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Asmelash, Henok

DOI:

[10.1093/ejil/chac043](https://doi.org/10.1093/ejil/chac043)

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Document Version

Publisher's PDF, also known as Version of record

Citation for published version (Harvard):

Asmelash, H 2022, 'The Regulation of Environmentally Harmful Fossil Fuel Subsidies: From Obscurity to Prominence in the Multilateral Trading System', *European Journal of International Law*, vol. 33, no. 3, pp. 993–1023. <https://doi.org/10.1093/ejil/chac043>

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The Regulation of Environmentally Harmful Fossil Fuel Subsidies: From Obscurity to Prominence in the Multilateral Trading System

Henok Asmelash*

Abstract

Environmentally harmful fossil fuel subsidies were notably absent from efforts to enhance the mutual supportiveness of trade and environment in the multilateral trading system. However, a combination of factors has recently propelled the regulation of such subsidies up the trade and environment agenda. The recently launched initiative to negotiate a plurilateral Agreement on Climate Change, Trade and Sustainability (ACCTS) represents the latest and most ambitious of the growing number of initiatives to discipline fossil fuel subsidies. This article examines the factors that brought the regulation of fossil fuel subsidies to prominence and the prospects of the ACCTS initiative to introduce binding rules on fossil fuel subsidies. The article argues that such an initiative is long overdue, but it faces significant hurdles to succeed. Drawing on past and present intergovernmental initiatives to tackle environmentally harmful subsidies, the article highlights the key challenges on the road ahead and suggests possible ways forward.

1 Introduction

The environmental community has long identified international trade and international trade rules as threats to the protection of the environment. Such concerns became acute in the early 1990s when the dispute settlement system of the General Agreement on Tariffs and Trade (GATT) faulted the USA for taking trade-restrictive

* Lecturer, Birmingham Law School, University of Birmingham, United Kingdom. Email: h.b.asmelash@bham.ac.uk.

environmental measures to protect dolphins from certain harmful fishing practices.¹ The attendant environmental backlash led to the adoption of environmental provisions and the establishment of the Committee on Trade and Environment (CTE) with a broad mandate to ensure the mutual supportiveness of trade and environment in the World Trade Organization (WTO).² These developments, and the recognition of sustainable development that protects and preserves the environment as an overarching objective of the WTO, promised to usher in a new era of mutual supportiveness between trade and environment.³ WTO members subsequently placed a wide range of trade and environment issues, ranging from environmental goods to environmentally harmful fisheries subsidies, on the Doha Development Agenda (DDA) in 2001.⁴ However, curiously, they left out energy subsidies from the trade and environment package of the DDA. The former WTO director general Pascal Lamy described the absence of fossil fuel subsidies from the DDA as ‘a missed opportunity’ in 2013.⁵ There have been slow but significant developments since then that have brought fossil fuel subsidies from obscurity to prominence within the multilateral trading system.

Several initiatives have emerged in recent years that have tackling fossil fuel subsidies in the WTO as one of their primary goals. These initiatives are driven by three informal groups of countries with overlapping membership: the Friends of Fossil Fuel Subsidy Reform (FFSR) (referred to as ‘Friends’ in this article), the Friends of Advancing Sustainable Trade (FAST) and the Trade and Environmental Sustainability Structured Discussions (TESSD). Most of the initiatives in the WTO seek to discipline fossil fuel subsidies through informal mechanisms such as non-binding commitments, peer reviews through the Trade Policy Review Mechanism (TPRM), policy dialogue and information and experience sharing within the CTE. The Agreement on Climate Change, Trade and Sustainability (ACCTS) departs starkly from the other initiatives in one major aspect: it aims to go beyond informal mechanisms and discipline fossil fuel subsidies through formally binding rules.⁶ This article examines the ACCTS initiative and its implications for ongoing intergovernmental fossil fuel subsidy reform (FFSR) efforts.

The article draws upon, and contributes to, two strands of international legal scholarship. The first concerns the trade and environment scholarship on the regulation of environmentally harmful subsidies. The focus of much of this scholarship

¹ General Agreement on Tariffs and Trade 1994, 55 UNTS 194. See Joseph, ‘The Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic, and Political Impacts’, 25 *Ocean Development and International Law* (1994) 1; K. Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (2011).

² See *Marrakesh Decision on Trade and Environment*, Doc. MTN/TNC/45(MIN), 15 April 1994.

³ Charnovitz, ‘The WTO’s Environmental Progress’, 10 *Journal of International Economic Law* (JIEL) (2007) 685.

⁴ Ministerial Declaration, Doc. WT/MIN(01)/DEC/1, 14 November 2001, paras 31–33.

⁵ See Lamy, ‘Energy Policies and the WTO’, *World Trade Organization* (2013), available at https://www.wto.org/english/news_e/sppl_e/sppl279_e.htm.

⁶ *Joint Leaders’ Statement on the Launch of the Agreement on Climate Change, Trade and Sustainability* (2019).

has been on the absence and likelihood of formal legal challenges against fossil fuel subsidies.⁷ This growing body of literature typically equates the absence of legal disputes with lack of action against fossil fuel subsidies. However, while legal disputes remain elusive, fossil fuel subsidies have been the subject of various recent informal initiatives. They have also recently become the subject of a plurilateral initiative to introduce formally binding rules (that is, the ACCTS). This article offers a detailed account of these informal and formal initiatives, drawing on the literature on informal international regulation. Recent academic literature has documented the rise in informal international law-making.⁸ The difficulty of reaching consensus on formally binding rules has made the phenomenon of informal regulation particularly pronounced in subsidy governance. In their seminal work on the role of informal law in disciplining subsidies, Gregory Shaffer, Robert Wolfe and Vincent Le examined whether and to what extent informal law can help discipline subsidies.⁹ On fossil fuel subsidies, they observed that the multilateral trading system paid relatively little attention to the issue.¹⁰ The informal and formal initiatives to discipline fossil fuel subsidies discussed in this article suggest that the situation has changed considerably since then.

Joost Pauwelyn defined informal international law-making as cross-border cooperation between public authorities that involves non-traditional forums for negotiation (process informality) and/or non-traditional diplomatic actors (actor informality) and/or non-formal sources of international law (output informality).¹¹ Early international law-making on fossil fuel subsidies exhibits output and process informality. The intergovernmental FFSR initiatives have produced a wide range of non-binding instruments. They have also relied mostly on loosely organized forums such as the FFFSR. The reliance on peer review and policy dialogue within WTO committees also indicates the process informality of fossil fuel subsidy regulation. These informal initiatives played a crucial role in pushing fossil fuel subsidies up the trade and environment agenda. However, the launching of the ACCTS initiative indicates that the rise of informal international regulation did not halt the quest for formal international law-making on fossil fuel subsidies. If anything, it has made it more feasible and desirable. This supports the claim that informal international law-making is overtaking,

⁷ See, e.g., Bièvre, Espa and Poletti, 'No Iceberg in Sight: On the Absence of WTO Disputes Challenging Fossil Fuel Subsidies', 17 *International Environmental Agreements: Politics, Law and Economics (IEA: PLE)* (2017) 411; Meyer, 'Explaining Energy Disputes at the World Trade Organization', 17 *IEA: PLE* (2017) 391; Steenblik, Sauvage and Timiliotis, 'Fossil Fuel Subsidies and the Global Trade Regime', in J. Skovgaard and H. van Asselt (eds), *The Politics of Fossil Fuel Subsidies and Their Reform* (2018) 121, at 121–139; Verkuyl *et al.*, 'Tackling Fossil Fuel Subsidies through International Trade Agreements: Taking Stock, Looking Forward', 58 *Virginia Journal of International Law* (2019) 309.

⁸ Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', in J. Pauwelyn, R.A. Wessel and J. Wouters (eds), *Informal International Lawmaking* (2012) 13, at 13–34; Wouters, 'International Law, Informal Law-Making, and Global Governance in Times of Anti-Globalism and Populism', in H. Krieger, G. Nolte and A. Zimmermann (eds), *The International Rule of Law* (2019) 242.

