984 defined "unjustifiable," "unreasonable," and "discriminatory practices" and provided for the initiation of Section 301 investigations by the USTR. The law required the preparation of an annual National Trade Estimate (NTE) and permitted the President to place restrictions on foreign direct investment.

In the *Omnibus Trade and Competitiveness Act* of 1988, amendments transferred final decision-making authority in Section 301 cases from the President to the USTR. The President retains supervisory authority but does not play a significant role in the processes of investigation and enforcement. The legislative history of the transfer of authority makes plain that Congress sought to limit the role of the President. The 1988 amendments also provided for mandatory action when the policy of a foreign government is inconsistent with its obligations under a trade agreement with the U.S.. These most recent amendments have, therefore, reduced the flexibility of the USTR in exercising its discretion, while continuing the trend toward increasing U.S. strength in bilateral trade conflicts.

(3) SECTION 301 AND ITS SANCTION

The current statute provides for three types of Section 301 actions: the original 301 action for unfair trade practices, the "special

301” action for the protection of intellectual property, and the “super 301” action for the mandatory annual identification of countries whose practices are unfair to U.S. interests. This part discusses original 301 actions; “super 301” actions will be examined in (4) below.

(a) MANDATORY VERSUS DISCRETIONARY ACTION

Section 301 specifies when the USTR must act and when actions are discretionary. Action must be taken when trade agreements are being violated. Action is not required in five specific circumstances: if (1) a GATT panel concludes there is no unfair trade practice; (2) the USTR believes the foreign government is taking steps to solve the problem; (3) the foreign government agrees to provide compensation; (4) the action could adversely affect the American economy to an extent disproportionate to the benefit to be achieved; and (5) the national security of the United States could be harmed.

The USTR has discretion to investigate foreign practices and impose sanctions on its own initiative or at the behest of domestic industries that petition for redress. To impose sanctions, the USTR must determine (1) that an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce; and (2) that action by the U.S. is appropriate.

(b) THE SANCTION

Section 301 enumerates various possible sanctions and confers broad discretion on the USTR to craft a satisfactory solution to unfair trade practices. Specifically, 19 U.S.C. sec. 2411 (c) authorizes the USTR to:

- (A) suspend, withdraw, or prevent the application of, benefits of trade agreement concessions...;
- (B) impose duties or other import restrictions on ... goods ... [or impose] fees or

restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate;

... OR

- (D) enter into binding agreements ... that commit such foreign country to:
 - (i) eliminate, or phase out, the act, policy, or practice ...,
 - (ii) eliminate any burden or restriction ... or
 - (iii) provide the U.S. with compensatory trade benefits ...

A preference for imposing duties rather than other import restrictions is contained in sec. 2411(c) (5) (A). This section places one of the few limits on the USTR’s discretion in this area.

The sanctions for retaliation at the disposal of the USTR may be taken on a nondiscriminatory basis or solely against the foreign country in question. Further, action may be taken in trade related to goods or economic sectors that have no connection to the unfair trade practices concerned.

(c) PROCEDURE

The USTR must decide whether to initiate an investigation “not later than 45 days after the date on which the USTR received the petition.” Once the USTR makes that decision, notice is published in the Federal Register. If the USTR decides to go forward with an investigation, a public hearing is announced within 30 days if the petitioner has requested one, or at such time as an “interested person” makes a timely request.

Each investigation must begin with a consultation with the government whose unfair practices are being investigated. Section 301 requires the USTR to request consultations on the day the investigation is announced, although a 90-day delay is allowed for verifying or improving the petition.

(d) THE INVESTIGATION TIMETABLE

The time frame for the conclusion of investigations depends on whether USTR action is mandatory or discretionary. Discretionary actions must be resolved by the USTR within 12 months of the start of the investigation. If mandatory action is required because the practice violates a trade agreement, the statute imposes an 18 month deadline for a determination or a termination date of 30 days after the conclusion of dispute settlement proceedings, whichever is earlier. If the dispute is not resolved by the deadline, the USTR must report to Congress on the reason for the impasse and on the prospects for resolution.

A decision to act must be implemented within 30 days of the determination. A delay of up to 180 days may be allowed if either the petitioner or domestic industries so request, or if the USTR determines that "substantial progress" toward a negotiated solution is being made.

Sanctions automatically terminate at the end of 4 years unless the petitioner or an affected domestic industry requests their continuation within 60 days of the close of that period. During the four-year period, the USTR has discretion to withdraw or modify the sanctions; but, before terminating or modifying any sanctions, the USTR must consult with the petitioner and representatives of domestic industries.

(4) SUPER 301 PROVISION

The *Omnibus Trade and Competitiveness Act* of 1988 added two specific categories of 301 actions. "Special 301" concerns intellectual property, and "Super 301" requires the USTR to identify and investigate "priority practices" of foreign governments that significantly affect American trade.

Section 301 of the *Trade Act* of 1974 was amended in 1988 to require the identification of priority practices that pose major barriers to trade and whose elimination will significantly benefit the U.S. The so-called "Super 301," this provision expired in 1990 under President Bush, but was reinstated by an executive orders issued by President Clinton in 1994, 1996 and 1999.

