Chapter 9

TRADE-RELATED INVESTMENT MEASURES

1. OVERVIEW OF RULES

1) Background of the Rules

After the late 1980s, a significant increase in foreign direct investment, especially in developing countries, took place throughout the world. Some countries receiving the foreign investment, however, imposed numerous restrictions to protect and foster domestic industries and to prevent the outflow of foreign exchange reserves.

Examples of these restrictions include local content requirements (which require that locally-produced goods be purchased or used), manufacturing requirements (which require that certain components be domestically manufactured), trade balancing requirements, domestic sales requirements, technology transfer requirements, export performance requirements (which require that a specified percentage of production volume be exported), local equity restrictions, foreign exchange restrictions, remittance restrictions, licensing requirements, and employment restrictions. Some of these restrictions distort trade in violation of GATT Articles III and XI, and are therefore prohibited.

Prior to the Uruguay Round negotiations, which resulted in a well-rounded Agreement on Trade-Related Investment Measures ("TRIMs Agreement"), only a few international agreements provided disciplines for measures restricting foreign investment and provided limited guidance in terms of content and country coverage. The OECD Code on Liberalisation of Capital Movements, for example, requires Members to liberalize restrictions on direct investment in a broad range of areas. The OECD Code's efficacy, however, is limited by the numerous reservations made by each of the Members. In addition, there are other international treaties, bilateral and multilateral, under which signatories extend most-favored-nation treatment to direct investment. Only a few such treaties, however, provide national treatment for direct investment. Moreover, although the APEC Investment Principles adopted in November 1994 provide rules for investment as a whole, including non-discrimination and national treatment, they have no binding force.

2) Legal Framework

GATT 1947 prohibited investment measures that violated the principles of national treatment and the general elimination of quantitative restrictions; the extent of the prohibitions, though, was never clear. However, the TRIMs Agreement, which was agreed as part of Annex 1A: Multilateral Agreement on Trade in Goods of the WTO Agreements, specifically prohibits investment measures that are inconsistent with the provisions of Articles III or XI of GATT 1994. In addition, the Agreement provides an illustrative list that explicitly prohibits local content requirements, trade balancing requirements, foreign exchange restrictions and export restrictions (domestic sales requirements) that would violate Articles III:4 or XI:1 of GATT 1994. The TRIMs Agreement prohibited those measures that are mandatory or enforceable under domestic law or administrative rulings, or those with which compliance is necessary to obtain an advantage (such as subsidies or tax breaks). Figure II-9-1 contains a list of measures specifically prohibited by the TRIMs Agreement. Figure II-9-1 is not comprehensive; it simply illustrates TRIMs that are prohibited by the TRIMs Agreement and calls particular attention to several common types of TRIMs. The figure also identifies measures that are inconsistent with Articles III:4 and XI:1 of GATT 1947.

The TRIMs Agreement is not intended to impose new obligations, but to clarify the pre-existing GATT 1947 obligations. Under the WTO TRIMs Agreement, countries are required to rectify measures inconsistent with the Agreement within a set period of time, with a few exceptions. The exceptions are detailed in Figure II-9-2.

Figure II-9-1

Examples of Measures Explicitly Prohibited by the TRIMs Agreement

Local content requirements	Measures requiring the purchase or use by an enterprise of domestic products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production (violation of GATT Article III:4).
Trade balancing requirements	Measures requiring that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports (violation of GATT Article III:4); and measures restricting the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports (violation of GATT Article XI:1).
Foreign exchange restrictions	Measures restricting the importation by an enterprise of products (parts and other goods) used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise (violation of GATT Article XI:1).
Export restrictions (*Domestic sales requirements*)	Measures restricting the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production (violation of GATT Article XI:1).