⁹ Shaffer, Wolfe and Le, 'Can Informal Law Discipline Subsidies?', 18 *JIEL* (2015) 711.

¹⁰ See *ibid.*, at 736.

¹¹ Pauwelyn, *supra* note 8, at 22.

but not replacing, formal international law.¹² The ACCTS illustrates that the informal rules on fossil fuel subsidies are slowly but surely evolving into formally binding rules.

The article is structured in six parts. Section 2 provides a general account of inter-governmental initiatives to reform environmentally harmful fossil fuel subsidies. It explains their origin, nature and rationales as well achievements (or lack thereof). Section 3 considers the driving forces behind the emergence of fossil fuel subsidies from obscurity in the multilateral trading system. Section 4 examines the nature and scope of the informal and formal initiatives to discipline fossil fuel subsidies in the multilateral trading system. Section 5 looks ahead and identifies potential challenges to the success of the ACCTS initiative. It draws on the experiences of previous inter-governmental FFSR initiatives and the ongoing negotiations to tackle fisheries subsidies to suggest some ways forward. Section 6 concludes the discussion.

2 Intergovernmental FFSR Initiatives

The roots of intergovernmental FFSR initiatives are found in studies from the late 1980s and early 1990s that established the link between the subsidization of fossil fuels and climate change.¹³ The most prominent of these early studies estimated that global fossil fuel subsidies totalled more than US \$230 billion in 1991 and suggested that their removal could reduce global carbon emissions by 9 per cent.¹⁴ Subsequent theoretical and empirical studies reinforced this claim and built a strong socio-economic and environmental case against the subsidization of fossil fuels. The environmental case against fossil fuel subsidies is threefold. First, they artificially lower fuel prices and thereby encourage wasteful consumption and inefficiency.¹⁵ Second, the subsidization of fossil fuel production enables the overproduction of fossil fuels. Studies have shown how tax exemptions and other government support measures facilitate the development of oil fields that would otherwise be economically unsustainable.¹⁶ By keeping fossil fuels competitive, such subsidies lock the world into decades of unsustainable high carbon energy systems. Third, fossil fuel subsidies undermine the competitiveness and, thereby, the development and deployment of renewable energy sources. Renewables have become increasingly competitive, but they are unlikely to leapfrog fossil fuels without interventions that level the playing field. Governments across the world have accordingly introduced climate policies such as carbon taxes and renewable energy subsidies. However, as Tim Groser, New Zealand's minister responsible for international climate change negotiations, aptly put it, 'it is completely incoherent for the world to be tentatively coordinating actions to put a price on carbon, while

¹² Wouters, *supra* note 8, at 252.

¹³ See M.N. Kosmo, *Money to Burn? The High Costs of Energy Subsidies* (1987); B. Larsen and A. Shah, *World Fossil Fuel Subsidies and Global Carbon Emissions* (1992); Summers, 'The Case for Corrective Taxation', 44 *National Tax Journal* (1991) 289.

¹⁴ Larsen and Shah, *supra* note 13.

¹⁵ Davis, 'The Economic Cost of Global Fuel Subsidies', 104 *American Economic Review* (2014) 581.

¹⁶ See Ploy Achakulwisut *et al.*, 'Effect of Subsidies and Regulatory Exemptions on 2020–2030 Oil and Gas Production and Profits in the United States', 16 *Environmental Research Letters* (2021) 084023.

simultaneously massively subsidizing consumption of carbon'.¹⁷ Growing awareness and recognition of the foregoing and other adverse impacts of fossil fuel subsidies has led to a widespread call for action against fossil fuel subsidies over the last decade.

The first major response was the 1997 Kyoto Protocol.¹⁸ Article 2.1(a)(v) of the protocol listed the 'phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors' among the policy measures that the parties to the protocol may take to meet their emission reduction targets.¹⁹ However, intergovernmental FFSR efforts started in earnest with the 2009 Group of Twenty (G20) Summit at which G20 leaders agreed to 'rationalize and phase out over the medium term inefficient fossil fuel subsidies that encourage wasteful consumption'.²⁰ This agreement prompted numerous intergovernmental forums to launch their own FFSR initiatives. The leaders of the Asia Pacific Economic Cooperation (APEC) instantly echoed the G20 commitment at their summit in 2011.²¹ The G7 leaders also agreed to eliminate inefficient fossil fuel subsidies by 2025.²² FFSR has also become part of the UN Sustainable Development Goals (SDGs).²³ These initiatives have made FFSR an important component of the climate policy toolkit, but fossil fuel subsidies remain prevalent and considerably higher than renewable energy subsidies. The International Energy Agency (IEA) has estimated that fossil fuel consumption subsidies alone amounted to \$440 billion in 2021.²⁴ This figure is without considering fossil fuel production subsidies and the cost of the negative externalities from fossil fuel combustion that the International Monetary Fund (IMF) counts as part of its post-tax subsidy estimate.²⁵ Various recent reports show that governments are not only failing to remove existing subsidies, but they are also introducing new ones.²⁶

The involvement of numerous intergovernmental forums in the fight against environmentally harmful fossil fuel subsidies underscores the growing prominence and crosscutting nature of the issue. It also highlights the fragmentation of international energy and environmental governance. Fragmentation risks duplicating efforts, but it is not necessarily negative.²⁷ Each intergovernmental forum has its own character

¹⁷ See Oil Change International, 'World Leaders, Ministers and Experts All Agree on Phasing Out Fossil Fuel Subsidies', *Price of Oil*, available at <http://priceofoil.org/fossil-fuel-subsidies/international/key-quotes/>.

¹⁸ Kyoto Protocol 1997, 37 ILM 22 (1998).

¹⁹ The draft Article 2.1(a)(v) specifically mentions 'fossil fuels'. See United Nations Framework Convention on Climate Change, *Completion of a Protocol or Another Legal Instrument: Consolidated Negotiating Text by the Chairman*, Doc. FCCC/AGBM/1997/7 (1997).

²⁰ Group of Twenty (G20), *G20 Leaders' Statement: Pittsburgh Summit*, 24–25 September 2009, paras 24, 29.

²¹ See APEC 2011 Leaders' Declaration, 12 November 2011.

²² See G7 Leaders' Declaration: Ise-Shima Summit, 26–27 May 2016.

²³ See *The Future We Want*, Doc. A/RES/66/288, 11 September 2012.

²⁴ See International Energy Agency (IEA), *World Energy Outlook 2021* (2021), at 80.

²⁵ See I. Parry, S. Black and N. Vernon, 'Still Not Getting Energy Prices Right: A Global and Country Update of Fossil Fuel Subsidies', IMF Working Paper no. WP/21/236 (2021).

²⁶ See 'Track Funds for Energy in Recovery Packages', *Energy Policy Tracker*, available at <https://www.energypolicytracker.org/>.

²⁷ See V. Rive, *Fossil Fuel Subsidy Reform: An International Law Response* (2019), at 240.

and contribution to the fight against fossil fuel subsidies.²⁸ The combined effort of all these intergovernmental forums has brought fossil fuel subsidies into the light. There is now much more transparency and information about the magnitude and impact of fossil fuel subsidies than even a few years ago. These forums have also produced a wide range of informal and soft law instruments that will form the basis for any future efforts to introduce formally binding rules (for example, the ACCTS). Some intergovernmental forums have also taken important steps to enhance the implementation of their commitments. The G20, for example, required each member to develop a national implementation strategy, established voluntary self-reporting and peer review mechanisms and commissioned studies on fossil fuel subsidies.²⁹ Peer review has been particularly useful in improving transparency and in serving as a forum for sharing information and experience. As of August 2021, three pairs of countries (China and the USA, Germany and Mexico and Indonesia and Italy) had completed their reciprocal peer reviews, and another pair (Argentina and Canada) is under review.³⁰ A number of developing countries have also included FFSR as a measure to meet their nationally determined contributions (NDCs) to the Paris Agreement (for example, Nigeria, Morocco, Vietnam and so on).³¹

The attention and pressure that these intergovernmental initiatives have generated has contributed to these significant developments. However, there are at least four caveats to this success story. First, fossil fuel subsidies remain high worldwide. Second, most countries not only remain reluctant to phase out existing fossil fuel subsidies but also have continued to introduce new ones. Third, the stability of subsidy reforms has proven elusive. Governments tend to bring back subsidies under pressure from interest groups especially when oil prices are high. Existing intergovernmental initiatives have no mechanisms to prevent reform reversals, nor do they offer any meaningful support for governments to withstand pressure from interest groups. Peer reviews are the only meaningful compliance mechanisms under the existing initiatives. However, both the scope and outcome of the reviews remain limited. The peer review panels typically publish a report at the end of the process, but the countries under review are under no obligation to implement the recommendations thereof. Fourth, despite much progress, there remains a significant transparency deficit in fossil fuel subsidies. A legally binding approach may not resolve all these problems. The political will for FFSR is more important than the formal or informal nature of the commitments. At the same time, having binding rules and formal compliance mechanisms will reinforce these informal mechanisms.

