

**Energy Subsidies and WTO Dispute Settlement: Why Only  
Renewable Energy Subsidies are Challenged?**

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**Abstract:** Over the past few years, renewable energy subsidies have become one of the main sources of trade disputes in the WTO. A total of six cases have been initiated against renewable energy subsidy programs since the first of such disputes was brought by Japan against Canada's Feed in Tariff (FIT) program in 2010. Yet not even a single case has so far been initiated against the much larger and environmentally harmful fossil fuel subsidies. The main objective of this paper is to examine what makes renewable energy subsidies vulnerable to WTO dispute, as compared fossil fuel subsidies.

**Keywords:** WTO, SCM Agreement, Subsidies, fossil fuel subsidies, renewable energy subsidies, dispute settlement system.

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## 1 Introduction

The linkage between trade and the environment has been intensely debated in the multilateral trading system over the past few decades. Nevertheless, the debate remains unresolved and continues to evolve.<sup>2</sup> Its scope has recently widened further to include energy, forming a triangle of trade, energy, and the environment. The status of energy subsidies within the multilateral trading system, an issue at the heart of this triangle, has become increasingly significant – particularly following the recent WTO disputes involving renewable energy subsidy programs. Energy is one of the most heavily subsidized sectors in the world. According to the International Energy Agency, fossil-fuel consumption subsidies alone were estimated at US\$544 billion in 2012.<sup>3</sup> However, only a fraction of this amount went to the renewable energy sector, i.e. US\$101 billion.<sup>4</sup> Yet subsidies to renewables are the ones that have increasingly become a major source of legal dispute in the WTO. While the Appellate Body has recently issued its report on the two disputes concerning Canada's Feed-in Tariff (FIT) program, consultations have been requested or took place with regard to four other renewable energy subsidy programs.<sup>5</sup> In view of the utter silence on the much larger and environmentally harmful fossil-fuel subsidies, the recent surge in the number of cases involving renewable energy subsidy programs raises a fundamental question: what makes renewable energy subsidies vulnerable to legal disputes as compared to fossil-fuel subsidies? Or why do WTO Members challenge renewable energy subsidy programs while remaining reticent towards fossil fuel subsidies? Given the fact that calls for phasing out fossil fuel subsidies are falling on deaf ears and the transition to low carbon energy, an essential element to avert climate change, is proceeding at a snail's pace, answering this question is of paramount importance.

However, the answer is not straightforward, simply because various factors may influence countries' decision on whether to initiate a WTO dispute. The growing empirical literature on dispute initiation in the WTO, which started with the seminal work of Horn *et al*, has shown that a number of factors including legal capacity, export volume and diversity, retaliatory threat, trade restrictiveness, domestic politics and pressure from interest groups, may affect a country's decision to initiate a dispute, albeit to a varying degree.<sup>6</sup> This paper does not purport to provide an

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<sup>2</sup> PAUWELYN, 2004.

<sup>3</sup> IEA, **World Energy Outlook 2013**, International Energy agency website. Available at: <http://bit.ly/1kZQkN> (last accessed in: Feb. 2014).

<sup>4</sup> Ibid.

<sup>5</sup> The latest in the series of disputes involving renewable energy subsidies is **India – Certain Measures Relating to Solar Cells and Solar Modules** (WT/DS456/1/Add.1).

<sup>6</sup> See HORN et al., 1999; BOWN, 2005, 2004 (for retaliatory threat and export volume); REINHARDT, 1999

empirical nor exhaustive answer to the question why green subsidies are challenged while their dirtier counterparts are ignored. Its question is also slightly different from the typical questions that have been addressed in the existing literature on WTO dispute initiation. Unlike in the latter case where the focus is largely on why certain countries initiate WTO disputes more than others,<sup>7</sup> this paper seeks to answer, mainly from a legal perspective, the question why certain measures (i.e. renewable energy subsidies) but not others (i.e. fossil fuel subsidies) are challenged under the WTO dispute Settlement System. In so doing, the paper explores whether the current multilateral subsidy rules could explain the existing pattern of energy subsidy related disputes at the WTO. This will be achieved by examining the main characteristics of fossil fuels and renewable energy subsidy programs, on a comparative basis, against the relevant WTO rules.

The rest of the paper is structured as follows. Section 2 sets the stage by exploring the main characteristics of fossil fuel and renewable energy subsidies. The WTO rules on subsidies are discussed in section 3. Here the discussion is limited to the general rules on subsidies set out under the Agreement on subsidies and Countervailing Measures (SCM Agreement).<sup>8</sup> Section 4 briefly reviews the energy subsidy related disputes in the WTO. Section 5 attempts to address the question why only renewable energy subsidy programs have become the subject of litigation. Finally, section 6 concludes.

## 2 Energy Subsidies: An Overview

Notwithstanding the SCM Agreement, which defines subsidies as financial contributions (by a government) that confer a benefit up on the recipient,<sup>9</sup> there is no commonly agreed definition of what constitutes energy subsidies or how they should be calculated. The lack of a common definition has led to varying estimates of global energy subsidies and confusion over what should and should not be considered as an energy

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(for domestic politics and pressure from interest group); BUSCH et al., 2008 (for legal capacity); GÖTZ et al., 2008 (for trade restrictiveness of the measure); DAVIS, 2008 (for trade restrictiveness of the measure and pressure from interest groups); HOLMES et al., 2003 (for export volumes).

<sup>7</sup> Often in the context of developed versus developing countries participation in dispute settlement.

<sup>8</sup> Although the Agreement on Agriculture (AoA) and its subsidy rules are relevant to energy subsidies – with respect to subsidies to biofuels – the paper focuses on the SCM Agreement mainly because it is the agreement that may have bearing both on fossil fuel and renewable energy subsidies. It should also be noted that only one of the six energy subsidy related cases that have been brought under the AoA, i.e. **WTO, European Union and Certain Member States – Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry**: Request for Consultations by Argentina, 2013 (WT/DS459/1, G/L/1027 G/SCM/D97/1, G/TRIMS/D/36 G/TBT/D/44).

<sup>9</sup> Article 1 of the SCM Agreement.

subsidy.<sup>10</sup> The definition of a subsidy in the literature ranges from as narrow as a direct cash payment by a government to an energy producer or consumer to as broad as any government intervention that, directly or indirectly, affect price or cost.<sup>11</sup> The International Energy Agency (IEA) defines energy subsidies as “any government action that concerns primarily the energy sector that lowers the cost of energy production, raises the price received by energy producers or lowers the price paid by energy consumers”.<sup>12</sup> Similarly, the Organization for Economic Cooperation and Development (OECD) defines it as any government measure that keeps prices for consumers below market levels, or for producers above market levels or that reduces costs for consumers and producers.<sup>13</sup> These definitions appear to be rather broader than the one provided by the SCM Agreement as they also capture a wide range of regulatory measures. For the purpose of this paper, energy subsidies shall be understood in the context of the OECD and IEA definitions, as any government measure that alters market prices or costs in favour of producers and/or consumers.<sup>14</sup>

Energy subsidies are also categorized in a variety of ways, including by administrative form (i.e. grant, loan, tax, concession), economic incidence (i.e. subsidy to outputs, subsidy to intermediate inputs), and type of recipients (i.e. consumption subsidy, production subsidy).<sup>15</sup> The following sub-sections highlight the main features of fossil fuel and renewable energy subsidies and the issues at stake.