"Super 301" requires the administration to provide an annual list of foreign countries', "unfair" trade practices that could result in sanctions. This list, which identifies countries with "major barriers and trade distorting practices," must be submitted to Congress 30 days after submission of the National Trade Estimate report, a comprehensive analysis of the trade barriers facing U.S. products and services around the world. During consultations with such foreign countries, the USTR must seek either the elimination of the barriers and practices or compensation within three years. Failure to reach agreement triggers the normal Section 301 authority, procedures and retaliatory provisions.

On January 6, 1999, when USTR Barshefsky announced President Clinton's decision to reinstitute Super 301, she stated that "last year's successful conclusion of a market access agreement for motor vehicles with Korea demonstrates the effectiveness of Super 301." In October 1997, the U.S. identified Korea's barriers to imported motor vehicles as a potential unfair trade practice and initiated a Section 301 investigation. One year later the U.S. entered into a Memorandum of Understanding with Korea that provides substantial opportunities for U.S. automakers by dismantling a range of discriminatory Korean trade barriers in the near term and by establishing a solid basis for steady improvement in the future. Ms. Barshefsky also stated that "Super 301 was also instrumental in successfully addressing Japanese market access barriers in the

satellite, supercomputer, wood products, medical technology, telecommunications and glass sectors.”²

(5) INTERNATIONAL RESPONSE TO SECTION 301

Despite its apparent success in liberalizing world trade, Section 301, including Super 301, elicits more international condemnation than any other U.S. trade provision. According to one academic, Section 301 “is probably the most criticized piece of U.S. foreign trade legislation since the *Hawley-Smoot Tariff Act* of 1930. Sovereign states unite in opposition to Section 301 regardless of their global economic standing. The European Union’s enactment of a counterpart to Section 301 is possibly the most forceful example of such opposition to this U.S. statute. While the European Union does not utilize its counterpart with the same avdour as the U.S. uses Section 301, the mere adoption of a mirror statute reflects international frustration with a “totally onesided affair in which the U.S. plays both prosecutor and judge, in which defendants are tried in absentia, and in which Congress has ordained certain guilty verdicts in advance...”

The international community and an ever-increasing number of academics criticize Section 301’s departure from multilateralism in favor of bilateral “initiatives based on bullying smaller trading partners.” Despite its ability to liberalize trade, Section 301 is a massively unpopular market opening mechanism, which could lead to retaliation by U.S. trading partners, and, potentially, in turn, produce a global economic slowdown. In light of international distaste for aggressive unilateralism, the international community designed a less reactionary trade resolution mechanism in the WTO.

Thus, Section 301 has achieved some success, but the success has not been free of costs. Many members of Congress, as well as legal commentators, have expressed concern over those costs. The Super-301 provision is also dangerous in that it further entrenches the practice of maintaining lists of unfair trade practices whose impact is quantified in terms of arbitrary estimates for which there is no agreed upon methodology. Finally, the provision forces action against practices regardless of whether they violate international rules.

2. APPLICATION OF SUPER 301 TO JAPAN’S SATELLITE PROCUREMENT

On May 25, 1989, USTR Carla Hills announced that the U.S. identified the Japanese market access barriers in the satellite, supercomputer and wood products as a potential unfair trade practice, in accordance with the Super 301 provision.

(1) A BRIEF HISTORY LEADING TO CHOOSING JAPAN’S SATELLITE PROCUREMENT³

In July 1983, the former public corporation of NTT expressed its intent to the Hughes Co. to buy technical documents and materials to design satellites weighing either 1 ton or more. The Hughes Co. rejected that request and asked NTT to buy Hughes satellites. NTT refused stating that they could not procure satellites from Hughes, because of their adherence to the Japanese space development policy. This triggered a campaign initiated by Hughes and the Ford Motor Co. and carried out by a Washington based lobbyist to draw attention to the Japanese government’s policy on satellite procurement as a trade issue between Japan and the U.S.

In January, 1986, the satellite procurement issue was discussed between the

two countries in the Market-Oriented Sector-Selective (MOSS) consultations. The U.S. insisted that in procuring satellites for practical or commercial purposes, governments should give equal opportunities to all companies, domestic or foreign, and any non-tariff trade barriers should not be allowed irrespective of the amount of satellites to be procured. The U.S. seemed to consider the then current Japanese Space Policy to be aimed at protecting the domestic satellite industry. In the MOSS discussions, no progress was made and eventually the USTR identified the satellite procurement policy of the Japanese government as a discriminatory practice and chose Japan as a potential unfair trade country in 1989, upon the enactment of the *Omnibus Trade and Competitiveness Act* of 1988 .

