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The Norwegian Framework for the Use of Countervailing Measures

- The Case of Solar Power

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1 Introduction

1.1 Clarifying the Topic

In this thesis I will be discussing the Norwegian framework for the use of countervailing measures (CVM). The framework in question is the legal one, so that other types of policy, trade policy included, are outside the scope of the topic. The Norwegian legislation is the basis for the discussion, but as Norway has signed and ratified several multilateral (and bilateral) agreements regarding international trade, a discussion of the Norwegian legislation also involves a discussion of the relevant international agreements and their implementation into Norwegian law. The most important ones are the *General Agreement on Tariffs and Trade 1994* (the GATT 1994) and the *Agreement on Subsidies and Countervailing Measures* (the SCM Agreement), which Norway have become signatories to through the World Trade Organisation (WTO). Norway is also a signatory to the European Economic Area (EEA) Agreement, but unlike the European Union, the EEA is not a customs union and we therefore have no common rules regarding CVM in relation to countries outside the EEA. I will, however, be using the EU law on CVMs as a basis for comparison to the Norwegian framework. Norway is a small economy that, to a great extent, relies on exporting its goods and services, especially in industries like the solar industry, where other countries have better conditions to utilise solar panels. I will be comparing Norway´s framework for the use of CVMs with the EU´s framework, to see how two different WTO Member´s have implemented the WTO agreements and what rights they have granted their industries. I will also be discussing possible reasons for the EU using CVMs more frequently than Norway.

1.2 Materials and Methodology

1.2.1 Relevant Materials

There are two WTO agreements regarding subsidies and CVM relevant to this thesis: the GATT 1994 and the SCM Agreement. They have been implemented into Norwegian legis-

lation through the Customs Act of 2007. The old Customs Act of 1966 and an administrative regulation[1] connected to it are also relevant when interpreting the current legislation. There is no Norwegian jurisprudence connected to the current or the historical legislation in this field, but there are preparatory works both from the current and the expired legislation. As for the EU legislation, there is a regulation[2] and practice regarding CVM.

1.2.2 Methodology

The starting point for discussing the Norwegian framework for the use of CVM is the Customs Act of 2007. When interpreting its provisions I will start with the ordinary meaning of the wording, and consider preparatory works, expired legislation and administrative regulations. Many different elements will influence a factor´s persuasiveness, and I will discuss this on a case-by-case basis.

The Norwegian framework for the use of CVM is largely influenced by international agreements, and consequently these must also be interpreted to determine the content of the Norwegian law.

The *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) Article 3.2 stipulates that the WTO dispute settlement system shall interpret the WTO provisions "in accordance with customary rules of interpretation of public international law". In *US – Gasoline*, the Appellate Body noted: "The 'general rule of interpretation' [set out in Article 31(1) of the *Vienna Convention on the Law of Treaties*] has attained the status of a rule of customary or general international law."[3] Consequently, the Vienna Convention (VCLT) must be used when interpreting the GATT 1994 and the WTO covered agreements.

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[1] The Introductory Provisions to the Customs Tariff.

[2] Council Regulation (EC) No 597/2009.

[3] Appellate Body Report, *US – Gasoline,* page 17.

The general rule of interpretation in Article 31.1 of the VCLT is that a term in a treaty shall be interpreted in its "ordinary meaning" taken in its context and in light of its "object and purpose". In *Japan – Alcoholic Beverages II,* the Appellate Body stated that Article 32 of the VCLT also has attained the status of a rule of customary law, so that the supplementary means of interpretation mentioned here also might be relevant when interpreting the covered agreements of the WTO.[4]

Panel and Appellate Body Reports are only binding on the parties in the specific case, and there is no rule of stare decisis in WTO dispute settlement, which means that later panels and the Appellate Body are not obliged to follow their previous interpretations.[5] However, they often follow their earlier interpretations of a provision if they consider it persuasive, and this is in accordance with the DSU Article 3.2, which provides that the dispute settlement system shall provide "security and predictability to the multilateral trading system". Given that the reasoning in a report is well founded it is likely that later panels and the Appellate Body will follow it. For this reason I will be referring to WTO jurisprudence when interpreting terms in the GATT 1994 and the SCM Agreement. I will mainly be using Appellate Body reports, as this is the final authority of appeal in the WTO dispute settlement system.[6]

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[4] Appellate Body Report, *Japan – Alcoholic Beverages II,* page 10.

[5] It is clear that there is no *de jure* doctrine of stare decisis in international trade law, but as Raj Bhala (Bhala (1999) p. 151) claims in his trilogy on the matter, it seems to be a *de facto* doctrine of stare decisis in WTO adjudication.

[6] The DSB ultimately decide a dispute as they must adopt Appellate Body reports. A report is considered adopted and accepted "unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members", cf. DSU Article 17.14.

1.3 Defining the Issues – the REC Case

REC – Renewable Energy Corporation ASA – is a Norwegian solar energy company founded in 1996. REC has production facilities in Singapore and the US, and sales offices in several countries across the world.[7] During the last few years, the solar market has grown rapidly and overproduction has caused a steep price decline. Production costs in Norway were too high to compete with solar products from e.g. China. In April 2012 REC announced that they would be closing down the remaining production facilities in Norway.[8] Before they shut down their production in Norway, both the company itself and the Norwegian government had to consider their options. For the owners of REC it was a question of profit. They were losing money producing in Norway. On the other hand, moving the production abroad could mean losing government support they might have been receiving from the Norwegian government, and a loss of important contracts and customers. The machinery and facilities were hardly used and it would be costly to shut down. What rights would REC have if they had wanted to prevent subsidized solar panels being sold below market price in Norway? Did Norwegian law give them the right to protect themselves against unfair competition from abroad? Could REC have joined e.g. EU or US efforts to prevent subsidised products from China taking over market shares?

For the Norwegian government there were other interests to consider, for instance the interest in developing a new technology and industry. Today oil is a large income for Norway, but it will not last forever, and there is a clear wish and need to focus on advanced technology for the future. The solar industry is still in its infant years and it continues to grow. It is an industry that many countries wish to develop, and if the Norwegian government provided research and support for REC in its early days, would they not want to keep them here? Further there were more than 1,000 people who lost their jobs when REC left Norway, and any technology REC had taken out a patent on was taken abroad. Could the

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[7] Key Facts, by REC Group.

[8] Press release: *"REC to exit all wafer operations in Norway"*.

government have prevented the alleged unfair competition from China from forcing REC out of Norway by using CVMs?

Furthermore, the government had to consider the fact that they are representatives for third party interests that they have committed themselves to through, e.g. international agreements. A third party interest that is particularly prominent when considering the use of CVM is the environmental interest. Norway has signed several international treaties regarding the environment. Through the *United Nations Framework Convention on Climate Change* (UNFCCC) Norway has agreed to, inter alia, the transfer of technology to developing countries to help them develop in a sustainable way, to use less coal and avoid them making the same mistakes as industrialised countries made while they were developing. What does this technology transfer involve for Norway, and could it mean that Norway should let, e.g. China, be in charge of developing the solar industry? Does it mean that Norway, after spending time and resources developing an industry, must give this technology to developing countries? It should also be asked if a country´s climate policy itself could justify the use of CVM.

One way to protect REC from artificial competition from abroad could have been to impose CVMs upon subsidised imports that were causing injury to the Norwegian solar panel industry. The national process for the imposition of CVM is a WTO regulated process, and the WTO regulation has been implemented into the WTO Members´ national legislation. In part 2, I will therefore be analysing the use of CVM as set forth in the GATT 1994 and the SCM Agreement before I in part 3 proceed to discuss the interests of the industry and the government when determining whether or not they wish to use CVM to protect the solar industry. CVM have not been used by Norway for many years, and in part 4 I will be analysing the implementation of the WTO legislation into Norwegian law, and discuss if the chosen technique may have affected the use of the trade measure. I will also be comparing the Norwegian framework to the EU´s framework for the use of CVM. I have chosen the EU as a basis for comparison because they have chosen a somewhat different technique than Norway when implementing the WTO legislation and they occasionally use CVM. I

will be discussing possible reasons as to why the EU use CVMs more frequently than Norway and if this may be a result of the different national/union legislation.

2 The International Framework for the Use of Countervailing Measures

2.1 Introduction

As an understanding of the WTO rules regarding CVM is necessary for the understanding of the Norwegian framework, I will begin discussing the WTO law on subsidies and CVM. After defining CVMs and when they can be used, I will continue to analyse the rights given to the domestic industries through the WTO law on CVM.

In essence, CVMs are a reaction by one WTO Member to another Member´s use of actionable or prohibited subsidies. They are an exception to the GATT 1994 Article II:1(b), which states that when products described in a Member´s Schedule of Concessions (Part I) is imported into the territory to which the Schedule relates, they shall "be exempt from ordinary customs duties in excess of those set forth and provided therein." A countervailing duty will be in excess of that provided in a Member´s Schedule, but paragraph 2(b) of Article II legalises the use of countervailing duties, as long as they are applied consistently with the provisions of Article VI.

Article VI:6(a) of the GATT 1994 lists three conditions which must be fulfilled before a Member lawfully can impose CVM upon another Member. There must be evidence of a (1) subsidy, (2) injury to the domestic industry and (3) a causal link between the two. Before I go on to discuss the different types of CVM available and when they may be imposed, I will discuss what constitutes a subsidy, as this is a condition that must be fulfilled regardless of the type of CVM being imposed. The investigation prior to the imposition of CVM is often referred to as an anti-subsidy investigation.

2.2 What Constitutes a Subsidy?

The GATT 1994 does not itself define what constitutes a subsidy, but the SCM Agreement contains a detailed definition. According to Article 1 of the SCM Agreement, there are

three elements, which must all be satisfied, for there to be a subsidy: (1) there must be a "financial contribution", (2) by a "government or any public body within the territory of a Member", (3) and the contribution must confer a "benefit".

2.2.1 Financial Contribution

The Appellate Body in *US – Softwood Lumber IV,* stated: "An evaluation of the existence of a financial contribution involves consideration of the nature of the transaction through which something of economic value is transferred by a government. A wide range of transactions falls within the meaning of "financial contribution" in Article 1.1(a)(1)".[9] This indicates that not all government measures are regarded as a "financial contribution", only the ones that fall within Article 1.1(a)(1)(i)-(iv). This was also stated by the Appellate Body in *US – Large Civil Aircraft (2nd complaint),* which said that the subparagraphs of Article 1.1(a)(1) provide an exhaustive, closed list of types of "financial contribution", "so that a transaction that does not fall within one of the listed categories is not covered by the Agreement."[10]

2.2.2 By the Government or a Public Body

The second element in the subsidy definition is that the government or a "public body" has made the financial contribution. What constitutes a "government" will usually not be in dispute, but the interpretation of a "public body" has been a matter of contention in the WTO dispute settlement system on several occasions. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* discussed what constitutes a public body within the SCM Agreement and in its Report it was said that "a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority. Yet, just as no two governments are exactly

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[9] Appellate Body Report, *US – Softwood Lumber IV,* paragraph 52.