### *2.1 Fossil Fuel subsidies*

Subsidies to fossil fuels such as oil, natural gas, and coal are prevalent both in developed and developing countries. They take many different forms and support the production and consumption of fossil fuels. Production subsidies often come in the form of reduced royalty payment, monopoly concession, under pricing of access to natural resources including government land, export restriction, credit guarantee, preferential tax treatment, and government-provided infrastructure.<sup>16</sup> In contrast, consumption subsidies

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<sup>10</sup> For example, factoring negative externalities, IMF estimated global fossil fuel subsidies to be at 1.9 trillion in 2012, while the IEA came up with a much lower figure. See IMF, 2013.

<sup>11</sup> UNEP, 2008.

<sup>12</sup> IEA, 1999, p. 43.

<sup>13</sup> OECD, 1998.

<sup>14</sup> The Broad interpretation is preferred mainly because it is energy specific and adopted by many in the field, and hence allows examining whether they fall under the SCM Agreement's subsidy definition.

<sup>15</sup> BEATON; MOERNHOUT, 2011, p. 5. See also STEENBLIK, 2010.

<sup>16</sup> UNEP, 2008.

tend to take the form of direct cash transfer, price control, and tax exemption and rebate.<sup>17</sup> Perhaps the most controversial forms of fossil fuel consumption subsidies are dual pricing policies.<sup>18</sup> Dual pricing is defined as “a two-tier pricing policy whereby energy exporting countries in particular charge domestic consumers, including industrial users, lower energy prices compared to its export or world prices”.<sup>19</sup> As we shall see, issues have been raised regarding the WTO compatibility of such schemes during Ministerial Conferences and the accession of energy-exporting economies such as the Russian Federation and Saudi Arabia.

According to various estimates, fossil fuel consumption subsidies tend to be far higher than production subsidies. In 2011, for instance, the Global Subsidies Initiative (GSI) estimated production subsidies to be around US\$100 billion, much less than the more than US\$500 billion spent on consumption subsidies.<sup>20</sup> Furthermore, unlike fossil fuel production subsidies, which are often targeted at specific producer(s), fossil fuel consumption subsidies usually apply to all consumers throughout the economy.

Governments justify fossil fuel subsidies on various socio-economic and political grounds. Some of the most common justifications include: reducing energy import dependency (i.e. energy security), supporting regional development, and ensuring access to modern sources of energy for poor households.<sup>21</sup> However, studies suggest that these subsidies rather encourage wasteful consumption, distort market, reduce energy security, impede investment in clean energy sources and undermine efforts to mitigate climate change.<sup>22</sup> According to the IMF, removing these subsidies could lead to a 13% decline in global carbon dioxide emissions.<sup>23</sup> It would also free up resources that can be used to address important social needs such as public health and education.<sup>24</sup> The removal of fossil fuel subsidies could also expedite the development and deployment of renewable energy technologies through: (i) the reallocation of resources to the renewable energy sector, or (ii), leveling the playing field for renewables.<sup>25</sup> Given the pervasive government interventions in the energy sector that have tilted the balance in favor of fossil fuels, the

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<sup>17</sup> Ibid.

<sup>18</sup> SELIVANOVA, 2008.

<sup>19</sup> POGORETSKY, 2011, p. 181.

<sup>20</sup> GSI, 2012.

<sup>21</sup> UNEP, 2008, p. 21

<sup>22</sup> G20, 2009, p. 14.

<sup>23</sup> IMF, 2013, p. 1.

<sup>24</sup> Ibid.

<sup>25</sup> Rubini, 2011, p. 6.

removal of these subsidies may enable alternative sources of energy to become more economically competitive.

The adverse effect of fossil fuel subsidies and hence the importance of their removal has been recognized in both the scientific and political communities since the early 1980s.<sup>26</sup> The 1997 Kyoto Protocol to the United Nations Framework Conventions on Climate Change (UNFCCC) has called for *Annex I* countries to progressively reduce subsidies in greenhouse gas emitting sectors.<sup>27</sup> More recently, G-20 and APEC member countries pledged to rationalize and phase out fossil fuel subsidies over the medium term.<sup>28</sup> The IMF and the World Bank have also repeatedly called for the removal of fossil fuel subsidies. However, as can be inferred from the continued upsurge of global fossil fuel subsidies, these calls are so far falling on deaf ears. This has been attributed to three main shortcomings, in the literature: (i) lack of clear standards and definitions, (ii) limited transparency regarding the extent and nature of subsidies, and (iii) lack of an enforcement mechanism.<sup>29</sup> The fact that these shortcomings are unlikely to be addressed within the international environmental regime anytime soon, has put the spotlight on the WTO and its multilateral trade rules relevant to subsidies. These rules are primarily enshrined in the SCM Agreement and have so far never been tested in a dispute involving fossil fuel subsidies.

## 2.2 Renewable Energy Subsidies

Renewable sources of energy, such as wind, solar, hydro, biomass, and geothermal account only for a small percentage of the global energy mix.<sup>30</sup> It is widely accepted that increasing their share can have significant positive economic and environmental implications. As the Director of the International Renewable Energy Agency (IRENA), Adnan Z. Amin, recently noted, the increased use of renewable energy sources can not only significantly reduce carbon dioxide emissions, but also provide other benefits such as enhanced energy security, more local jobs and value-creation, and a cleaner and healthier environment.<sup>31</sup> Because of these and some other policy reasons, countries are making

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<sup>26</sup> See GSI, 2010, p. 9.

<sup>27</sup> See Article 2.1.a (v) of the Kyoto Protocol.

<sup>28</sup> G20, 2009.

<sup>29</sup> HARRISON INSTITUTE FOR PUBLIC LAW, 2014.

<sup>30</sup> According to the International Energy Agency (IEA), renewables account less than 20% of the global energy mix in 2012.

<sup>31</sup> IRENA, 2014.

efforts, at both the international and national levels, to replace carbon-intensive fossil fuels with renewable energy sources. In particular, while the UN has launched a global initiative to double the share of renewable energy in the global energy mix by 2030,<sup>32</sup> transition to a low-carbon energy has become a key element of many, if not most, countries' national energy policy targets.<sup>33</sup>

Subsidies are perhaps the most common policy instruments used by governments to spur the development of renewable energy sources. Unlike in the case of fossil fuels, renewable energy subsidies are generally provided to producers.<sup>34</sup> They often come in the form of Feed-in Tariffs (FITs) and power purchase agreements, capital grants and soft loans, favorable tax treatment, and R&D funding.<sup>35</sup> Over the past few years, FITs have become very popular (and equally controversial in the WTO context) forms of renewable energy support program.<sup>36</sup> Under FITs, governments basically guarantee that energy producers will be paid a minimum (above-market) price per KWh of electricity they produce from renewable sources and deliver into the national electricity system.<sup>37</sup> Governments often tend to attach domestic content requirements as preconditions for participation in FIT Programs.<sup>38</sup> That is, renewable energy producers must source at least certain percentage of their equipment and other production material inputs from domestic producers. Energy producers who use foreign solar panels or wind turbines are unlikely to benefit from the FITs. As some commentators pointed out, governments usually attach such conditions under the guise of creating local jobs, and hence garner political support for renewable energy technologies.<sup>39</sup> The problem is, however, such conditions discourage, albeit indirectly, the use of foreign renewable energy equipment, and therefore act as a *de facto* trade barriers that has already raised serious WTO-compatibility concerns.

