CHAPTER 11

BRAZIL

NATIONAL TREATMENT

BRAZIL'S MEASURES CONCERNING DISCRIMINATORY TAXATION AND CHARGES FOR AUTOMOBILES, ETC.

<OUTLINE OF THE MEASURE>

The Brazilian Government has introduced measures for drastic reductions or exemptions from indirect taxes on products in the automobile, information and communications (ICT), and other sectors, based on such requirements as carrying out "basic production process" (PPB) (manufacturing of certain parts and assembly of final products) in Brazil. As a result, the difference in effective tax rates between imported products and domestic products has arisen.

In September 2011, it was announced that industrial products tax (IPI) would increase by 30% from the current rate for domestically produced and imported vehicles (effective December 2011), but vehicles meeting certain requirements from Brazil, Mercosur, or Mexico were exempt from the additional industrial products tax. A new automobile policy (Inovar-Auto) announced in October 2012 keeps the 30% IPI increase on automobiles in place for five years from 2013 to 2017, while allowing automobile manufacturers to reduce IPI by up to 30% under certain conditions.

<PROBLEMS UNDER INTERNATIONAL RULES>

The above preferential taxation measures grant drastic reductions or exemptions from indirect taxes only on products manufactured in Brazil and certain other countries, and provide an incentive for companies manufacturing automobiles, etc., in Brazil to preferentially use domestic parts over imported parts in order to benefit from tax reductions or exemptions, treating imported parts unfavorably. Also, it treats imported parts unfavorably. Moreover, under the Inovar-Auto Policy, the auto reduction tax is only approved for automobiles produced in Mercosur or Mexico. Automobiles imported from countries other than Mercosur and Mexico are treated unfavorably in relation to not only domestically-produced automobiles but also automobiles imported from Mercosur or Mexico.

Therefore, the measures violate GATT Article I (most-favored nation treatment) and Article III (national treatment), TRIMs Article 2, and the SCM Agreement Article 3.1 (b).

<RECENT DEVELOPMENTS>

Japan participated in the DS case as a third party in which the EU made a request for the establishment of a panel in advance in December 2014 regarding the measures taken by Brazil (not only the automobile policy and the preferential taxation measures for the information and communications technology sector but also the preferential taxation measures for specific exporting companies were also set within the scope of the panel).[1] Furthermore, Japan made a request for WTO consultations with Brazil in July 2015, and then requested the establishment of a panel in September 2015.[2] The panel was established in the same month (Consolidated with the EU's panel proceedings).

On August 30, 2017, the Panel accepted the claims made by Japan and the EU, and found that the preferential taxation measures in the automobile sector and the information and communications technology sector are inconsistent with GATT Article I (most-favoured nation treatment) and Article III (national treatment), TRIMs Article 2 and the SCM Agreement Article 3.1 (b). In addition, the Panel accepted the claim by Japan and the EU, and found the preferential taxation measures for specific exporting companies inconsistent with the SCM Agreement Article 3.1 (a).

Brazil made an appeal and the Appellate Body Report

[1]For the case in which the EU became a complainant country, see page 134 of the 2019 Report on Compliance by Major Trading Partners with Trade Agreements -WTO, FTA/EPA and IIA-.
[2] For details of bilateral and multilateral consultations carried out before the request of WTO consultations, please see page 172 of the 2017 Report on Compliance by Major Trading Partners with Trade Agreements -WTO, FTA/EPA and IIA-.

was circulated in December 2018. Overall, the Appellate Body upheld the Panel's report, and recommended to correct and eliminate the preferential tax treatment on the automobile and ICT sectors as it is inconsistent with GATT Article III (national treatment), and to withdraw without delay the prohibitive subsidies (the SCM Agreement Articles 3.1(b) and 3.2). On the other hand, the Appellate Body reversed the Panel's finding regarding certain aspects of the measures related to the ICT sector, the domestic production procedure requirements related to the Inovar-Auto Policy, and the finding regarding export subsidies. Based on the Appellate Body Report, the DSB recommended Brazil to withdraw without delay the prohibitive subsidies, and to bring the inconsistent measures into conformity with the WTO Agreement.