[10] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint),* paragraph 101.

alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case."[11] This means that it will have to be determined on a case-by-case basis what constitutes a "public body", but that there are certain characteristics that should be present, such as the possession of governmental authority.
According to Article 1.1(a)(1)(iv), a private body making a financial contribution may be identified with the government when the government has entrusted or directed the private body to carry out one or more of the type of functions illustrated in Article 1.1(a)(1)(i) to (iii).

2.2.3 That Confers a Benefit

The last element that must be present for there to exist a subsidy is that the financial contribution must confer a "benefit". What constitutes a "benefit" has been discussed in WTO jurisprudence. In *Canada – Aircraft* the Appellate Body said: "A 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient." It then went on to say that "there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution."[12]

2.2.4 Specificity

A government measure that fulfils the three elements is considered a subsidy. However, not all subsidies are within the scope of the SCM Agreement´s disciplines, and therefore not all subsidies can be counteracted with CVMs. Subsidies must be "specific" according to Article 2, cf. Article 1.2, to be subject to the disciplines set out in the SCM Agreement. They

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[11] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China),* paragraph 317.

[12] Appellate Body Report, *Canada - Aircraft,* paragraphs 154 and 157.

can be specific to an industry, an enterprise, a group of enterprises or a group of industries in the Member State, cf. Article 2.

Of the specific subsidies there are two types that may be subject to CVM: actionable subsidies and prohibited subsidies. Actionable subsidies are those, which cause adverse effects to the interests of another Member. According to Article 5.1 of the SCM Agreement there are three types of adverse effects, but only "injury to the domestic industry of another Member", Article 5.1(a), can be the basis for the initiation of an anti-subsidy investigation, cf. Article 11.2. Prohibited subsidies may also be the foundation for the imposition of CVM. According to Article 3.1, there are two types of prohibited subsidies; export subsidies and import substitution subsidies. They are prohibited because their purpose is to affect trade, and thereby, in all probability, will cause adverse effects (injury) to other Members´ industry. If a dispute regarding the existence of a prohibited subsidy is brought for settlement in the DSB, CVM can be imposed if, after a final determination of its existence, the prohibited subsidy is not brought to an end.[13]

For an actionable subsidy to be the basis for imposing CVM, it must be evidenced that a subsidy exists (Article 1), that it is specific (Article 2), that there is injury caused to the domestic industry of the investigating Member (Article 5.1(a), and that there is a causal link between the subsidy and the injury. This last element means that injury caused by other factors, cannot be attributed to the effects caused by the subsidy.

2.2.5 Summary

A CVM can be a reaction to both prohibited and actionable subsidies, and they can be imposed both unilaterally and multilaterally. As a unilateral remedy, CVMs are imposed by a Member itself, after an anti-subsidy investigation, and do not have to go through the WTO dispute settlement system. As a multilateral remedy, a WTO Panel/Appellate Body can

[13] Example: *US - FSC*

impose them if prohibited subsidies are not discontinued after a final decision. In both cases the CVM aims at offsetting the injurious effects of a subsidy. I will be limiting this thesis to the use of CVMs as a unilateral, national remedy. Next I will discuss what constitutes a CVM and the procedure for the investigation leading to its imposition. In part 4 I will be discussing the implementation of these provisions into Norwegian and EU law.

2.3 Defining Countervailing Measures

Article 32.1 of the SCM Agreement states that "no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." As CVMs are "an action against a subsidy", the first place to look for a definition of the term is the GATT 1994. Article VI:3 contains a short definition: "the term 'countervailing duty' shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise". The same definition is found in footnote 36 to Article 10 of the SCM Agreement.

To determine what the definition means it must be interpreted. The starting point for the interpretation is, according to the VCLT Article 31.1, the term´s "ordinary meaning", seen in its context and in light of the treaty´s object and purpose. The definition says that CVMs are a "special duty", which must mean that they are something other than an ordinary customs duty. Further, the purpose of the duty is to offset a "bounty or subsidy", which indicates that it is a duty to counteract the effects of a subsidy. One of the GATT 1994´s purposes, as indicated in its preamble, is to ensure "the full use of the resources of the world and expanding the production and exchange of goods". If a subsidy, as defined in the SCM Agreement, causes injury to the domestic industry of a Member (Article VI:6(a) of the GATT 1994), this is working against the purpose of the Agreement, as such subsidies are preventing those who actually produce competitive products at competitive prices, from competing in the global market. Therefore, a countervailing duty must be understood as an extraordinary duty to prevent unfair or artificial competition and thereby an unsustainable development.

A CVM is not any type of measure that has the potential to offset the injurious effects of a subsidy. The different types of CVMs that can be used are fairly limited. Article 10 of the SCM Agreement says that Members shall take "all necessary steps" to ensure that the imposition of CVMs "is in accordance with the provisions of GATT 1994 and the terms of this Agreement". The term "all necessary steps" indicates that there is no leeway for Members on this matter. If it said "all possible steps" it would perhaps mean that the Members had a certain margin of appreciation to do everything possible, but that if they did not succeed, that could also be satisfactory. The term "all necessary steps" to ensure that the imposition of CVM "is in accordance with the provisions of GATT 1994 and the terms of this Agreement" has been interpreted by the Appellate Body to mean that a Member cannot impose other CVM than those listed in Article VI:3 of the GATT 1994 and Part V of the SCM Agreement. In *US – Offset Act (Byrd Amendment)* the Appellate Body said that "To be in accordance with the GATT 1994, as interpreted by the *SCM Agreement*, a response to subsidization must either be in the form of definitive countervailing duties, provisional measures or price undertakings, or in the form of multilaterally sanctioned countermeasures resulting from resort to the dispute settlement system."[14] Imposing CVMs must be done in accordance with both the GATT 1994 and the SCM Agreement.[15] Before I discuss the different types of CVM I will present the main rules governing the imposition of them.

2.4 Imposing Countervailing Measures According to WTO Rules

In the following section I will be analysing the procedure for imposing CVM pursuant to the national system[16] in addition to a brief discussion of the requirements that must be fulfilled before CVM can be imposed. This is to see what rights and obligations are granted to

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[14] Appellate Body Report, *US – Offset Act (Byrd Amendment),* paragraph 273.

[15] Appellate Body Report, *Brazil – Desiccated Coconut,* page 14.

[16] As opposed to the imposition through the WTO Dispute Settlement Body.

the state and to the industry according to the WTO system, so that when I discuss the Norwegian legislation, I can see if they have been transferred to the domestic law of Norway.

The procedure for applying CVM is regulated in Article VI of the GATT 1994 and Articles 10 to 23 of the SCM Agreement. According to GATT 1994 Article VI:6(a) three conditions must be fulfilled in order for a Member to impose CVM. There must be evidence of (1) a subsidy, (2) injury to the domestic industry and (3) a causal link between the two. Article 15.5 of the SCM Agreement provides that "It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement." (My underlining.) This means that injury caused by other factors is not to be attributed to the (injury caused by) subsidised imports, as they have no causal link with the subsidy. These conditions must be proven through an anti-subsidy investigation.

As a rule, a Member must receive an application from the domestic industry before they can initiate an anti-subsidy investigation,[17] cf. Article 11.1 of the SCM Agreement. It is important to determine what constitutes the "domestic industry", and Article 11.4 stipulates, inter alia, that:

> *"The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry."*

[17] The exception in Article 11.6 will be discussed under section 4.3.

This means that if, for instance REC, had wanted to submit an application, they would need support from other producers in the industry in Norway unless they themselves accounted for at least 25 per cent of the solar panel industry in Norway, *and* more than 50 per cent of the industry that either expressed support for or opposition to the application.

Article 11.2 of the SCM Agreement says that the application must provide "sufficient evidence" of "(a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury." This indicates that the industry must undertake some investigations of their own before they can make a complaint to the government. Nevertheless, the authorities cannot take the information provided in the complaint for granted, and must, according to Article 11.3, review the evidence provided in the complaint before initiating an investigation. The investigation itself must determine with certainty that the three elements contained in the application are present before (definitive) CVM may be imposed. Detailed rules regarding evidence, calculation of the amount of a subsidy and how to determine injury to the domestic industry are found in Articles 12 to 16 of the SCM Agreement. I will not be discussing the details of these provisions, as it would be too broad for the scope of this thesis.

If REC had applied for anti-subsidy investigations to be initiated by the Norwegian authorities, it would be important for them to know the timeframe for the investigation. If they were losing profits due to artificial competition from China, they would have to calculate if they could afford to keep producing in Norway for the duration of an investigation. If an investigation would not be within their financial means, there would be no reason to submit an application. Article 11.11 of the SCM Agreement stipulates that investigations should be concluded within one year of their initiation, and in no case later than 18 months. The one-year limit may only be exceeded in "special circumstances", and according to the Panel in

Mexico – Olive Oil, there is no basis in Article 11.11 to prolong an investigation beyond 18 months, whatever the reason may be.[18]

Before the initiation of an investigation, the investigating authority shall invite the Member, which may be subject to investigation, to consultations with the ambition of clarifying the situation as to the matters referred to in paragraph 2 of Article 11, cf. Article 13.1. This could add to the time before an investigation is initiated, unless the consultations are successful and thereby conclude the matter. However, the provision only says that the Member that may be subject to an investigation "shall be invited for consultations". As the Panel in *Mexico - Olive Oil* stated, "we see no requirement that a sufficient interval must be allowed after issuance of the invitation and before initiation that consultations could be held. Rather, the requirement in that provision is that the invitation must be issued 'in any event before' initiation, with no indication of any specific time interval."[19] Given that the authorities promptly send out an invitation for consultations, the initiation of an investigation should not be delayed. Article 13.2 states that consultations should, preferably, continue during the investigation, with a view to reach a mutually agreed solution.

An anti-subsidy investigation can end in three different ways; if the authorities are satisfied that there is not sufficient evidence of subsidisation or injury the investigation must be terminated promptly (Article 11.9); if the exporter revises its prices or eliminates or limits its subsidies, also known as voluntary undertakings (Article 18.1(a) and (b)); or if the investigating authorities impose definitive countervailing duties (Article 19.1). Even if the domestic industry finds that the conditions for imposing CVM are satisfied, and the investigating authorities too, there is no guarantee that the decision-making authorities will use CVM.

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[18] Panel Report, *Mexico – Olive Oil,* paragraph 7.121.