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<sup>32</sup> UN, 2011, p. 4.

<sup>33</sup> REN 21, 2013. According to this report, at least 138 countries have already set renewable energy targets.

<sup>34</sup> See IEA, 2012.

<sup>35</sup> See GHOSH with Himani Gangania, 2012.

<sup>36</sup> As of early 2013, at least 71 countries around the world have enacted FIT policies (REN 21, 2013, p. 116).

<sup>37</sup> For a detailed analysis of FIT Schemes see UNEP (2012).

<sup>38</sup> KUNTZE; MOERENHOUT, 2013.

<sup>39</sup> See, for example, Lewis (2013).



### 3 The WTO Rules on Subsidies

Together with agriculture and fisheries, energy is the most heavily subsidized sector worldwide.<sup>40</sup> However, while special rules apply to agricultural subsidies and new disciplines for fisheries subsidies are in the pipeline, there are no energy-specific subsidy rules (nor negotiations to this end, for that matter).<sup>41</sup> Energy subsidies are instead subject to the general rules on subsidies under the SCM Agreement. In this section, we examine how these rules apply to energy subsidies in general terms, focusing on the legal elements of the subsidy definition and the conditions under which subsidies could be challenged in WTO dispute settlement proceedings.

Before proceeding with the examination of the rules, it is useful to keep in mind the following two points regarding energy and the overall scope of the SCM Agreement. First, the SCM Agreement applies only to trade in goods, and hence does not apply to subsidies to services sector.<sup>42</sup> This naturally leads us to the question whether energy is a good or a service. The paper does not purport to provide a detailed answer to this question, but it is important to note that, first, the debate over this question is limited to non-liquefied natural gas and electricity.<sup>43</sup> There is no question over the fact that energy products such as oil, liquefied natural gas and solid fuels are goods. Second, electricity is considered as a good under the General Agreement on Tariffs and Trade (GATT).<sup>44</sup> Third, electricity is also classified as a good together with other energy products such as coal, gas and oil under the Harmonized System (HS) Nomenclature.<sup>45</sup> Finally, and perhaps most importantly, in *Canada-Renewable Energy/FIT* cases, the only energy-subsidy-related cases that reached the Appellate Body stage so far, the Appellate Body confirmed the Panel's finding that the government purchase of electricity under the FIT program constitutes a government *purchase of goods* within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.<sup>46</sup> Hence, we consider energy products, including electricity, as goods.

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<sup>40</sup> UNITED NATIONS SECRETARY-GENERAL'S HIGH-LEVEL PANEL ON GLOBAL SUSTAINABILITY, 2012, p. 52.

<sup>41</sup> The WTO Agreement on Agriculture (AoA) contains independent disciplines on domestic support measures for agriculture. These disciplines apply to subsidies to biofuels.

<sup>42</sup> Subsidies to services sector are generally dealt with under Article XV of the General Agreement on Trade in Services (GATS). However, it should be noted that the particular provision does not set out specific rules and merely suggest future negotiations to develop multilateral disciplines.

<sup>43</sup> WTO, Energy Services: Background Note by the Secretariat, Council for Trade in Services, Document number S/C/W/52, 1998, p. 2.

<sup>44</sup> *Ibid.*; See also Cottier et al. (2009).

<sup>45</sup> *Ibid.*

<sup>46</sup> WTO, Appellate Body Reports, *Canada-Renewable Energy/FIT*, para.5.128.

It is also important to bear in mind from the outset that the SCM Agreement does not, as such, distinguish between subsidies to fossil fuels and renewable energy. That means both subsidies to fossil fuels and renewable energy could fall within the scope of the SCM Agreement, provided that they meet the requirements set out therein. The requirements are provided under Article 1 of the Agreement, which provides that a government support measure shall be considered as a “subsidy” only in so far as it is: (i) a financial contribution, or income or price support, by a government, or a public body (ii) that confers a benefit up on the recipient. Moreover, the subsidy needs to be specific to certain enterprises to fall within the ambit of the SCM Agreement.<sup>47</sup>

### *3.1 The Government Measure Must be a Financial Contribution*

Whether a particular government measure constitutes a financial contribution largely hinges on the specific form it takes. Article 1.1(a)(1) of the SCM Agreement provides a closed list of measures that constitute a financial contribution. As confirmed by the Appellate Body in *US-Softwood lumber IV*, this exhaustive list contains a wide range of measures including direct transfer of funds such as loans and grants, government revenue forgone, and government provision of goods and services.<sup>48</sup> Although the only explicit exclusions are government provision of general infrastructure and border tax adjustments, *de facto* excluded from the list are the so-called “regulatory subsidies”.<sup>49</sup> These are subsidies, for instance, that stem from failures of governments to set/enforce labour and environmental standards.<sup>50</sup> This is of a particular relevance to energy subsidies. Some fossil fuel subsidy estimates including that of the IMF comprise failure to price negative externalities such as the costs of climate change.<sup>51</sup> But such regulatory support measures do not fall within the list of financial contributions, and hence fall outside the ambit of the SCM Agreement.

However, as is evident from the jurisprudence that has given expansive interpretation to the measures listed therein, the list is sufficiently broad enough to capture many of the common forms of energy subsidies discussed in the preceding section.<sup>52</sup> In

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<sup>47</sup> Article 1.2 & 2 of the SCM Agreement.

<sup>48</sup> WTO, Appellate Body Report: **US- Final Countervailing Duty Determination with Respect to Softwood Lumber from Canada** (hereinafter **US-Softwood Lumber IV**), WT/DS257/AB/R, 2004, Para. 52.

<sup>49</sup> COPPENS, 2014, p. 448-9.

<sup>50</sup> Ibid.

<sup>51</sup> See WHITLEY, 2013, p. 6.