²⁸ See Shaffer, Wolfe and Le, *supra* note 9, at 714 (noting that organizations have their own comparative advantages).

²⁹ See H. Asmelash, *Phasing out Fossil Fuel Subsidies in the G20: Progress, Challenges and Ways Forward* (2017), at 6–9, available at www.greengrowthknowledge.org/research/phasing-out-fossil-fuel-subsidies-g20-progress-challenges-and-ways-forward.

³⁰ See Organisation for Economic Co-operation and Development (OECD) and IEA, *Update on Recent Progress in Reform of Inefficient Fossil-Fuel Subsidies That Encourage Wasteful Consumption 2021* (2021), at 21.

³¹ Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

3 The Emergence of FFSR in the WTO

The WTO has paid little attention to fossil fuel subsidies until recently. This is puzzling for at least three reasons. First, the WTO has been the only forum with binding international rules applicable to fossil fuel subsidies. Aside from the question of their effectiveness, the subsidy rules contained in the Agreement on Subsidies and Countervailing Measures (SCM Agreement) are applicable to fossil fuel subsidies.³² One normally expects these rules to constitute the basis for any intergovernmental effort to discipline fossil fuel subsidies and the institution overseeing their operation to become the institutional home of such efforts.

Second, the WTO has already taken on the task of tackling environmentally harmful subsidies in the fisheries sector. If it concerns itself with the environmental impact of fisheries subsidies, there is no reason whatsoever why it should not be concerned with fossil fuel subsidies. This point was not lost on the WTO. Its former director general lamented in 2013 that '[g]iven that WTO members have decided to tackle the issue of environmentally harmful subsidies in the fisheries sector as part of the Doha Round, the absence of this topic from the WTO radar screen can be considered as a missed opportunity'.³³ The decision to place fisheries subsidies on the DDA but not to even consider the larger and even more environmentally harmful fossil fuel subsidies is curious at best.³⁴

Third, fossil fuel subsidies were discussed within the CTE ahead of the Doha Round. In 1997, the WTO Secretariat conducted a study on the 'environmental benefits of removing trade restrictions and distortions' that identified fossil fuel subsidies as an energy policy measure with varying economic and environmental effects.³⁵ The study underlined that 'coal subsidies have contributed to maintaining inefficient domestic production ... reducing imports of other fuels ... encouraged the use of coal resources and increased the use of coal in electricity production'.³⁶ It also highlighted that 'the removal of subsidies and the restructuring of taxes to bring energy prices in line with marginal social costs could result in significant environmental benefits'.³⁷ The European Union (EU) and Saudi Arabia responded to the study, outlining the need for further discussion on fossil fuel subsidies.³⁸ However, while similar discussions led to the fisheries subsidies negotiations, fossil fuel subsidies fell off the CTE's radar.

Fossil fuel subsidies eventually returned to the CTE's radar in 2014, and a combination of five factors is responsible for this. The first factor was the growing

³² Agreement on Subsidies and Countervailing Measures (SCM Agreement) 1994, 1869 UNTS 14.

³³ See Lamy, *supra* note 5.

³⁴ Global fisheries subsidies amounted to \$35.4 billion in 2018. See Sumaila *et al.*, 'Updated Estimates and Analysis of Global Fisheries Subsidies', 109 *Marine Policy* (2019) 103695.

³⁵ See World Trade Organization (WTO), *Environmentally Harmful and Trade Distorting Measures and Policies in Energy Markets*, Note by the Secretariat, Doc. WT/CTE/W/67 (1997), para. 58ff.

³⁶ *Ibid.*, para. 64.

³⁷ *Ibid.*, para. 66.

³⁸ See WTO, 'Environmentally Harmful and Trade Distorting Measures and Policies in Energy Markets' (2001) Communication from the European Communities, WT/CTE/W/185; WTO, 'Energy Taxation, Subsidies and Incentives in OECD Countries and Their Economic and Trade Implications on Developing Countries' (2002) Submission by Saudi Arabia, WT/CTE/W/215 TN/TE/W/9.

international recognition of FFSR as a climate policy instrument. This recognition has increased since the trade and environment package of the DDA was adopted. The second factor was the establishment of informal country groupings to advocate for FFSR within the WTO. The role of informal groupings in international trade governance is well documented. The ‘friends of fish’ were instrumental in pushing fisheries subsidies onto the trade and environment package of the DDA.³⁹ The last few years have seen the establishment of three informal groupings with overlapping memberships (that is, the FFFSR, the FAST and the TESSD). The first and most prominent of these informal groupings is the FFFSR, which was established in the aftermath of the G20’s and APEC’s FFSR commitments in June 2010.⁴⁰ The Friends issued their first communique ahead of the Paris Climate Summit in 2015, calling for action against fossil fuel subsidies.⁴¹ They are also behind the discussions of fossil fuel subsidies in the CTE and the first ever WTO Ministerial Statement on Fossil Fuel Subsidies, which was issued in 2017.⁴² They have also been active in convening public events at the WTO and raising fossil fuel subsidies questions during trade policy reviews and through the notification and surveillance systems of the SCM Agreement. The leading members of the FFFSR are also signatories to the ACCTS initiative, and all but one FFFSR member (Ethiopia) are signatories to the FAST and the TESSD.

The FAST is an informal group of 24 WTO members established at the Davos World Economic Forum in 2018 to support and complement the work of the CTE. The FAST signatories aim ‘to help steer the WTO into its better future’ by facilitating open, constructive and informal discussions on how to improve the mutual supportiveness and synergies between trade and environmental policies.⁴³ They have identified fossil fuel subsidies as a key trade and environmental issue. The TESSD is a similar initiative that comprises 50 WTO members. It was launched in November 2020 to ensure that trade policy plays an important role in tackling climate change and other environmental challenges.⁴⁴ One of its key objectives is ‘to collaborate, prioritize and advance discussions on trade and environmental sustainability, including by ... working on possible actions and deliverables of environmental sustainability in the various areas of the WTO’.⁴⁵ It ‘intend[s] to organise structured discussions for interested WTO Members as well as a dialogue with external stakeholders’.⁴⁶ Their communication identifies ‘fossil fuel subsidies reform’ as an issue ‘where trade and environmental policy

³⁹ See Bigdeli, ‘Will the “Friends of Climate” Emerge in the WTO? The Prospects of Applying the “Fisheries Subsidies” Model to Energy Subsidies’, 2 *Carbon and Climate Law Review* (2008) 78.

⁴⁰ The Friends of Fossil Fuel Subsidy Reform (FFFSR) comprises Costa Rica, Denmark, Ethiopia, Finland, Iceland, Netherlands, New Zealand, Norway, Sweden, Switzerland and Uruguay. On the FFFSR, see Rive, ‘Fossil Fuel Subsidy Reform: A New Zealand Perspective on the International Law Framework’, 27 *New Zealand Universities Law Review* (2016) 73.