Figure II-9-2
Exceptional Provisions of the TRIMs Agreement

Transition period	Measures specifically prohibited by the TRIMs Agreement need not be eliminated immediately, although such measures must be notified to the WTO within 90 days after the entry into force of the TRIMs Agreement. Developed countries will have a period of two years within which to abolish such measures; in principle, developing countries will have five years and least-developed countries will have seven years.
Exceptions for developing countries	Developing countries are permitted to retain TRIMs which generally would violate GATT Articles III or XI, provided that the measures meet the conditions of GATT Article XVIII which, by virtue of the economic development needs of developing countries, allows specified derogation from the GATT provisions.
Equitable provisions	In order to avoid damaging the competitiveness of companies already subject to TRIMs, governments are allowed to apply the same TRIMs to new foreign direct investment during the transitional period described above.

3) Extension of Transition Period

Under the TRIMs Agreement, Member countries are required to notify the WTO Council for Trade in Goods of their existing TRIMs that are inconsistent with the TRIMs Agreement within 90 days from the date of entry into force of the WTO Agreement (Article 5.1). To date, 27 Members have notified the WTO of such measures. Figure II-9-3 details the TRIMs which have been notified to the WTO by member countries. Most measures involve local content requirements for the automotive and agricultural sectors.

Each country is obliged to eliminate TRIMs notified under Article 5.1 within the specified transition period (Article 5.2); the transition period for the above-mentioned notifying countries expired at the end of 1999.

The Council for Trade in Goods, however, can extend the transition period at the request of the notifying developing Member countries (including least developed countries) if they can demonstrate that circumstances prevent them from eliminating the TRIMs in a timely manner (Article 5.3). In November 2001, an extension of the transition period for eliminating the notified TRIMs was granted until the end of May 2003 for Romania; until the end of June 2003 for the Philippines; and until the end of December 2003 for Chile, Argentina, Colombia, Mexico, Malaysia, Pakistan, and Thailand.). (*See* the same section of the 2014 Report on Compliance by Major Trading Partners with Trade Agreements for the details of the background to the extension of the transition period.)

Of the countries for which the transition period was extended in November 2001, Argentina, Chile, Colombia, Thailand, Mexico, Malaysia and Romania eliminated their TRIMs measures by the end of 2003 as scheduled. The Philippines eliminated local-content requirements and foreign exchange restrictions in the automotive sector on July 1, 2003. However, the Philippines still maintains 60% local content requirements in some sectors. Although these measures are suspended, the Philippines has not committed to eliminate them. In December 2003 Pakistan requested another extension until the end of December 2006, but then expressed its intention to officially withdraw the extension request (and to eliminate the remaining TRIMs) at the Council for Trade in Goods meeting in March 2006. In July 2006,

the "Deletion Program" at issue was abolished. In its place, the Tariff Based System was introduced. However, provisions of this system promote localization by, for example, levying a 35% tariff on CKD parts for local automakers but a 50% tariff on others. For all intents and purposes then, the measure may constitute a demand for local content. As noted above, TRIMs notified under Article 5.1 immediately after the establishment of the WTO Agreement in principle have been eliminated. However, whether the elimination of all these measures has been done is not clearly confirmed.

The Hong Kong WTO Ministerial Declaration, made in December 2005, provided that the existing TRIMs measures of least developed countries notified within two years from 30 days after the date of the Declaration could be maintained until December 18, 2012, and newly introduced measures notified within six months after the introduction could be maintained for up to five years. However, none of the measures had to be eliminated by 2020 (even if extension were granted by the Council for Trade in Goods). To date, no TRIMs have been notified under this Declaration.

As an example of notifications made under Article 5.1 of the TRIMs Agreement by countries that acceded to the WTO in recent years, at the time of its accession to the WTO in January 2013, Russia notified its regulations on investment for the "industrial assembly" in the automobile industry as TRIMs that were inconsistent with the Agreement. Russia retained these TRIMs and committed in its Accession Protocol to eliminate them by July 1, 2018.