<sup>52</sup> COPPENS, 2014, *Supra* note 49.

the *Canada-Renewable Energy/FIT* cases, for example, the arguments of the parties were mainly focused on the proper legal characterization of the challenged measure, but not on whether the measure, as such, constitutes a financial contribution.<sup>53</sup>

### 3.2 *The Financial Contribution must Confer a Benefit*

Financial contributions must confer a benefit to the recipient in order to be considered as a “subsidy” within the meaning of the SCM Agreement.<sup>54</sup> The particular form of the financial contribution largely determines how difficult it is to ascertain whether a benefit has been conferred. It is axiomatic that ascertaining the existence of a benefit is straightforward in the case of direct cash transfers than, for example, in the case of financial contributions that take the form of government purchase of goods. Generally, however, whether a benefit has been conferred is determined irrespective of any cost to the government and in particular by assessing whether the financial contribution has left the recipient better off than it would otherwise have been.<sup>55</sup> That is, by assessing whether the recipient has received a “financial contribution on terms more favourable than those available to the recipient in the market”.<sup>56</sup>

However, the market may be too distorted by government intervention, as in the case of energy markets, to serve as a benchmark for the purpose of the benefit comparison.<sup>57</sup> As the jurisprudence suggests, alternative benchmarks should be used in such circumstances. That is because reliance on a substantially distorted market benchmark would lead to a false negative finding.<sup>58</sup> The Appellate Body further extended the ground for resorting to alternative benchmarks in *Canada-Renewable Energy/FIT*. According to the Appellate Body, a distinction should be drawn between government interventions that create markets and interventions in an already existing market.<sup>59</sup> It is of the view that, “where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it”.<sup>60</sup> The rationale for using alternative benchmarks in such circumstances is not because the market is distorted, but

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<sup>53</sup> See WTO, Appellate Body Reports: **Canada-Certain Measures Affecting the Renewable Energy Sector & Canada-Measures Relating to the Feed-in Tariff Program** (hereinafter *Canada-Renewable Energy/FIT*), WT/DS412/AB/R & WT/DS426/AB/R, 2013, paras. 2.86-2.93 and 5.116-5.139.

<sup>54</sup> Article 1.1(b) of the SCM Agreement.

<sup>55</sup> WTO, Appellate Body Report: **Canada-Measures Affecting the Export of Civilian Aircraft** (hereinafter *Canada-Aircraft*), WT/DS70/AB/R, 1999, para.157.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> See COPPENS, 2014, p. 455.

<sup>59</sup> WTO, Appellate Body Reports, **Canada-Renewable Energy/FIT**, 2013, Para.5.118

<sup>60</sup> *Ibid.*

because it is created by the government intervention. The Appellate Body further held that the alternative benchmark must be found within the relevant market, which should rather be defined at the beginning of the benefit analysis.<sup>61</sup> As we shall see later, the Appellate Body's new approach has significant implications for energy subsidies.

### 3.3 The Subsidy Must be Specific

Even after qualifying as a subsidy, an energy support measure may not necessarily be prohibited or actionable unless it is "specific" within the meaning of Article 2 of the SCM Agreement.<sup>62</sup> Article 2.1 of the SCM Agreement, in particular, stipulates that only subsidies that are either *de jure*<sup>63</sup> or *de facto*<sup>64</sup> "specific" to certain enterprises or industries are subject to the disciplines of the SCM Agreement. Subsidies limited to certain enterprises located within a designated geographical region and those prohibited in accordance with Article 3 of the SCM Agreement are automatically deemed to be specific pursuant to Article 2.2 and 2.3 of the SCM Agreement.

In the context of energy subsidies, there appears to be an apparent disparity in the degree of specificity between production and consumption subsidies. It is relatively straightforward to establish specificity when the subsidy is explicitly limited to certain enterprises or industries, as in the case of most subsidies to renewables. For example, all the renewable energy support programs that have been challenged in the WTO so far were targeted at producers of wind<sup>65</sup>, solar<sup>66</sup> or renewable energy sources in general.<sup>67</sup> In fact, since renewable energy as a sector constitutes only a small portion of the overall energy market, subsidies to renewable energy producers are highly likely to be found specific regardless of

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<sup>61</sup> Ibid, para.5.169. In this particular case, the Appellate Body found that the relevant market for solar and wind power electricity are the competitive markets for wind and solar-generated electricity that results from the specific energy supply-mix set by the government, but not the single market for electricity generated from all sources of energy. See, *Ibid*, para.5.174.

<sup>62</sup> Article 1.2 of the SCM Agreement

<sup>63</sup> Article 2.1(a) & (b) of the SCM Agreement: *De jure* specificity exists when access to the subsidy is explicitly limited to certain enterprises. Furthermore, specificity does not exist when "objective criteria or conditions" governing the eligibility for, and the amount of, the subsidy are established. As described under Footnote 2 of the SCM Agreement Objective criteria or conditions refer to criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application.

<sup>64</sup> Article 2.1 (c) of the SCM Agreement: A subsidy that appears to be *de jure* non-specific may in fact be specific if: (i) it is used by "only a limited number of certain enterprises; (ii) "there is "predominant use by certain enterprises;" or (iii) "disproportionately large amounts of subsidy to certain enterprises."

<sup>65</sup> See, for example, the **China-Measure Concerning Wind Power Equipment** case.

<sup>66</sup> See, for example, the **India-Certain Measures Relating to Solar Cells and Solar Modules** case.

<sup>67</sup> See, for example, the **Canada-Renewable Energy/FIT** cases.

whether they are targeted to only a certain renewable energy technology or renewable sources of energy in general.<sup>68</sup>

In contrast, as noted in section 2.1, fossil-fuel subsidies are largely targeted towards consumers than producers. As far as they are available generally to enterprises throughout the economy, consumer subsidies are less likely to be deemed at least *de jure* specific. Some commentators however suggested that such subsidies might be deemed *de facto* specific under Article 2.1(c) of the SCM Agreement since they are likely to be disproportionately or predominately used by energy-intensive industries.<sup>69</sup>

### *3.4 Subsidies are Either Prohibited or Actionable*

Subsidies were classified into three categories (as prohibited, actionable, and non-actionable) under the SCM Agreement.<sup>70</sup> However, the non-actionable category was adopted on a provisional basis and expired at the end of 1999 – WTO Members failed to reach agreement to extend its application as required by Article 31 of the SCM Agreement.<sup>71</sup> The non-actionable category, which was set out in Article 8 of the SCM Agreement, immunizes subsidies, *inter alia*, to adapt existing facilities to new environmental requirements, from legal action.<sup>72</sup> This provision would have provided some legal shelter for energy subsidies that intend to attain environmental objectives.

Subsidies are now either prohibited or actionable under the SCM Agreement. As noted by Guzman and Pauwelyn, while the former are defined by the conditions required to receive the subsidy, the latter are defined primarily by their impact on other countries.<sup>73</sup> Prohibited subsidies are those subsidies, which are contingent upon either export performance or the use of domestic over imported goods.<sup>74</sup> These subsidies are considered to be inherently trade distorting, and hence must be “withdrawn without delay” once their existence is established.<sup>75</sup> Export subsidy is not an issue in the fossil fuel industry as fossil fuel exports are hardly

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<sup>68</sup> See RUBINI, 2011.

<sup>69</sup> See, for example, Howse (2010, p. 9).

<sup>70</sup> See Article 3, 5 & 8 of the SCM Agreement.

<sup>71</sup> For a detailed analysis on non-actionable subsidies and the case for their resurrection, see Bigdeli (2011). See also Casier et al. (2013).

