Discussion Paper

Using the Transatlantic Trade and Investment Partnership to Limit Fossil Fuel Subsidies

9 January 2014

Contents

Prepared for the Greens Group by the
HARRISON INSTITUTE FOR PUBLIC LAW
GEORGETOWN LAW

Discussion Paper[*]

Using the Transatlantic Trade and Investment Partnership to Limit Fossil Fuel Subsidies

Abstract

Fossil fuel subsidies contribute to climate change by encouraging production and consumption of carbon-intensive energy sources. The G20's commitment in 2009 to phase out fossil fuel subsidies has had little effect due to the lack of an enforcement mechanism and other shortcomings. International trade rules could provide the needed enforcement regime, but unfortunately, the rules of the World Trade Organization (WTO) have been used to challenge renewable energy programs rather than fossil fuel subsidies. The negotiations between the United States and the European Union on the Trans-Atlantic Trade and Investment Partnership (TTIP) present an important opportunity to negotiate both enforceable limits on fossil fuel subsidies and protections for renewable energy programs.

1. Fossil Fuel Subsidies and Climate Change

Fossil fuel subsides are among the most significant drivers of climate change. In 2012, worldwide fossil fuel *consumption* subsidies alone reached an estimated $544 billion.[1] Fossil fuel *production* subsidies are estimated to add $100 billion per year.[2] These subsidies encourage excessive fossil fuel production and consumption,[3] resulting in billions of tons of carbon emissions annually. They also weaken incentives to invest in renewable energy sources.[4]

The OECD estimates that eliminating fossil fuel consumption subsidies by 2020 would result in a 10% reduction in GHG emissions by 2050,[5] which climate experts project could significantly contribute to efforts to limit the increase of global temperature

---

[*] The lead author of this paper is Matthew Porterfield <porterfm@law.georgetown.edu> with contributions from Robert Stumberg <stumberg@law.georgetown.edu>. It reflects the views of the authors and not those of Georgetown University.

[1] International Energy Agency, *World Energy Outlook 2013* at 93, *available at* http://www.worldenergyoutlook.org/publications/weo-2013/.

[2] *See* Global Subsidies Initiative (International Institute for Sustainable Development), *Fossil Fuels—At What Cost? available at* http://www.iisd.org/gsi/fossil-fuel-subsidies/fossil-fuels-what-cost. Other estimates are much higher. Oil Change International estimates that all fossil fuel subsidies run in excess of $775 billion, and perhaps as high as a trillion dollars. *See International Fossil Fuel Subsidies,* available at http://priceofoil.org/fossil-fuel-subsidies/international/. According to the IMF, the number rises to $1.9 trillion if negative externalities such as traffic congestion, road damage, accidents and pollution-related public health problems are included. IMF, *Energy Subsidy Reform, Lessons and Implications*, *available at* http://www.imf.org/external/np/fad/subsidies/index.htm.

[3] Energy Subsidy Reform, *supra*.

[4] *Id.*

[5] *Id.*

to 2°C.[6] Eliminating fossil fuel subsidies would also yield additional economic, environmental and public health benefits. Money spent on fossil subsidies could be reallocated to renewable industries that create sustainable jobs.[7] In addition, eliminating fossil fuel subsidies would reduce sulfur dioxide and nitrogen oxide emissions and the resulting air pollution, acid rain and respiratory diseases.[8]

2. The G20 Commitment and its Limits

The need to eliminate fossil fuel subsidies has been recognized by the G20, the organization of major economies—including the European Union and the United States—that accounts for approximately 85% of global GDP.[9] At a 2009 meeting in Pittsburgh, the G20 Leaders agreed to "phase out and rationalize over the medium term inefficient fossil fuel subsidies while providing targeted support for the poorest."[10] The G20 Proposal called for the OECD to collaborate with the IEA, OPEC, and the World Bank to "provide an analysis of the scope of energy subsidies and suggestions for the implementation of this G20 country initiative."[11] The G20 has since established a working group of energy and finance officials and delegated reporting to the above-listed organizations.[12] At the Toronto Summit in 2010, energy and finance ministers prepared "implementation strategies, based on national circumstances," and the G20 urged all nations to adopt policies to phase out inefficient fossil fuel subsidies according to the timetables.[13]