Figure II-9-3

List of TRIMs Notified under Article 5.1 at the Entry into Force of the WTO Agreement

	Local Content	Trade Balancing	Foreign Exchange Balancing	Export Restrictions	Present Status
Argentina	●	●			Eliminated
Bolivia				△	Eliminated
Barbados	◇				
Chile	○	○			Eliminated
Colombia	○ ◆	◆			Eliminated
Costa Rica	△				Eliminated
Cuba	△				
Cyprus	◇				Eliminated
Dominican Republic	△	◇ △			
Ecuador	○				
India	△			◇ △	Eliminated
Indonesia	○ ◇ △				Eliminated
Mexico	●	●			Eliminated
Malaysia	● ▲				Eliminated
Pakistan	● △				
Peru	◇				
Philippines	● △		●		
Poland	△				Eliminated
Romania	▲				Eliminated
South Africa	○ ◇ △				
Thailand	○ ◆ △				Eliminated
Uganda	△	△	△	△	
Uruguay		○			
Venezuela	○				

Notes:

1) TRIMs for which no extension requests were filed: Automotive ○, Agricultural ◇, Other △.

2) TRIMs for which extension requests were filed: Automotive ●, Agricultural ◆, Other ▲.

3) Egypt, Nigeria, and Jordan have informed the WTO of incentive systems for industrial promotion, but the nature and coverage of the systems is unknown.

4) Poland has informed the WTO of income tax rebates for cash registers.

5) Blank columns indicate unknown status (still under investigation).

Source: Figure II-9-3 is based on notifications submitted to the WTO by each country.

4) TRIMs Committee

A committee on TRIMs (TRIMs Committee) was established under the TRIMs Agreement (Article 7) to afford Members the opportunity to consult on matters relating to the operation and implementation of the Agreement. Committee meetings have been held regularly twice a year to carry out responsibilities assigned to it by the Council for Trade in Goods[1] (Article 7.2) and report annually to the Council for Trade in Goods (Article 7.3). The Committee is also utilized as a place for Members to exchange opinions on their specific individual measures that are suspected of being inconsistent with the TRIMs Agreement, etc.

5) Economic Aspects and Significance

Some governments view TRIMs as a way to protect and foster domestic industry. TRIMs are also mistakenly seen as an effective remedy for a deteriorating balance of payments. These perceived benefits account for their frequent use in developing countries. In the long run, however, TRIMs can retard economic development and weaken the economies of the countries that impose them by stifling the free flow of investment.

Local content requirements, for example, illustrate this distinction between short-term advantage and long-term disadvantage. Local content requirements may force a foreign-affiliated producer to use locally produced parts. Although this requirement results in immediate sales for the domestic parts industry, it also means that the industry is shielded from the salutary effects of competition. In the end, this industry will fail to improve its international competitiveness. Moreover, the industry using these parts is unable to procure high-quality, low-priced parts and components from other countries and will be less able to produce internationally competitive finished products. Consumers in the host country also suffer as a result of TRIMs because they must spend much more on a finished product than would be necessary under a system of liberalized imports. Since consumers placed in such a position must pay a higher price, domestic demand will stagnate. This lack of demand also stifles the long-term economic development of domestic industries.

2. MAJOR CASES

1) India - Measures Affecting the Automotive Sector – (DS146 & DS175)

In December 1997, India announced a new automotive policy that requires manufacturers in the automotive industry and the Ministry of Commerce and Industry to draft and sign a memorandum of understanding (MOU) on new guidelines for the industry. The policy has the following TRIMs Agreement-related problems: First, the policy requires that 50 per cent local content be achieved within three years of the date on which the first imported parts (CKD, SKD) are cleared through customs; the requirement increases to 70 percent within five years of first clearance. Second, the policy requires that export of automobiles or parts begin within three years of start-up; restrictions on the amount of parts

[1] The responsibilities assigned to the TRIMs Committee by the Council for Trade in Goods in the past include the discussion of a proposal on specific and differential (S&D) treatment for developing countries relating to Articles 4 and 5.3 of the TRIMs Agreement, which were implemented for the period 2002-2007.

