SOFTBANK BB

December 17, 2004

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee
ATTN: Section 1377 Comments
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: <u>Japan:</u> WTO General Agreement on Trade in Services
WTO Reference Paper

Dear Ms. Blue:

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 3106, the Office of the United States Trade Representative ("USTR") has invited comments regarding compliance with certain telecommunications trade agreements. Softbank BB Corp. ("Softbank BB") respectfully responds to this request based on its experience with Japanese telecommunications markets and regulatory processes, offering its first-hand perspective to help the USTR formulate its report on competition in Japanese telecommunications markets.[1]

Softbank BB seeks, and urges the USTR to seek; Japanese telecommunications markets that are open to competition based on efficiency and are subject to independent, fair, and transparent regulation. In particular, Softbank BB urges the USTR to (1) press the Japanese Government to open its mobile market by granting

[1] The stated purpose of the USTR's review is to "determine whether any act, policy, or practice of a country that has entered into a telecommunications trade agreement with the United States is inconsistent with the terms of such agreement." With regard to the WTO Basic Telecoms Agreement, you seek comments on whether any WTO member is acting in a manner that is inconsistent with its commitments, including the Reference Paper, or with other obligations, including the Annex on Telecommunications. Request for Comments Concerning Compliance with Telecommunications Trade Agreements, 69 Fed. Reg. 68,439 (Nov. 24, 2004).

spectrum to qualified new entrants,[2] and (2) drive the Japanese Government to resist NTT's efforts to backtrack on its obligations to unbundled network fiber on reasonable terms. Our position is entirely consistent with the many statements of the USTR in its Annual Reform Recommendations to Japan.

It should be noted that Softbank BB's interest in the USTR review is somewhat different from that of most parties submitting comments pursuant to Section 1377. As a Japanese company, it is not asserting rights to non-discrimination under bilateral or multilateral agreements involving Japan and the United States. But, like any actual or potential competitor from outside Japan, Softbank BB is keenly interested in a level playing field—a field in which Japanese consumers enjoy the benefits of effective competition and potential entrants are given a fair and equal opportunity to compete. To the extent that the USTR, the European Commission, or other government agencies are able to persuade or oblige the Government of Japan to institute fair administrative processes and pro-competitive policies in telecommunications, Softbank BB, as well as consumers in Japan and the U.S., will benefit from increased competition.

Softbank BB is the wholly-owned subsidiary of Softbank Corp., a publicly-traded Japanese company, based in Tokyo. Softbank BB was formed in 2000 to provide broadband access and other competitive telecommunications services in Japan. It offers services in voice-over internet protocol, fixed wireless roaming, and IPTV in addition to DSL, and it is seeking to enter the mobile telecommunications market in Japan. These services, which Softbank BB is offering and is seeking to offer, affect U.S.-Japan communications, because they transmit, originate and/or terminate communications to or from the United States.

The Government of Japan, and more specifically the Ministry of Internal Affairs and Communications ("MIC"), has been frequently reluctant to open telecommunications markets to new competition or to institute a system of independent, fair, and transparent regulation. This regulatory deficiency has been especially clear in the processes that MIC uses to award radio spectrum licenses, which favor dominant incumbents over qualified potential entrants. As a future competitor in the fast-growing mobile telecommunications industry in Japan, Softbank BB is being injured by the clear deficiencies in the processes employed by MIC in awarding mobile licenses.

Softbank BB contends that, in order to have an effectively competitive telecommunications market, the Government of Japan must place the interest of the

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[2] Softbank BB believes that it is especially well qualified as a potential entrant based on its track record in providing broadband access in Japan. Since its entry, Softbank BB has led the market to much higher speeds and lower prices than were available before – or are available now in other parts of the world (including the U.S.).

consumer above private entities' interests, and promote (i) reasonable interconnection rates, (ii) sufficient competition to assure reasonable mobile termination fees and (iii) a fair and open spectrum allocation process. By doing so, the Government of Japan would provide the benefits of competition for consumers in the U.S. and Japan, as well as permitting entry by qualified providers such as Softbank BB.