Unfortunately, the G20 initiative has had little success. Because of rising oil prices, global consumption subsidies more than doubled[14] from 2009 to 2012, notwithstanding the G20's reaffirmed commitment to the initiative in 2012 at Los Cabos.[15] This failure is

---

6 *The Scope of Fossil-Fuel Subsidies in 2009 and a Roadmap for Phasing out Fossil-Fuel Subsidies: An IEA, OECD and World Bank Joint Report, Prepared for the G-20 Summit, Seoul (Republic of Korea), 11-12 November 2010, available at* http://www.oecd.org/env/cc/46575783.pdf.

7 Natural Resources Defense Council, *Governments Should Phase out Fossil Fuel Subsidies or Risk Lower Economic Growth, Delayed Investment in Clean Energy and Unnecessary Climate Change Pollution* (June 2012), *available at* http://www.nrdc.org/energy/files/fossilfuel4.pdf.

8 IEA, OPEC, OECD, World Bank Joint Report, *Analysis Of The Scope Of Energy Subsidies And Suggestions For The G-20 Initiative* (June 16, 2010), available at http://www.oecd.org/env/45575666.pdf (viewed January 3, 2014).

9 G20 Members, https://www.g20.org/about_g20/g20_members.

10 *See G20 Leaders' Statement—The Pittsburgh Summit* (Sept. 24 – 25, 2009), *available at* http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf.

11 *Id.*

12 Kerryn Lang, The Global Subsidies Initiative, *The First Year of the G-20 Commitment on Fossil-Fuel Subsidies: A commentary on lessons learned and the path forward* (January 2011), *available at* http://www.iisd.org/gsi/sites/default/files/ffs_g20_firstyear.pdf.

13 *Id.*

14 *Energy Subsidies: The ball is now in the WTO's court*, The Globe and Mail (April 2 2013), *available at* http://www.theglobeandmail.com/report-on-business/economy/economy-lab/energy-subsidies-the-ball-is-now-in-the-wtos-court/article10633014/.

15 See Natural Resources Defense Council, *supra*.

a result of several weaknesses in the G20 initiative, including the lack of clear standards and definitions, limited transparency on subsidy levels, and lack of an enforcement mechanism.

a. *Lack of clear standards and definitions*
The G20 proposal does not define essential terms such as "subsidy," "inefficient," "wasteful consumption," and "medium term." Consequently, countries are merely "changing their definitions, not their subsidy policies."[16] For example, at the Toronto Summit in 2010, seven countries including Saudi Arabia, which accounts for 22% of estimated G20 consumption subsidies,[17] claimed that they did not have inefficient fossil fuel subsidies and thus were not required to draft a plan.[18] Similarly, the United States has focused only on tax breaks, a narrow subset of subsidies.[19]

b. *Limited data on fossil fuel subsidy levels*
According to Oil Change International, "the scope and quality of public reporting by members on fossil fuel subsidies to the G20 is well below any reasonable minimum needed for real reforms to take hold."[20] In the absence of information from government documents or websites, the OECD inventory must estimate subsidy levels.[21] Without better data, the G20 is unable to accurately assess progress and ensure compliance.

c. *No monitoring or enforcement mechanism*
The G20 lacks the technical capacity to monitor or assess the accuracy of reports by countries concerning their fossil fuel subsidies.[22] Moreover, the G20 proposal does not provide an enforcement mechanism to ensure compliance with commitments to reduce subsidies.

3. The WTO, Subsidies, and Energy Trade

Agreements covering fossil fuel subsidies and trade in energy

Trade rules could provide a powerful mechanism for reducing fossil fuel subsidies that would not suffer from the same deficiencies as the G20 initiative. Trade agreements

---

[16] Doug Koplow, *Phasing Out Fossil-Fuel Subsidies in the G20: A Progress Update*, *available at* http://priceofoil.org/content/uploads/2012/06/FIN.OCI_Phasing_out_fossil-fuel_g20.pdf (viewed January 9, 2014).

