

COLUMN: CHALLENGES AND ACTIONS TO IMPROVE ACCESS TO COUNTERVAILING DUTY MEASURES IN ORDER TO RESPOND TO EMERGING TRADE ISSUES

Amid further progress in the free trade system, including the coming into force of the Regional Comprehensive Economic Partnership (RCEP) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), there is a growing movement, particularly in the United States and Europe, to strengthen domestic enforcement and cooperate with allies against unfair trade practices, such as excessive production structures and market-distorting measures.

However, where subsidized imports are causing damage to domestic industries, as Countervailing Duty (CVD) measures are also necessary to promptly remedy the damage to domestic industries caused by subsidies from other countries, the number of CVD measures implemented worldwide has been increasing in recent years. The Japanese industrial world is also highly interested in other countries' market-distorting subsidy policies.

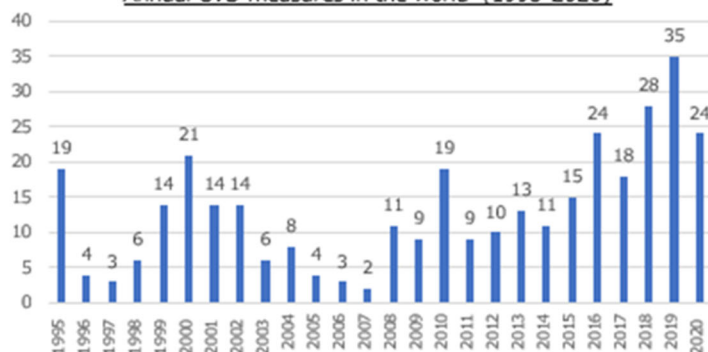
In Japan, although the use of anti-dumping (AD) measures has become more active recently, there has been only one CVD measure taken against DRAMs (Dynamic Random Access Memories, DRAMs) from Korea in 2006, and since then, there have been no CVD measures taken in the past 10 years. One possible reason for this is the high hurdles in the application process. However, it is important to prepare for being able to utilize legitimate tools under international law, such as CVD, so that Japan can use it when necessary. This is not only for domestic industries but also for further cooperation with the United States and the EU on trade policy in the future.

Considering these circumstances, METI has been consulting experts to form a coherent picture of the challenges involved since February 2021, and the Subcommittee on Trade Remedy Measures under the Industrial Structure Council made recommendations toward improving access to CVD measures in Japan on August 30 of the same year, after discussing the challenges and directions for action based on the experts' opinions. This column introduces the outline of such proposal.

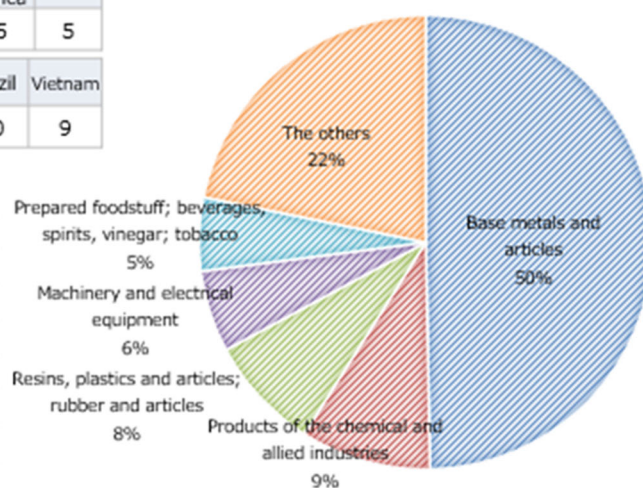
Top 10 countries (regions) of the total number of CVD measures in the world (1995-2020, Reporting member / Exporter)

Reporting member	USA	EU	Canada	Australia	Mexico	India	Brazil	China	Peru	South Africa	Taiwan
CVD cases	173	45	36	16	11	11	10	10	7	5	5
Exporter	China	India	South Korea	Indonesia	USA	Turkey	EU	Italy	Brazil	Vietnam	
CVD cases	129	56	15	13	12	12	12	11	10	9	

Annual CVD measures in the world (1995-2020)



CVD measures by sector in the world (1995-2020)



Data source : https://www.wto.org/english/tratop_e/scm_e/scm_e.htm

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1. PAST IMPLEMENTATION CASE IN JAPAN (KOREAN DRAMS)

In Japan, the only case of implementation of CVD measures was against DRAMs¹ from Korea in 2006. In June 2004, Elpida Memory and Micron Japan filed an application with the Japanese government for a CVD investigation of DRAMs products manufactured by Hynix of South Korea. In response, the Ministry of Economy, Trade and Industry and the Ministry of Finance jointly initiated an investigation in August 2004 and, in January 2006, imposed CVD measures at the rate of 27.1%. This was the first case of CVD measures imposed in Japan.