[19] Panel Report, *Mexico – Olive Oil,* paragraph 7.39.

2.5 The Different Types of Countervailing Measures

There are two (three) different types of CVM that can be imposed as a result of an anti-subsidy investigation. They can be imposed at different times during the investigation and may be imposed for a shorter or longer period of time. They are called definitive countervailing measures and provisional measures. It can be argued that a third type, voluntary undertakings, is not really a CVM as it is not the investigating authorities that impose a duty upon the exporting Member, but rather the exporting Member voluntarily eliminating the injurious effects of its subsidisation. For that reason I consider it not to constitute a CVM, and will not be discussing it in further detail.

2.5.1 Definitive Countervailing Measures

The imposition of definitive countervailing measures is regulated in Article 19 of the SCM Agreement. According to paragraph 1, a Member can only impose definitive countervailing measures after making "a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury…" Ergo, the investigation must have been successful and come to an end. As a consequence of the principle that injury caused by other factors than the subsidy shall not be attributed to the subsidy, the 'lesser-duty' rule in paragraph 2 states: "…the duty should be less than the total amount of subsidy if such lesser duty would be adequate to remove the injury to the domestic industry…".

2.5.2 Provisional Measures

The application of provisional measures is regulated in Article 17 of the SCM Agreement. Provisional measures are temporary. Pursuant to Article 17.1(c), the application of provisional measures must be judged "necessary to prevent injury being caused during the investigation", and thereby have the characteristics of a security measure for the investigating authorities´ domestic industry. According to paragraph 3, provisional measures may not be applied earlier than 60 days from the date of initiation of an anti-subsidy investigation and they shall be "limited to as short a period as possible, not exceeding four months", cf. para-

graph 4. The Panel in *US – Softwood Lumber III* said that the limitations in paragraphs 3 and 4 are unambiguous, and cannot be deviated from.[20] This seems reasonable considering the imposition of provisional measures do not require the same level of certainty with regard to the evidence as definitive measures do.

[20] Panel Report, *US – Softwood Lumber III,* paragraph 7.100.

3 Countervailing Measures in the Solar Industry – Interests of the Main Actors

3.1 Introduction

The solar industry is still in its infant stage, and as climate change and energy supply are political concerns across the globe, many countries and companies see the opportunities and benefits in developing this industry. The technology is continuously developing, increasing the quality and decreasing the production costs. A state´s interests in developing the solar industry are not necessarily concurrent with the interests of the industry itself. The primary concern for the industry will often be how to improve their technology and increase its market share, whilst the state´s interests will often include a broader concern for the society as a whole. The state is also a representative for third party interests through, e.g. international agreements and national policies. In paragraph 3.2 I will be discussing the interests of the solar industry and in paragraph 3.3 the interests of the government, both as the executive branch of government and as a representative of third party interests, when considering the use of CVM in the solar industry.

3.2 The Solar Industry

The solar industry has the opportunity to influence Norway´s use of CVMs, as they can make a complaint to the government regarding a foreign country´s subsidisation causing injury to their industry (SCM Agreement Article 11.1). Their interests in imposing CVM may differ from those of the government and also the environmental interests the government represents. They have a different agenda than the government and not the same obligations regarding the environment. Additionally, the interests within a company itself may differ. For instance, in the REC case, the board possibly had different interests than the owners as they also represented the employees. In the following, I will look at some of the factors that may affect the solar industry´s interests related to the use of CVM, on the basis of the REC case.

3.2.1 The Interests of the Owners

A domestic industry can send an application to the government requesting that they initiate anti-subsidy investigations against WTO Members who subsidise their industry (only if it is prohibited or actionable subsidies) and thereby cause injury to the domestic industry. The purpose of an investigation is to determine whether or not to use CVM to prevent the injury. A question that should be asked, is why REC did not submit such an application to the Norwegian authorities? In the following I will discuss the interests of REC´s owners, and then the interests of the board of directors.

To be able to produce electricity from solar panels, there is a basic requirement for sufficient sunshine. Consequently, Norway does not have a high demand for solar panels. Germany, Italy, USA, Japan and China are the most developed markets within the solar industry today,[21] hence REC is dependent on export to these – and other – countries to make a profit. The Norwegian market was not where REC made their money. When they started losing money producing in Norway, imposing CVM on solar panels being imported into Norway would not be sufficient to save the Norwegian production facilities. What REC needed, was a competitive advantage in the bigger solar panel markets.

Even though REC´s position would not have improved drastically if CVM were imposed upon solar products being imported to Norway, the signal effect it could have on other countries with a solar panel market could have an impact on REC. Firstly, it could cause the Member with the subsidised exports to remove or limit the injurious effects of the subsidy, not only in relation to exports to Norway, but also on exports to other countries, to avoid them imposing CVM. This would not only benefit the industries in the importing countries. It would also be beneficial to the exporting country, as they, or their subsidised industry, would get the profit from, for example, raising the price on exported products. If CVM were imposed, the countries imposing them would be the ones benefitting from the

[21] Market Overview by REC Group.

extra duty levied upon the subsidised imports. Consequently, the effect of one country imposing CVM could be that the exporting country limits or removes the effect of the subsidy to all importing countries. However, there is no guarantee for this, and it would be a chance for REC to take. The effect could also take years, which REC might not have been able to afford to wait for.

REC´s purpose is described in their Articles of Association §3 where it says, inter alia, "The Company's purpose is development and sale of products and services related to renewable energy sources, and to perform other financial operations related to such." If this purpose could not be pursued in Norway, or it could be pursued more efficiently elsewhere, it is likely that the owners of REC would see fit to relocate its production to a location where the purpose was more likely to be fulfilled. The Articles of Association does not specify that the purpose must be fulfilled in Norway, and given that CVM imposed by the Norwegian government would have minimal effects on REC´s sales, this could be one reason why they did not submit an application with the Ministry of Finance to initiate anti-subsidy investigations.

Both the US and the EU have initiated anti-subsidy investigations against China, and the US investigation has already been concluded and resulted in the imposition of definitive countervailing duties up to 15.97 % on solar PV products imported from China.[22] Before the definitive decision was made, the Chinese government referred two disputes to the DSB regarding the preliminary duties imposed. On 25 May 2012 and 17 September 2012, China requested consultations with the US through the WTO dispute settlement system regarding, inter alia, the preliminary determinations regarding CVM imposed on their solar exports.[23]

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[22] Fact sheet by the U.S. Department of Commerce, International Trade Administration, 2012.

[23] *US – Countervailing Measures (China)* and *United States – Countervailing and Anti-dumping Measures on Certain Products from China.*

China is moving from a developing to a developed country, which involves a need for more electricity, preferably of the renewable kind. As they are not responding well to countries that try to limit their exports, it seems as though REC has decided to stay out of the on-going trade war so as not to agitate the Chinese government. In a press release from 20 July 2012, REC denies any unlawful act after being made respondent to the investigation initiated by the Chinese towards the US solar industry. In the press release REC stated:

> *"REC has opposed the imposed import duties in the US, and has voiced its opposition to a threatened trade case against Chinese made solar modules imported into Europe.*
>
> *REC is disappointed at the escalation of the trade war with the recent filing and is regretful of the prospect of increased costs across solar industry. REC Silicon values its Chinese customers highly, and does not believe it has engaged in price discrimination or unfair or illegal international trade in the export of its US made polysilicon to China and will defend itself in relation to any such charges."*[24]

It could be that REC sees an opportunity of expanding their market share in the Chinese market, and therefore do not wish to agitate them by joining the ongoing trade war between China, the US and the EU. In May last year, REC announced that they would be opening a new applications and research centre in China. In connection with this, Kurt Levens, VP of Commercial Development and Planning in REC Silicone said that they wish to be close to their expanding customer base in China.[25] If REC were to participate in the solar trade war with China, it would in all likelihood not impress their potential (and existing) Chinese

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[24] Press release: *"REC Regrets the Escalation In Solar Industry Trade War And Denies Any Wrongdoing"*.

[25] Press release: *"REC Announces New Silicone Technologies Applications and Research Center in Shangyu, China"*.

customers. Their interest is to develop their technology and produce products at competitive prices, whether in Norway or in other countries.

3.2.2 The Interests of the Board of Directors

The board of directors represent the interests of the owners, and also the interests of the employees. These will often be similar, but the shutting down of REC´s production facilities in Norway gives an example of when the interests of the owners and those of the board of directors may not correspond.

The board of directors in REC had four employee representatives when it was decided that REC would cease all wafer operations in Norway. Three of them voted against the closedown decision.[26] There is no documentation of the reasoning behind the voting, but it could be the result of their interests being focused on the employees, and not on the owners.

3.3 The Norwegian Government´s Interest in Developing the Solar Industry in Norway

A country´s interest in developing an industry will often be different from the interests held by the industry itself. The government holds the interests of the country as a whole, which do not necessarily correspond to the interests of an industry trying to make a profit.

Norway has long, dark and cold winters, which is not ideal for producing solar energy, and this is the time of year when the demand for energy is highest. During a Norwegian summer the days are long and the conditions are good for producing solar energy, but at this time of year the demand for energy is down. This makes Norway less suitable for solar energy production than countries that have more sunshine throughout the year. However,

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[26] Press release: *"Rec to exit all wafer operations in Norway"*.

Norway has large deposits of quartz with a high content of silicone, which is an important part of wafers used in solar panels. Other than using the silicone for domestic production of wafers, Norway can utilise its access to the raw material in two ways; either export it for wafer production in other countries, or develop the necessary technology and industry itself and export the end product.[27] On these grounds, Norway could benefit financially from the raw material even without developing and maintaining their own solar industry. However, there are interests that speak in favour of having a solar industry in Norway, and the focus in this section, will be arguments for and against using CVM to protect the Norwegian solar industry.

3.3.1 Norwegian Investment in the Solar Industry

If a country spends resources investing in its own industries, for example for research or capital to start up a company, it seems natural that the government would wish to protect its industry from other countries subsidising and causing injury to the domestic industry, potentially forcing domestic producers to close down. I will therefore be looking at investments the Norwegian government has made in the solar industry generally, and REC specifically, and thereafter discuss other interests which could affect Norway´s decision not to initiate anti-subsidy investigations against imports of subsidised solar PV products.