Effective Interconnection at Fair Rates

In 2000, then-U.S. Trade Representative Barschefsky negotiated an agreement on interconnection with Japan, based on Japan's obligations under the GATS and the Reference Paper.[3] In one of the most relevant sections of the 2000 agreement, Japan pledged to open new points of access ("unbundling") to NTT's network and to enact rules to ensure fair usage rates and connections, with the understanding that interconnection issues are key to enhancing competition.[4] Also, interconnection has been a concern of the USTR in almost all of its Annual Regulatory Reform Recommendations to Japan.[5] Since 2001, USTR has urged Japan to broaden access to NTT network elements for competitors. More recently, in 2003, the USTR urged Japan to "address structural flaws in the 2003-2004 interconnection rate methodology" in order to "[encourage] cost-oriented and reasonable interconnection rates that promote efficient competition."

Softbank BB strongly believes that effective interconnection and unbundling are very important issues; and therefore it urges USTR to keep up its efforts in this area. In Japan, where NTT controls the entire facilities infrastructure, these policies are especially important. Softbank BB's success in creating a broadband telecommunications system, with higher speeds and lower consumer charges than available in the U.S. and the EU,[6] was built upon Softbank BB's ability to obtain

[3] Importantly, Section 2 of the Reference Paper states that interconnection must be supplied by the incumbent "under non-discriminatory terms, conditions…and rates and of a quality no less favorable than that provided for its own like service."

[4] USTR Press Release on Japan Interconnection Rates, dated July 19, 2000.

[5] It is interesting to note that this issue was recently discussed by the European Commission in its Priority Proposals for Regulatory Reform in Japan (published October 28, 2004) ("EC Proposals"). The EC Proposals noted that "interconnection charges in Japan are still significantly above international benchmarks."

[6] For example, Softbank BB charges approximately ¥59 per 1Mbps (Megabits per second) per month, while NTT charges consumers ¥2,127 per month for the same connection speed. The differences in various U.S. and EU areas are staggering for the 1Mbps service: ¥4,432/month (New York); ¥6,474/month (London); and ¥5,850/month (Paris). See Attachment 1.

effective access to NTT's analog and fiber facilities at reasonable rates. Lately, however, NTT has been seeking the elimination of its unbundling and line sharing obligations and has pointed to the recent policies of the FCC to support this position. Thus, it is important for the USTR to make clear that the FCC's policies are based on the very different competitive situation that prevails in the U.S.—including very high cable television penetration that provides an alternative (and competitive) facilities path to over 90% of American homes.[7]

Reasonable Termination Fees on Calls to Mobile Phones

The performance of Japan's mobile telephone market is monopolistic—with consumers being charged drastically high prices for basic mobile phone services and imposing high termination fees upon foreign callers, while Softbank BB and other potential competitors are kept out of the market. For basic services, a standard comparison of overseas and Japanese fees shows the excessive (in some cases almost double) monthly service rates borne by Japanese mobile phone consumers. For example, if Japanese mobile users pay an average of $100 for basic fee plus 150 minutes for 1 month; then U.S. mobile users would only pay an average of $63, while U.K. users would only pay an average of $64, and users in France would only pay an average of $65. See Attachment 2.

In general, Japan has failed to establish an effective competitive environment that would generate reasonable mobile termination fees for calls originating outside of Japan. For example, U.S. callers are hostage to supracompetitive termination fees, which are paid almost exclusively by the U.S. caller on calls originating in the United States. This sentiment was clearly highlighted by the USTR in its 2003 Annual Reform and Recommendations which urged Japan to "investigate if rates for termination to the NTT DoCoMo network are set at reasonable, competitive levels" and cited "serious erosion in new entrants' ability to compete against NTT companies."