Subsequently, based on the WTO's Appellate Body Report, the duty rate was changed to 9.1% in September 2008. Further to this, a change in circumstances review was initiated in October 2008, and it was confirmed that the subsidy benefit had ceased to exist. As a result, CVD measures were eliminated in April 2009.

At hearings from experts on the lessons learned from this case, it was pointed out that too much time was spent on the application for the investigation. Namely, it is possible that some of the measures were judged to be in violation of the WTO Agreement, because the subsidy amortization period for the semiconductor industry ended as a result of the delay in applying for an investigation while the subsidy amortization period was only five years, and the benefit of the subsidy was already lost when the CVD measures were imposed. In addition, it was pointed out that one of the primary causes may be the fact that it was extremely difficult to obtain reliable information necessary to prove the government's entrustment and instructions, and that it was necessary to accumulate circumstantial evidence.

Therefore, it is important to impose CVD measures in a timely and appropriate manner as much as possible when necessary, and it is also important to take appropriate actions in a timely and appropriate manner while looking at the balance between collecting sufficient evidence for each issue and the expiration of the subsidy amortization period. In addition, information collection through cooperation among investigating authorities and development of databases are also considered to be effective.

2. CHALLENGES FOR IMPROVE ACCESS OF CVD MEASURES

(1) DIFFICULTY IN OBTAINING INFORMATION ON FOREIGN SUBSIDIES

(a) Difficulties in Obtaining Information about Subsidy

The first step in a CVD application is to find a subsidy. According to the current judgment of the WTO Dispute Settlement Body, it is necessary to prove, at least at the start of the application and investigation, that subsidies clearly exist; namely, that there is a system of subsidies, there are benefits, and there is specificity. When applying for CVD measures, it is necessary to submit information on subsidies for the products under investigation to the investigating authorities. However, it is difficult for Japanese companies to conduct on-site investigations to identify subsidies, and it is very difficult to obtain information due to insufficient information disclosure on subsidies by foreign governments. In particular, in emerging nations, there is a major transparency problem, with insufficient reporting to the WTO², and it often happens that Japanese companies do not know where to find information on subsidies.

¹ DRAMs (semiconductor memory) is an electronic component (volatile memory) that temporarily stores data and programs processed by computers. Applications include personal computers, games, and electronic dictionaries.

² Article 25 of the SCM Agreement provides that Members shall notify not later than 30 June of each year of any specific subsidy defined in Article 1 of the SCM Agreement

Furthermore, there are many cases in which subsidies themselves are hidden. For example, it is often difficult to find subsidies because the conditions are often not open, such as low-interest loans or investments in unprofitable projects. In these cases, finding a subsidy is difficult in itself.

In addition, at the start of the application and investigation, it is necessary to conduct an economic analysis of the extent of the injury caused to Japanese industries by subsidized imports. However, it has been pointed out that such an analysis is extremely technical and it is very difficult for the applicant industries or companies to demonstrate the extent of the injury.

(b) Difficulties in Forecasting the Tax Effects of CVD Measures

In cases where high duties are imposed due to AD or CVD measures, the effect of reducing the volume of imports is high. On the other hand, however, if the margins of the individual subsidies under investigation are small, the effect of reducing the volume of imports will be limited because the duty rate will be low even if they are accumulated.

A challenge for filing an application is that while filing an application is costly, it may result in insufficient trade remedies and the effects of CVD measures may not be commensurate with the application costs.

When Japan makes use of CVD measures, the key point is whether it can forecast the balance between the effect of the measure and the application cost by cooperating with investigating authorities from the early stage of the examination of the application, in relation to the level of evidence required and the existence and content of the subsidy to be investigated.