From 2004-2012, most of the research and technology development in the renewable energy sector was organised through the Norwegian Research Council´s RENERGI-programme (Clean Energy for the Future). The different Ministries have financed the RENERGI-programme, but the main funding has come from the Ministry of Petroleum and Energy. The programme financed about 500 research and development projects, in total approximately 2 billion NOK. Though this is used for research in many different fields within the clean energy sector, a not insignificant part of it has been used for research and develop-

[27] Holen … [et al.], 2008.

ment on solar energy.[28] From 2013, the programme is continued through the ENERGIX-programme. One of the main goals of the ENERGIX-programme is to develop the Norwegian industry in fields where the Norwegian participants have an advantage.[29] As I have mentioned, Norway has the necessary raw material for silicone wafer production and also knowledge and technology within the industry. This indicates that the Norwegian participants in the solar industry have such an advantage, and as REC was one of the largest producers in the industry, they should have been protected from being forced out of the country. It makes little sense to invest so much in developing the solar industry if we are going to let go of the largest producers. It is however specified that to be considered a Norwegian participant, a company does not have to be operating in Norway as long as it contributes to economic growth in Norway. Though REC is no longer producing in Norway, it is still a Norwegian company, with its headquarters in Sandvika, and is thereby contributing to the Norwegian economy.

In 2009, the Norwegian Research Centre for Solar Cell Technology was opened. In their 2011 annual report, the statement of accounts shows that more than 1/3 of their funding came from the Norwegian Research Council,[30] which itself is funded by the Norwegian government. Both this and the RENERGI-programme are examples that show that the Norwegian government has, and still is, investing large resources in developing renewable energy sources in general, and solar energy specifically.

According to Nordland County Administration,[31] REC has since the start-up in 1996 received close to 120 MNOK in high-risk loans and grants from them, channelled through

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[28] RENERGI End Report (2012).

[29] The Norwegian Research Council (2005).

[30] The Norwegian Research Centre for Solar Cell Technology (2011).

[31] Skille (2012).

Innovation Norway.[32] Both the Norwegian local and central governments have, and still are, investing significant amounts in the solar industry. Spending such amounts on research and grants, one can ask why the Norwegian government did not do more to keep REC, one of the world´s largest solar companies, producing in Norway?

One possibility could be that the extensive support provided by the Norwegian government to REC, and the rest of the domestic solar industry, is itself a subsidy that can be counteracted by importers of Norwegian solar panels. If Norway initiates investigations towards other countries´ industries, it could increase the chances of an investigation against the Norwegian industry, revealing the double standards it would be for Norway to counteract subsidies to other countries´ solar industry. Considering REC was not able to produce at competitive prices even with the subsidies they were receiving, the Norwegian industry would most definitively have to close down if trade measures were imposed on their exports, or if the subsidies were stopped.

3.3.2 Employment

A factor, which is important for all economies, is the state´s unemployment rate. When REC closed down their production facilities in Norway, more than 1,000 people were left unemployed. However, according to Norway´s national budget for 2013, the unemployment rate has decreased to a historically low level. This doesn´t mean that the government is not concerned about unemployment, but there is a demand for labour in Norway, especially engineers. In times with a high unemployment rate the government might be more inclined to use CVM, but it´s more likely to be one of several factors, and not a reason on its own to use or not to use CVM.

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[32] Innovation Norway is one of the Norwegian Government´s most important instruments for innovation and development of Norwegian industry.

3.3.3 A Small Economy in the Global Market

The solar industry is still a young industry where producers are fighting for market shares in a constantly growing market. Norway lost its largest actor when REC closed down production here. If Norway is not willing to protect its own industries, they have little chance of surviving in competition with artificially competitive foreign producers entering the Norwegian market. On the other hand, Norway is a small country dependent on export. According to WTO statistics, Norway was the world´s 31st largest exporter and 36st largest importer in 2011 which, considering the population is barely 0,1 % of the world´s total, is noteworthy.[33] This shows how dependent Norwegian welfare and development is on other economies, and for Norway to initiate an anti-subsidy investigation against any large economy, would have minimal effects, especially in an industry like solar panels where the industry is dependent on exporting its products. The most developed solar markets in 2011 were Germany, USA, Italy, Japan and China.[34] As long as subsidised, cheaper solar products are freely exported to these markets, the Norwegian industry won't be able to compete.

The EU is currently investigating China´s subsidisation of their solar industry and China has requested consultations with the EU regarding some of their solar subsidy programmes.[35] The Chinese consultations with the EU are first and foremost regarding the solar industries in Greece and Italy, and as I have mentioned, Italy is one of the worlds most developed solar markets. As Norway´s solar industry will benefit from subsidised exports being prevented from entering markets where they themselves export their products, Norway should take part in these disputes. They should be securing their interests in

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[33] WTO´s Statistics Database, Norway.

[34] Market Overview by REC.

[35] EC News Archive: *EU initiates anti-subsidy investigation on solar panel imports from China* and WTO dispute: *European Union and certain Member States — Certain Measures Affecting the Renewable Energy Generation Sector.*

the global market. Norway should not ignore trade matters that can affect the Norwegian industries.[36]

3.3.4 Norway´s Oil and Gas Industry

Norway is a small economy dependent on the global economy and export of goods, in particular oil and gas. During 2009 and 2010, the EU Member States implemented Directive 2009/28/EC, which sets targets to increase the share of energy from renewable energy sources.[37] According to the International Energy Agency´s (IEA) Key World Energy Statistics 2012 Edition, Norway is the 9th largest oil exporter in the world and the 3rd largest natural gas exporter.[38] Many of the largest importers, especially of natural gas, are EU Member States. If they reduce their use of oil and gas, it will affect Norway´s export to these countries. Norway needs to protect and promote the development of e.g. solar power in Norway, or we will lose an important source of income. We should reflect the development in the countries we export to, and try to adjust to their development. This, in addition to the fact that the oil will not last forever, should encourage Norwegian authorities to protect other industries that will help secure the future of the Norwegian economy.

3.3.5 Norway as a Representative for Third Party Interests

Through, inter alia, its national policies and international commitments, Norway has agreed to promote interests that will not necessarily benefit Norway economically, but which for other reasons are important to society. A third party interest when discussing CVMs in the

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[36] After the Nobel Peace Prize was given to Liu Xiaobo, who in China is considered a criminal, the relationship between Norway and China has been tense, and the Norwegian government may not want to put more pressure on the Norway-China relationship by entering the solar trade war.

[37] Directive 2009/28/EC Article 1.

[38] Key World Energy Statistics 2012 pages 11 and 13.

solar industry, is the environmental interests and the possible effect they may have on a state´s decision to use, or not to use, CVM in this industry. In this section I will be discussing some of the environmental interests that may affect Norway´s use of CVM in the solar industry, with a focus on the UNFCCC Article 4.5 and the Norwegian Climate Compromise.

3.3.5.1 The UNFCCC Article 4.5

In the UNFCCC preamble, the Parties to the Convention acknowledge "that change in the Earth´s climate and its adverse effects are a common concern of humankind…" They also note that the largest share of green house gas (GHG) emissions have originated in developed countries, and that developing countries´ emissions will continue to grow to meet their social and developmental needs. For years industrialised countries polluted without regard of the harm it was causing the environment. Therefore, it is said that the historical responsibility for reducing the GHG emissions lay with the industrialised countries. In addition to reducing their own emissions, developed countries need to help developing countries economically and technologically to reduce their emissions. This is part of the reasoning behind the UNFCCC´s declaration of countries´ "common but differentiated responsibilities" (UNFCCC Article 3.1) to mitigate climate change. Our common responsibilities refer to all countries being responsible for creating a sustainable future. Even though they are differentiated, this does not give developing countries a right to pollute more than necessary.

As a result of these "common but differentiated responsibilities", the developed country Parties included in Annex II (Norway has agreed to this part of the UNFCCC) have in Article 4.5 of the UNFCCC agreed to "take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and knowhow to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention." When REC, which was Norway´s largest producer of solar panels, moved their production out of Norway, Norway lost much of its market shares to other countries and REC´s technology was relocated abroad. In the following I

will discuss whether or not Norway´s obligation[39] to transfer technology could have had an impact on their use of CVM in the solar industry.[40]

According to the VCLT Article 31.1, the general rule of treaty interpretation is that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their contexts and in light of its object and purpose." It seems clear that the technology and knowledge Norway has gained in the solar industry must be considered to fall within the term "environmentally sound technologies" in the UNFCCC Article 4.5, so the next question is whether or not the UNFCCC Article 4.5 expresses an obligation for the Norwegian Government to give, or sell, its knowledge to developing countries.

The Oxford Dictionary defines 'transfer' as conveying, removing or handing over e.g. a thing. The term 'access to' is defined as "the right or opportunity to reach, use or visit." These terms must be seen in the context of the treaty in light of its object and purpose. In determining the purpose of a treaty, Article 31.1 of the VCLT says that the treaty´s preamble may be taken into consideration. The last sentence of the UNFCCC´s preamble suggests that the purpose of the treaty is to "protect the climate system for present and future generations". Keeping this in mind, the terms 'transfer' and 'access to', in the context of the UNFCCC, do not mean that Norway has to give up its solar industry for the benefit of developing countries to be able to respect its commitments. It could, however, mean that we should be sharing our technology or knowledge so that developing countries also can take advantage of it.

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[39] The wording of Art.4.5 indicates that it is so-called soft law, and thereby less binding than traditional law.

[40] I will not be discussing the details of the process of technology transfer itself.

The obligation in Article 4.5 is not simply to transfer or give access to certain technologies, but to "take all practicable steps to promote, facilitate and finance, as appropriate…" a transfer or access to. "All practicable steps" indicates that what is not possible is not expected, but at the same time reasoning non-fulfilment of the obligation with it being inconvenient, will not be sufficient. The obligation does not state that developed countries must give their technologies to developing countries free of charge. For example, if China lacked the knowledge to develop "environmentally sound technologies", they could financially cooperate with Norway to develop e.g. solar panel technology. That way Norway would be promoting the transfer of solar panel technology. Norway could also finance research and development of solar technology in China, or assist in other ways with their development.

The term "as appropriate" in Article 4.5 limits the obligation. For instance it would not be appropriate to send Norwegian scientists to China to facilitate the transfer of solar technology if the scientists lives were in danger in China. Neither would it be appropriate to finance research in a country where the researchers were victims of human rights breaches, or where corruption made it hard to determine what the money was actually used for. It must be determined on a case-by-case basis what is considered "appropriate".

Given that Norway promoted, facilitated or financed China´s access to solar technology, could Norway subsequently impose CVM upon imported products that resulted from that technology transfer? It´s a known fact that labour costs and the cost of production itself often are cheaper in developing countries than in Norway, and if the industry is also subsidised by the government, prices can be even lower. If Norway imposed countervailing duties in such a situation, it would contravene the purpose of the UNFCCC Article 4.5. Additionally it would not make much sense if Norway first spent resources helping to develop an industry abroad, and later imposed CVM on that industry´s exports. On the other hand, one of the WTO´s purposes is to promote free trade, which speaks in favour of imposing countervailing duties where the conditions are fulfilled and the government wishes to do so. Additionally, technology transfer is supposed to help the country secure a sustainable future, which does not necessarily mean they must export the products.