When mobile termination rates in Japan are compared with rates elsewhere (or even if they are compared to Japanese fixed-line termination rates on international calls to Japan), foreign callers are grossly over-paying. For example, mobile termination charges in Japan are more than six times those for international incoming calls on fixed lines: Incoming calls from the U.S. to a Japanese fixed line consumer are $0.02-0.03/min., while incoming calls from the U.S. to a Japanese mobile phone customer are

[7] Japan's access case is just factually very different from the U.S., where U.S. telecommunications service providers have multiple routes into households – e.g., cable, telephone wire, and even satellite services. Moreover, non-state owned providers exist for that access, especially in urban areas (e.g., competitive local exchange carriers). Thus, access in the U.S. has built-in alternatives for non-incumbent providers, while providers in Japan are completely reliant on NTT permission for access.

approximately $0.13/min. Meanwhile, termination fees on calls from Japan to the U.S. are $0.02/min., regardless of whether they are to a fixed line or mobile phone. See Attachment 3. Thus, Japanese regulators have failed to curb the abuses of the dominant wireless carriers in Japan (NTT DoCoMo and KDDI), or authorize new entry to inject new competition that would curb these abuses.

If Softbank BB is permitted to enter the mobile market, it is committed to reducing the termination charges on domestic and international calls to Japan. As with broadband services, new competition from Softbank BB should be sufficient to end the situation where Japan has some of the highest termination charges among the G-8 countries.

A Fair and Open Spectrum Allocation Process

The process by which MIC allocates spectrum in Japan is a matter of urgent concern to Softbank BB, and we urge that the USTR give the subject a high priority in its Section 1377 report and discussions with the Japanese government. In the frequency bands allocated for mobile communications, the MIC policy seems designed to entrench further two competitors that are charging some of the highest cellular phone rates to consumers anywhere in the world.

Accordingly, MIC's procedures and policies on spectrum allocation are plainly deficient with respect to creating a competitive process in two areas: first, there is a lack of transparency in spectrum procedures and decisions; and second, there is a lack of neutrality and independence among telecommunication services regulators.

The USTR has regularly supported the position that potential entrants and international callers would benefit from a much needed improvement in transparency and predictability of the rules and procedures used to allocate spectrum and potentially open the market to competition.[8] For example, the most recent USTR Annual Regulatory Reform Recommendations (published on October 14, 2004) urges Japan to "take steps to transfer regulatory functions to an independent agency not under ministerial authority, *and end MIC's control over NTT's business decisions*."[9] (Emphasis added.)

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[8] The USTR's position has been echoed by other governments. The EC Proposals also described Japan's proposed system for allocation as "outdated and counterproductive" and stated that "frequency allocation should be made on a competitively neutral basis instead of automatically re-allocating the 800MHz spectrum to DoCoMo and KDDI. Against this background, [Japan's current] allocation would distort competition and discriminate unfairly against other providers."

[9] Likewise, the EC Proposals suggest that there exists in Japan "an inappropriate mixing of industry promotion and regulatory oversight."

Unfortunately, U.S. and European concerns over spectrum allocation and biased oversight have been underscored during Softbank BB's attempt to enter the mobile telecommunications market in 2003-2004 by obtaining spectrum, for a planned market entry in 2006-2007. In October 2003, Softbank BB submitted a demand paper to MIC for slivers of the 2GHz band that were going unused by the incumbents (DoCoMo, KDDI and Vodaphone). MIC responded by stating that the remaining bands were to be reserved for the benefit of the incumbents, and rejected Softbank BB's request. Shortly thereafter, MIC quietly awarded the bands to the incumbents.[10] In contrast to the important revisions of Telecommunication Business Law, there were very few significant revisions to the Radio Law. This lack of legislative focus in favor of competition has fostered an environment where it appears there has been some agreement between MIC and the incumbents concerning spectrum allocation and delay in implementation of fair and transparent telecommunications regulation in Japan.