⁴¹ See FFFSR, *Fossil-Fuel Subsidy Reform Communique*, April 2015.

⁴² See WTO, *Fossil Fuel Subsidies Ministerial Statement*, Doc. WT/MIN(17)/54 (2017) (‘Buenos Aires Statement’).

⁴³ WTO, *Minutes of the Meeting Held on 26 July 2018*, Doc. WT/GC/M/173 (2018), paras 12.2, 12.3.

⁴⁴ See WTO, *Communication on Trade and Environmental Sustainability*, Doc. WT/CTE/W/249 (2020).

⁴⁵ *Ibid.*, para. 2.

⁴⁶ *Ibid.*, para. 3.

intersects'.⁴⁷ The relationship between the three groups remains unclear, but the TESSD communication states that 'the structured discussions are not meant to duplicate other initiatives in the WTO'.⁴⁸

The third factor concerns the rise in trade disputes over renewable energy subsidies. Energy issues have not figured prominently in the GATT/WTO, such that there has even been a widespread misconception about the application of the WTO rules to the energy sector.⁴⁹ The rise of renewable energy subsidy disputes not only helped dispel this misconception but also raised questions about the lack of legal action against the much larger and environmentally harmful fossil fuel subsidies.⁵⁰ The fourth factor is the limited success of the forums spearheading the intergovernmental initiatives. I noted in section 2 that these initiatives have raised awareness of the adverse effects of fossil fuel subsidies. However, the continued prevalence of fossil fuel subsidies suggests that more effort is needed. Early initiatives may have bypassed the WTO, but their limited success is drawing attention back to it. The WTO possesses an unparalleled experience and institutional structure for disciplining subsidies. It is therefore only logical that the champions of the FFSR initiatives turn their attention to the WTO.

The final factor relates to growing concern about the trade-distorting effects of fossil fuel subsidies. Subsidies are more likely to face WTO scrutiny when they raise trade concerns.⁵¹ The discussions of fossil fuel subsidies in the CTE ahead of the Doha Round were fuelled by concerns about their adverse effects on trade (rather than on the environment). However, the ever-growing demand for energy, the concentration of fossil fuels in few jurisdictions and the glasshouse syndrome induced by their subsidization almost everywhere has made fossil fuel subsidies unlikely to raise trade concerns on their own.⁵² There is also growing recognition that fossil fuel subsidies distort trade in other commodities. Fossil fuel subsidies constitute input subsidies to energy-intensive tradeable products such as steel and aluminium. Concerns about these aspects of fossil fuel subsidies were expressed during the Uruguay Round and the accession negotiations of energy-exporting countries. The USA and the EU were particularly adamant that these countries commit to reforming their dual-pricing practices.⁵³ However, no WTO member has yet taken direct legal action against fossil fuel subsidies in the WTO.

⁴⁷ *Ibid.*, para. 1(j).

⁴⁸ *Ibid.*, para. 6.

⁴⁹ See Grigorova, 'WTO Law and Energy Resources: The Absurdity of a Systemic Exclusion of the Energy Sector by a Gentlemen's Agreement', *SSRN*, 15 January 2015; Marhold, 'The World Trade Organization and Energy: Fuel for Debate', 2 *ESIL Reflections* (2013) 1.

⁵⁰ See Asmelash, 'Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies Are Challenged', 18 *JIEL* (2015) 261.

⁵¹ See Shaffer, Wolfe and Le, *supra* note 9; Steenblik, 'Subsidies in the Traditional Energy Sector', in J. Pauwelyn (ed.), *Global Challenges at the Intersection of Trade, Energy and the Environment* (2010) 183, at 189.

⁵² On the lack of WTO disputes over fossil fuel subsidies, see Asmelash, *supra* note 50; Bièvre, Espa and Poletti, *supra* note 7; Meyer, *supra* note 7; Verkuijl *et al.*, *supra* note 7.

⁵³ See Milthorp and Christy, 'Energy Issues in Selected WTO Accessions', in J. Selivanova (ed.), *Regulation of Energy in International Trade Law: WTO, NAFTA, and Energy Charter* (2012) 259.

4 Initiatives to Discipline Fossil Fuel Subsidies in the WTO

This section examines the nature and scope of recent initiatives to discipline fossil fuel subsidies at the WTO. Section 4.A considers initiatives that rely on informal mechanisms, while section 4.B examines the ACCTS initiative and its aspiration for formally binding rules.

A *Informal Regulation of Fossil Fuel Subsidies*

The dispute settlement system is traditionally viewed as the primary means of rule enforcement in the WTO. However, it is neither the only nor the most often used means of ensuring the enforcement of international trade rules. As Shaffer, Wolfe and Le aptly put it, ‘disputes are the small tip of a large pyramid of conflict management mechanisms in the WTO’.⁵⁴ There are many less formal but important mechanisms to encourage compliance with international trade rules. There has long been scepticism in international legal scholarship about the role and efficacy of informal or soft law in regulating state behaviour.⁵⁵ However, there is now ample evidence that form is not the only factor that determines the effectiveness of international norms.⁵⁶ Being soft or informal does not necessarily make the law ineffective. Both soft and hard rules have strengths and limitations. International law scholarship has come to recognize that informal rules are ‘more feasible, faster and flexible than formal arrangements, while binding rules tend to be more credible and have a higher capacity to facilitate implementation and compliance’.⁵⁷ However, it remains unclear as to whether informal mechanisms help discipline subsidies. Shaffer, Wolfe and Le have argued that informal law works through coercion (for example, social sanctions and financing conditionality) and reciprocity arrangements (for example, reciprocal peer reviews and notification and surveillance systems).⁵⁸ They also have observed that informal law ‘can lead to policy learning through information sharing and deliberation’.⁵⁹ The success of both formal and informal mechanisms for subsidy governance primarily depends on their ability to generate trustworthy data.⁶⁰ Shaffer, Wolfe and Le have argued that ‘with better information and robust surveillance, governments providing [subsidies] will need to explain themselves to their peers and to citizens’.⁶¹ They consider that ‘such interactive processes of information exchange, knowledge production, and reason giving can generate new consensual understanding about subsidies disciplines, which is where all law, whether formal or informal, begins’.⁶² In other words,

⁵⁴ Shaffer, Wolfe and Le, *supra* note 9, at 716.

⁵⁵ See Klabbers, ‘The Redundancy of Soft Law’, 65 *Nordic Journal of International Law* (1996) 167.

⁵⁶ See Brunnée, ‘Sources of International Environmental Law: Interactional Law’, in J. d’Aspremont and S. Besson (eds), *The Oxford Handbook of the Sources of International Law* (2017) 960.

⁵⁷ Andresen, Rosendal and Skjærseth, ‘Why Negotiate a Legally Binding Mercury Convention?’, 13 *IEA: PLE* (2013) 425, at 427.

⁵⁸ See Shaffer, Wolfe and Le, *supra* note 9.

⁵⁹ *Ibid.*, at 738–739.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, at 741.

⁶² *Ibid.*

informal mechanisms can give rise to formal mechanisms. The various initiatives attempting to discipline fossil fuel subsidies primarily rely on informal mechanisms – from non-binding commitments to voluntary peer reviews and information/experience sharing. It is difficult to assess the impacts of these mechanisms, but the launch of the ACCTS initiative underscores their role in building consensus on the need to discipline fossil fuel subsidies.

Raising awareness, policy dialogue, peer review, non-binding declarations and information and experience sharing have been some of the most prominent informal mechanisms that the Friends and their supporters have employed to tackle fossil fuel subsidies within the WTO. Much of their early efforts were within the CTE and the TPRM, but they have used the SCM Committee and ministerial conferences in recent years to advance their agenda. I will briefly discuss their efforts to tackle fossil fuel subsidies within each of these committees/forums.