Free trade and technology transfer are two important and internationally agreed upon obligations, and which one that will prevail if a dispute arises is not easy, if even possible, to predict. Nevertheless, it could be inconsequential for a country to first promote the transfer of an environmentally sound technology to a developing country, and later hinder their exports.

3.3.5.2 Norwegian Climate Policy

Norwegian climate policy has been a topic for discussion and disagreement for years, but in April 2012, the Government finally agreed on a recommendation[41] regarding Norwegian climate policy. This White Paper elaborates the objectives and principles in Norwegian climate policy from the 2008 Climate Agreement.[42] In June 2012 the Storting (Norwegian Parliament) reached the Climate Compromise.[43]

The White Paper outlines some of the Government´s suggestions on how to reach the goals they have agreed to in the Kyoto Protocol, with the ultimate goal to become a low-emission society. It says that Norwegian "climate policy should contribute to develop and transform [the] industry and commerce in a climate-friendly direction. Technological development is a crucial element."[44] Though the solar industry can be developed without REC, they have agreed to promote climate friendly technology development, and REC certainly contributed to this.

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[41] Meld.St. 21 (2011-2012).

[42] Innst. S.nr. 145 (2007–2008).

[43] Ministry of the Environment News Archive, 11 June 2012: "Klimaforliket vedtatt i Stortinget".

[44] Meld.St. 21 (2011-2012) page 4.

According to the White Paper part 1.7, the Government "proposes a national initiative to develop technologies that can mitigate climate change". They wish to establish a climate and energy fund for development of technology and industrial transformation. This was approved by Parliament in the Climate Compromise. Through the White Paper and the Compromise, the Norwegian Government shows its ambition to focus on developing new technologies to reduce GHG emissions. They also agreed to ban fossil fuels to heat private houses from year 2020, and to continue the benefits given to those who own electric cars. If more people use electric cars, we will use more electricity. This electricity should come from renewable energy sources, such as solar power. It seems contradictory with the Government's ambitions to let go of the technology we have already developed in the solar industry. We need these technologies to meet the goals set in the Climate Compromise.

As we have seen, the Norwegian government cannot exclusively consider internal interests when determining whether or not to use CVM. Third party interests, such as the environment, must also be considered. As a developed country we have certain responsibilities to secure a sustainable future, which cannot necessarily be given less priority than other international obligations.

3.4 Summary

In this section I have discussed the interests of the main actors in the solar industry when determining whether or not to use CVM. Whilst the industry is mainly concerned with income and expenses, the government has a much wider range of interests to consider, and must prioritise. Their priorities will not always correspond to the main interests of the industry.

In section 4 I will analyse Norway´s use of CVM in light of the various interests, and discuss how they may affect the solar industry´s decision to file an anti-subsidy complaint, and the government´s decision to initiate investigations, finally imposing CVM. I will also be discussing the possibility of the government´s interests affecting the implementation of the WTO legislation into Norwegian law.

4 Norway´s Use of Countervailing Measures

4.1 Introduction

In this section I will be analysing the Norwegian framework for the use of CVM. Before I discuss the separate provisions and the rights presented therein, I will examine the history of the Norwegian framework and how it has affected the existing legislation. In section 4.2 I will compare the Norwegian legislation to the relevant EU legislation, to demonstrate two different methods for implementing the WTO agreements into national law, and to see how the use of CVM may be affected by the chosen method.

4.1.1 The Legal Framework in an Historical Context

The Customs Act of 2007 is the result of a technical revision of its predecessor from 1966. The Customs Act of 1966 was the successor to a law from 1928, which had many and very detailed provisions. The 1966 Customs Act did not contain any rules regarding subsidies and CVM, but these were added by an administrative decision.[45] The Act was revised in 1993[46] to make the law more up to date and to implement international agreements Norway had become part of since 1966.

The GATT 1994 and the SCM Agreement entered into force after the revision in 1993, and they had to be implemented into Norwegian law to be binding internally. The implementation of international agreements in Norway occurs either by incorporation or transfor-

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[45] The Introductory Provisions to the Customs Tariff §3. §3 was continued as an administrative decision every year as part of the National Budget. The last time the Storting made this decision was in 2007, which expired 31.12.2008.

[46] The revision resulted in a revision act: Lov av 3. juni 1994 nr 14: Lov om endringer i lov av 10. juni 1966 nr. 5 om toll (tolloven).

mation.[47] When an agreement is incorporated, a formal decision (an act) is made stating that the treaty itself is legally binding in Norway. By using the second method, transformation, the treaty is transformed into Norwegian law by enacting a new act (or new articles in several acts) where the treaty is translated into Norwegian and rewritten to be more suitable for Norwegian conditions.

In 1995, section 3 of the Introductory Provisions to the Customs Tariffs was edited to implement the newly ratified GATT 1994 and the WTO Agreement with its covered agreements. The implementation was effected through both transformation and incorporation. As opposed to today's provisions, section 3 covered both dumping and subsidies, and did not contain a definition of what constituted a subsidy. Section 3.3 stated that CVM could be used within the WTO framework if so decided by the King,[48] and thereafter listed some rules that applied to both anti-dumping and anti-subsidy measures. In the 2007 Customs Act the provisions regarding subsidies and dumping have been seperated.

Norway becoming part of the EEA in 1994 did not affect the Norwegian rules on subsidies and CVM in regard to countries outside the EEA. The EEA is not a customs union, and consequently the EFTA[49] countries do not have common rules with the EU regarding trade with third party countries. The EEA only concerns trade with the other countries within the EEA. In consequence, the provisions in the EEA Agreement Article 26 and its Protocol 13 regarding, inter alia, CVM, fall outside the scope of this thesis and will not be discussed any further.

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[47] There is also a third type, so-called passive transformation, where the internal law is already in accordance with the international agreement, and this is simply stated.

[48] The King in Norwegian law is usually equivalent to the King in the Council of the State (the Government).

[49] European Free Trade Association.

There was an extensive amount of administrative decisions connected to the Customs Act of 1966, and this was one of the reasons for the revision in 2007. When the Ministry of Finance prepared the law, they said that lifting provisions that created rights for private people or companies from administrative regulations to formal acts was important for it to be in accordance with the principle of legal authority. The legislators wanted to make the law more accessible, but at the same time acknowledged that it would not be possible to make the law so that everybody could determine their legal rights only by consulting the act.[50]

The Customs Act of 2007 uses both incorporation and transformation when implementing the WTO law. It also lifts the provisions regarding CVM from an administrative decision to a formal Act. The 2007 Act has three provisions implementing the WTO law regarding CVM,[51] sections 10-3, 10-4 and 12-7. This is more than the previous legislation, but it still seems that many of Norway´s international obligations in this matter have been implemented through what has been called sector-monism.[52] According to section 10-3 paragraph 1, the introduction of CVM must happen within the limitations of international law and agreements with other states or organisations. As a consequence, international agreements will affect the application of the Act. This includes not only the relevant WTO law, but also bilateral free trade agreements and other treaties and agreements regarding subsidies and CVM. It also means that international obligations that did not exist when the Customs Act entered into force can be of significance. This is why it has been referred to as sector-monism. This might be the most practical solution, but it makes it harder to determine ones rights and obligations according to the law.

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[50] Ot.prp.nr. 58 (2006-2007) page 12.

[51] And any other international agreement that may be relevant.

[52] Ot.prp.nr. 58 (2006-2007) page 23 (”del-monisme”).

After years of revisions and development of international agreements that affect the Norwegian framework for the use of CVM, Norway has ended up with a fragmented legislation that is not possible to understand by only reading the Customs Act.

4.1.2 The Norwegian Framework Today

The starting point when establishing the Norwegian framework for the use of CVM is the Customs Act of 2007. As the provisions covering this part of the law are few and not very detailed, I will also be using other legal sources to interpret the Act.

In connection with the consultative round when preparing the Act, the Ministry of Finance prepared a discussion document. Out of consideration for the democracy, we should not attach great significance to these types of preparatory works, but on the other hand it is normally at this stage of the legislative process the groundwork for the act is prepared, and where we find most discussions and comments regarding its contents. Though we are not strictly bound by the preparatory works when interpreting an act, they are often referred to in jurisprudence if they are considered a relevant argument. Many factors, such as who produced the preparatory works,[53] at what stage in the legislative process they were prepared, their age, the type of statement etc. will affect the significance given to the preparatory works. Their authority also depends on which other grounds we have for the interpretation. If the text of an act is ambiguous, most people will comply with the preparatory works, given that the interpretation therein appears equally reasonable as the other possible interpretations. Nevertheless, if the preparatory works imply an interpretation that is in conflict with the ordinary meaning of the terms, the wording of the act will usually prevail.[54]

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[53] A group of experts, a politician making a comment during the voting etc.

[54] Eckhoff (2001) page 73.

In addition to the discussion document, there is a proposition to the Odelsting,[55] which forms part of the preparatory works to the Customs Act. This document originates from the democratically chosen government and should be considered more authoritative than the discussion document. What is unusual in the preparatory works to the Customs Act is that they seem to provide rights and obligations for the user of the Act that are not stipulated in the Act itself. The legislator has sought to legislate through the preparatory works. This is an ineffective legislative technique as it makes it hard to determine ones rights when reading the Act.

There are two administrative regulations that mention countervailing duties. The first is a parliamentary decision[56] regarding customs duties for the budget year of 2013, which in section 5 merely states that it is up to the Government to decide whether or not to use sections 10-1 to 10-7 of the Customs Act 2007. The second is the so-called Customs Regulation,[57] but the section regarding CVM[58] only makes a reference to an administrative regulation regarding agricultural products, which is not of relevance to this thesis. As there is neither any jurisprudence from Norwegian courts regarding subsidies and CVM, nor any practice from the government, we are left with the Act, its preparatory works, international agreements and jurisprudence, and equitable considerations when determining the contents of the Norwegian framework.

4.1.2.1 Norway´s Bilateral Agreements

The international agreements that are part of the Norwegian framework is not limited to the relevant WTO law, but also includes free trade agreements Norway have signed with other

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[55] Ot.prp.nr. 58 (2006-2007).

[56] Administrative Regulation of 27 November 2012 number 1218.

[57] Tollforskriften.

[58] Section 10 of the Customs Regulation.

countries.[59] Norway´s free trade agreements have primarily been negotiated through EFTA[60] with individual countries outside the EEA. The free trade agreements are an instrument to reduce trade barriers and improve Norwegian export of goods and services.[61] Per 9 January 2013 Norway is a partner to 24[62] free trade agreements and are negotiating with another 10 trade partners.