(CKD, SKD) that can be imported depend on the degree to which the export requirement is met. This policy amounts to an export/import balancing requirement. Even prior to this policy, India made auto parts import licenses for companies setting up operations within its borders conditional upon signing an MOU containing local content requirements and export/import balancing requirements — despite the lack of any legal basis for doing so. It is clear that the new automotive policy of 1997 is designed to institutionalize the previous administrative guidelines.

In October 1998, the EU requested WTO consultations (in which Japan and the United States participated as third parties). The first consultations were held in December 1998, but were unsuccessful. A WTO panel was established in November 2000 at the request of the EU; Japan participated as a third party. In June 1999, the United States requested separate consultations that were held in July 1999. Japan and the EU participated as third parties. These consultations were also unsuccessful. A panel was subsequently established at the request of the United States in July 2000, and Japan, the EU and the Republic of Korea participated as third parties. At the end of November 2000, the two panels were consolidated into a single panel.

Prior to this dispute, India had already lost before the WTO Appellate Body a complaint brought by the United States over import restrictions on specific items, including automobiles. India reached an agreement with the United States to eliminate import restrictions by April 2001. Consequently, quantitative restrictions on 714 items were eliminated on April 1, 2000, and an additional 715 items on April 1, 2001. Consequently, Department of Commerce and Industry Notice No. 60 was abolished in September 2001. However, the export obligations continued and, thus, the measures cannot be regarded as having been fully eliminated. Indeed, the WTO panel subsequently examined Commerce and Industry Department Notice No. 60 and found that the MOU based on it violated GATT Articles III and XI. India, which was dissatisfied with the Panel Report, appealed to the Appellate Body on January 31, 2002, but withdrew the appeal on March 14. Subsequently, in August 2002, the Indian Government abolished the export obligations and, accordingly, the automotive policy was fully eliminated.

Column: Efforts to Establish New Rules Regarding Investment in the WTO

1) Current Status of International Rules on Investment

In the context of a quantum expansion in the proportion of foreign direct investment (FDI) in international economic activities, the number of bilateral investment agreements in the 1990's increased rapidly from several hundred to some two thousand. In addition, parties negotiating FTAs started to incorporate a chapter on investment rules, suggesting the need for establishing multilateral investment rules.

The Member states of the Organization for Economic Cooperation and Development (OECD) began negotiating a "Multilateral Agreement on Investment (MAI)" in 1995. Negotiations ceased in 1998 because of a lack of developing country participation and difficulties involving excessive liberalization obligations, the treatment of general exceptions, considerations on environmental and labour issues, etc. In 1996, discussions on investment began at the WTO. However, they ceased in 2004 because of opposition by developing countries. As described below, the issue of "trade and investment" was discussed as a

Singapore issue as part of the Doha Development Agenda, but to date no comprehensive multilateral framework on trade liberalization has been formulated.

2) WTO Considerations on Investment Rules

Since some of the agreements concluded during the Uruguay Round cover rules on certain types of investments, a brief description of these is provided below. This section then discusses the multilateral investment rules currently under review at WTO.

(a) Agreement on Trade-Related Investment Measures (TRIMs)

The TRIMs Agreement prohibits trade-related investment measures that violate the general elimination of quantitative restrictions and national treatment, both basic principles of the GATT.

(b) Agreement on Subsidies and Countervailing Measures (SCM)

The SCM Agreement covers "specific subsidies" with a view to addressing those subsidies with a particularly high trade-distorting effect. "Specific subsidies" are those granted by host governments only to specific businesses or industries as an incentive to attract investment (tax breaks, for example) and fall within the "yellow" (subject to elimination) category as defined under the Agreement. Because the SCM Agreement deals with the granting of subsidies related to trade in goods, it does not cover all investment incentives. (see Chapter 7, Part II for the SCM Agreement)

(c) General Agreement on Trade in Services (GATS)

Article I:2 of the GATS specifies four modes of trade in services, of which the third, commercial presence (supply of services by a service supplier of one Member through commercial presence in the territory of another Member), covers direct investment in services (branch establishment by banks, etc.). General obligations that must be applied in all service sectors include most-favored nation treatment and transparency, while obligations with respect to national treatment and market access are undertaken in these sectors according to the specific commitment for each sector and mode. (see Chapter 12, Part II for trade in services)