1 Workshops on Fossil Fuel Subsidies

Much of the early efforts to tackle fossil fuel subsidies in the WTO took the form of public events organized by or at the WTO Secretariat in Geneva and were instrumental in raising awareness and garnering support for FFSR within the WTO. The first major event was the 2013 workshop entitled 'The Role of Intergovernmental Agreements in Energy Policy', which was co-organized by the WTO and the Energy Treaty Secretariat.⁶³ In his opening speech to this workshop, Lamy called the absence of fossil fuel subsidies from the DDA 'a missed opportunity'.⁶⁴ His remarks were crucial in drawing attention to the lack of action against fossil fuel subsidies in the multilateral trading system. It was no coincidence that the Organisation for Economic Co-operation and Development (OECD) presented its latest inventory of fossil fuel subsidies at the CTE's next meeting in October 2013.⁶⁵ This was also the first meeting in which the Friends expressed their interest to discuss fossil fuel subsidies in the CTE.⁶⁶ Several workshops on fossil fuel subsidies have been held at the WTO since that time. Most recently, the Friends organized a session on 'Fossil Fuel Subsidies Reform: International Collaboration and the Link between Sustainability Objectives and Global Trade' at the 2019 WTO Public Forum.⁶⁷ These events brought together trade officials and experts to discuss the need for, and ways of disciplining, fossil fuel subsidies. They have been instrumental in raising awareness and forging consensus over the need to tackle fossil fuel subsidies.

⁶³ See 'Workshop on the Role of Intergovernmental Agreements in Energy Policy', WTO, available at https://www.wto.org/english/tratop_e/envir_e/wksp_envir_apr13_e/wksp_envir_apr13_e.htm.

⁶⁴ See Lamy, *supra* note 5.

⁶⁵ WTO, *Report of the Meeting Held on 16 October 2013*, Doc. WT/CTE/M/56 (2014), para. 1.54.

⁶⁶ *Ibid.*, para. 1.55.

⁶⁷ See WTO, *WTO Public Forum'19: Fossil Fuel Subsidies Reform: International Collaboration and the Link between Sustainability Objectives and Global Trade*, Report by Session Organizer (2019), available at https://www.wto.org/english/forums_e/public_forum19_e/pf19_84_rpt_e.pdf.

2 Fossil Fuel Subsidies Discussions within the CTE

The CTE is the primary forum for trade and environment discussions in the WTO. Its work programme contains 10 items set out in the Marrakesh Decision on Trade and Environment.⁶⁸ Discussions of fossil fuel subsidies within the CTE take place under Item 1, which mandates the CTE ‘make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required ... as regards ... [t]he relationship between the provisions of the multilateral trading system and trade measures for environmental purposes’.⁶⁹ Fossil fuel subsidies first appeared as an agenda item within the CTE in June 2014 and have featured consistently in all regular CTE meetings since.⁷⁰ All of the CTE’s discussions of fossil fuel subsidies start with a presentation from New Zealand, speaking on behalf of the Friends, on the need for FFSR and updating the CTE on developments in other intergovernmental forums tackling fossil fuel subsidies. Many of the early discussions were dominated by the question of whether fossil fuel subsidies fall within the mandate of the CTE. While Saudi Arabia and other oil-producing and oil-exporting countries (for example, Venezuela, Bolivia, Qatar, Ecuador and Russia) have argued that fossil fuel subsidies fall outside the mandate of the CTE, the Friends and their supporters (for example, Canada, Chinese Taipei and the EU) have maintained that the CTE’s mandate is broad enough to discuss fossil fuel subsidies.

Neither the Marrakesh Decision nor any other legal instrument explicitly authorizes the CTE to discuss fossil fuel subsidies. However, the Marrakesh Decision has conferred a broad mandate on the CTE to ensure the mutual supportiveness of trade and environment. This mandate is broad enough to cover fossil fuel subsidies. It is also ironic that Saudi Arabia challenged the mandate of the CTE to discuss fossil fuel subsidies having presented a study on the adverse effects of, and the need to discipline, non-oil fossil fuel subsidies within the CTE in 2002.⁷¹ The debate over the CTE’s mandate remains open, but the opponents have moved to other more nuanced grounds of objections in recent years. The most prominent of these is that the CTE is not an appropriate forum for tackling fossil fuel subsidies because other forums are already dealing with the issue. Saudi

⁶⁸ See *Marrakesh Decision*, *supra* note 2.

⁶⁹ See WTO, *Report of the Meeting Held on 3 July 2020*, Note by the Secretariat, Doc. WT/CTE/M/69 (2020), at 4.

⁷⁰ See WTO, *Report of the Meeting Held on 30 June 2014*, Note by the Secretariat, Doc. WT/CTE/M/57 (2014), paras 1.33–1.43; WTO, *Report of the Meeting Held on 22 June 2015*, Note by the Secretariat, Doc. WT/CTE/M/59 (2015); WTO, *Report of the Meeting Held on 30 June 2016*, Note by the Secretariat, Doc. WT/CTE/M/61 (2016); WTO, *Report of the Meeting Held on 14 and 15 November 2016*, Note by the Secretariat, Doc. WT/CTE/M/62 (2017); WTO, *Report of the Meeting Held on 20 June 2017*, Note by the Secretariat, Doc. WT/CTE/M/63 (2017); WTO, *Report of the Meeting Held on 1 November 2017*, Note by the Secretariat, Doc. WT/CTE/M/64 (2018); WTO, *Report of the Meeting Held on 28 June 2018*, Note by the Secretariat, Doc. WT/CTE/M/65 (2018); WTO, *Report of the Meeting Held on 30 November 2018*, Note by the Secretariat, Doc. WT/CTE/M/66 (2019); WTO, *Report of the Meeting Held on 15 May 2019*, Note by the Secretariat, Doc. WT/CTE/M/67 (2019); WTO, *Report of the Meeting Held on 26–27 November 2019*, Note by the Secretariat, Doc. WT/CTE/M/68 (2020); WTO, *Report of the Meeting Held on 30 March 2021*, Note by the Secretariat, Doc. WT/CTE/M/71 (2021).

⁷¹ See WTO, Submission by Saudi Arabia, *supra* note 38.

Arabia champions this line of argument and attends CTE meetings to place on record that ‘the issue was dealt with under the G20’.⁷² Other opponents simply echo Saudi Arabia.⁷³ Second, they argue that the issue concerns only a subset of WTO members. Venezuela has maintained that the ‘the discussion only concerned G20 members’ and thus should not be on the CTE’s agenda.⁷⁴ Third, they claim that there are more environmentally harmful subsidies to tackle. Venezuela has expressed its concern that ‘several delegations insisted on raising this issue in the WTO rather than focusing their efforts on subsidies that were within the WTO’s sphere of competence and that were trade distortive and had a major impact on greenhouse gas (GHG) emissions’.⁷⁵ Fourth, they insist that phasing out fossil fuel subsidies is the prerogative of each government and that the issue should be dealt with ‘in accordance with national circumstances, priorities and needs’ and on a ‘voluntary basis’.⁷⁶ Given that all these opponents have already undertaken at least one of the non-binding commitments (for example, SDG target 12.C), their opposition to discussing fossil fuel subsidies within the CTE seems to stem from concerns over the relative strength of the WTO in disciplining subsidies.

Despite continued opposition, the depth and breadth of the CTE’s discussions on fossil fuel subsidies has increased consistently. The discussions have also become more inclusive. Besides the Friends, several WTO members (for example, Canada, Chile, Chinese Taipei, the EU, Mexico, Nigeria and Pakistan) have supported tackling fossil fuel subsidies in the WTO. The Friends have also moved from establishing the need for FFSR to establishing the importance of doing so at the WTO. New Zealand recently argued that the WTO is a ‘natural home to consider FFSR’ based on the considerations discussed in section 3 of this article.⁷⁷ The Friends have also started to call for ‘effective and ambitious disciplines’ on fossil fuel subsidies. The progress from justifying the need for discussions on fossil fuel subsidies within the CTE to calling for new disciplines on fossil fuel subsidies illustrates the growing political consensus within the multilateral trading system.