[17] *A Role for the G-20 in Addressing Climate Change?* (October 2010), *available at* http://www.iie.com/publications/wp/wp10-15.pdf.

[18] G20 Research Group: 2011 Cannes G20 Final Compliance Report (16 June 2012).

[19] Doug Koplow, *G20 Fossil Fuel Subsidy Reform: Flexible definitions make compliance easy* (Aug. 8 2012), *available at* http://www.earthtrack.net/blog/g20-fossil-fuel-subsidy-reform-flexible-definitions-make-compliance-easy.

[20] *Phasing Out Fossil-Fuel Subsidies in the G20*, *supra*.

[21] *Joint Report by IEA, OPEC, OECD, and World Bank on fossil fuel and other energy subsidies: An update for the G20 Pittsburgh and Toronto Commitments* (2011), available at http://www.oecd.org/site/tadffss/49006998.pdf.

[22] *See Phasing Out Fossil-Fuel Subsidies in the G20*, *supra*.

can impose specific obligations on countries regarding subsidies, require disclosure of subsidy levels, and provide for enforcement of the obligations through dispute settlement proceedings. In theory, the rules of the World Trade Organization (WTO)—including the provisions of the Agreement on Subsidies and Countervailing Measures (SCM Agreement)[23]—could be used to restrain fossil fuel subsidies. The SCM Agreement restricts subsidies that are either considered to be inherently trade distorting or that are shown to have "adverse effects"[24] on other WTO members. In practice, however, the SCM Agreement does not appear to have significantly influenced government policies regarding fossil fuels. The Director General of the WTO has referred to the institution's failure to address fossil fuel subsidies as a "missed opportunity."[25]

The failure of the SCM Agreement to constrain fossil fuel subsidies can be attributed to several factors. These include lack of adequate data on the form and magnitude of subsidies and the complexity of the legal and economic analysis that countries must present to support a claim under the SCM Agreement.

The SCM Agreement requires WTO-member countries to provide detailed notifications regarding their subsidy programs.[26] Compliance with this obligation, however, has been poor. "Subsidies are woefully under-reported in the WTO,"[27] due to the lack of an effective system for enforcing the SCM Agreement's disclosure obligations. Even if countries were to disclose accurate information on their fossil fuel subsidies, most claims under the SCM Agreement require complicated and expensive economic and legal analysis to demonstrate that the challenged subsidies cause trade distortions. For example, countries typically must prove that a subsidy suppresses prices for the subsidized commodity or that it permits the subsidizing country to gain a greater market share.[28]

Several other WTO agreements apply to trade in energy goods and services, including the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Investment Measures (TRIMS).[29] These agreements, unfortunately, have proven

---

[23] WTO, Agreement on Subsidies and Countervailing Measures, available at http://www.wto.org/english/docs_e/legal_e/24-scm.pdf.

[24] *See* SCM Agreement, Article 5.

[25] *See Lamy calls for dialogue on trade and energy in the WTO* (April 29, 2013)**,** *available at* http://www.wto.org/english/news_e/sppl_e/sppl279_e.htm (viewed January 3, 2014)**.**

[26] *See* SCM Agreement, Article 25.

[27] Kerryn Lang, Peter Wooders, Kati Kulovesi, *Increasing the Momentum of Fossil-Fuel Subsidy Reform: Roadmap for International Cooperation,* at 10 (International Institute for Sustainable Development, June 2010), *available at* http://www.iisd.org/pdf/2010/increasing_momentum.pdf (viewed January 3, 2014).

[28] *See generally* Chris Wold, Grant Wilson and Sara Foroshani, *Leveraging Climate Change Benefits through the World Trade Organization: Are Fossil Fuel Subsidies Actionable*? 43 Georgetown Journal of Int'l Law 615, 685-693 (2012).