<sup>72</sup> See article 8.2(c) of the SCM Agreement.

<sup>73</sup> GUZMAN; PAUWELYN, 2009, p. 421.

<sup>74</sup> See Article 3.1 of the SCM Agreement. Prohibited subsidies are deemed to be specific (Article 2.3) and must to be withdrawn without delay (Article 4.7). However, it is not clear whether it is the entire subsidy scheme or its discriminatory aspect that must be withdrawn.

<sup>75</sup> See Article 4.7 of the SCM Agreement.

subsidized. The industry is rather riddled with export taxes and export restrictions.<sup>76</sup> Less clear, however, is the case of renewable energy subsidies. Since electricity is rarely traded on a cross-border basis, one may assume that export subsidies are inapplicable in the renewable energy sector.<sup>77</sup> However, countries could subsidize the export of renewable energy technologies to make their domestic firms more competitive in the international market.<sup>78</sup> Furthermore, as already noted, domestic content requirements are quite popular in the renewable energy sector. In the absence of any express exemption, such subsidies face elimination, regardless of their underlying policy objectives, if their existence is established under Article 1 of the SCM Agreement.

Those subsidies that fall outside the definition of a prohibited subsidy could still be challenged under the SCM Agreement as “actionable subsidies,” provided that they meet the requirements of specificity and adverse effects.<sup>79</sup> Adverse effects may occur in the form of: (i) injury to the domestic industry, (ii) nullification or impairment of benefits, and (iii) series prejudice to the interests of other members.<sup>80</sup> Any member, adversely affected by a specific subsidy, may take action either unilaterally through trade remedies or multilaterally through the dispute settlement system.<sup>81</sup> Provided that they meet the subsidy definition to begin with, most fossil fuel subsidies are likely to be scrutinized under this provision. Whether they are likely/unlikely to meet the specificity and adverse effects requirements will be discussed in section five.

#### **4 Energy Subsidy Related Disputes in the WTO**

Subsidies are persistent sources of dispute in the WTO. On average, five cases have been filed each year under the SCM Agreement since its entry into force in 1995.<sup>82</sup> However, as noted by Rubini, challenges to energy subsidies have been missing from the register of cases at the WTO.<sup>83</sup> It was only after the first of such cases was brought by Japan against Canada’s Feed-in Tariff program in 2010 that energy subsidy programs started to face legal challenges in the WTO. While subsidies to fossil fuels are yet to be challenged, a total of six

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<sup>76</sup> See PAUWELYN, 2009.

<sup>77</sup> HOWSE, 2005.

<sup>78</sup> ICTSD, 2013.

<sup>79</sup> See Part III of the SCM Agreement

<sup>80</sup> See Article 5 of the SCM Agreement.

<sup>81</sup> See Article 10 and 11 of the SCM Agreement

<sup>82</sup> LEITNER; LESTER, p. 257-67.

<sup>83</sup> RUBINI, 2014, p. 3.

cases have been initiated against renewable energy subsidy programs as of August 2014. The principal aim of this section is merely to highlight the controversial aspects of the challenged renewable energy support programs and the provisions under which they were challenged.

#### *4.1 Canada – Certain Measures Affecting the Renewable Energy Sector and Canada - Measures Relating to the Feed-in Tariff*

These parallel WTO cases were initiated by Japan and the European Union against Canada's measure relating to domestic content requirements under the FIT program adopted by the Canadian province of Ontario.<sup>84</sup> According to this program, Ontario-based wind and solar PV electricity generation projects must comply with the "minimum required domestic content levels" to qualify for the guaranteed above-market purchase price.<sup>85</sup> Japan and the EU claimed that the domestic content requirements make the FIT Program a prohibited subsidy within the meaning of Article 3.1(a) of the SCM Agreement and constitute a violation of Article 2.1 of the Agreement on Trade Related Investment Measures (TRIMs) and by extension the national treatment obligation of GATT Article III:4 .

Both the Panel and the Appellate Body found that the domestic content requirements under the FIT program are inconsistent with GATT Article III:4 and thereby also inconsistent with Article 2.1 of the TRIMs Agreement.<sup>86</sup> This finding was fairly straightforward that it was not even contested by Canada. The key issue on appeal was whether the domestic content requirements fall under GATT Article III:8(a), which provides for exemption of government procurement from the national treatment obligation. Noting that the procurement of electricity by the government of Ontario under the FIT program was undertaken "with a view to commercial resale," the Panel found that the FIT program is not covered by the terms of Article III:8(a).<sup>87</sup> The AB upheld this finding under modified reasoning. According to the AB, "the product being purchased by a governmental agency for purposes of Article III:8(a) (i.e., *electricity*), is not the same as the product that is treated less favourably as a result of the

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<sup>84</sup> WTO, Panel Reports: *Canada-Renewable Energy/FIT*, 2012, paras.7.66-67. The FIT program is divided into "two streams: (i) the FIT stream - for projects with a capacity to produce electricity that exceeds 10 kW, but is no more than 10 MW for solar PV projects or 50 MW in the case of waterpower projects; and (ii) the micro-FIT stream - for projects having a capacity to produce up to 10 kW of electricity (typically small household, farm or business generation projects)."

<sup>85</sup> The minimum domestic content levels range from 50% for wind projects as of 2012 to 60% for solar projects as of 2011. See WTO (2012), Panel reports: *Canada-Renewable Energy/FIT*, para.7.158.

<sup>86</sup> See WTO, Panel reports: *Canada-Renewable Energy/FIT*, 2012, para 7.117.

<sup>87</sup> See WTO, Panel reports: *Canada-Renewable Energy/FIT*, 2012, para.7.152.

minimum required domestic content levels of the FIT Program (i.e., *certain renewable energy generation equipment*).”<sup>88</sup>

This finding shuts the door on perhaps the most feasible legal shelter for discriminatory FITs. The AB did not explicitly say that domestic content requirements attached to FITs could not be justified as government procurement. What it said instead is that the products procured by a government and less favourably treated must be the same. However, what governments procure under FITs is renewable electricity, while the products they (want to) discriminate against are not renewable electricity (as they hardly face competition from such imports), but equipment used in the generation of renewable electricity.

With regard to the subsidy claim, as already noted, both the Panel and the AB first found that the purchase of electricity under the FIT program is a “purchase of goods” within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.<sup>89</sup> The identification of market benchmarks to determine whether a benefit has been conferred by the purchase of electricity was, however, the most controversial issue of the case. Both the Panel majority and the AB rejected the market benchmarks suggested by the complainants and came out with their own market benchmarks, but were unable to complete their analysis due to insufficient facts on the record.<sup>90</sup> Neither the Panel nor the AB gave an ultimate conclusion regarding whether the FIT confers a benefit within the meaning of Article 1.1(b), and, hence, the question whether FITs qualify as a subsidy under the SCM Agreement remained unanswered.