Then, Softbank BB decided to focus on obtaining 800MHz spectrum. It formed this plan in August 2004, after the MIC announced that it planned to reallocate the 800MHz spectrum in ways that would make additional spectrum available, a step that Softbank BB took, because 800MHz spectrum is more efficient and hence a system can be built out with fewer base stations. MIC, however, awarded this spectrum in a manner that would entrench the dominance of NTT DoCoMo and KDDI. MIC labeled these two already dominant wireless carriers as the only two "qualified providers," thereby excluding Softbank BB and all other potential competitors from any 800MHz spectrum. As the same time MIC pronounced its allocation to the incumbents, it started the public comment period running, thus preventing other providers from being capable of applying for spectrum and severely limiting the public input on and review of MIC's allocation processes. Thus, Softbank BB's plans to obtain 800MHz spectrum were moot from the first opportunity to apply because MIC's process refused to consider Softbank BB as a potential licensee.

Unable to qualify under the incumbent-favoring policies of MIC, Softbank BB has since sought judicial relief in the Tokyo District Court. Its pleadings first requested (1) a suspension in the execution of the spectrum allocation plan for 800MHz, and (2) the formulation of a new allocation plan and acceptance of new license applications. In addition, Softbank BB petitioned for a preliminary injunction against the Government of

[10] When Softbank BB objected, MIC defended itself by stating that incumbent providers needed those bands for potential "overflow" of customer use. MIC's actions, however, did not comport with market realities – for example, one of the incumbents, KDDI, was publicly known as having substantial unused (or under-utilized) spectrum in the 2GHz range.

Japan and MIC, as well as NTT DoCoMo and KDDI, with respect to prohibition of disposal of records of dealings with NTT and KDDI.

MIC decided to conduct Committee hearings on effective utilization of frequency bands after Softbank BB had indicated that it would seek judicial relief. This hearing process was hardly a "fair and open." MIC selected the Committee members through a secret process. The meeting was conducted on the condition that the number of attendees per company was severely limited. The "minutes" prepared by MIC did not reflect any disputed points, nor did the minutes discuss problems with the allocation process. Importantly, Softbank BB requested the MIC to inform them of the next step in the spectrum allocation process. As of today, MIC has neither informed Softbank BB, nor the public, about MIC's plans for spectrum allocation.

In its response to the Tokyo District Court, MIC explained that (i) Softbank BB could apply for 800MHz spectrum without the announcement of an application period by Minister of MIC based on the Radio Law, since MIC had allocated 800MHz spectrum in the past without such an announcement; but (ii) Softbank BB but had failed to apply. The court then suggested that Softbank BB should apply for the license and Softbank BB has since filed an application for 800MHz spectrum. Overall, it seems MIC's handling of Softbank BB's efforts to enter the mobile telecommunications market dramatically illuminate Japan's lack of transparency in spectrum procedures and lack of neutrality and independence of telecommunication services regulators (and hence its failure to meet its WTO commitments).

Conclusion

For the reasons described above, Softbank BB urges the USTR to (1) ensure fair and non-discriminatory process for allocating mobile service spectrum in accordance with the WTO General Agreement on Trade in Services and the Reference Paper; (2) press the Japanese Government to adopt a pro-competitive policy of favoring qualified new entrants when awarding mobile radio licenses and (3) urge the Japanese Government to resist NTT's efforts to backtrack on its obligations to unbundle network elements and permit line sharing on reasonable terms and (4) urge the Japanese Government to hold NTT, as the entrenched facilities monopolist, to its fair operation of co-location and rights of way and to press NTT to open its customer data on reasonable terms.