[29] Trade in energy goods and services could also be affected by the General Agreements on Trade in Services and the Agreement on Government Procurement.

better suited to restricting renewable energy programs than fossil fuel subsidies.[30] The WTO's Appellate Body has ruled that Ontario's feed-in tariff program to promote wind and solar power violates Canada's obligations under GATT and TRIMS.[31] Other renewable energy programs have also been targeted as inconsistent with trade rules, including programs in India, the United States, China, Italy and Greece.[32]

Sector-Specific WTO Subsidy Rules

The WTO's Agreement on Agriculture (AoA)[33] imposes sector-specific limits on subsidies for agricultural products. The AoA takes a different approach to subsidies than the SCM Agreement, imposing quantitative limits rather than prohibitions based on the form of subsidies or restrictions based on evidence of their trade-distorting effects. The AoA also contains a "peace clause," which protected agriculture subsidies that did not exceed prescribed limits from challenge under the SCM Agreement during an initial implementation period that expired at the end of 2003.[34] Like the SCM Agreement, the AoA has been plagued by poor compliance with its subsidy disclosure requirements.[35]

Sector-specific rules on fisheries subsidies are also being negotiated as part of the Doha Round of WTO negotiations.[36] A 2007 draft of the new WTO subsidy rules indicates that the provisions on fisheries subsidies would include prohibitions on designated categories of subsidies rather than quantitative limits or restrictions based on demonstrations of adverse trade effects.[37]

---

[30] *See* Timothy Meyer, *Energy Subsidies and the World Trade Organization*, ASIL Insights, Vol. 17, issue 22, at 2 (Sept. 10, 2013) (noting "the difficulties posed by the increased application of WTO subsidy rules to renewable energy at a time in which fossil fuel subsidies programs continue to elude significant scrutiny.")

[31] *See, e.g.,* Reports of the Appellate Body, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector – Canada – Measures Relating to the Feed-In Tariff Program*, WT/DS412/AB/R and WT/DS426/AB/R (May 6, 2013). The Appellate Body held that certain domestic content provisions of the feed-in tariff programme violated Article III:4 of the General Agreement on Tariffs and Trade (GATT) and Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMS).

[32] *See* Meyer, *supra*, at 4-5.

[33] Available at http://www.wto.org/english/docs_e/legal_e/14-ag.pdf.

[34] See AoA, Article 13.

[35] See David Orden, David Blandford, Tim Josling, and Lars Brink, *WTO Disciplines on Agricultural Support – Experience to Date and Assessment of Doha Proposals,* IFPRI Research Brief 16 at 4 (May 2011) (noting that notifications of agricultural subsidies by WTO members "have sometimes been delayed for many years" and "often fail to provide accurate and meaningful measurements of the economic support provided to [agricultural] producers"), available at http://www.ifpri.org/sites/default/files/publications/rb16.pdf (viewed January 3, 2014).

[36] See *Doha WTO Ministerial 2001: Ministerial Declaration*, WT/MIN(01)/DEC/1 (adopted on 14 November 2001), at paragraph 28 (negotiations shall "aim to clarify and improve WTO disciplines on fisheries subsidies . . . .") Several countries, including the United States, are also seeking restrictions on fisheries subsidies in the ongoing negotiations on the Trans-Pacific Partnership. *See USTR Green Paper on Conservation and the Trans-Pacific Partnership* (December 2011) ("The United States and other TPP countries have proposed TPP disciplines on subsidies that contribute to overcapacity and overfishing, potentially lighting the way for a WTO multilateral agreement on fisheries subsidies"), available at http://www.ustr.gov/about-us/press-office/fact-sheets/2011/ustr-green-paper-conservation-and-trans-pacific-partnership.

[37] *See Draft Consolidated Chair Texts of the AD and SCM Agreements*, Annex VIII ("Fisheries Subsidies"), TN/RL/W/213 (30 November 2007), *available at* http://www.wto.org/english/tratop_e/rulesneg_e/rules_chair_text_nov07_e.htm (viewed January 3, 2014).