(2) PROCESS OF DISCUSSIONS BETWEEN JAPAN AND US DURING 1989 - 1990

In response to the U.S. application of the Super 301 to Japan in three fields, including satellite procurement, the Government of Japan decided to refuse to negotiate under the Super 301 provision, but they could not help but negotiate under frameworks other than Super 301. As a forum for clarifying the issues with which the U.S. was concerned, the two governments chose the then ongoing Japan-U.S. Trade Committee, a meeting aimed to discuss broad trade issues between the two countries.⁴ After USTR Hills' statement on May 25, 1989, the 16th Trade Committee was held in Hawaii on September 7-9, and discussions on the three practices above began.

Discussions of the satellite procurement issue started in September 1989 and were followed by a meeting of four satellite experts held from November 1989 to March 1990, in which the National Space and Aeronautics Administration of the U.S. (NASA) and the National Space

Development Agency of Japan (NASDA) and other space-related agencies of both countries were involved. As a result of the follow-up meeting of the Japan-U.S. Trade Committee held from March 29 to April 3, both governments reached mutual understanding in substance on this issue. In addition, in the satellite experts meeting held on June 12, both governments confirmed the procedures for the procurement of non-R&D satellites. Based upon the preceding consultations with the U.S. government and in order to ensure openness, transparency and non-discrimination in the procurement of non-R&D satellites, the Committee for Drawing Up and Promoting the Action Program of Japan, an organization established in the Cabinet, chaired by the Chief Cabinet Secretary and composed of Administrative Vice-Ministers in all Ministries and Agencies etc., adopted "the Measures Relating to Procedures for the Procurement of non-R&D Satellites," at its 14th Meeting on June 14, 1990.⁵ The following day, June 15, consultations with the U.S. Government were finally completed by exchanging letters between USTR Carla Hills and Ambassador Ryohei Murata.

(3) OUTCOME OF DISCUSSIONS⁶

(a) OUTLINE OF OUTCOME

The final documents concluded under the above-mentioned consultations between the two Governments comprise the following: (a) the letters exchanged between Ambassador Ryohei Murata and USTR Carla Hills; (b) Attachment I (Policies and Procedures Regarding Satellite R&D/Procurement); (c) Attachment II (Procedures for the Procurement of non-R&D satellites); (d) Attachment III (Typical Examples of Japanese Research & Development Satellites); (e) Attachment IV (Typical Examples of U.S. Research & Development Satellites).

**(b) EXCHANGE OF LETTERS
BETWEEN USTR HILLS AND
AMB. MURATA**

Upon instruction from the Japanese Government, in Ambassador Murata's Letter, he stated the following, with reference to the discussions between the two Governments from September 1989 to June 1990 regarding the satellite R&D/procurement issue:

- (A) It is the policy of the Government of Japan to promote free trade and open markets. Accordingly, the Government of Japan has decided to establish the policies set forth in the Attachments to this letter, and to take measures to implement such policies, including those described in the Attachments for the implementation of open, transparent and non-discriminatory procurement procedures for satellites other than R&D satellites. These measures shall not be construed as affecting the GATT Agreement on Government Procurement, as amended.
- (B) In this connection, in the view of the Government of Japan, further elaboration is needed on governmental R&D satellite development in connection with satellite procurement, including a common definition of R&D satellites, as soon as possible in an international forum such as the OECD.

On the other hand, in USTR Hills' letter, she stated that the U.S. Government welcomed the Japanese Government's decision to establish open, transparent and non-discriminatory policies and procedures for the procurement of non-R&D satellites. In addition, she confirmed that the U.S. Government would continue to take measures generally comparable to the policies and procedures set forth in the Attachments to Amb. Murata's letter.

**(4) POLICIES AND PROCEDURES
REGARDING SATELLITE
R&D/PROCUREMENT**

In Attachment I to Amb. Murata's letter, as a result of the discussions concerning the satellite R&D/procurement issue, the Japanese and U.S. Governments confirmed the following:

1. It is the policy of the Government of Japan to procure non-R&D satellites on an open, transparent and non-discriminatory basis.
2. (1) The procurement of all satellites, other than R&D satellites and R&D payloads on non-R&D satellites, by or for the Government of Japan or any entity whose satellite procurement procedures are subject to direct or indirect government control, including NTT (Japan Telegraph and Telephone Corporation), will be conducted in accordance with open, transparent and non-discriminatory procedures.
(2) The Government of Japan will not otherwise influence, obstruct, or hinder the procurement of non-R&D satellites by NHK (Japan Broadcasting Corporation) or any other entity, nor attempt to do so.
(3) These procedures are set forth in Attachment II and are consistent with the GATT Agreement on Government Procurement, as amended.
3. The two Governments have decided, in the interests of taking a practical approach, to set forth the following understandings with respect to R&D satellites:
 - (1) The term "R&D satellites" means satellites designed and used entirely, or almost entirely, for the purpose of in-space development and/or validation of technologies new to either country, and/or non-commercial scientific research.