3 Fossil Fuel Subsidies Questions in the TPRM

The TPRM is a non-binding process whereby the trade policies of WTO members undergo peer review on a regular basis. The reviews are based on two separate reports

⁷² See WTO, *Meeting Report on 3 July 2020*, *supra* note 69, para. 1.35; WTO, *Meeting Report on 15 May 2019*, *supra* note 70, para. 1.5; WTO, *Meeting Report on 26–27 November 2019*, *supra* note 70, para. 1.6.

⁷³ See WTO, *Meeting Report on 30 June 2014*, *supra* note 70, paras 1.35–1.36, 1.40; WTO, *Meeting Report on 22 June 2015*, *supra* note 70, paras 1.108–1.109; WTO, *Meeting Report on 30 June 2016*, *supra* note 70, para. 1.49; WTO, *Meeting Report on 14 and 15 November 2016*, *supra* note 70, paras 1.26–1.27; WTO, *Meeting Report on 20 June 2017*, *supra* note 70, para. 1.76; WTO, *Meeting Report on 1 November 2017*, *supra* note 70, para. 1.8; WTO, *Meeting Report on 28 June 2018*, *supra* note 70, paras 1.17–1.18; WTO, *Meeting Report on 30 November 2018*, *supra* note 70, paras 1.10, 1.13; WTO, *Meeting Report on 15 May 2019*, *supra* note 70, paras 1.9–1.12.

⁷⁴ WTO, *Meeting Report on 28 June 2018*, *supra* note 70, para. 1.17.

⁷⁵ *Ibid.*

⁷⁶ See, e.g., WTO, *Meeting Report on 15 May 2019*, *supra* note 70, paras 1.11 (Russia), 1.12 (Bolivia); WTO, *Meeting Report on 26–27 November 2019*, *supra* note 70, para. 1.6 (Saudi Arabia).

⁷⁷ WTO, *Meeting Report on 1 November 2017*, *supra* note 70, at para. 1.3.

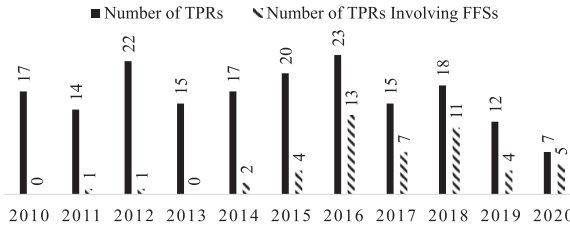


Figure 1: Fossil fuel subsidies in TPRs, 2010–20. Source: compiled by the author.

by the WTO Secretariat and the member under review. Neither report traditionally covers fossil fuel subsidies, but the former report has started to include them in its ‘subsidies’ or ‘energy’ sections.⁷⁸ This has allowed the Friends to raise FFSR-related questions during the review process. An empirical analysis of the over 190 trade policy reviews (TPRs) that took place between 2010 and 2020 shows a significant increase in the use of the TPM to tackle fossil fuel subsidies (see Figure 1). The Friends and Chinese Taipei have been particularly active in asking questions about fossil fuel subsidies in TPRs (see Table 1).

These questions fall into five broad categories. The first and largest category concerns actions taken and/or planned to reform fossil fuel subsidies.⁷⁹ New Zealand, for example, recently asked: ‘How does Japan intend to rationalise any inefficient fossil fuel subsidies that encourage wasteful consumption in line with the United Nations’ Sustainable Development Goal 12(c) and the G20 commitment so as to contribute to the reduction of greenhouse gas emissions?’⁸⁰ The responses to these questions are mostly general and brief. The respondents often refer to measures they have taken to phase out their fossil fuel subsidies (for example, the EU), while others dodge the question (for example, China) or claim they have no subsidies to reform (for example, Saudi Arabia, Japan and Australia). Others reply more directly and pertinently (for example, Nigeria and Egypt).

The second category relates to the existence and extent of fossil fuel subsidies. Switzerland, for example, asked Australia whether it was ‘supporting the production and consumption of fossil fuels and, if yes, what are the main subsidies?’⁸¹ Responses to these questions range from denying the existence of fossil fuel subsidies (for example, Australia, Russia and Japan) to referring to reform efforts (for example, the EU

⁷⁸ See WTO, *Trade Policy Review: Republic of Korea*, Report by the Secretariat, Doc. WT/TPR/S/346 (2016), para. 4.61; WTO, *Trade Policy Review: Indonesia*, Report by the Secretariat, Doc. WT/TPR/S/401 (2020); WTO, *Trade Policy Review: India*, Report by the Secretariat, Doc. WT/TPR/M/403 (2020), at 81.

⁷⁹ Trade policy reviews (TPRs) with such questions include Australia (2011 and 2020); USA (2012, 2014 and 2017); Malaysia (2014 and 2018); Thailand (2015); Fiji (2016); Turkey (2016); Saudi Arabia (2016); China (2016); Russia (2016); South Korea (2016); United Arab Emirates (2016); Japan (2017 and 2020); Mexico (2017); Nigeria (2017); European Union (EU) (2017 and 2020); Brazil (2017); Egypt (2018); Israel (2018) Chinese Taipei (2018); Canada (2019); Costa Rica (2019); and Peru (2019).

⁸⁰ WTO, *Trade Policy Review: Japan*, Minutes of the Meeting, Doc. WT/TPR/M/397/Add.1 (2020), at 227.

⁸¹ WTO, *Trade Policy Review: Australia*, Minutes of the Meeting, Doc. WT/TPR/M/396/Add.1 (2020), at 190.

Table 1: TPRs involving fossil fuel subsidies by members under review and questioners

Review years	Members under review (questioners)
2010	
2011	Australia (Switzerland)
2012	USA (New Zealand)
2013	
2014	Malaysia (New Zealand); USA(New Zealand)
2015	India (Switzerland, New Zealand); Chile (Chinese Taipei); New Zealand (Chinese Taipei); Thailand (Chinese Taipei)
2016	Morocco (New Zealand); Fiji (New Zealand); Turkey (New Zealand, Costa Rica, Switzerland, Norway); Saudi Arabia (New Zealand, Switzerland); Ukraine (Switzerland); United Arab Emirates (Costa Rica, New Zealand); China (Costa Rica); Singapore (Costa Rica, New Zealand, Norway); Russia (Switzerland, Costa Rica, Norway, New Zealand); South Korea (Norway, Switzerland, Costa Rica); Sri Lanka (New Zealand); Solomon Island (New Zealand); USA (Costa Rica, New Zealand)
2017	Japan (Switzerland, Costa Rica); Mexico, Norway, Switzerland); Switzerland (Norway, New Zealand, Costa Rica); Nigeria (Norway, New Zealand, Costa Rica); EU (Switzerland, New Zealand, Russia); Brazil (New Zealand, Switzerland, Costa Rica); Iceland (Switzerland)
2018	Malaysia (New Zealand, Switzerland, Costa Rica); Egypt (New Zealand and Switzerland); Philippines (New Zealand, Chinese Taipei); Colombia (Switzerland, Norway, New Zealand); Norway (Switzerland, New Zealand, Chile); Uruguay (New Zealand); China (New Zealand, Costa Rica, Switzerland, Chinese Taipei); Israel (New Zealand, Costa Rica); Chinese Taipei (Switzerland, New Zealand); Hong Kong (New Zealand); USA (New Zealand)
2019	Samoa (New Zealand); Canada (China, New Zealand, Switzerland); Costa Rica (New Zealand, Switzerland); Peru (New Zealand)
2020	EU (New Zealand, Switzerland, Chinese Taipei); Australia (Switzerland); Japan (Chinese Taipei, New Zealand, Switzerland); Thailand (Chinese Taipei); Indonesia (New Zealand)

Source: compiled by the author.

in 2020) and justifying the subsidization of fossil fuels (for example, Thailand). The third category pertains to sharing information and experience. The Friends frequently ask members under review for additional information on their subsidy programmes or share their reform experiences.⁸² New Zealand, for example, asked Turkey to 'share lessons learned' from its 'previous reform efforts and progress on energy pricing'.⁸³ The responses to these questions are quite mixed. Some members provide detailed responses (for example, the EU), while others (for example, Turkey, Indonesia) offer brief answers. The fourth category of questions aims to encourage participation in

⁸² Such TPRs include Chile (2015); Turkey (2016); Saudi Arabia (2016); Sri Lanka (2016); Ukraine (2016); Brazil (2017); Chinese Taipei (2018); Canada (2019); EU (2020); Thailand (2020); and Indonesia (2020).