Sincerely,

President and CEO
Masayoshi Son

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ADSL – Charge per 1Mbps

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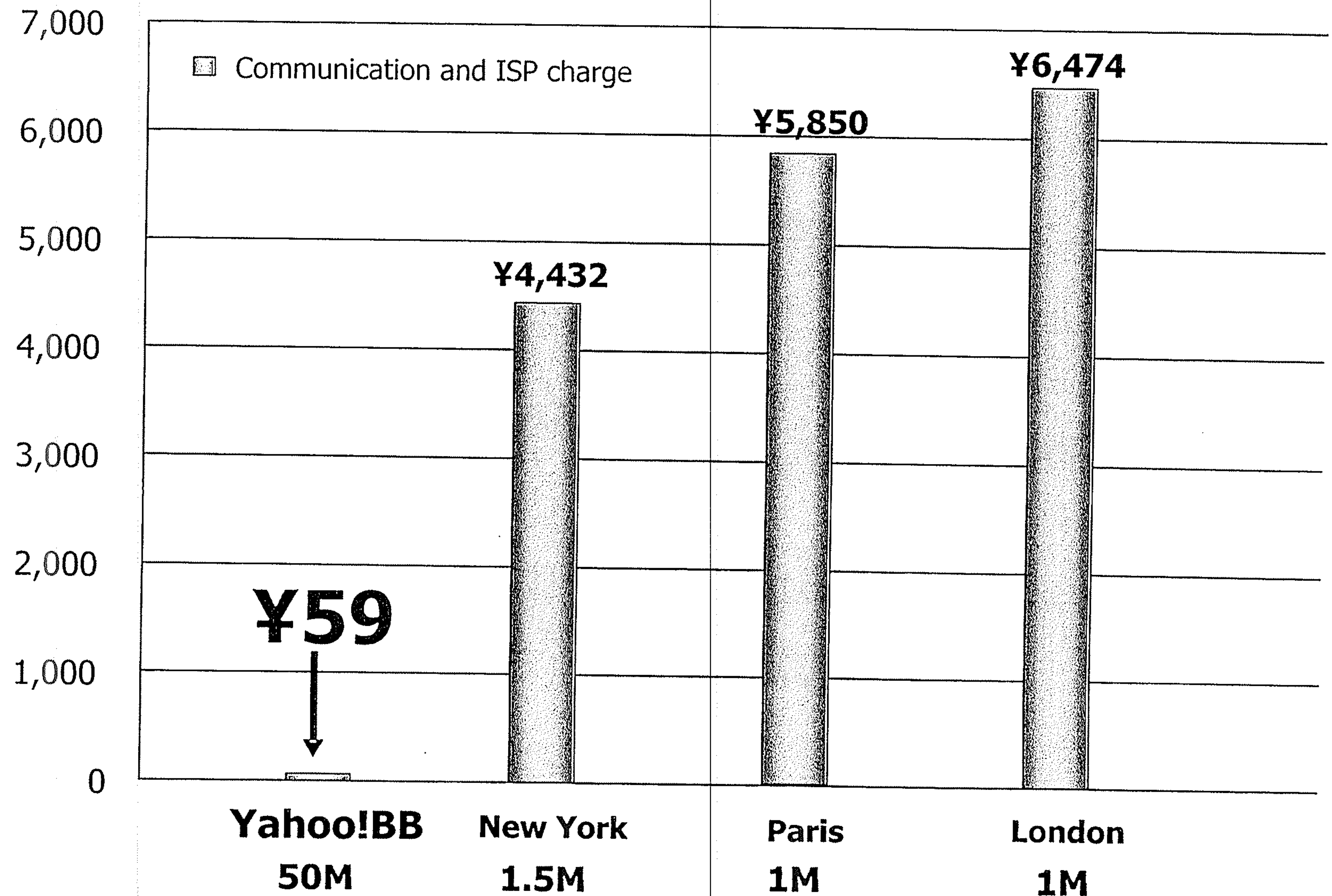

Source: "Survey of difference between telecommunications prices in Japan and overseas,2003," MPHPT

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Comparison of Mobile Telephony Rates - Worldwide

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Mobile phone rates in Japan are much higher than elsewhere.

Standard Rate Comparison of overseas and Japan in %

	Japan	US	UK	France	Germany
Mobile Phone *1 (monthly fee + charge 150 minutes)	100	63	64	65	76
Fixed Line *1 - Long Distance Call (weekdays Daytime 3min. call)	100	48	37	71	68
ADSL *2 (charge per 1Mbps)	100	7512	10973	9915	4934

Source: *1 White Paper on National Life, 2004
*2 "Survey of difference between prices in Japan and overseas for telecommunications,2003,MIC