#### *4.2 China – Measures Concerning Wind Power Equipment*

The second WTO dispute involving a renewable energy subsidy program was brought by the United States against China’s Special Fund for Industrialization of Wind Power Equipment.<sup>91</sup> The challenged measures provide grants that are contingent on the use of domestic over imported parts and components by Chinese wind power equipment

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<sup>88</sup> WTO, Appellate Body Reports: **Canada-Renewable Energy/FIT**, 2013, para.5.75 (*Emphasis added*).

<sup>89</sup> See WTO, Panel reports: **Canada-Renewable Energy/FIT**, 2012, para.7.222; and WTO, Appellate Body Reports: **Canada-Renewable Energy/FIT**, 2013, para.5.128.

<sup>90</sup> According to the Panel, comparing the FIT rates of return with the average cost of capital in Canada for projects having a comparable risk profile in the same period would be a useful way to determine whether the FIT program confers a benefit within the meaning of Article 1.1(b). See, para.7.327.

<sup>91</sup> This case arose out of an investigation initiated in response to a petition filed by the United Steelworkers (USW) under section 301 of the Trade Act of 1974.



manufactures.<sup>92</sup> In its request for consultations, the US alleged that the challenged measures are inconsistent, *inter alia*, with Article 3, and Article 25 of the SCM Agreement.<sup>93</sup> This dispute was, however, resolved at the consultations stage, following China's agreement to terminate the program as of February 2011.<sup>94</sup> Given China's claim early on in the discussion that the measures are WTO consistent as they are "beneficial to resource conservation and environment protection and contribute to overcome the climate change and global warming," this case would have given the WTO an opportunity to deliberate on the question whether subsidies could still be justified on environmental protection grounds under the SCM Agreement.

#### *4.3 EU and Certain Members – Certain Measures Affecting the Renewable Energy Generation Sector*

This dispute arose out of a challenge brought by China against the EU and certain members (Italy and Greece) concerning domestic content requirements attached to the FIT programs enacted under the powers delegated to EU Member States by, *inter alia*, Directive 2009/28/EC of the European Parliament and of the Council "on the promotion of the use of energy from renewable sources".<sup>95</sup> In its request for consultations dated 5 November 2012, China claimed that the various measures taken in relation to the FIT programs are inconsistent with Articles I, III:1, III:4 and III:5 of the GATT 1994, Articles 3.1(b) and 3.2 of the SCM Agreement, and Articles 2.1 and 2.2 of the TRIMs Agreement. This dispute largely resembles to the *Canada-Renewable Energy/FIT dispute*, but it has not yet proceeded beyond consultations.<sup>96</sup>

#### *4.4 India – Certain Measures Relating to Solar Cells and Solar Modules*

The United States requested supplementary consultations concerning India's domestic content requirements under "Phase II" of the Jawaharlal Nehru National Solar Mission (NSM)

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<sup>92</sup> WTO, **China – Measures Concerning Wind Power Equipment**: Request for Consultations by United States, 2010 (WT/DS419/1).

<sup>93</sup> Ibid.

<sup>94</sup> ICTSD, 2011.

<sup>95</sup> WTO, **European Union and Certain Member State – Certain Measures Affecting the Renewable Energy Generation Sector**: Request for Consultations by China, 2012 (WT/DS452/1).

<sup>96</sup> According to the latest update on the WTO website, the case is still in the consultations stage. See <[http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds452\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds452_e.htm)> (last accessed: March 2014).

for solar cells and solar modules on 13 February 2014, exactly one year after its first request for consultations concerning “Phase I” of the same program.<sup>97</sup> The Request for supplementary consultations was followed by a request for the establishment of a panel on 14 April 2014.<sup>98</sup> As of August 2014, the Panel has been established, but not yet composed.<sup>99</sup> Since the two requests for consultations were brought before and after the Appellate Body’s ruling in *Canada- Renewable Energy/FIT*, a brief look at their contents offers a glimpse into the practical impact of the Appellate Body’s ruling on current and future renewable energy subsidy cases.

Under both complaints, the United States alleged that Indian solar power developers are required to purchase and use solar cells and solar modules of domestic origin in order to participate in the NSM program and “receive certain benefits and advantages, including subsidies through guaranteed, long-term tariffs for electricity”.<sup>100</sup> According to its first complaint dated 11 February 2013, the United States claimed that the domestic content requirements under the NSM Program are inconsistent with India’s obligations under GATT Article III:4, Article 2.1 of the TRIMs Agreement, and under various articles of the SCM Agreement, including Article 3.<sup>101</sup> Whereas in the second complaint, the United States has only claimed violations of GATT Article III:4 and Article 2.1 of the TRIMs Agreement.<sup>102</sup> The withdrawal the claims under the SCM Agreement from the second consultations request (this has since been confirmed in the request for the establishment of the panel as well) seems to have been informed by the ruling in *Canada-Renewable Energy/FIT*. The Appellate Body’s ruling in that case appear to have convinced the US that making claims under the GATT and the TRIMs Agreement would be enough to prevent India from pursuing with the allegedly discriminatory aspect of its subsidy program. It may have also been influenced by the Appellate Body’s narrower “market benchmark” interpretation that has made it difficult for complainants to establish whether the challenged measure “confers a benefit,” and hence qualify as a subsidy under the SCM Agreement.

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<sup>97</sup> WTO, **India – Certain Measures Relating to Solar Cells and Solar Modules**, information available at <<http://bit.ly/1kH00Cn>> (last accessed: August 2014).

<sup>98</sup> WTO, **India – Certain Measures Relating to Solar Cells and Solar Modules**: Request for the Establishment of a Panel by the United States, 2014 (WT/DS456/5).

<sup>99</sup> See WTO, *Supra* note 96.

<sup>100</sup> See WTO (2014), *supra* note 98, and WTO, **India – Certain Measures Relating to Solar Cells and Solar Modules**: Request for Consultations by the United States, 2013 (WT/DS456/1, G/L/1023G/TRIMS/D/35, G/SCM/D96/1).

<sup>101</sup> See WTO, 2013, *supra*.

<sup>102</sup> WTO, **India – Certain Measures Relating to Solar Cells and Solar Modules**: Request for Consultations by the United States, 2014 (WT/DS456/1/Add.1, G/L/1023/Add.1, G/TRIMS/D/35/Add.1, G/SCM/D96/1/Add.1).

## 5 Why renewables but to fossil fuel subsidies?

This section addresses the question why WTO Members initiate disputes over renewable energy subsidies but remain silent on fossil fuel subsidies. As highlighted in the preceding sections, the WTO rules on subsidies, in principle, do not distinguish between fossil fuel and renewable energy subsidies. However, given the different characteristics fossil fuel and renewable energy subsidies tend to take, the rules seems to be better suited to challenge subsidies to renewables than to fossil fuels. This is further compounded by the rules of dispute initiation under the SCM Agreement and the different role played by interest groups in the fossil fuels and renewables sector.