- (2) The term "R&D payloads" means payloads designed and used entirely for the purpose of in-space development and/or validation of technologies new to either country, and/or non-commercial scientific research.
 - (3) Satellites designed or used for commercial purposes or for the provision of services on a regular basis are not R&D satellites.
 - (4) Typical examples of U.S. and Japanese R&D satellites which have been in use since 1988 or are currently scheduled for development are set forth in Attachments III and IV.
4. The Government of Japan will take measures to alter the existing CS-4 project, whereby NASDA will develop an R&D satellite for the purpose of the in-space validation of technologies new to Japan which will be consistent with the definition in Paragraph 3 above of an R&D satellite.
 5. This policy will apply to all satellite procurements by the Government of Japan and any entity referred to in Paragraph 2 above, that are initiated or on-going on or after June 14, 1990, with the exception of satellites for which development contracts have been legally entered into prior to that date.

(5) PROCEDURES FOR THE PROCUREMENT OF NON-R&D SATELLITES

As the Attachment II to Amb. Murata's letter, the "Procedures for the Procurement of Non-R&D Satellites" (hereinafter referred to as "Procedures") governs the procurement of all satellites, other than R&D satellites and R&D payloads on non-R&D satellites, by or for the Government of Japan, or by any entity whose satellite procurement procedures are subject to direct or indirect government

control, including NTT. These Procedures should be implemented while ensuring consistency with the requirements of the GATT Agreement on Government Procurement, as amended.

One of the distinctive features of the final documents on the non-R&D satellite procurement is the provision relating to consultations between the Government of Japan and the Government of the U.S. to resolve disputes over the classification of satellites. Attachment II, Section III. 1. states as follows;

- 1.1. The Government of Japan will publish annually in the Kanpo the Space Development Program (hereinafter referred to as "Program") which includes the development program for R&D satellites. If the Government of Japan, before the publication of the subsequent Program, decides to develop a satellite as an R&D satellite or an R&D payloads on a non-R&D satellite which was not included in the previously published Program, or decides to modify a satellite included in the previously published Program, it will publish that decision in the Kanpo in sufficient detail to enable the proper classification to be ascertained. The information that will be published will include a summary description of all relevant aspects of the satellites.
- 1.2. Where the Government of Japan has classified a planned satellite as an R&D satellite or an R&D payload on a non-R&D satellite, and a potential supplier or the Government of the U.S. believes that such classification is not consistent with the Arrangement, that supplier may request the Government of the U.S., or the U.S. Government may itself, initiate consultations with the Government of Japan with respect to the classifications of the satellite. The U.S. Government will make such a request promptly following the publication of the

information pursuant to Paragraph 1.1 above.

1.3. Upon such a U.S. Government request, the two Governments will engage in consultations in an expeditious manner.

These provisions on the consultative mechanisms, however, are not intended to restrict the scope of judgment by the Procurement Review Board.⁷ Rather, any complaint over the classification of the satellite will also be subject to review by the board.

3. IMPACT ON SATELLITES R&D/PROCUREMENT BY JAPAN

(1) RECORD OF AWARDING JAPANESE R&D SATELLITE PROCUREMENT CONTRACTS⁸

(a) COMMUNICATION SATELLITES

The communications satellite (CS) series, composed of CS, CS-2a and CS-2b, and CS-3a and CS-3b, have been developed and operated to meet increasing and diversifying communications demands and to develop advanced satellite communications technologies. This CS series was developed by NASDA in cooperation with the Ministry of Posts and Telecommunications and NTT, for both public use and R&D purposes.

These satellites are spin stabilized geostationary satellites and were developed based on technology transfer from the U.S. in accordance with the 1969 Japan-U.S. agreement.⁹ In this series, Japan took initiative in developing and utilizing the Ka band (30/20 GHz) with its own technologies around the world.

The "phantom" CS-4 project which should have succeeded the CS-3, was cancelled due to the result of the Japan-U.S.

1989-1990 discussions, and, since then, development of all communications satellites, including those for the purpose of public use by the Japanese Government has not been pursued. As a result, in order to continue to make progress in communications services using CS-3, NTT launched "N-STARa" and "N-STARb" by Ariane IV in August 1995 and February 1996, respectively. These satellites were manufactured by the Space/Systems Loral who was awarded the contract through transparent, open and non-discriminatory competitive procedures, in accordance with the 1990 Satellite Procurement Procedures.

(b) BROADCASTING SATELLITES

The broadcasting satellite (BS) series, composed of BS, BS-2a and BS-2b, and BS-3a and BS-3b, have been developed and operated for satellite broadcasting systems, to acquire operation technology and to solve problems with transmission in areas with poor reception, given increasing and diversifying communications demands. These satellites have conducted broadcasting services using the BS-2, and high-definition television test using BS-3. This BS series was developed by NASDA in cooperation with the Ministry of Posts and Telecommunications and NHK. The purpose of this series was both for operational public use and R&D.

These satellites are three-axes attitude controlled geostationary satellites and were developed based on technology transfer from the U.S. in accordance with the 1969 Japan-U.S. agreement.