4. Using the TTIP to Restrict Fossil Fuel Subsidies

The TTIP negotiations will include rules on "raw materials and energy," which could include negotiations on subsidies.[38] This is an important opportunity to develop a binding international framework for reducing fossil fuel subsidies and protecting renewable energy subsidies.

TTIP provisions on fossil fuel subsidies could include the following elements:

a. ***Enforceable reporting requirements***
The WTO's rules requiring disclosure of subsidy programs have been largely ineffective due to the lack of an effective enforcement mechanism and sanctions for nondisclosure. TTIP could include provisions that would make it easier to impose sanctions for failing to provide timely and accurate notifications regarding fossil fuel subsidies.

b. ***Clear restrictions on fossil fuel subsidies***
The TTIP could include rules that would prohibit specific forms of fossil fuel subsidies without requiring complicated and expensive economic analysis demonstrating that the challenged subsidy programs are trade distorting. Potential models include the SCM Agreement's "red light" prohibitions on import substitution and export subsidies[39] and the WTO Agreement on Agriculture's quantitative limits on subsidy levels.

c. ***Exceptions for consumer energy subsidies that target low-income groups***
Most fossil fuel subsidies in the United States and the EU take the form of production rather than consumption subsidies.[40] In order to ensure broad access to essential energy services, however, restrictions on fossil fuel subsidies in the

---

[38] *See* European Commission, *EU-US Transatlantic Trade and Investment Partnership, Raw Materials and Energy — Initial EU Position Paper* (July 2013), *available at* http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151624.pdf (viewed January 3, 2014). The Initial EU Position Paper on Raw Materials and Energy indicates that dual pricing of energy that subsidizes domestic industrial users should be prohibited (*see id.* at 3), and suggests that local content requirements for renewable energy subsidies should be restricted. *Id.*

The TTIP will also include a chapter on sustainable development, which could address fossil fuel subsidies given the significant role they play in contributing to climate change. See European Commission, *EU-US Transatlantic Trade and Investment Partnership, Trade and Sustainable Development—Initial EU Position Paper* (July 2013) ("we envisage an integrated chapter specifically devoted to aspects of sustainable development of importance in a trade context—more specifically, on labour and environmental, including climate change aspects, as well as their inter-linkages"), *available at* http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151626.pdf (viewed January 3, 2024).

[39] *See* SCM Agreement, Article 3.

[40] International Energy Agency, *World Energy Outlook 2013* at 94-95 ("Almost all consumption subsidies are in non-OECD countries, while production subsidies, typically intended to expand domestic supply, are a much more common form of subsidy in OECD countries than consumption subsidies.")

TTIP could include an exception for subsidy programs targeted at low-income consumers.[41]

d. ***Protection for renewable energy and energy efficiency subsidies***
The TTIP could also include a provision protecting subsidies for renewable energy and energy efficiency from challenge. This provision could apply not only to challenges under TTIP, but also to challenges by the United States or the EU under WTO agreements. Potential models for this provision include the Peace Clause of the Agreement on Agriculture[42] and the expired "green light" provisions of the SCM Agreement.[43]

5. Questions for Discussion

a. What should be the goals of TTIP with regard to energy and climate?

(1) *Options discussed in working papers:* Use TTIP to promote expansion of trade in conventional fossil fuel sources of energy.[44]

(2) *Options implied in working papers:* Both the EU and the United States agree that fossil fuel subsidies exacerbate greenhouse gas emissions and that climate change will result in severe economic harm and human suffering. Nonetheless, it appears that TTIP negotiators do not plan to address fossil fuel subsidies that are climate-distorting and trade-distorting.[45]

(3) *Alternative:* Use TTIP to advance the goal of reducing fossil fuel subsidies and the resulting adverse climate impacts.

b. What are the policy choices for addressing energy subsidies in TTIP?