It is also necessary to sort out issues such as the significance of the use of CVD measures when the duty rate and the tax effect are difficult to forecast, and whether there will be a problem of double relief if the investigation is conducted simultaneously with the AD measures as in other countries. If, as in the United States, the simultaneous investigation of AD and CVD is conducted, it requires more man-hours for the CVD investigation, such as collecting evidence for subsidies, while the AD investigation may proceed smoothly, but the investigation may take a longer time for the CVD investigation. As a result, if the AD measures are expected to be subject to a certain level of taxation, the applicant may have decided to pursue prompt implementation of the AD measures.

(2) CONCERNS ABOUT RETALIATION FROM EXPORTING COUNTRIES

According to the hearings, one of the reasons why the industrial world does not make active use of CVD measures is because there is the fear that if active use of CVD measures is made in the future, there may be a risk of retaliatory AD or CVD measures being taken by exporting countries.

In this regard, some Japanese experts and the industrial world were of the opinion that even if Japan makes use of CVD measures, there is no need to worry about the risk of retaliatory CVD measures when considering the following reasons:

- For example, Japan's exports are mainly high value-added products, and there is no competition in the export destination market, so they are not subject to AD measures; and
- Since Japan does not provide subsidies that are subject to CVD measures, it may be difficult to impose CVD measures in the first place.

On the other hand, other Japanese experts and the industrial world were of the opinion that there was still fear of retaliation for CVD measures when considering the following reasons:

- Even in the case of high value-added products, there have been cases where AD measures have been taken due to the involvement of other countries, and there may be retaliation through non-duty barriers other than trade remedies such as mandatory specifications and import permits; and
- The fact that Japan has never taken either AD or CVD measures against its export countries may be one of the reasons why Japan is not targeted for retaliation by other countries.

In any case, it is necessary to further analyze the possibility of retaliation from the exporting countries.

(3) LACK OF AWARENESS OF CVD MEASURES

Through the hearings, it was pointed out that the hurdles to the use of CVD measures in the industrial world are the lack of awareness among the companies themselves of the usefulness of such trade remedies as a strategic tool, as well as the difficulties relating to the collection of information on an individual basis and the application procedures.

(a) Lack of Fostering of Appropriate Mindset for the Use of CVD Measures

As a background to the lack of progress in the use of CVD measures by domestic industries and companies, it was pointed out that the mindset of considering trade remedies as self-reliant and being aware of their usefulness as a strategic tool has not been fostered among most industries and companies, except for some industries and companies such as those relating to steel and chemicals, and this is one of the major problems Japan has faced in trade for many years. In this regard, for example, it was pointed out that even in the chemical industry, which has a relatively high awareness of such issues, there is no environment in which companies are required to take measures through trade remedies on a daily basis, as in the steel industry, and that AD and CVD measures have not yet become firmly established in the corporate mindset as effective and necessary measures for business strategy. It was also pointed out that in the chemical industry, there are many companies that operate organizations by product type, and there are few companies that have trade divisions, and that it is difficult to share information because subsidies are related to various products and span departments and divisions. Closing this gap and enabling companies to see trade policies and trade remedies as their own affairs and to recognize AD and CVD measures as strategic tools are the key issues to be overcome in the future to increase the use of CVD measures.

Furthermore, it has been pointed out that as a result of, or against the background of, the lack of use of trade policies and trade remedies, the number of human resources with knowledge of trade law in the industrial world and academia is not increasing but rather decreasing over the long term. In order to incorporate trade policies and trade remedies into business strategies in the industrial world, raising the level of human resources is also a challenge.

(b) Difficulties in Information Collection and Application Procedures

It became clear that there are also challenges with respect to information collection and procedural hurdles relating to the preparatory procedures for taking CVD measures.

For example, while it is important to first gain a good understanding of the actual circumstances regarding the injury suffered by a company, in addition to the viewpoint of whether each business is making profits, it is also necessary to have a broad viewpoint of the global business situation, but it is difficult to collect such information.

Furthermore, even in cases where injury is found to have been incurred, there is still a need to obtain the assistance of the government or law firm in the procedures leading up to the start of the investigation.

It also became clear that the applicant industries and companies feel that there are many issues to be solved at each stage, such as the difficulties in collecting information as well as in actually completing the procedures.