3) Considerations from the Singapore Ministerial Meeting to the Doha Ministerial Meeting

The impetus behind the WTO's efforts to review multilateral investment rules stems from the decision to establish "the Working Group on the Relationship between Trade and Investment" during the First WTO Ministerial Meeting in Singapore in December 1996. The Working Group met 15 times between 1997 and 2001 and engaged in a broad range of activities, including analyzing the economic effect of FDI and its impact on development policy. The Working Group also discussed investment provisions, including defining investment, transparency, and development provisions.

4) Doha WTO Ministerial Conference Discussion and Results

The Fourth Ministerial Conference, held in Doha, Qatar in November 2001, achieved little convergence between Japan, the EU and other WTO Members in favor of immediately

launching negotiations toward the creation of a WTO investment framework. India, Malaysia, many African nations, as well as other Member countries, perceived such negotiations as premature and pushed instead for further Working Group considerations. After some coordination, the Ministerial Declaration noted that the Working Group would, in the period until the Fifth Ministerial meeting, focus on the clarification of investment framework components. Negotiations taking place after the Fifth Session would be contingent on whether a decision could be reached by consensus on modalities of negotiations.

5) Discussions under the Doha Development Agenda

After the Doha Ministerial Meeting in November 2001, the Working Group met six times and worked on clarifying seven factors identified in the Doha Ministerial Declaration: (1) Scope and definition; (2) Transparency; (3) Non-discrimination; (4) Modalities for pre-establishment commitment; (5) Development provisions; (6) Exceptions and Balance-of-Payments safeguards; and (7) Consultation and the settlement of disputes between Members. At the Fifth Ministerial Meeting held in Cancun, Mexico, in September 2003, developed countries announced that work on clarifying the seven factors was complete and requested an initiation of negotiations. Developing countries, however, strongly opposed the start of negotiations and demanded that the Working Group continue discussions.

While countries led by the EC and Japan emphasized the importance of investment negotiations, developing countries maintained their strong opposition. The Doha Work Programme established during the July 2004 WTO General Council was designed to provide a framework for negotiations on trade facilitation under one of the four Singapore Issues. However, investment, competition and transparency in government procurement were excluded from the Doha framework. While discussions in these areas are not prohibited under the current round, they cannot form the basis for beginning negotiations. There currently are no prospects for resuming these discussions.

6) The reasons of developing countries' opposition

The major reasons that developing countries oppose the start of negotiations are: (i) implementation of existing agreements already poses a burden and, therefore, they are not prepared to address additional rule-making in a new field; (ii) while well-aware of the importance of attracting investments for their economic development, they also seek to restrict direct investments from foreign companies in order to develop their own domestic industries; and (iii) investment-related rule making through the WTO does not necessarily guarantee investment increases.

7) Significance of establishment of multilateral investment rules

Due to accelerating globalization, cross-border investment and trade in goods and services has become indispensable for international Japanese companies. Through investment, these companies have developed an international network centered around East Asia for the division of labor. However, the lack of a multilateral investment framework has sometimes proved disadvantageous to the companies when looking to protect and liberalize investment in host countries. In view of these circumstances, bilateral investment agreements, etc. are being concluded, but expectations of industries for the formulation of a

unified multilateral investment framework are still high. Japan, during the current DDA, has emphasized the importance of creating such a framework.

Also, a multilateral investment framework, once created, would benefit developing countries by improving investment conditions in terms of transparency and stability, offering an attractive business environment to foreign investors. Since foreign investment contributes to the economic growth of developing countries, the establishment of such a framework is important in ensuring that these countries can profit from liberalization. In other words, an investment framework benefiting both investors and host countries will become an essential element of the future world economy.