(1) How should fossil fuel subsidies be defined? The SCM Agreement defines "subsidy" to include a financial contribution by a government (including foregone tax revenue) or equivalent that confers a benefit.[46] A subsidy covered by the SCM Agreement must also be "specific" to an enterprise or industry or group of enterprises or industries.[47] Is this definition sufficiently broad to capture all relevant forms of fossil fuel subsidies?

---

[41] *See id.* at 96 ("Although providing blanket subsidies to an entire population is an extremely inefficient way to make energy affordable for the poor, if the subsidies are to be removed, it is often important to provide targeted welfare assistance to avoid restricting access to modern energy services.")

[42] *See* Agreement on Agriculture, Article 13.

[43] The "green light" provisions of Article 8 of the SCM Agreement defined certain subsidies as permissible ("non-actionable"), including "assistance to promote adaptation of existing facilities to new environmental requirements . . . ." SCM Agreement, art. 8.2(c). The green light provisions expired in 2000. See SCM Agreement, Article 31. Although the green light provisions were narrowly drafted, broader language could be used in TTIP to cover renewable energy subsidies, either with or without a time limitation.

[44] *See , Raw Materials and Energy —Initial EU Position Paper*, *supra.*

[45] *Id.*

[46] *See* SCM Agreement, Article 1.1. The definition also includes subsidies that occur "when a government provides goods or services other than general infrastructure, or purchases goods." *See id.*

[47] *See id.,* Articles 1.2 and 2.

(2) How should disclosure obligations regarding subsidies be enforced? The failure of countries to properly disclose their subsidy programs has been a major impediment to compliance with the WTO's SCM Agreement and Agreement on Agriculture. There are, however, some provisions in the WTO agreements that could be used as a basis for more effective subsidy disclosure rules in TTIP.

For example, under Annex 5 of the SCM Agreement, the WTO's Dispute Settlement Body is authorized to engage in information-gathering concerning subsidy programs. If a country fails to cooperate with the information-gathering process, that failure can be used to draw "adverse inferences" against it in a dispute settlement proceeding concerning the country's subsidy programs. TTIP could build upon this approach by providing for a presumption that a country is violating the relevant restrictions on fossil fuel subsidies if that country fails to cooperate with the information-gathering process.

(3) What form should restrictions on fossil fuel subsidies take? There several approaches that merit consideration, and they are not mutually exclusive:
   (a) Prohibitions on certain types of subsidies.
   (b) Quantitative limits on the level of subsidies.
   (c) Effects-based limits (e.g., restrictions on subsidies that cause "adverse effects" or "serious prejudice" to trading partners).
   (d) Limits that are phased in during an implementation period.

(4) Should rules on energy subsidies provide protection for government measures to promote renewable energy or energy efficiency? Should the protections extend to claims under WTO agreements? Should any protections extend to local content provisions in renewable energy programs?

c. Who potentially would support addressing energy subsidies in TTIP?

The following constituencies have a major stake in the outcome – or absence – of TTIP negotiations to reduce fossil fuel subsidies. They are also sources of expertise for TTIP negotiators and the foundation for a consensus to break the inertia shown to date among G20 leaders. Each constituency is an important target for outreach and discussion of TTIP policy choices.

(1) Renewable energy industries

(2) Energy-intensive industries

(3) EU and U.S. environmental officials

(4) EU and U.S. legislatures

(5) European national governments

(6) U.S. state governments

(7) International organizations: G20, IEA, OECD

(8) Civil society

d. *How can discussion lead to action?*

(1) *A coherent theory of change:* How can the TTIP draw upon the positive and negative lessons of the WTO subsidy agreements and the G20 initiative?

(2) *Discussion in each supportive network:* How can each constituency listed above initiate an internal discussion of the opportunity presented by TTIP?

(3) *Collaboration among networks:* What fora would enable these constituencies to combine their expertise and power as policy networks? Would it help to create a forum that brings them together to focus on TTIP and fossil fuel subsidies?

(4) *Engagement with TTIP negotiators:* Among these constituencies, who are the most effective messengers to engage with TTIP negotiators? Can any afford to be left out of direct dialogue with negotiators? What is the most appropriate timing to initiate that dialogue?