Because the purpose of this BS series was not only R&D but also operational, the Japanese Government could not continue this series due to the result of the Japan-U.S. discussions, and, since then, development of all the broadcasting satellites has not been pursued. As a result, in order to continue to

progress in broadcasting services using BS-3, NHK and its related company, Japan Satellite Broadcasting Inc. (JSB), jointly conducted an open bid for procuring BS-3N under the transparent, open and non-discriminatory competitive procedures provided in the 1990 Satellite Procurement Procedures, and GE Astrospace Co., now Lockheed Martin Co., won the contract. This BS-3N was launched by Ariane IV in July 1994. Similarly, they conducted an open bid for procuring BSAT-1 and Hughes Co. won this contract. This satellite was launched by Ariane IV in April 1997.

(c) METEOROLOGICAL SATELLITES

The geostationary meteorological satellite (GMS) series, composed of GMS, GMS-2, GMS-3, GMS-4 and GMS-5, have been developed to contribute to meteorological services improvement and to develop meteorological satellite technology. This satellite plays an integral part in the World Weather Watch Program of the World Meteorological Organization (WMO) as one of the five geostationary satellites implementing a meteorological satellite network for global observation. This GMS series was developed by NASDA in cooperation with the Japan Meteorological Agency (JMA) which was mainly in charge of the ground facilities needed for operational use of these satellites. The purpose of this series was both for operational public use and R&D.

These satellites provided their own spin motion at a rate of 100 rpm to stabilize gyroscopic attitude. They boarded the Visible and Infrared Spin Scan Radiometer (VISSR) to obtain Earth data through 2,500 scans at 30 minute intervals. The major parts of these satellites were also developed based on technology transfer from the U.S. in accordance with the 1969 Japan-U.S. agreement.

Because the purpose of this GMS series was not only R&D but also operational, these satellites could not be classified as R&D satellites per the 1990 Japan-U.S. satellite procurement discussions. At that moment, this GMS series was terminated. Consequently, MTSAT, Multi-purposes Transportation Satellite, as a successor to GMS-5, was procured by the Ministry of Transportation and JMA by conducting an open bid based on the 1990 Satellite Procurement Procedures. As with the successors to the CS series and BS series, an American company, the Space Systems/Loral Co., won this contract. It is now being prepared for launching by NASDA using a Japanese H-II launch vehicle.

(d) U.S. EVALUATION OF SATELLITE PROCUREMENT BY THE JAPANESE GOVERNMENT

Contrary to the Japanese perspective, the U.S. Government views the results of the 1990 Japan-U.S. discussions as very successful. In a report entitled "Foreign Trade Barriers" issued in April 1999 by the USTR¹⁰, the evaluation of satellite procurement by the Japanese Government is as follows:

Under the 1990 US-Japan Satellite Procurement Agreement, the Japanese Government committed to open non-R&D satellite procurement to foreign satellite makers. Coverage includes procurement for broadcast satellites by NTT and NHK, the government owned television-radio service.

To date, the agreement has been successful in opening the Japanese Government procurement market to foreign competition. From 1990 to 1997, U.S. satellite makers, who are the world leaders in this field, won all five contracts with a combined value exceeding 1 billion openly bid under the competitive procedures outlined in the agreement. Given U.S. strength in this area,

the U.S. Government expects that the success will continue.

(2) DEVELOPMENT OF R&D SATELLITES BY NASDA

Until the 1990 Japan-U.S. discussions, NASDA, as the core agency responsible for Japanese space development, got started on the development of CS, BS and GMS based on satellite technology transferred by the U.S. under the U.S.-Japan Space Agreement concluded on July 31, 1969 and its subsequent amendments. This agreement permitted U.S. industry to provide the Japanese Government and/or Japanese industry with unclassified technology and equipment for the development of Japanese communications satellites and other satellites as well as a launch vehicle for non-military use. Since then, NASDA continued to develop these series of satellites in order to increase the portion of domestic technology in each series of satellite. As the first satellite of each series, CS, BS and GMS, and GMS-2, were not intended for operational use but for R&D only, NASDA developed these 4 satellites with its own budget. Conversely, as the other satellites of these series were for the dual purpose of technology R&D and operational public use, NASDA and the agencies in charge of satellite operations, JMA and the Telecommunication Advancement Organization of Japan (TAO), which represents user agencies such as NTT and NHK, shared the development costs including launch and TT&C in early orbit phase. NASDA developed them, and the costs were allocated based on the relative importance of the respective technology R&D and operational uses.

Following the 1990 Japan-U.S. discussions, any satellite of these series was not regarded as an R&D satellite, and thus the successors of CS-3, BS-3 and GMS-5 were supposed to be removed from the national space development program of

Japan and subsequently subject to open and non-discriminatory bid by NTT, NHK/JSB and MOT/JMA.

NASDA was forced to change its policy from one of steady ongoing development of satellites in each series, to novel development of satellites without sufficient accumulated technology. Due to such change, NASDA and its contractors faced considerable difficulties in developing satellite technology.

(3) CURRENT STATUS JAPANESE INDUSTRY'S ACCESS TO THE MARKET

Before the 1990 Japan-U.S. discussions, Japanese industry aimed to become internationally competitive in the satellite market, as NASDA's contractors for the CS, BS and GMS series accumulated and enhanced domestic satellite technologies. Such strategy, however, collapsed due to U.S. pressure to open the Japanese Government's satellite procurement before Japanese industry could catch up the U.S. and European industries.