3. DIRECTIONS FOR FUTURE RESPONSES TO EACH CHALLENGE

CVD measures does not necessarily result in high duties unless the relevant countries actively apply Facts Available (FA) or Adverse Facts Available (AFA)³ as in the United States. On the one hand, since CVD measures directly offset market-distorting subsidies by exporting countries, they can directly influence the correction of market-distorting measures by other countries and can emphasize the policy grounds for imposing AD measures. In addition, unlike AD measures, they can be expected to have effects beyond duty measures, such as obtaining information on the countries subject to investigation through CVD investigations and contributing to the resolution of problems through other remedies including intergovernmental consultations. Countries that share values with Japan, such as the United States and the EU, use CVD measures as a strategic tool, and from the viewpoint of creating an economic order that supports the upgrade of the free trade system, it is desirable for Japan to develop an environment in which not only AD measures but also active use of CVD measures can be made in a timely manner against market-distorting measures by other countries in order to ensure a level playing field.

On the one hand, it has become clear that there are many challenges to the active use of CVD.

(1) While it is difficulty in obtaining information on foreign subsidies, it is important to obtain information in a timely manner, to start CVD investigations and to impose CVD measures, as shown by the precedent relating to DRAMs from Korea.

In this regard, 1) it is necessary to establish a method to identify subsidies to be investigated from a large amount of subsidies at the stage of application. For example, listing subsidies in past cases of implementation by the United States and the EU, reporting subsidies to the WTO, and obtaining information based on news reports may be effective. In addition, it is also effective to actively share information within the industrial world⁴, and to collect information on which industries receive subsidies from OECD and other reports. It is important for the Ministry of Economy, Trade and Industry to actively provide such information to the industrial world, provide guidance on the information necessary for CVD applications, provide detailed prior consultation on individual projects from the initial stage of consultation, and work together with industries and companies as a team to narrow down specific items and subsidies. Therefore, it is necessary to improve and strengthen the system of the consultation desk

³ This is a provision under the laws of the United States that allows an investigating authority to make an adverse inference and apply a high duty rate if a person or a country subject to an AD or CVD investigation fails to cooperate with the investigation, such as a failure to provide sufficient information in response to a request for information from the investigating authority.

In addition, Article 6.8 of the AD Agreement provides that if an interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, the investigating authority may make a decision based on the facts available (FA).

⁴ With regard to anti-dumping (AD) measures, as joint applications and collective applications have faced issues such as the cost of coordination between business operators for filing applications and compliance concerns regarding information exchange, a study group has been held to examine these issues since August 2020. In October 2020, a “Model Case for Consideration of Joint Application for Anti-Dumping Measures” was prepared and published (https://www.meti.go.jp/policy/external_economy/trade_control/boekikanri/trade-remedy/petition/data/modelcase_20201026.pdf). For CVD measures, it is recommended to refer to the Model Case when filing a joint application, etc.

for CVD applications. In addition, alignment with trade policy is also essential, such as ensuring that Members notify the WTO of subsidies.

Second, 2) while it is important to obtain information accurately and in a timely manner at the stage of investigation, it is also important to share information more actively between authorities or to establish such a mechanism. At the international level, since the practice of some countries of responding to market-distorting activities by providing large-scale industrial subsidies has become a problem, it may be effective to establish a mechanism sharing information on subsidies among investigating authorities in each country, and in turn, cooperating to the point where CVD measures are actually imposed.

In addition, it is important for investigating authorities to determine the extent to which it is necessary to collect evidence on the assumption that FA is applied, given that information on subsidies is difficult to obtain. Furthermore, in determining the existence of subsidies, it is necessary to consider the use of investigation routes and reports from overseas organizations such as the Japanese embassies in various countries and overseas agencies including JETRO, as well as international organizations such as the Organisation for Economic Co-operation and Development (OECD), in addition to responses from the counterparty governments and companies subject to the investigation. Furthermore, it is essential to examine how third-country benchmarks should be used, including the validity of the current WTO rules.