The Norwegian framework would become too extensive if the WTO agreements and all the free trade agreements were implemented into the Customs Act, and it would make it even harder to determine ones rights according to the rules. However, as the WTO agreements are Norway´s main priority in its trade policies,[63] having a more detailed implementation of the WTO framework with a reference to Norway´s free trade agreements could be a possibility. Though the free trade agreements are part of the Norwegian framework for the use of CVM, I will not discuss the details of them any further.

4.1.3 The EU Framework

When discussing the Norwegian legislation, I will be using the EU framework for the use of CVM as a basis for comparison. The EU has used transformation to implement the SCM Agreement into Community legislation, and the result is very different from the Norwegian framework. I will analyse the differences and the impact they may have on the use of CVM.

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[59] Ot.prp.nr. 58 (2006-2007) page 87.

[60] We also have one bilateral agreement, which is with the Faroe Islands. It was not negotiated through EFTA.

[61] Ministry of Trade and Industry, ”Om handelsavtaler” (2009).

[62] The one with Colombia has not yet been ratified.

[63] ”Om handelsavtaler” (2009).

The EU has implemented the SCM Agreement through Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community. The significance of the rules being enacted through a regulation,[64] is that it has general application and is binding in its entirety and directly applicable in all Member States.[65] Considering the EU represents its Members in trade disputes with other non-EU Members, it is more convenient that they all have the exact same rules. By making such a detailed legal framework in the Community legislation language, the EU has, as opposed to Norway, laid the groundwork for easier access to the rules for those who are given rights according to them, namely the industry. They do not have to confer with national legislation, preparatory works and international law to determine their rights. They have one regulation where all the relevant rules are collected (with the exception of bilateral free trade agreements).

The EC Regulation has 35 articles compared to the Norwegian legislation´s three sections. According to the preparatory works to the Norwegian Act, the reference to "international law" in section 10-3, creating a kind of sector-monism, shows loyalty to the other WTO Members.[66] However, it seems more loyal to make sure that if the WTO provisions are implemented into domestic law, they are made clear and available.

4.2 What Rights are granted the Solar Industry According to the Norwegian Framework and the EU Framework?

In this section I will be analysing the Norwegian framework for the use of CVM and the corresponding rights in EC Regulation. I will be discussing the specific implementation of some of the WTO provisions regarding subsidies and CVM, and what rights the Norwegian legislation and the EC Regulation gives the private industry, and what rights the govern-

[64] Rather than a directive or a recommendation.

[65] TFEU Article 288 paragraph 2.

[66] Ot.prp.nr. 58 (2006-2007) page 23.

ment has. I will also be discussing how the different legislative techniques may affect the use of these rights.

4.2.1 The Rights Given to the Domestic Industries

4.2.1.1 The Submission of an Application

The SCM Agreement Article 11.1 stipulates that an anti-subsidy investigation "shall be initiated upon a written application by or on behalf of the domestic industry." For the Norwegian industry to have this right, the Government must grant them it. The Customs Act does not specifically mention who has the right to submit complaints or to whom the complaint should be made. Section 12-7(1) states that "complaints against subsidised imports shall be directed to the Ministry".[67] The preparatory works state that Section 12-7 is meant to implement, inter alia, Article 11 of the SCM Agreement.[68] Article 11.1 says that a complaint must be made "by or on behalf of the domestic industry", and therefore this must be the case according to the Norwegian Customs Act, too. There are no other factors that indicate otherwise.

The Ministry of Finance is granted authority according to the Customs Act, so when section 12-7(1) says that "complaints against subsidised imports shall be directed to the Ministry", it means the Ministry of Finance.

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[67] "Klage over subsidiert import skal rettes til departementet…"

[68] Ot.prp.nr. 58 (2006-2007) page 97. It seems that the preparatory works are referring to the wrong WTO covered agreement. It refers to, inter alia "article 5 (initiation and subsequent investigation)", which is found in the Anti-dumping Agreement. I assume that they mean the corresponding articles in the SCM Agreement and have therefore referred to Article 11 of the SCM Agreement.

Article 10.1 of the EC Regulation stipulates that "any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry" can submit a written complaint to the Commission requesting anti-subsidy investigations. According to Article 10.11 of the EC Regulation, the Commission is obliged to initiate proceedings within 45 days of the lodging of the complaint if "after consultations, it is apparent that there is sufficient evidence to justify initiating proceedings." Neither the Norwegian legislation nor the SCM Agreement contains a similar timeframe for the authorities to determine whether or not there is sufficient evidence, nor do they state an obligation to initiate investigations given there is sufficient evidence. The Norwegian authorities may give other reasons for a rejection, such as the interests discussed in section 3.3.

4.2.1.2 What Evidence Is Required In the Application?

When a domestic industry submits an application with the authorities requesting an anti-subsidy investigation, the application must include evidence that supports the initiation of an investigation. But what kind of evidence is required from the industry?

The Customs Act section 12-7(1) says that the complaint shall be accompanied by "necessary evidence",[69] but does not explain further what the evidence should be for. The old Norwegian framework[70] is of no guidance as it contained no rule regarding evidence, but simply stated that the imposition of CVM had to be done within the WTO framework. The preparatory works stipulate that section 12-7 is meant to implement, inter alia, Article 11 of the SCM Agreement.[71] Article 11.2 says that an application must include "sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury." Though the Norwegian provi-

[69] "nødvendig bevismateriale".

[70] Introductory Provisions to the Customs Tariffs § 3.3.

[71] Ot.prp.nr. 58 (2006-2007) page 97, see footnote 67.

sion requires "necessary evidence" whilst the SCM Agreement requires "sufficient evidence", there does not seem to be any reason to believe the Norwegian legislators have meant to demand any more or less evidence from the Norwegian industry than that needed according to the SCM Agreement. Consequently, "necessary evidence" in the Customs Act section 12-7(1) means the same as "sufficient evidence" in the SCM Agreement Article 11.2.[72]

The EC Regulation Article 10.2 contains rules regarding the evidence that must be provided in the complaint from the industry. Similar to the SCM Agreement, the EC Regulation requires "sufficient evidence of the existence of countervailable subsidies (including, if possible, of their amount), injury and a causal link between the allegedly subsidised imports and the alleged injury." Article 10.2(a)-(d) also contains requirements for additional information if it is "reasonably available" to the complainant. This is yet another example of how the EU has given more detailed regulations in their Regulation than that in the Customs Act, and thereby made it less complicated for the industries in the EU to determine what is required by them if they wish to make a complaint to the authorities.

4.2.1.3 When Can the Authorities Initiate an Investigation?

After the industry has submitted a complaint with the authorities, it is up to the authorities to initiate, or not initiate, an anti-subsidy investigation. In this section I will investigate under what circumstances the authorities can initiate an investigation.

The SCM Agreement Article 11.3 requires that the authorities review the evidence provided in the complaint before initiating an investigation. This provision has been implemented into the Norwegian legislation through section 12-7(1) of the Customs Act, where it is stated: "A decision to impose a countervailing measure or provisional measure shall only be taken after a prior formal investigation." According to the preparatory works, "formal in-

[72] See section 2.4.

vestigation" means that the investigating authority must determine that the evidence it has been given is accurate and adequate, and that the complaint is made by, and has the necessary support, from those with a right to make a complaint, before an investigation can be initiated.[73] The Norwegian provision and its preparatory works fail to provide further details, and we must confer with the SCM Agreement Article 11.4 to determine what constitutes "by or on behalf of the domestic industry".[74] Article 11.4 stipulates that the complaint, as a rule, must be supported by at least 50 per cent of "the domestic industry expressing either support for or opposition to the application". Additionally, no less than 25 per cent of the "domestic industry" of the like product must expressly support the application.[75]

The EC Regulation Articles 10.3 and 10.6 stipulate the same requirements as the SCM Agreement Articles 11.3 and 11.4 for the Commission to be able to initiate an anti-subsidy investigation. The wording is almost identical to the SCM Agreement, only with small modifications, presumably to make it more suitable for an EC Regulation.

4.2.1.4 The Investigation and Imposition of CVM

Section 10-3(1) of the Norwegian Customs Act requires the investigating authorities to determine "that there exists direct or indirect subsidisation of goods that are exported to Norway, and that the subsidisation causes or threatens to cause significant injury" before CVM can be imposed. These are the same requirements as stipulated by the SCM Agreement Articles 17.1 and 19.1. In Norway, it is ultimately up to the Government to decide if the requirements are fulfilled and whether or not to impose CVM. Section 10-3(1) of the Customs Act stipulates: "…the King may … implement a countervailing measure." (My underlining). This means that even though the domestic industry has submitted a valid complaint, the Ministry has investigated and concluded that there is evidence for a subsidy,

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[73] Ot.prp.nr. 58 (2006-2007), page 97.

[74] See section 4.2.1.1.

[75] See section 2.4.

injury to the domestic industry and a link between the two, *and* sent a proposition to the Government, the Government is not bound by the proposition. Other factors, such as those I discussed in section 3.3, may influence the decision of whether or not to impose countervailing duties. If, for example, REC had submitted a complaint with the Ministry and the Ministry had investigated and proposed to the Government that they impose CVM upon imports of Chinese solar panels, the Government could reject this on the grounds of the tense relationship between the two countries, and not wanting to put further pressure on the relationship. The decision is left to the discretion of the Government. The SCM Agreement does not obligate Members to use CVM; it just stipulates the rules that must be followed *if* a Member wishes to do so.

The EU also require a final determination of the existence of a specific subsidy to exporters, injury to the Community industry and a causal link between the two, before the Council can impose CVM. But the EU has gone further, and as the only WTO Member they additionally require a determination as to whether or not the use of CVM will be against the Community interests.[76] This is to ensure that the overall economic interests of the EU do not suffer as a result of the use of CVM.[77] According to Article 31.1, the community interest includes "the interests of the domestic industry and users and consumers." An imposition of definitive CVM will mean that those importing the products concerned, the Community industries using the products and, ultimately the consumers, will have to pay a higher price. As this is an argument that could be used to argue against most cases of imposing CVM, Article 31.1 also says that special consideration shall be given to "the need to eliminate the trade-distorting effects of injurious subsidisation and to restore effective competition." The authorities must therefore "clearly conclude that it is not in the Community interest to apply such measures."[78]

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[76] EC Regulation No 597/2009 Article 15.1.

[77] EC Regulation No 597/2009 Article 31.

[78] EC Regulation 597/2009 Article 31.1.

Compared to Norway, where it seems the authorities can base a decision not to use CVM on any interest they find relevant, the authorities in the EU must show that it is *clearly* not in the interest of the European Community to impose CVM. This gives the industry a stronger right than according to Norwegian law, given that there is sufficient evidence for a subsidy causing injury to the domestic industry.