The U.S. Government, since its commencement of space development, has invested a substantial portion of its national civil and military budgets into space development, as well as intelligence, while promoting the commercialization and competitiveness of the U.S. satellite industry. Under such circumstances, the U.S. has become the world's leader in the satellite industry based on experience and internationally competitive satellite technologies accumulated over about 40 years. Europe has also been conducting space development under similar policies, which promote the commercialization of space utilization and European competitiveness. On the contrary, Japan has been conducting space development aimed at catching up to the U.S. and Europe, with a relatively small budget only for strictly civil purposes and

without a particular strategy for commercialization and enhancing international competitiveness. During the latter half of the 1980's and early 1990's, the U.S. asserted that Japan was unfair in its satellite procurement procedures while drawing attention to the then current satellite development projects in Japan which had dual R&D and operational purposes, and ignored the overwhelming U.S. advantage and the above-mentioned handicap of Japan in this field.

As a result, the Japanese satellite industry, thus far, has not won any contract as prime contractor, public or commercial, either abroad or domestically, and has been given opportunities as subcontractors for components and parts of the U.S. of European satellites makers who are now overwhelmingly dominating the world satellite market.

4. ISSUES ARISING FROM THE RESULT OF THE 1990 JAPAN-US DISCUSSIONS

(1) POSSIBILITY OF UNFAIRNESS

The discussions on satellite procurement/R&D between Japan and the U.S. during 1989-1990 were unilateral. The outcome forced Japan to rescind its space development policy for developing satellites for both satellite technology R&D and operational public use. Thus, Japan lost the opportunity to acquire satellite technology necessary for catching up to the U.S. and Europe. As stated in detail above, "the Measures Relating to Procedures for the Procurement of non-R&D Satellites" adopted by the Japanese Government to ensure openness, transparency and non-discrimination in procuring non-R&D satellites, following the Japan-U.S. discussions, in fact, precludes for the Japanese satellite industry from entering the

international satellite market or the Japanese satellite market, and virtually grants the U.S. industry all the contracts for Japanese Government, public entity and private sector satellite procurement.

Basically, the result of these trade discussions should have been bilateral with both parties on an equal footing; the result in this case, however, is suspicious. The USTR Carla Hills confirmed, in her letter on June 15, 1990 to the Japanese Ambassador Murata, that the U.S. Government would continue to take measures generally consistent with the policies and procedures set forth in the Attachments to Ambassador Murata's letter. Our point is that such consistency is actually ensured by the U.S. procurement system described below.

(a) BUY AMERICAN ACT AND GOVERNMENT PROCUREMENT AGREEMENT

The *Buy American Act* of 1933 and its subsequent legislation encourage the purchase of U.S. products prior to those of foreign origin. The relevant provisions, codified as 41 U.S.C. Sec. 10a, 10b, 10c and 10d, provide that when the federal government acquires products for public use, constructs a public building, repairs or alters such public building, or performs any public work projects, the government is obligated to acquire products produced or manufactured in the U.S.A., unless the head of the department finds that such obligation will contravene the public interest, in that U.S. supply cannot meet the demanded quantity and/or quality, that the price of U.S. products is unreasonably high or that the products will be acquired for use outside of the U.S.A.

According to Executive Order No. 10582 (1954), which was introduced to enforce the *Buy American Act* as stated above,

(i) Materials shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes 50% or more of the costs incurred after arrival in the U.S.A.

(ii) Even though the price of U.S. materials is higher than that of foreign materials, if the rate of such excess price is 6% or less (12% for domestic offers from small business concern), U.S. materials will not be considered "unreasonably expensive."

On the other hand, title III of the 1979 Act, codified as 19 U.S.C. Sec. 2511 through 2518, provides the President with authority to waive the *Buy American Act* with respect to products of certain foreign countries, and to bar procurement altogether from other countries. When the 1979 Act was adopted, the favored countries were those that were parties to the Agreement on Government Procurement approved by the 1979 Act; however, the *Uruguay Round of Agreements Act* amended the definition so that it now refers to the *Agreement on Government Procurement* from the Uruguay Round. An argument can be made that Title III of the 1979 Act changed the purpose of the *Buy American Act*, from protecting U.S. suppliers to encouraging other countries to open procurement to foreign (especially, of course, U.S.) sources. Title III of the 1979 Act is implemented by Executive Order 12260 (1980) and regulations at 48 C.F.R. 25.400 through 25.408. 41 C.F.R. 25.401 includes a list of 60 countries for which the *Buy American Act* has been waived, including Japan. The current *Agreement on Government Procurement*, one of the multilateral trade agreements which compose the *Marakesh Agreement Establishing WTO* effective from January 1995 as the Annex 4, is ratified by the member countries of the WTO independent from the *Marakesh Agreement*. As of May 1, 1997, 23 countries, including the EU, ratified this agreement. The U.S. and Japan also ratified this agreement. In the Annex to the *Agreement on*

Government Procurement, the U.S. notes that "for goods and services (including construction) of Japan and suppliers of such goods and services, this Agreement does not apply to procurement by the National Aeronautics and Space Administration (NASA)." By this exclusion the waiver of the *Buy American Act*, authorized by Title III of the 1979 Act, is no longer applicable to Japan to the extent related to non-R&D satellite procurement by NASA and thus, in practice, Japanese industry will be discriminated against in that market.