Column: Specific examples of local content requirements

1. Specific examples of local content requirements

1-1. Local content requirements related to solar power panels made in the Province of Ontario, Canada (domestically-produced goods -- prohibited subsidy)

1-2. Local content requirements related to solar power panels made in India (domestically-produced goods -- prohibited subsidy)

1-3. Local content requirements related to automobiles made in Brazil (conditional tax reductions/exemptions for industrial goods (domestically-produced goods – prohibited subsidy))

2. Effects and issues of local content requirements

Local content requirements are government measures that require companies producing in a country to purchase or use products of a national origin or products from domestic sources. They are explicitly prohibited in Article 2 of the WTO Agreement on Trade-related Investment Measures (TRIMs Agreement) and the illustrative list annexed to it. They also are inconsistent with Article III:4 of the General Agreement on Tariffs and Trade (GATT).

Typically, these requirements include a measure that involves the government of a country requiring manufacturers in a specific industry sector to procure a certain percentage of parts and other inputs within the country as a condition of granting incentives (*i.e.,* subsidies and tax reduction). This not only is a local content requirement, but also infringes Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures as a prohibited subsidy with a local content requirement.

A recent case involves the Japanese government requesting consultations under the WTO Dispute Settlement Understanding (DSU) concerning the local content requirements of solar-power panels made in the Province of Ontario, Canada (In May 2013, the Appellate Body report was issued; Japan's claim was generally accepted).

Furthermore, in 2011 Report on Compliance by Major Trading Partners with Trade Agreements, measures concerning two cases of local content requirements – local content requirements by India on solar power panels (*see* Chapter 11, "India") and internal tax increases on industrial products made in Brazil (*see* Chapter 10, "Brazil") – are discussed as cases that may possibly not be consistent with the WTO Agreement.

In this column, the problem of local content requirements will be examined by taking up the measures in these three cases as examples. Besides these three, other measures involving local content requirements exist, such as export restrictions on mineral resources by Indonesia (Chapter 2, Part I) and recycling fees on motor vehicles by Russia (Chapter 9, Part I). See the respective Chapters in Part I for details of these measures.

Country name	Product	Trade measure
The Province of Ontario, Canada	-Solar-powered electricity facilities / wind-powered electricity facilities -Local content requirements, domestic-product preferential subsidies	● The usage of solar/wind-powered electricity facilities that satisfied certain local procurement conditions was made mandatory as a condition of participation in the fixed-price purchase program for renewable energy-produced electricity.
India	-Solar power electricity facilities -Local content requirements, domestic-product preferential subsidies	● The usage of solar-power electricity facilities that satisfied certain local procurement conditions was made mandatory as a condition of participation in the fixed-price purchase program for renewable energy produced electricity.
Brazil	-Automobile -Local content requirements, domestic-product preferential subsidies (tax exemptions)	● Increases of internal taxes on automobiles that have not met a certain local procurement level. ● An increase of internal taxes was exempted on the condition of achieving a level of local procurement and investments in research & development within Brazil.

1-1. Local content requirements (domestic-product preferential subsidies) on solar power panels made in Ontario, Canada

Ontario, Canada enacted the Green Energy and Green Economy Act 2009 in May 2009, introducing a feed-in tariff program (FIT program) -- a fixed purchase price program -- with the aim of promoting renewable energy such as solar, wind power and biomass energy. The Province made it mandatory to use solar-powered and wind-powered electricity facilities that are value-added in Ontario as a condition for a power producer to participate in the FIT program.

Since this measure creates an incentive to buy solar panels produced in the Province of Ontario rather than imported goods, in order to meet the local content requirements, among the producers who attempt to participate in the FIT program in the Province, those using imported goods are at a competitive disadvantage.