4.2.1.5 Timeframes For the Investigation

The strict timeframes for the investigations provided for in the SCM Agreement Article 11.11 have been explicitly implemented in the Norwegian Customs Act section 12-7(2). Investigations should be concluded within one year, and in no case later than 18 months after their initiation. The EC Regulation has made the timeframes even stricter, and investigations must in any event be concluded within 13 months.[79] For the industry it will be beneficial that the investigation is concluded as soon as possible. They are most likely losing income every day the subsidised imports are freely accepted into the domestic market. On the other hand, it is important that the result of an investigation is correct. If a Member wrongfully imposes CVM upon the imports from another Member, it can be challenged in the WTO dispute settlement system.[80]

4.2.2 Does the Method of Implementation Affect the use of Countervailing Measures?

Trade measures, including CVM, have not been used in Norway since the 1980´s,[81] and it can be asked if this is a result of the limited rights pronounced explicitly in the Customs

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[79] EC Regulation 597/2009 Article 11.9.

[80] The SCM Agreement Articles 30 and 32.1.

[81] Discussion document page 93. States that trade measures have not been used by Norway since the 1980´s, but failes to mention what kind of measures that was used.

Act. The fact that the international law on CVM is not implemented through a more detailed transformation in Norway may be seen as a signal that the Government has little ambition to use CVM as a method to protect Norwegian industry from artificial foreign competition. This is not saying that the Government does not wish to protect Norwegian industry, but that they do not consider CVM as the best way to do it. The WTO covered agreements do not require countries to use CVM, but if a WTO Member wishes to do so, it must be done in accordance with the rules prescribed therein.

Though it is ultimately the Government who decides whether or not to impose CVM in Norway, they are, as a rule, dependent on the domestic industry´s complaint before they can initiate anti-subsidy investigations. If the law is not clear, the industry might not even know of their right to complain. Clearer rights pronounced in the legal framework will make the industry better aware of their rights and, potentially, result in them using their rights. However, if Norway´s policy is to not use CVM, the industry itself cannot force the imposition of such measures as long as they are only given a right to complain, and not a right for the complaint to lead to an investigation, and possibly the imposition of CVM, provided certain conditions are fulfilled. If REC had made a complaint, the decision would still lie with the Government, and for them, interests like the ones mentioned in section 3.3 will affect the decision. For example, if the consequences on the public economy and the evaluations of corporate-, foreign- and trade policies are not in favour of using CVM, they will most likely not be imposed.

The table below shows where some of the rights granted in the WTO law have been implemented into Norwegian and EU legislation.

	WTO	NORWAY	THE EU
The industry´s right to complain	The SCM Agreement Article 11.1	Ot.prp.nr. 58 (2006-2007) page 87	EC Regulation Article 10.1
Application "by or on behalf of the industry"	The SCM Agreement Articles 11.1, 11.4 and 16	Ot.prp.nr. 58 (2006-2007) page 87, reference to the SCM Agreement Art. 11	EC Regulation Articles 10.6 and 9
The government´s right to complain	The SCM Agreement Article 11.6	Ot.prp.nr. 58 (2006-2007) page 97	EC Regulation Articles 10.1(3) and 10.8
Duration of investigation	The SCM Agreement Article 11.11	Customs Act Section 12-7(2)	EC Regulation Article 10.9
Consultations before investigation	The SCM Agreement Article 13	Ref.: "international law" in Customs Act section 10-3(1)	EC Regulation Articles 10.7 and 11.10

As the table demonstrates, very few of the Articles from the WTO law on subsidies and CVM have found their way into the Customs Act. Many provisions must be interpreted into the law through reference to international law or by comments in the preparatory works. This makes the legislation less accessible for the private industry, and knowledge of international law becomes necessary to fully understand the Norwegian law.

The EU has chosen a method where even the details of the WTO framework are transformed into an EC regulation. The wording has been slightly changed to correspond to Community legislation, and in some places the Regulation has provided additional requirements or stricter timeframes, but still within the WTO framework. This method makes the provisions more accessible, and makes it easier for the domestic industries to determine their rights. This can be demonstrated by looking at how often CVM have been used. The

last time it was used in Norway was in the 1980´s,[82] whilst the EU occasionally uses it. However, Norway and the EU have different starting points when determining whether or not to use CVM. The effect for the EU when using such duties is a lot more significant than if used by a small country like Norway. The EU consists of 27 countries that will all impose them simultaneously.

The different legislations may also signalise that the industry has a strong position in the EU, whilst in Norway the government has a more dominant position.

4.2.3 EU Use of Countervailing Measures

4.2.3.1 EU vs China – The Case of Solar Power on the Continent

The EU has a clear mandate to fight unfair trade by using, inter alia, the instruments provided for by the WTO,[83] and they are increasingly using CVM to protect their industries. On 8 April 2013, there were five anti-subsidy investigations in process in the EU.[84] 8 November 2012, the European Commission gave notice of initiation of an anti-subsidy proceeding concerning imports of solar panels and their key components from China.[85] If REC was still producing in Norway, the outcome of this investigation could have had huge repercussions on their production in Norway. Nonetheless, it will have consequences for the remaining solar industry in Norway as they export a lot of their production to the EU mar-

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[82] Discussion document, page 93.

[83] EU Trade Commissioner, Karel De Gucht, December 2012: "The EU's membership in the World Trade Organisation and bilateral trade agreements help the EU economy. Those agreements must be respected for them to deliver results. When international trade disputes prove that other countries haven't played by the rules, the EU needs to be able to react efficiently and swiftly to defend its interests".

[84] List of Investigations from the European Commission on Trade.

[85] *"EU initiates anti-subsidy investigation on solar panel imports from China"* (2012).

ket. Norway therefore must be said to have so-called third party interests in the EU vs China case. Does Norway have any rights in the EU investigation against China or if a dispute arises for the WTO dispute settlement system?

4.2.4 Third Party Interests

4.2.4.1 Third Party Interests In an Investigation

If more than one Member has an interest in initiating anti-subsidy investigations against another Member, it should be asked if these Members could cooperate in their investigations by sharing information and findings. There are no rules regarding Members cooperating in an anti-subsidy investigation in the SCM Agreement, but Article 12.1 contain rules concerning the collection of evidence in an investigation, which stipulates that "Interested Members and all interested parties in a countervailing measure investigation" shall be given an opportunity to present evidence which they consider relevant in respect of the investigation. In the example with the EU and China, this means that the EU can request evidence from other Members, e.g. the US, who have already concluded their investigations against China. However, the EU must conduct their own investigation, as, according to the SCM Agreement Article 11.7, the investigating authorities must consider the "evidence of both subsidy and injury" simultaneously. This means that even though another Member has imposed CVM upon imports from China, the EU may not necessarily be able to do the same. It is the injury to the Community industry that is relevant, and the Commission must determine if the subsidy still exists.

Article 12.1 also creates a right for Norway, as an "interested Member" in the EU investigation against China´s solar industry, to be given the opportunity to present evidence they may have. It should be asked if REC, as a competitor on the EU market, could contribute with evidence in the EU investigation. It seems clear that subparagraphs (i) and (ii) of Article 12.9 would not include REC as and "interested party", but they could be allowed to provide evidence according to the provision in the second sentence of Article 12.9, which includes others than those specifically mentioned in the first sentence.

4.2.4.2 Third Party Interests In a WTO Dispute

If a dispute regarding the imposition of CVM arises for a WTO panel, Members who are not a party to the dispute may be heard in the proceedings if they have a substantial interest in the matter and have notified the DSB.[86] For example, Norway has joined one of the disputes between China and the US regarding CVM imposed by the US on, inter alia, solar panel components from China.[87] Even though REC no longer produces in Norway, it is still a Norwegian company, which is important for Norway, and we have other solar panel companies in Norway. As the US is one of the worlds most developed solar markets,[88] it can affect the Norwegian solar industry if they are importing subsidised solar panels. Consequently, the dispute between the US and China is of "substantial interest" to Norway, and they have notified the DSB of their interests. The dispute has not yet been concluded.

4.3 The State´s Right to Use Countervailing Measures

In this section I will be discussing the rights of the authorities to use CVM without a prior complaint from the industry.

The general rule regarding the initiation of anti-subsidy investigations is that the WTO Member State must receive an application from the domestic industry.[89] But if the Norwegian government had wanted to investigate possible subsidised imports of solar panels and subsequent injury caused to the Norwegian solar industry, could they have done that without a complaint from, e.g. REC?

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[86] DSU Article 10.2.

[87] *US — Countervailing Measures (China).*

[88] Market Overview by REC.

[89] The SCM Agreement Article 11.1.

There is an exception to the general rule in Article 11.6 of the SCM Agreement. According to this provision, the "authorities concerned" can initiate investigations without a written application from the domestic industry, if they have "sufficient evidence of a subsidy, injury and a causal link, as described in paragraph 2…" Additionally, there must be "special circumstances".

This rule illustrates how the WTO regulates and limits a purely national process, and they tend to react strictly to breaches of the agreements. If the rules regarding e.g. initiation of an investigation, the investigation itself, or the imposition of CVM, are not followed, the Member affected by the measure may challenge the CVM through the WTO dispute settlement system. Therefore, it is important to determine what constitutes, or does not constitute, "special circumstances", which I will discuss in the following section. I will also discuss any special circumstances that may have been present in the REC case.

4.3.1 "Special Circumstances"

The basis to determine what may constitute "special circumstances" is the VCLT´s rules of interpretation. Article 31.1 says that the general rule of interpretation is that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their contexts and in the light of its object and purpose". The Oxford Dictionary defines "special" as something that is "particularly good; exceptional; out of the ordinary." However, this gives little guidance for the interpretation unless we put it in the context of the SCM Agreement, specifically the provisions regarding initiation of an anti-subsidy investigation.

Paragraph 6 of Article 11 is an exception to the main rule in paragraph 1, which says that the domestic industry must submit an application with the authorities before they can initiate an investigation. The typical reason for the domestic industry to submit an application will be that they are experiencing unfair competition from foreign producers who are receiving specific subsidies from their governments. The injury suffered by the domestic industry will typically be the loss of market shares. Being an exception, paragraph 6 should

require something else and more than that which follows from the main rule. Restricting the exception to "special circumstances" implies that it must be reasoned by something else than what would usually be the reason for a complaint made by the industry according to paragraph 1. Accordingly, the authorities cannot justify the initiation of an investigation just because an industry is losing market shares.

There is no WTO jurisprudence discussing the SCM Agreement Article 11.6 and what constitutes "special circumstances". The Anti-Dumping Agreement Article 5.6 contains a similar provision, but like the SCM Agreement´s provision, it has not been topic for discussion in a dispute in the WTO dispute settlement system.