The exclusion from NASA's procurement mentioned above, was reportedly a measure of U.S. Government retaliation against Japan for not applying the *Agreement on Government Procurement* to NASDA. Conversely, although NASDA is not agency to which the *Agreement on Government Procurement* applies, NASDA, like the Japanese governmental agencies, NTT, NHK and so forth, is obliged to abide by the 1990 satellite procurement procedures which is consistent with the Agreement on Government Procurement and to conduct open and non-discriminatory bids for procuring non-R&D satellites. In short, with regard to the procurement of non-R&D satellites, NASA is allowed to discriminate against Japan's satellite industry, but Japanese government related agencies are obliged to conduct internationally open bidding. Thus, a significant inequality exists in the 1990 Japan-U.S. discussion results. We should continue to carefully monitor the U.S. attitude in this regard to promote equality.

(b) COMPLAINT PROCEDURES FOR THE CLASSIFICATION OF A SATELLITE

In the "Procedures for the Procurement of Non-R&D satellites" of 1990, the Government of Japan is obliged to publish annually in the Kanpo, an official daily gazette of Japanese Government, the Space

Development Program which includes the development program for R&D satellites. Otherwise, a potential supplier or the Government of the U.S. may believe that classification as an R&D satellite by the Government of Japan is not consistent with the definition described in the "Policies and Procedures Regarding Satellite R&D/Procurement" of 1990, and it may request consultations with the Government of Japan with respect to the classification of the satellite. In fact, the U.S. Government has self-initiated consultations with the Government of Japan with respect to the classification of the DRTS (Data Relay Test Satellites) program of NASDA and the two Governments conducted consultations in September 1996. At that time, the Government of Japan responded to U.S. questions and elaborated on why the DRTS is an R&D satellite consistent with the definition confirmed by both Governments in 1990 mainly from the technical point of view.

On the contrary, there is not any provision on procedures by which the U.S. Government publishes annually the development program for R&D satellites or on the mechanisms by which the Government of Japan may consult with the U.S. Government on the classification of the R&D satellites. In addition, the Government of Japan organized and operated the Procurement Review Board independent from the Government in order to review complaints from potential providers around the world, but it is not evident that the U.S. has any mechanism corresponding to the Japanese one. This represents an additional inequality between the two Governments.

(2) ELIMINATION OF NEED FOR SECTION 301 UNDER NEW WTO DISPUTE RESOLUTION PROCEDURES¹¹

The WTO's *Dispute Settlement Understanding* adopted a new dispute

resolution procedure which covers all WTO agreements, making dispute resolution uniform within the WTO. For example, under this new process, a party has a presumptive right to a panel unless, by consensus, all WTO parties decide against the formation of a panel, and strict timelines are imposed on all panel actions in the prehearing phase. In addition, the WTO presumptively adopts an appellate report unless it decides by consensus to reject such a report. This consensus to overrule procedure, coupled with a cumbersome mechanism that constrains the ability to override an appellate ruling, will give final judicial decisions lasting force.

As such, the WTO dispute resolution process holds much promise, for it permits the entry of any claim into the system, processes the claim in a timely manner, grants an ambiguous right of appeal, virtually ensures the adoption of the final judicial result, and pressures the losing party to adjust its practices. Remarkably, the WTO judicial body has "jurisdiction to rule that governments must amend or repeal domestic laws that are inconsistent with world trade norms or risk imposition of trade sanctions. The international trading community has created a broad-based dispute resolution mechanism in the WTO, thus tilting the balance away from unilateralism toward multilateralism.

(a) WTO DISPUTE RESOLUTION PROCEDURES AND SECTION 301

Article 23(1) of the Understanding, entitled Strengthening of the Multilateral System, states, "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of

this Understanding.” In other words, if either a violation of a WTO obligation, nullification or impairment of a WTO benefit, or an impediment to a WTO objective occurs, then a WTO claim results and a signatory must channel its complaint through the WTO. In these three situations, the signatory nation may not employ unilateral sanctions like Section 301 at the outset to remedy an alleged WTO violation. The scope of Article 23 is quite broad given the numerous ways in which a WTO signatory could violate an obligation, nullify or impair a benefit, or impede a WTO objective. In essence, Article 23 dictates that the WTO is to have the first attempt at dispute resolution. It means the U.S. Government can no longer use the bilateral approach based on Section 301 or Super 301 provision.