### 5.1 *The Likelihood of success*

Studies show that the strength or weakness of a potential legal case may influence the likelihood of dispute initiation in the WTO.<sup>103</sup> Davis, in particular, noted that countries are unlikely to initiate a legal dispute unless they have strong legal case or a very good chance of winning.<sup>104</sup> As she pointed out, previous Panel rulings suggest that countries screen out weak legal cases before filing a dispute.<sup>105</sup> This is not surprising, given the litigation and political economy costs of initiating a dispute. The average cost of initiating a dispute is estimated to be around US\$1 million per year for the duration of the dispute, depending on its complexity.<sup>106</sup> Filing a case against a trading partner may also antagonize the partner and hence adversely affect diplomatic relations.<sup>107</sup> It also poses the risk of setting a precedent that may come back to haunt the complainant or legitimize the use of the contested measure.<sup>108</sup> It is, therefore, logical that WTO Members screen out weak legal cases and target the slam-dunk ones. As will be argued below, this seems to be the case in energy subsidy disputes.

One common feature of the disputes that have so far been brought against energy subsidy programs is that they were targeted at feed-in tariff schemes with domestic content requirements. Such requirements are often attached to feed-in tariff schemes with a view to generate domestic jobs (and hence garner public support for the high feed-in tariffs) or to

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<sup>103</sup> See, in particular, Davis (2008), Eckhardt (2013) and Brutger (2014).

<sup>104</sup> Davis (2008) and Brutger (2014).

<sup>105</sup> Ibid., p. 14, “The observation that over eighty percent of the rulings by WTO panels favor the plaintiff suggests that governments screen out weak legal cases before filing or in early settlement”.

<sup>106</sup> BRUTGER, 2014, p. 3.

<sup>107</sup> DAVIS, 2011, p. 11.

<sup>108</sup> Ibid.

promote the domestic manufacturing sector.<sup>109</sup> The discriminatory nature of such requirements is hardly contested. By forcing renewable energy producers to source a certain percentage of their components domestically, feed-in tariff schemes with domestic content requirements provide more favourable treatment to domestic renewable energy technology producers. Non-discrimination is, however, a fundamental principle of the multilateral trading system. Given the high regard with which the WTO holds the principle of “non-discrimination,” such discriminatory subsidy programs can be challenged successfully even without invoking the legal provisions of the SCM Agreement. As we have seen in *Canada-Renewable Energy/FIT*, in so far as they include domestic content requirements, the WTO inconsistency of renewable energy support programs can easily be established under GATT Article III:4 and thereby Article 2.1 of the TRIMs Agreement.

Under the SCM Agreement, such subsidies were challenged as prohibited subsidies within the meaning of Article 3.1(b). Provided that they meet the requirements of Article 1, i.e. financial contributions and benefit, feed-in tariffs schemes that are contingent up on the use of domestic over imported components could easily fall within the meaning of prohibited subsidies under article 3.1(b). Complainants filing a dispute against such subsidies need to establish neither the specificity nor the adverse effect of the subsidies. However, although it was unable to complete the benefit analysis - due to insufficient facts on the record - and therefore did not reach a conclusion regarding the question whether the feed-in tariff program has conferred a benefit, the Appellate Body’s benefit analysis in *Canada-Renewable Energy/FIT* has indicated that it might not be easy to establish the existence of a benefit in such cases.

It should also be noted that not all renewable energy subsidy programs include domestic content requirements or have discriminatory elements. The fact that only subsidy programs with discriminatory elements have been challenged so far illustrates how complainants were selective as to which renewable energy subsidy programs they challenge before the WTO. In filing a case against discriminatory subsidy programs, they know that their legal case is strong enough to result in a favourable ruling. Their likelihood of success is also enhanced by the lack of express exemption for environmental subsidies - after the expiry of the non-actionable category. Some commentators have argued that otherwise unlawful subsidies may still be justified under the general exceptions of GATT Article XX. Their main line of argument is that the SCM Agreement

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<sup>109</sup> See COSBEY; RUBINI, 2013, p. 2.

is simply an elaboration on GATT Articles VI and XVI and since there is no provision to the contrary either in the SCM Agreement or in any other WTO Agreement, GATT Article XX should apply to the SCM Agreement.<sup>110</sup> However, there are several reasons why the argument for the application of GATT Article XX beyond the GATT and in particular to the SCM Agreement is untenable. The most persuasive arguments against the application of GATT Article XX to the SCM Agreement include: (i) the expression “nothing under this agreement” in Article XX limits the scope of the Article to the GATT; (ii) unlike other Covered Agreements such as the Agreement on Sanitary and Phytosanitary Measures (SPS), the SCM Agreement does not make an express reference to Article XX; and (iii) the lapsed Article 8 of the SCM Agreement indicates the negotiators’ intention to provide exceptions tailored to the SCM Agreement.<sup>111</sup> This issue is the subject of ongoing debate, but even if we assume that renewable energy subsidies could be justified under GATT Article XX, domestic content requirements are unlikely to meet the two-tiered test thereof.<sup>112</sup> The key challenges being establishing: (i) how their use is “necessary” to achieve the environmental objectives pursued, and (ii) that their application do not result in “arbitrary or unjustifiable” discrimination.

Fossil fuel subsidies, on the other hand, do not tend to be contingent upon domestic content requirements or on export performance. In fact, as noted in section 2.1, they mostly come in the form of consumer subsidies. Although concerns over fossil fuel subsidies and dual pricing schemes in particular have been raised and discussed within the WTO, no formal dispute involving fossil fuel subsidies has so far been brought to the WTO.<sup>113</sup> The concerns were related to the fact that dual pricing schemes provide domestic industries with energy at a price lower than the world market. And this provides unfair advantage to the energy intensive industries of the subsidizing countries.<sup>114</sup> These concerns were, in particular, raised during the accession negotiations of energy-exporting countries such as the Russia Federation and Saud Arabia, but have not, so far, led to the filing of a formal WTO dispute.

So long as they are not contingent upon domestic content requirements or export performance such subsidies may only be challenged as actionable subsidies under the

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<sup>110</sup> For more on the arguments for the application of GATT Article XX beyond the GATT, see, Jegou and Rubini (2011, p. 40).

<sup>111</sup> Ibid.

<sup>112</sup> For more on this, see Wilke (2011, p. 20).

<sup>113</sup> For more on the historical account of energy subsidy related discussions within the WTO, see Lang et al. (2010).

<sup>114</sup> Ibid.

SCM Agreement. The requirements for establishing the existence of an actionable subsidy are, however, considerably more complex than the criteria to establish the existence of a prohibited subsidy. To successfully challenge a subsidy as an actionable subsidy, a complainant must establish that the subsidy is “specific” to certain enterprises and causes “adverse effects” to the interests other members, on top of meeting the “financial contribution” and “benefit” requirements. In the context of fossil fuel subsidies, perhaps the most difficult challenge comes in the form of meeting the specificity requirement. As already noted, fossil fuel consumer subsidies are often available to all consumers throughout the economy – including to industrial customers - and hence are unlikely to be found specific.<sup>115</sup> This has to be seen in contrast to the relative ease with which the specificity of renewable energy subsidies can be established.<sup>116</sup> However, as noted in section 3.3, some commentators contend that fossil fuel consumer subsidies may *in fact* be specific.<sup>117</sup> Their argument is premised on the notion that “energy-intensive industries would likely be highly disproportionate users of such subsidies”.<sup>118</sup> However, finding relevant evidence to demonstrate the fact that the subsidy scheme has benefitted the energy intensive industries disproportionately more than the other customers would not be easy.