⁸³ WTO, *Trade Policy Review: Turkey*, Minutes of the Meeting, Doc. WT/TPR/M/331/Add.1 (2016), at 100.

the G20/APEC peer reviews. New Zealand often asks such questions (for example, Malaysia, Japan, Brazil, Russia and Turkey), while Norway uses review meetings to underline the importance of peer review. The final category concerns support for intergovernmental FFSR initiatives. The Friends ask members under review (for example, Colombia, Canada and the United Arab Emirates) to endorse their communiqué or support efforts to tackle fossil fuel subsidies at the WTO.

We can discern at least three major trends in the use of TPRs for tackling fossil fuel subsidies. First, the questions and replies are generally smooth and cordial. The Friends tend not to follow up even when members under review blatantly deny the existence of fossil fuel subsidies or contradict themselves. Japan, for example, reassured Switzerland that it ‘remains committed to the elimination of inefficient fossil fuel subsidies’ but then admitted that it has ‘no inefficient fossil fuel subsidies that encourages wasteful consumption’.⁸⁴ Similarly, Israel claimed that it ‘does not maintain subsidies for fossil fuel’ and then went on to admit that ‘the only measure concerning consumer support for fossil fuels in Israel is a tax rebate on diesel fuel for commercial vehicles’.⁸⁵ Unlike in the CTE, there has been no major opposition to the use of TPRs for tackling fossil fuel subsidies. The only such instance was when the USA refused to answer a question about its reform plans, noting that ‘TPRs are retrospective reviews’.⁸⁶ Second, more coverage of fossil fuel subsidies in the Secretariat’s report leads to more questions in the TPR process (for example, Indonesia). Third, while TPR questions on subsidies in other sectors are framed in terms of compliance with the SCM Agreement, none of the TPR questions on fossil fuel subsidies refer to the SCM Agreement. The Friends typically frame their questions in terms of either the G20 and APEC commitments or SDG 12(c). This action once again highlights the non-inquisitorial nature of their approach.

4 Notification and Surveillance of Fossil Fuel Subsidies

The notification and surveillance mechanism of the SCM Agreement requires WTO members to self-notify their subsidies annually to the SCM Committee.⁸⁷ Other members can request information on the nature and extent of any notified subsidy (Article 25.8) and notify subsidies that other members fail to notify (Article 25.10). The Friends have started to utilize this system to tackle fossil fuel subsidies. The questions and replies within the SCM Committee are largely similar to those under the TPRM. The Friends use the system to seek clarification or further information, express concerns about fossil fuel subsidies, encourage experience sharing, naming and shaming by asking for plans to reform fossil fuel subsidies and so on. New Zealand has been particularly active in this regard. For example, it recently asked Mexico to provide further

⁸⁴ WTO, *Trade Policy Review: Japan*, Minutes of the Meeting, Doc. WT/TPR/M/351/Add.1 (2017), at 25, 177.

⁸⁵ WTO, *Trade Policy Review: Israel*, Minutes of the Meeting, Doc. WT/TPR/M/376/Add.1 (2018), at 15, 26.

⁸⁶ WTO, *Trade Policy Review: United States*, Minutes of the Meeting, Doc. WT/TPR/M/350/Add.1 (2017), at 313.

⁸⁷ See SCM Agreement, *supra* note 32, Arts 25, 26.

details on how its Marine Diesel and Coastal Gasoline programmes are consistent with the SDG target 12.C.1.⁸⁸ Responses from notifying members range from total denial that the measure in question constitutes a subsidy to justifying the measure on public policy grounds (for example, Brazil).⁸⁹ These interactions are important in raising awareness and building consensus around the need to tackle fossil fuel subsidies in the multilateral trading system. However, the utilization of the notification and surveillance system to tackle fossil fuel subsidies remains limited.

5 Ministerial Statements on Fossil Fuel Subsidies

The Buenos Aires Ministerial Statement on Fossil Fuel Subsidies was a major indication of the growing prominence of fossil fuel subsidies at the WTO.⁹⁰ It represents the first official call for action against fossil fuel subsidies within the WTO. The statement recognizes the adverse effects of fossil fuel subsidies and the need to accelerate their reform. Underlying the call is the shared understanding among the 12 signatories that the WTO can play a 'central role' in 'achieving effective disciplines on inefficient fossil fuel subsidies'.⁹¹ In December 2021, 19 WTO members issued a similar 'ministerial statement' that reiterated the urgency of accelerating FFSRs and promised to 'elaborate concrete options' ahead of the next Ministerial Conference.⁹² The rise in the number of signatories and the tone of the latest ministerial statement is yet another sign of growing consensus in the multilateral trading system.

B Towards Formal Regulation of Fossil Fuel Subsidies

Launching the ACCTS initiative is a major milestone in the decades-old intergovernmental cooperation against fossil fuel subsidies. It marks a move towards legally binding approaches to disciplining fossil fuel subsidies. Before discussing the initiative and its aspiration for legally binding rules, it is imperative to reflect on the need for and potential role of a legally binding approach to disciplining fossil fuel subsidies.

1 Why Negotiate Legally Binding Rules on Fossil Fuel Subsidies?

The case for legally binding international rules on fossil fuel subsidies is at least four-fold. First, a legally binding approach helps reduce reform slippages and reversals. One of the major lessons from the previous initiatives is the vulnerability of subsidy reforms to the prevailing political climate (neither new nor specific to fossil fuel subsidies) and fuel price volatility.⁹³ The use of subsidies as a political tool to garner and

⁸⁸ See WTO, *Subsidies: Questions from New Zealand Regarding the New and Full Notification of Mexico*, Doc. G/SCM/Q2/MEX/33 (2020).

⁸⁹ See WTO, *Brazil's Answers to Questions Posed by the New Zealand Regarding the New and Full Notification of Brazil*, Communication from Brazil, Doc. G/SCM/Q2/BRA/50 (2018).

⁹⁰ See WTO, 'Buenos Aires Statement', *supra* note 42.

⁹¹ *Ibid.*

⁹² WTO, *Ministerial Statement on Fossil Fuel Subsidies*, Doc. WT/MIN(21)/9/Rev.1 (2021).

⁹³ OECD and IEA, *supra* note 30, at 39.

maintain political support is well documented.⁹⁴ The problem is that the existing informal mechanisms are not strong enough to prevent reform reversals. Unlike non-binding commitments, legally binding international rules help reformist governments fend off pressure from interest groups and tie the hands of their successors. This is not to say that legally binding international commitments guarantee against any reform slippage but, rather, that non-compliance with legally binding rules incurs relatively higher reputational costs.⁹⁵ Legally binding rules on fossil fuel subsidies could serve reformist governments both as a sword (to undertake FFSR) and as a shield (from interest group pressure). Certainly, negotiating formally binding rules takes more time.⁹⁶ The relative ease of negotiating informal rules stems partly from the absence of the domestic treaty ratification process through which binding rules normally pass.⁹⁷

However, this, in turn, can make non-binding rules ‘comparably harder to implement ... if funding, legislation or public support are necessary’ for their implementation.⁹⁸ This has been the case with non-binding FFSR commitments. The USA, for example, undertook non-binding commitments to phase out its inefficient fossil fuel subsidies within the G7, G20 and APEC. It also participated in the G20 peer review process, which identified several federal fossil fuel subsidy programmes.⁹⁹ However, Congress refused to amend/repeal the legislations underlying the subsidies.¹⁰⁰ Similarly, several developing countries have joined non-binding FFSR initiatives. Yet the FFSRs in such countries often face significant public backlash.¹⁰¹ The very factors that enable the speedy conclusion of non-binding commitments (for example, not passing through the domestic ratification process) tend to undermine their implementation. In contrast, the protracted ratification processes help binding commitments obtain domestic support and credibility.