In addition to requiring the WTO to be the forum of “first resort,” the Understanding limits unilateral action in at least three other ways. First, the WTO signatory “shall not make a determination” that a violation, impairment, or impediment has occurred, except through recourse to the WTO dispute resolution procedure. In effect, this mandate delays any domestic action on the trade dispute until the WTO dispute resolution process runs its course. Second, if the complaining signatory receives a favorable WTO ruling on an issue, the nation cannot act immediately, but instead must wait for a “reasonable period of time for the Member concerned to implement the recommendations and rulings” of the WTO. Finally, even if a complaining signatory addresses the WTO before taking any action, waits for a WTO ruling, and then allows a reasonable amount of time for compliance, it cannot unilaterally sanction a defending signatory as it sees fit. The complaining signatory must adhere to the procedures of the Understanding to determine the extent of permissible retaliation. Thus, in order to give unilateral sanctions in accordance with Section 301, the U.S. Government must

adhere to the procedures of the Understanding.

(b) THE REDUNDANCY OF SECTION 301 UNDER THE WTO REGIME

The conditions which gave rise to the present-day Section 301 were the GATT’s painfully slow, ineffective dispute resolution process and its concomitant inability to combat “the dilatory strategy.” These shortcomings in the GATT dispute resolution process motivated Congress to create and subsequently strengthen Section 301. In contrast, the WTO dispute resolution process will alleviate precisely Congress’s concerns that initially prompted the creation and bolstering of Section 301. The Understanding guarantees a party the right to a panel, permits a timely appeal to the Appellate Body, assures the adoption of a final ruling, imposes a rigid timeline for each phase of the dispute process, carefully monitors compliance with decisions, authorizes retaliation for noncompliance, and provides for binding arbitration should monitoring and sanctions fail. With the implementation of the WTO’s formal dispute resolution mechanism, the U.S. will be able to obtain redress without the need for Section 301. Thus, the establishment of the WTO’s dispute resolution process eliminates the need for Section 301 and Super 301.

5. CONCLUSION

In this decade, the result of Japan-U.S. discussions on procurement/R&D of satellites made under the unilateral strategies of the U.S. employing the Super 301 provision and its essential Section 301, has resulted in the U.S. satellite industry being awarded all satellite procurement contracts by the Japanese Government and its related entities. The Japanese industry not only lost

in such open bids but also lost their chance to acquire satellite technologies and become internationally competitive. The Japanese Government is also forced to suppress its strategy to get autonomous satellite technologies due to domineering and unilateral U.S. strategies. In short, such strategies have worked very well just as the U.S. expected.

Since January 1995 when the WTO was established, although the U.S. brought more than 40 cases for WTO dispute resolution, the U.S. Government continues to use bilateral negotiations and reinstated the Super 301 provision this year. As mentioned above, under the new WTO dispute resolution procedures, the need for such unilateral action has been eliminated. If the U.S. employs such unilateral threats in satellite procurement/R&D issues, accused countries should not engage in any bilateral negotiation and should bring the case to multilateral forum such as the WTO. Additionally, if technical issues arise such as the definition of R&D, countries concerned should seek to discuss such issues in the WTO or OECD. In the case of Japan, it is of vital importance to bring the 1990 Japan-U.S. discussions outcome to the WTO and to have the WTO review whether the outcome preserves equality between the two nations and is consistent with principles of justice.

⁰ For details on this section, see A. Lynne Puckett and William L. Reynolds, "Current Development: Rules, Sanctions and Enforcement Under Section 301: At Odds with the WTO?", The American Journal of Law (October 1996), at 82-93, and Jared R. Silverman, "Multilateral Resolution over Unilateral Retaliation: Adjudication the Use of Section 301 before the WTO", University of Pennsylvania Journal of International Economics Law (Spring 1996), at 2-5.

¹ Office of the United States Trade

Representative, Section 301 Table of Cases (July 1995)

² Office of the United States Trade Representative, "USTR Barshefsky Announces Super 301 and Title VII Executive Order" (January 6, 1999)

³ See Masahiro Mori, "Personal Idea on Space Development Strategy", Journal of the Institute for Advanced Space Activities (November 1986 and July 1989).

⁴ See Noboru Hatakeyama, "Trade Negotiations: Drama Surrounding National Interest", Nihon Keizai Shinbun (January 1996), at p29-33.

⁵ See Councillors' Office on External Affairs of Prime Minister's Office, "Japan's Government Procurement: Policy and Achievements Annual Report (FY1998) - Toward Government Procurement Open to the World" (March 1999), at p829.

⁶ For details on the outcome of discussions, see Annual Report, *supra* note 6, at p1036-1071.

⁷ Any potential supplier may file a complaint with the Government Procurement Review Board when it believes the procurement has been carried out in a manner inconsistent with the intent of the procedure or any provision of the procedures laid out in Attachment II.

⁸ See "Data-book on Space Development '97" edited by NASDA, Japan Space Forum (January 1998), at p6-10.

⁹ For details of the 1969 *Japan-U.S. technology Transfer Agreement*, see Masafumi Miyazawa and Masahiko Sato, "Historical Review of Space Technology Transfer from the United States to Japan in the Space Applications Area"(IAA-96-IAA.3.2.07)

¹⁰ See Office of the United States Trade Representative, "Foreign Trade Barriers" (April 1999), Japan's section, at p30-31.

¹¹ For details, see Silverman, *supra* note 1, at p5-17.