The Japanese government requested consultation under the WTO Dispute Settlement Understanding (DSU) in September 2010, claiming that such measures by the Ontario Provincial government violate GATT Article III (National Treatment Obligations), which prohibits the discriminatory treatment of imported products compared to domestically-produced products, as well as TRIMs Agreement Article 2 and Subsidy Agreement Article 3.1(b), which prohibits the payment of subsidies that provide preferential treatment of domestic products as a condition. Furthermore, a request for the establishment of a panel was made in June 2011, and the final panel report was published in December 2012. The report accepted Japan's claims in general and concluded that Canada had violated GATT Article III and TRIMS Article II and had given unfair preferential treatment to local products. However, the Panel did not rule on violations of Article 3 (prohibited subsidies) of the Agreement on Subsidies and Countervailing Measures on the grounds that the existence of benefits, which was a requirement for the subsidy determination, was not proved. Canada appealed to the Appellate Body in February 2013, and the Appellate Body report was issued

in May of the same year. The Appellate Body report upheld the determinations of the panel report, and determined violations to GATT Article III and Article 2 of the TRIMs Agreement, but did not find a violation of Article 3 of the Agreement on Subsidies and Countervailing Measures on the basis that there was insufficient proof. (See Chapter 10 "Canada", Part I for the details of the compliance.)

1-2. India - Local content requirements (domestic-product preferential subsidies) on solar powered electricity facilities

In January 2010 the Indian government announced the Jawaharalal Nehru National Solar Mission (JNNSM) with the policy objectives of "making India the world leader in the solar industry" and "to expand solar energy within India". The government proclaimed that it would attempt to popularize and promote solar energy by dividing the process into three periods. As a specific policy to popularize solar energy, the government introduced a feed-in tariff program of electricity generated by solar panels and solar-heat. The Ministry of New and Renewable Energy (MNRE), which has jurisdiction of the program, published guidelines for the program in July 2007, began the solicitation of businesses that wished to participate in the FIT program. The Indian government required meeting a certain percentage of local content as a condition to participate in the program.

(i) Solar-power generation project

Applicants before 2011 were required to use solar panels with modules produced in India. Applicants from 2011 onward were required to use solar panels with both cells and modules produced in India.

(ii) Solar-heat electricity generation project

The government of India demanded that 30% of parts used for plants related to solar-heat generated electricity to be products produced in India.

Japan asked questions regarding details of this program at the WTO Subsidies Committee meeting held in May 2011, since there was a possibility that the local content requirements and the granting of subsidies with those requirements as conditions infringed GATT Article III, TRIMs Agreement Article 2 and Subsidy Agreement Article 3.1(b). Furthermore, Japan expressed its concerns by raising similar questions during the India-TPR (Trade Policy Review) meeting held in September 2011. In addition, Japan has repeatedly expressed its concerns along with the US and the EU in the WTO TRIMS Committee meetings held since May 2012. In February 2013, the US requested WTO consultations, claiming that the system violated GATT Article III, Article 2 of the TRIMs Agreement, and Article 3 of the Agreement on Subsidies and Countervailing Measures (a request was made to add to the items subject to consultation in February 2014) (Japan requested participation in the consultations as a third party, but India denied the request). As the issue was not resolved through consultations, the US requested the establishment of a panel in April 2014, and the panel was established in May of the same year (Japan participates in the panel as a third party).

1-3. Brazil – Increase of internal tax on imported automobiles (domestic-product preferential subsidies)

On September 15, 2011, the Brazilian government announced that the domestic tax on industrial goods including automobiles would be increased on an interim basis until the end of 2012. However, not all businesses became subjected to the increase. The Brazilian government simultaneously announced the requirements for businesses to be excluded from the increase. The conditions for being excluded from the increase are the following three:

1) To procure over 65% of parts within MERCOSUR
2) For at least six of the eleven manufacturing processes to occur within Brazil
3) To invest over a certain percentage (0.5%) of profit into R&D within Brazil

In October 2012, it was decided that the increase in tax on industrial goods would be extended for five years from 2013 to 2017. A new automobile policy (Inovar-Auto) was announced, requiring the achievement of the designated fuel efficiency standards etc. as a requirement for tax exemption. New tax exemption requirements according to the new policy are: 1) achievement of the designated fuel efficiency standards and participation in the vehicle labeling program; 2) fixed investment in domestic R&D etc.; and 3) implementation of specific production processes within the country. It was decided that if these conditions are satisfied, then "credits" that can be used for tax reduction will be granted.