Furthermore, being *de facto* specific does not necessarily make the subsidies in question actionable under the SCM Agreement, unless they also cause one of the three types of adverse effects set out in Article 5. Adverse effect is deemed to exist if a subsidy granted by a member results in injury to the domestic industry of another member, nullification or impairment, or serious prejudice.<sup>119</sup> According to those who claim that fossil fuel consumption subsidies such as dual pricing schemes constitute *de facto* specific actionable subsidy, the adverse effect of such subsidies is on energy-intensive industries of other members. However, given the high standard of proof required, it is extremely difficult for the complainant to demonstrate the existence of adverse effects on its like energy-intensive industry. To a certain extent this is reflected in WTO Members’ attempt to address their concerns over dual pricing schemes through accession negotiations than through the Dispute Settlement System.

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<sup>115</sup> See SELIVANOVA (2007).

<sup>116</sup> See Section 3.3 of this paper.

<sup>117</sup> HOWSE, 2010, p. 11.

<sup>118</sup> *Ibid.*, p. 11.

<sup>119</sup> See Article 5 and 6 of the SCM Agreement.

## 5.2 *Pressure from interest groups*

Pressure from interest groups is another factor that may explain the existing pattern of energy subsidy related disputes in the WTO. Although only Members States may file a dispute before the WTO Dispute Settlement Body, private actors play a significant role in the dispute settlement proceedings.<sup>120</sup> Studies have shown that private-public partnerships are of paramount importance for the initiation of trade disputes at the WTO. The process often begins with the affected industries identifying the potential WTO inconsistent measures and informing/requesting the government to take action. This is more apparent in dumping and subsidy related cases. While import-competing industries petition their governments to initiate investigation and eventually impose countervailing duty against subsidized imports, affected export-oriented industries lobby for the initiation of a formal WTO dispute against the subsidizing member. The key question is, however, whether the domestic industries have an incentive to lobby their government to take action against the subsidization either unilaterally through trade remedies or multilaterally through the dispute settlement system.

In this regard, renewable energy equipment manufacturing industries have been particularly active and influential in the recent renewable energy subsidy related disputes. The role of US based firms and industry groups in US-China renewable energy subsidy disputes, for example, is typical example of the part that have been played by private actors in the rising renewable energy subsidy related disputes. The row between the two countries started in 2010 with the filing of a petition by the United Steelworkers (USW) with the United States Trade Representative (USTR) requesting that it investigate China's violation of its WTO commitments in relation to clean energy.<sup>121</sup> This was followed by another petition by the Coalition for American Solar Manufacturing (CASM) with the US Department of Commerce and International Trade Commission (ITC) in 2011 requesting the US government to take action against China's allegedly unlawful subsidies to solar companies.<sup>122</sup> In October 2012, the ITC released its final determination imposing anti-dumping and countervailing duties on Chinese solar imports on the basis of its preliminary finding that the US solar industry had suffered "material injury".<sup>123</sup> Similar petition was also filed by the US wind component companies' coalition (the Wind Tower Trade Coalition) asking the US Department of Commerce to initiate anti-dumping and countervailing duty investigations against imports of

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<sup>120</sup> ECKHARDT, 2013, p. 9.

<sup>121</sup> See LEWIS, 2013.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

utility scale wind towers from China.<sup>124</sup> The US government has responded to all these petitions not only by investigating and imposing countervailing duties, but also by initiating a formal dispute against China's subsidy program for wind-power equipment, which ended with the termination of the subsidy program in February 2011.<sup>125</sup>

The same holds true for US-India and EU-China renewable energy subsidy controversies, which resulted in formal WTO disputes. Private actors such as EU's ProSun and US's Solar Energy Industries Association have played a significant role in these disputes. Moreover, Japan was also thought to have initiated the *Canada-Renewable Energy* dispute in the wake of a \$7million deal between Ontario and Korea's Samsung (which is a competitor to Japanese firms such as Mitsubishi and Sharp) to generate electricity from renewable energy sources like solar and wind.<sup>126</sup>

However, the situation is completely different with regard to fossil-fuel subsidies. Fossil-fuel producers or other industries that can potentially be affected by foreign fossil-fuel subsidies such as energy-intensive industries appear to be relatively passive in terms of petitioning or lobbying their governments to take action against foreign fossil-fuel subsidies for different reasons.<sup>127</sup> From the trade perspective, the main concern in relation to fossil fuel subsidies has been their adverse effects on energy intensive industries of other members. However, these industries have so far been inactive in terms of lobbying their governments to take action against the subsidization of fossil fuel consumption abroad. In the absence of request from affected industries, governments are unlikely to take action against foreign fossil fuel subsidies either unilaterally or multilaterally. As explicitly set out under Article 11.1 of the SCM Agreement, WTO Members cannot initiate countervailing duty investigations without the formal request of the affected industries. Second, governments rely heavily on their domestic industries to identify potential WTO-inconsistent subsidies and they are unlikely to initiate a formal dispute by their own initiative in the absence of such information from the affected industries. It should also be noted that the presence of pressure from interested groups does not necessarily mean that governments will act accordingly. Governments normally screen out cases based on several other factors including the strength/weakness of the potential case.

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<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> ICTSD, 2010.

<sup>127</sup> The author is not aware of any petition by private actors for the initiation of countervailing duty investigation against subsidized fossil-fuel imports or for the initiation of WTO disputes against foreign fossil-fuel subsidies.



## 6 Conclusion

This paper has sought to provide possible explanations of why renewable energy subsidies are challenged while the much larger and environmentally harmful fossil fuel subsidies are ignored. It offers two possible explanations that are not necessarily alternative to each other. First, the presence of domestic content requirements in feed-in tariffs schemes - the most popular forms of subsidies to renewable energy - makes subsidies to renewables vulnerable to trade disputes. Such subsidies can successfully be challenged either as prohibited subsidy under the SCM Agreement or as discriminatory measures contrary to the National Treatment Obligations of the GATT and thereby the TRIMs Agreement. Fossil fuel subsidies, on the other hand, tend to be consumer-targeted and non-discriminatory. Such subsidies may only be challenged as actionable subsidies under the SCM Agreement, provided that they meet the specificity and adverse effect requirements provided therein. However, since fossil fuel consumer subsidies are usually provided to all consumers throughout the economy, they are unlikely to meet the specificity requirement of the SCM Agreement in particular. Perhaps in recognition of this, WTO members have been trying to address their concerns over fossil fuel subsidies through other means such as the WTO accession negotiations of energy-exporting countries. Pressure from interest groups is another factor that may explain why only renewable energy subsidies have been challenged so far. While the industries that could potentially be affected by the subsidization of fossil-fuels appears to be passive for whatever reason, renewable energy equipment manufacturing industries have been active and influential in their governments' decisions to initiate disputes against renewable energy subsidies.

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