4.3.1.1 Special Circumstances in the REC Case

The next question that should be asked is if there were "special circumstances" in the REC case that could have supported the Norwegian government if they had wanted to initiate investigations into China´s solar industry to prevent REC from closing down its production in Norway.

As I wrote in section 3.3.1, the Norwegian government has provided supported for the solar industry´s development, for example by investing in research and supporting companies, e.g. REC, starting up production in Norway. When REC moved their production abroad, Norway not only lost an industry, but also an investment. However, investments are made every day, and there is no guarantee that an investment will be beneficial. The investments made by the Norwegian government were not completely wasted as REC is still producing and developing the industry. They have not suffered bankruptcy and shut down all research and production, so in the bigger picture the investment has paid off, even though it may not have been as beneficial for Norway as hoped.

Another factor in the REC case was the loss of jobs. When REC closed down their production facilities in Norway, hundreds of people lost their jobs. The factories were located in

fairly small communities[90] where REC became cornerstone companies, and the effects on the communities could be severe, depending on the options for those left unemployed.

When REC stopped producing in Norway, they took their technology abroad. Technology that had been supported through research in Norway, possibly even financed by the government. Given that REC did not hold a patent on the technology, it would still be available for other companies to use, but Norway lost the largest company that used the technology and thereby limited the opportunity to develop it further domestically. Any technology that REC had taken out a patent on was lost for Norway. Consequently, Norway did not only lose an industry, their investments, and jobs, but also advanced technology that could benefit both Norway and the global environment in the future. It seems possible that when the government itself has been so involved in developing technology for an industry, it could justify them initiating anti-subsidy investigations to protect their investment and interest in the industry, even without a complaint from the industry itself.

Norway also had to consider its third party interests in the environment in the REC case. In section 3.3.5, I mentioned the Norwegian climate policy and the political ambition to develop technologies to mitigate climate change as relevant environmental interests. In order for it to be profitable for the government to invest resources to develop solar technologies, we need an industry that can utilise the technologies. The government needs an industry to fulfil its goals. Furthermore, Norway has international obligations to maintain, e.g. the UNFCCC Article 4.5, which contains an obligation for developed countries to transfer cer-

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[90] Glomfjord had 1,264 inhabitants per 01.01.2012: http://www.meloy.kommune.no/no/Om-Meloy/Fakta-om-Meloy/Folketall/
Herøy had 8,750 inhabitants per 09.03.2012: http://www.heroy.kommune.no/Modules/article.aspx?ObjectType=Article&Article.ID=867&Category.ID=1115

tain technologies to developing countries. Before a country can transfer technology, it must develop the technology, and it is unlikely that a country will develop a technology only to transfer it to other countries. However, if they have their own industry using the technology, they will have an (extra) incentive to develop it. Accordingly, the development and maintenance of a solar industry in Norway can benefit developing countries that Norway may transfer its technologies to. If the use of CVM was decisive for the survival and development of the Norwegian solar industry, and thereby the transfer of technology, it could speak in favour of using such duties. I refer to my analysis of the UNFCCC Article 4.5 in section 3.3.5.1 for a detailed discussion of this problem.

Finally, there is the factor of supporting a sustainable future by having an industry that develops and produces environmentally friendly technology. If the alternative to imposing CVM in the REC case was Norway having to use, for example, coal to produce electricity, this could have spoken in favour of allowing the authorities themselves to initiate anti-subsidy investigations. Protecting the environment and securing a sustainable future will benefit the whole world, and WTO panels and the Appellate Body have occasionally used environmental interests to support a decision.[91] Though we cannot know if environmental interests in general will be accepted by the Appellate Body, reports show that they at least consider the environment where it is relevant for a case. I do however consider it more likely that the Appellate Body would accept a more specific interest, e.g. the preservation of an endangered species.[92]

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[91] Example: *United States — Shrimp.* The dispute did not concern CVM and ”special circumstances” according to the SCM Agreement Article 11.6. It related to turtle protection standards when harvesting shrimp that was imported into the US. The Appellate Body made clear that countries have the right to take trade action to protect the environmnet and endangered species and exhaustible resources. The US lost the case, not because it sought to protect the environment but because it discriminated between WTO members.

[92] Ibid.

It is uncertain how much is needed before there can be said to exists "special circumstances". The separate factors I have discussed in this section will most probably not be sufficient alone, but combined they might be enough. The more "special" the circumstances are, as in the further away from what is ordinarily the reason for a complaint, the more probable it is that it will be accepted as "special circumstances" according to the SCM Agreement Article 11.6.

4.3.2 "Special Circumstances" According to EU Law

The EU has adapted the implementation of the WTO rules to fit its organisation. An example of this is the exception to the general rule for initiation of an investigation needing an application on behalf of the Community industry.[93] Article 10.1(3) of the EC Regulation stipulates that its Member States shall give evidence it may have of "subsidisation and of resultant injury to the Community industry" to the Commission, regardless of receiving a prior application. This rule seems to be based on the organisation of the EU, which puts the Commission in charge of CVM investigations. To avoid the domestic authorities in the EU Member States having no rights unless the industry complains, they are given the opportunity to give the Commission evidence it may be in possession of. However, it is the Commission that is given the right to initiate anti-subsidy investigations without a prior application on behalf of the Community industry. Article 10.8 of the Regulation stipulates that the Commission in such cases must have "sufficient evidence of the existence of countervailable subsidies, injury and causal link". "Special circumstances" must also be present, which is the same requirements as in the SCM Agreement Article 11.6 and in the Norwegian law.

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[93] Council Regulation (EC) No. 597/2009 Article 10.1(1).

After reviewing the anti-subsidy investigations available, on the European Commission on Trade´s website, there does not seem to be any investigations that have been initiated by the Commission without a prior application from the Community industry.[94]

4.3.3 Conclusion

Though there are many factors that may constitute "special circumstances", neither the EU nor Norway has, as far as I can see, initiated anti-subsidy investigations without a prior complaint from the industry, nor is there any WTO jurisprudence regarding this. The reasons why it has not been used are unknown, but it may be it is not considered necessary to initiate anti-subsidy investigations unless the industry itself has complained. It seems likely that the industry, if familiar with their rights, will complain if they are being injured by artificial competition from abroad. Further, it will not be as practical for a small country like Norway as it may be for the EU or larger countries to use this exception. For them the effects of using CVM will be larger than for Norway.

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[94] The investigations prior to 2003 are not available in the search engine, and of the 29 investigations that have taken place since 2003, not all initiation notifications have been made available online. My statement is based on the available information.

5 Summary and Conclusion

I have discussed the framework for CVM at two levels; first the rules as they were agreed upon in the WTO through the Uruguay Round, and second the implementation of these rules into domestic legislation, in Norway and in the EU. I have discussed different actors´ interests in the use of CVM, and I have demonstrated differences in the techniques of implementation and how this and other factors may affect a country´s use of CVM.

As WTO Members are not obliged to use CVM and have different starting points for using them, it is difficult to say that one method for implementation is more correct than the other. Nevertheless, the chosen method may reflect national policies on, and affect the use of, CVM. I have analysed two different approaches that can be used when implementing the WTO rules on subsidies and CVM and discussed some of the possible reasons behind the different use of these measures. The difference between Norway´s and the EU´s implementation may be reasoned in their different starting points and needs. Norway is a small country whilst the EU is one of the worlds largest custom unions. When the EU imposes CVM, they are imposed in all its 27 Member States, which naturally has a greater impact than if one country alone does so. CVMs are a more efficient means to promote free trade for the EU than for Norway, which is supported by the fact that the EU has initiated 29 anti-subsidy investigations since 2003, whilst Norway has initiated zero.

As there is no international obligation to use CVM to counteract certain types of subsidies, WTO Members are not obligated to implement the WTO rules on this matter into their national legislation. Many interests today may speak in favour of Norway not using CVM. In the solar industry, the fact that they receive considerable support (subsidies) from the Norwegian government, may create a fear of being subject to investigations themselves, and thereby prevent the Norwegian industry and government from participating in the ongoing solar trade war. The other reasons discussed in section 3 may also affect the decision, and in the REC case, CVM was perhaps not considered an effective measure to protect the Norwegian solar industry, which was, and still is, largely export orientated and dependent

on the export market. However, what if a domestic industry with its main market in Norway is injured by subsidised imports? What if the Norwegian bunad production faces injury from China? Or Finnish timber threatens the Norwegian timber industry? Even though CVM are not being used in Norway today, it might be deemed necessary in the future. If that happens, a clear framework stating the rights and obligations of the industry and the government should be in place. This does not necessarily mean that all the international rights and obligations should be implemented into the Customs Act, but it is hard to determine the content of today´s fragmented framework. The Ministry of Finance is given the authority to make administrative regulations with more detailed rules regarding the use of CVM.[95] A common administrative regulation[96] has been made to complement the Customs Act, but the section concerning trade measures[97] has no provisions regarding CVM. The first step should be to move the rights that have been given through the preparatory works to the Customs Regulation. This would make it easier for those trying to determine their rights, and it would be more in line with the principle of legal authority.

Though Norway is not currently using CVM, I have discussed other ways Norway can participate in anti-subsidy investigations carried out in other countries or disputes brought for the WTO dispute settlement system. In section 3.3 I discussed Norway´s dependence on the rest of the world, and this speaks in favour of participating in issues that can affect Norway, either as a third party to disputes or by providing evidence in investigations carried out in other countries. Since the SCM Agreement entered into force in 1995, Norway has participated as a third party in three disputes regarding renewable energy.[98] Norway has brought four cases for the WTO dispute settlement system regarding trade measures taken against

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[95] Customs Act section 10-3(7).

[96] The Customs Regulation.

[97] Customs Regulation section 10.

[98] *Canada – Feed-In Tariff Program, Canada – Renewable Energy* and *US – Countervailing Measures (China)*

Norwegian exports, but none of these concerned the Norwegian solar industry, or other renewable energy industries.

Though REC is no longer producing in Norway, they are still a Norwegian company, and the government should take an interest in it. In July 2012, REC was made a respondent to Chinese trade investigations into the US solar industry.[99] If the Chinese government imposes CVM upon imports from the US, it will affect REC´s exports from their US based production facilities to China.

In addition to participating in investigations and disputes abroad, Norway should take a stand and decide whether or not they wish to use CVM. They do not have to implement the WTO rules if they have no intention of using them, but it is also important to remember that conditions may change rapidly, and we may want to use CVM in the future. In such a case it would be beneficial to have a clear framework for the use of CVM in place.

[99] Press release: *"REC Regrets the Escalation In Solar Industry Trade War And Denies Any Wrongdoing"*

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