Termination Charges* in Japan and USA

*Inter-carrier rates

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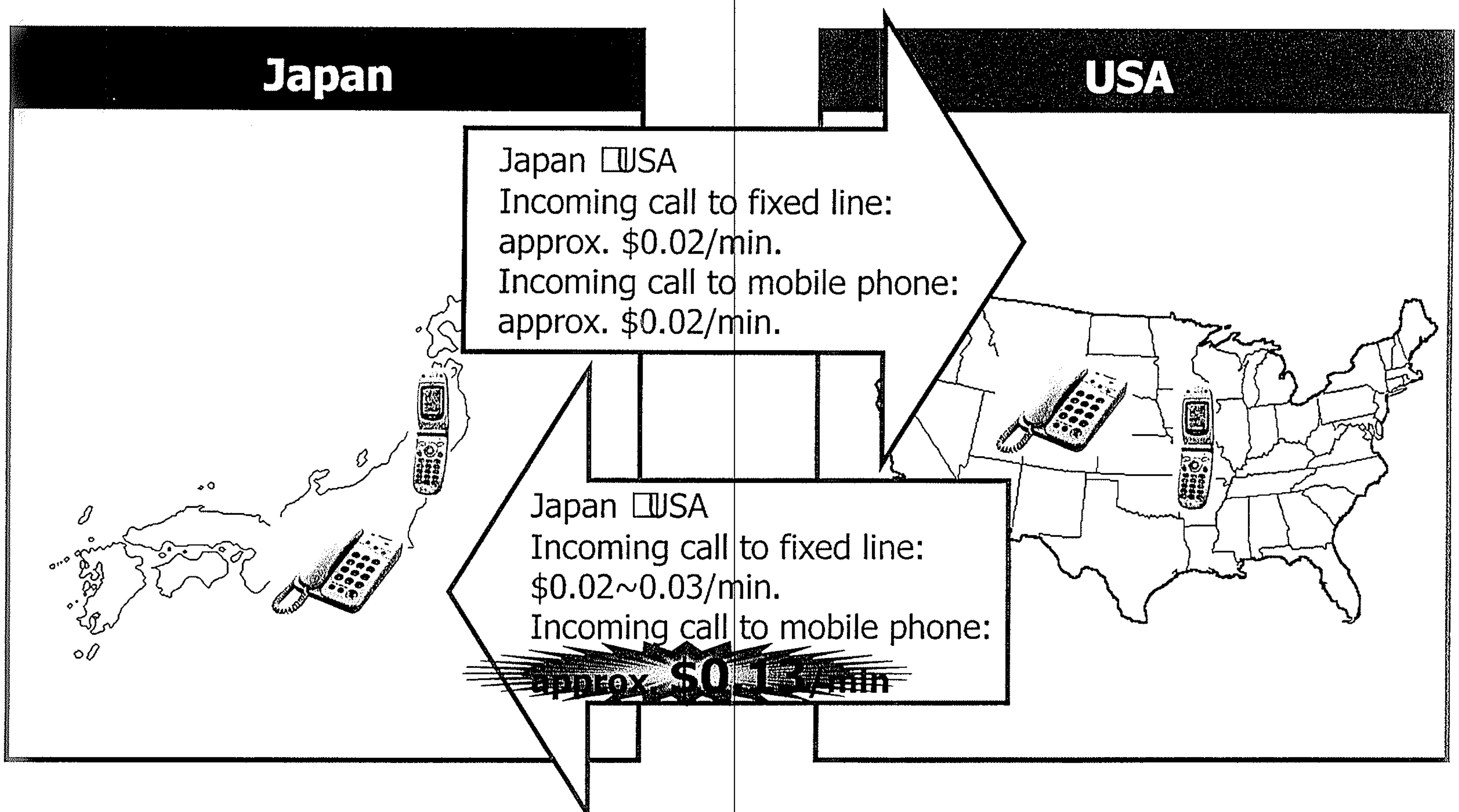
Prices for international incoming calls on mobile phones are **more than 6 times those for international incoming calls on fixed lines** since the Japanese wireless operators set a comparatively high price.



Source: Interview with one Japanese company and two foreign-affiliated companies in Japan