Second, (2) concerns about Retaliation by the counterparty companies and the governments are cited as reasons for the industrial world's reluctance to make use of CVD measures. In this regard, at hearings from the United States and the EU, it was mentioned that there were cases where companies in the counterparty country had brought up the issue of retaliation, but it did not necessarily mean that they had gone through with such retaliation. In addition, a view was offered that the fear of retaliation might not apply to Japanese industries, which produce high value-added products and receive little subsidies. To date, there have been few cases in which a WTO complaint was filed against Japan's trade remedies. In fact, in the overwhelming majority of cases, trade remedies have been sought against Japan, and it would be a good idea to analyze whether there would be retaliation against Japan if it imposes CVD measures, for example, whether there is a correlation between the invocation of trade remedies by other countries and the filing of a WTO complaint or the implementation of retaliatory trade remedies. In addition, it is deemed necessary to analyze whether there are subsidies that may be subject to CVD measures and whether there are exports that may be subject to retaliation from countries subject to CVD measures, as measures that can be taken by individual industries and companies. Furthermore, it is possible to conduct risk analysis from a broad perspective in collaboration with regional counterparts from the Trade Policy Bureau of the Ministry of Economy, Trade and Industry, as well as with JETRO, to determine whether there is a possibility of retaliation by means of non-duty barriers other than AD and other CVD measures and, with respect to the counterparty country that may bring about a retaliation, it is necessary to maintain channels with the government of the counterparty country and to build cooperation with other countries to respond to the threat of retaliation through international cooperation.

Furthermore, (3) as supply chains become more globalized, companies are required to make use of a large number of industrial subsidies to cope with conflicts with shrewd companies in various countries. Against this backdrop, it is important for industries and companies to position the use of trade remedies as a business strategy. It is necessary for investigating authorities to continue outreach activities by actively making use of seminars and newsletters, and to actively communicate with the industrial world so that such measures become familiar. In doing so, investigating authorities should try to convey to the people as a whole, including the industrial world and consumers, the policy significance of the use of such trade remedies in accordance with trade rules against unfair trade measures taken by other countries, not only for the benefit of individual companies, but also for maintaining domestic production bases in the long run, leading to the safety of people's lives, and contributing to the rule of law in the international

community.

In order for trade remedies to be used as a tool in reality, it is deemed essential that companies first analyze their supply chains from procurement of raw materials to sales, monitor trends in import volumes and prices of competing products from other countries, monitor the invocation of trade remedies by other countries for those products, and accurately understand trade risks. It is also considered effective to create a mechanism that allows companies to share examples of actions taken by other industries or other companies. In addition, in order to respond to the potential needs of the industrial world for trade remedies, it is necessary to strengthen the functions of investigating authorities, including increasing personnel and improving investigation techniques. Furthermore, in the long term, in order to expand the pool of human resources to deal with such trade issues and to increase the number of experts who can play an active role in various fields, such as investigating authorities, trade departments, legal departments of companies, and law firms, it is considered important for investigating authorities to undertake outreach activities to universities and law schools from a long-term perspective.

Finally, as industrial and trade structures are changing on a global scale in recent years in response to climate change and the further globalization of supply chains, there are a number of issues that cannot be addressed by the enforcement of existing trade remedy rules alone. For example, one issue is how to respond internationally to market-distorting movements such as overproduction capacity caused by harmful industrial subsidies in some industries. Against this backdrop, the EU has allowed the application of existing CVD measures to subsidies offered by China to Chinese investment capital in Egypt as a part of its Belt and Road Initiative, in order to deal with issues such as increasing cross-border investments through subsidies. In addition, the United States is moving to amend its domestic laws and impose CVD measures against foreign exchange manipulation in other countries, and it is necessary to continue to closely monitor movements in each country regarding CVD measures.

In order to realize a sustainable society (i.e. achieving the Sustainable Development Goals (SDGs)), each country needs to achieve major changes in its industrial structure. For example, in order to achieve carbon neutrality in 2050, the EU is finding a way to introduce various subsidies, regulations, and rules, such as Carbon Border Adjustment Mechanism. On the other hand, the United States has been investigating and imposing measures against the German steel industry, which received preferential treatment under the Emissions Trading System (ETS). This shows that trade issues relating to environmental policies are also increasing steadily.

As such, changes in the international industrial structure in response to global issues have brought about problems that cannot be addressed by the conventional way of enforcing the rules of trade remedies. In this context, cooperation with countries, such as information sharing on subsidies and the simultaneous implementation of trade remedies, has become even more important. In addition, how to make good use of trade remedies in response to new issues is an issue to be addressed in the future, and further consideration is needed.