In January 2019, Brazil expressed its intention to implement the recommendations and rulings and agreed with Japan on correcting the WTO-inconsistent measures by December 31, 2019 (by June 21 regarding some of the measures having been found to be prohibited subsidies).

At the DSB meeting in January 2020, Brazil declared that when the Appellate Body Report was adopted, some of the preferential tax treatment on the automobile and ICT sectors had already been expired and there were only preferential taxation measures for ICT equipment and semiconductors (Informatics Program and PADIS). The amendment law of the above remaining two programs (Law 13,969) was enacted in December 2019 and the implementation had been completed within the period, it explained. Brazil also declared that the prohibited subsidies that were inconsistent with the WTO Agreements were eliminated or replaced by alternative measures.

However, it is questionable whether or not Brazil's new preferential taxation measures for ICT equipment and semiconductors, which were adopted through the amendment enacted for implementation, are consistent with the WTO Agreements. Therefore, Japan will continue gathering information regarding the implementation status of Brazil and closely monitor the measures that were found to be inconsistent with the WTO agreements in order to ensure that they are promptly corrected.

PROTECTION OF INTELLECTUAL PROPERTY

LICENSING REGULATIONS ON PATENTS AND KNOW-HOW

<OUTLINE OF THE MEASURE>

In Brazil, regarding license contract of industrial property rights such as patents and technology transfer agreement including provision of know-hows, it is necessary to perform registration (contract screening) to National Institute of Industrial Property (Instituto Nacional da Propriedade Industrial; INPI) when (1) royalty income is to be transferred overseas, (2) the contract is to have effect on third parties, and (3) tax deduction is to be received. In addition, it has been confirmed that, in the contract screening by INPI, there may be an instruction regarding the royalty rate and the confidentiality period, and the contract period of the technology transfer agreement is approved only for five years usually (may be extended up to 10 years).

<PROBLEMS UNDER INTERNATIONAL RULES>

It is mostly foreign companies that need to register the license contract with the INPI to receive the overseas remittance of the royalty. Therefore, if a registration system mainly targeting contract by foreign companies is provided and the government intervenes in a contract content between companies such as the royalty rate and contract period, foreign companies may undergo restriction that is disadvantageous compared with domestic companies. It is necessary to examine the rationality of requiring such a system and the details and degree of the disadvantage caused by actually operating the system. If the registration system is unreasonable or an excessive regulation, it may be inconsistent with the duty of national treatment as referred to in Article 3 of the TRIPS Agreement.

<RECENT DEVELOPMENTS>

At the First Japan-Brazil Trade Investment Promotion Committee and Industrial Cooperation Joint Committee in October 2013, it was determined that the expiration date of the overseas technology transfer agreement would be eliminated, and that a license for know-hows such as operation technology would also be the target. As well, regarding the transfer pricing regulation, a request for clarifying the tax rate calculation criterion for each product was made, and it was decided that a special discussion would be held for each task. Later, also at the second committee in September 2014 and at the interim meeting of the Japan-Brazil Trade Investment Promotion Committee and Industrial Cooperation Joint Committee in February 2016, Japan made a request to improve the system operation with respect to the overseas technology transfer agreement, and two countries would continue the discussion.

In April 2017, the INPI issued and enforced the INPI Rule 70/2017 for simplifying the registration of license contract etc. (enforced on July 1, 2017). Right after enforcing the rule, the INPI further issued Resolution 199/2017, which includes guidelines related to the registration procedure. According to the Article 13 of the

rule, the registration certificate includes descriptions such as “INPI does not examine the contract in terms of Accounting Act, Tax Law, and Foreign Capital Law,” “Declared contract price,” and “Declared contract period.” The article also suggests that the contracting parties can freely determine the contract price (royalty rate) and the contract period. On the other hand, even in the above rule and guidelines, it has not been clarified regarding the license contract of know-hows and that the government does not intervene in the contract between the parties.

Therefore, it is necessary to keep paying attention to whether the contract examination by INPI and its operation are consistent with the TRIPS Agreement.