These requirements for tax exemption are thought to be disadvantageous for imported goods and give advantages to automobiles manufactured within Brazil. In addition, they have the effect of giving preference to the usage of domestically produced parts for the manufacturing of automobiles.

For the latter, the discriminatory requirements for granting the tax exemption violate GATT Article III: 4. Reduction in industrial products tax in the automobile industry can also be regarded as a prohibited subsidy by providing preferential treatment to domestic products.

Japan expressed its concern during the WTO Committee on Market Access meeting held in October 2011, asserting that the policy infringed GATT Article III, TRIMs Agreement Article 2 and Subsidy Agreement Article 3.1(b). Regarding the new policy of October 2012, in November 2012, the Minister of Economy, Trade and Industry pointed out to the Brazilian Minister of Development and Industry that it potentially violates the WTO rules. At the meetings of the Joint Committee for Japan-Brazil Trade and Investment Promotion held in November 2012, October 2013, and September 2014, METI's Vice-Minister for International Affairs expressed concerns along with a request for cooperation on information provision etc. Also at the meetings of the WTO Council for Trade in Goods and the TRIMs Committee held since November 2012, Japan has repeatedly expressed its concerns along with the US, the EU and Australia. However, there has been no action to improve this policy. Furthermore, there has been an effort to expand preferential taxation measures that are linked to local content requirements to a wide range of sectors, including telecommunications network devices and chemicals (fertilizers). The EU therefore requested WTO consultations with Brazil in January 2014. (Japan requested participation in the consultations as a third party, but Brazil denied the request). As the issue was not resolved through consultations, the EU requested the establishment of a panel in October of the same year, and the panel was established in December. (Japan participates in the panel as a third party).

2. The effects and issues of local content requirements

Such local content requirements give incentives for businesses to preferentially use domestically produced goods (parts). They treat imported goods discriminately and have the

effect of protecting and promoting a specific domestic industry. Therefore, it is believed that countries are implementing such requirements as a measure of industrial policies to protect and foster their own country's industries. While the WTO Agreement does not prohibit those kinds of industrial policies themselves, it does impose discipline on them and does not allow protection and fostering of domestic industries through measures inconsistent with the WTO Agreement.

The measures by the Province of Ontario, Canada, appear to artificially create incentives to preferentially use solar panels manufactured in the province during the installation of renewable energy installations by making the local content requirements mandatory as a condition of participating in the FIT program of renewable energy. According to the announcement by the Ministry of Economy, Trade and Industry, the reason for requesting consultations was that due to the local content requirements by the Province of Ontario, Canada "solar panels and such products that Japanese companies export to Ontario receive disadvantageous treatment compared to the products produced in the province" as a. The preferential subsidy for the domestically-produced solar panels in India claims to have similar effects.

The Brazilian government, in addition to the local content requirements as a condition of exemption from the increase of the internal tax on automobiles, required that the important manufacturing processes of automobile manufacturing be conducted in Brazil and that a certain percentage of the profits be spent on investment in domestic R&D etc. Such tax systems potentially claim to give preference to automobiles and automobile parts manufactured within Brazil.

The WTO Agreement does not prohibit the introduction of industrial policies that have the objective of stimulating economies and fostering specific industries. However, the WTO member countries have the obligation to design and implement their domestic policies in a manner consistent with the WTO rules. In particular, policies that include requirements that discriminate against imported goods – by giving motives to use domestic products and parts, rather than imported products and parts, by providing subsidies and such incentives to domestic producers – are most likely inconsistent with the WTO Agreement and are problematic from the perspective of maintaining a sound multilateral trading system. In the future, in order to ensure that Japanese products are receiving fair treatment in each country's market, the government of Japan needs to make bilateral requests, have discussions in WTO committees and utilize the WTO dispute settlement procedures concerning measures that it believes violate the WTO rules.