Second, existing intergovernmental FFSR commitments remain vague and difficult to implement. None of them define what constitutes a subsidy. They even exacerbate the definitional problem by adding vague qualifications such as ‘inefficient’ and ‘harmful’ that also remain undefined. The lack of definitional clarity gives signatories

⁹⁴ Cerda and Vergara, ‘Government Subsidies and Presidential Election Outcomes: Evidence for a Developing Country’, 36 *World Development* (2008) 2470 (establishing a positive correlation between government subsidies and votes obtained by incumbents in Chile); Schady, ‘The Political Economy of Expenditures by the Peruvian Social Fund (FONCODES), 1991–95’, 94 *American Political Science Review* (2000) 289 (observing the significant rise in subsidies before national elections in Peru).

⁹⁵ See Lipson, ‘Why Are Some International Agreements Informal?’, 45 *International Organization* (IO) (1991) 495, at 504; Raustiala, ‘Form and Substance in International Agreements’, 99 *American Journal of International Law* (AJIL) (2005) 581, at 596 (and the citations therein).

⁹⁶ See Boyle, ‘Some Reflections on the Relationship of Treaties and Soft Law’, 48 *International and Comparative Law Quarterly* (ICLQ) (1999) 901, at 903; Lipson, *supra* note 95.

⁹⁷ See Boyle, *supra* note 96, at 903; Lipson, *supra* note 95, at 514; Raustiala, *supra* note 95, at 598.

⁹⁸ Boyle, *supra* note 96, at 903.

⁹⁹ See G20, *G20 Voluntary Peer Review by China and the United States on Inefficient Fossil Fuel Subsidies That Encourage Wasteful Consumption*, China Self-review Report (2016).

¹⁰⁰ See Oil Change International, *Dirty Energy Dominance: How the US Fossil Fuel Industry Depends of Subsidies and Climate Denial* (2017), at 5.

¹⁰¹ See N. McCulloch *et al.*, *An Exploration of the Association between Fuel Subsidies and Fuel Riots*, preprint (2021), available at <https://www.researchsquare.com/article/rs-142268/v1>.

an easy escape route from their obligations. For example, the absence of an agreed definition of an inefficient subsidy enabled most G20 members to categorically deny their subsidization of fossil fuels.¹⁰² Unlike their informal counterparts, formally binding rules require greater precision.¹⁰³ Christine Chinkin, for example, has argued that what makes a legal instrument 'hard law' is not its form but, rather, its espousal of provisions that are 'precisely worded and specify the exact obligations undertaken or the rights granted'.¹⁰⁴ Formally binding rules on fossil fuel subsidies cannot operate effectively without agreed definitions that determine the scope of the obligation they impose. They also require establishing some criteria to distinguish the good from the bad. These two aspects are crucial to effectively disciplining environmentally harmful fossil fuel subsidies. It is within this context that legally binding rules will complement existing informal mechanisms, adding much needed precision and clarity to the scope of the reform commitments.

Third, and relatedly, a legally binding approach adds much needed credibility and accountability to intergovernmental commitments to phase out fossil fuel subsidies. Several international soft laws have functioned relatively well without any enforcement mechanism.¹⁰⁵ However, informal mechanisms are relatively ineffective in areas where the definition of the subject matter of governance remains ambiguous.¹⁰⁶ Symbolism and hypocrisy surround existing intergovernmental initiatives against fossil fuel subsidies. Governments advocate FFSR internationally while maintaining their own subsidies. One environmental non-governmental organization highlighted this hypocrisy in a puckish way at the 2015 Paris Climate Summit. The Climate Action Network gave New Zealand – the de facto leader of the anti-fossil fuel subsidies movement – the 'fossil of the day' award for 'urging countries to phase out fossil fuel subsidies' while continuing to subsidize fossil fuel production at home.¹⁰⁷ The voluntary nature of existing commitments allows governments to engage in such hypocrisy and undermines credibility.

Finally, a legally binding approach would address the imbalance that the current informal mechanisms perpetuate. I noted in section 4.A that informal mechanisms work through different forms of coercion. In the world of fossil fuel subsidies, coercion mainly takes the form of pressure from international financial institutions. The World Bank and the IMF have been ardent proponents of FFSR. The World Bank has contributed most of the early studies on fossil fuel subsidies, and the IMF has managed to draw global attention to fossil fuel subsidies with its inflated estimates. Besides

¹⁰² G20, *Progress Reports on the Commitment to Phase Out Inefficient Fossil Fuel Subsidies* (2012).

¹⁰³ Abbott and Snidal, 'Hard and Soft Law in International Governance', 54 *IO* (2000) 421, at 421; see also Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413, at 414.

¹⁰⁴ See Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', 38 *ICLQ* (1989) 850, at 851; Raustiala, *supra* note 95, at 588–591 (who argues that the consideration of treaties with imprecise obligations as soft law is inconsistent with state practice).

¹⁰⁵ This is particularly the case for international financial law. See Brummer, 'How International Financial Law Works (And How It Doesn't)', 99 *Georgetown Law Journal* (2010) 257.

¹⁰⁶ Shaffer, Wolfe and Le, *supra* note 9.

¹⁰⁷ See Rive, *supra* note 27, at 14.

publishing a series of studies and reports on fossil fuel subsidies, both the bank and the fund exert their influence to coerce governments into phasing out these subsidies in the form of policy recommendations and loan conditionality. However, their influence works against poor and vulnerable economies that fall at the mercy of their programmes. Evidence from Tunisia, Egypt and many other developing countries indicates that FFSR is emerging as a condition of IMF and World Bank loans or grants.¹⁰⁸ Although both developed and developing countries have undertaken FFSR commitments, the enforcement of these commitments through conditionalities unfairly targets countries in the developing world. Developed countries barely fall prey to this coercion. Such a scenario has created a situation whereby existing intergovernmental commitments to phase out fossil fuel subsidies are voluntary for some and de facto binding for others. Multilaterally negotiated binding rules applicable to all nations could remedy this structural deficiency in the existing intergovernmental initiatives to phase out fossil fuel subsidies.

2 The ACCTS Initiative

The leaders of New Zealand, Fiji, Iceland, Norway, Costa Rica and Switzerland launched this initiative to negotiate what they referred to as the ‘first of its kind’ and ‘forward-looking’ agreement in September 2019.¹⁰⁹ Their joint statement underlines the urgent need to meet the emission reduction targets of the Paris Agreement and to use ‘all policy levers’ ‘to drive the transformation to low-emissions, climate-resilient and sustainable economies’.¹¹⁰ The signatories seek to ‘demonstrate in a concrete and substantive manner how trade measures and trade policy can – and must – support climate and environmental objectives and provide momentum towards an eventual multilateral set of outcomes’.¹¹¹ They present their initiative as ‘a pathfinder to multilateralism’.¹¹² The plan is to start among a likeminded subset of members and eventually turn the initiative into a multilateral one.

The ACCTS signatories identified ‘a host of known actions in the trade policy area that could contribute meaningfully to combatting climate change and other serious environmental challenges’.¹¹³ These actions range from the liberalization of trade in environmental goods and services to the ‘establishment of disciplines to eliminate harmful fossil fuel subsidies’.¹¹⁴ The joint statement is silent on the nature of the fossil fuel subsidy disciplines they seek to establish, but Switzerland clarified at a recent CTE meeting that its aim is ‘to establish binding trade rules to eliminate FFS harmful to the

¹⁰⁸ Hanieh, ‘Shifting Priorities or Business as Usual? Continuity and Change in the Post-2011 IMF and World Bank Engagement with Tunisia, Morocco and Egypt’, 42 *Journal of Middle Eastern Studies* (2015) 119.

¹⁰⁹ See *Joint Leaders’ Statement*, *supra* note 6. Switzerland officially joined the Agreement on Climate Change, Trade and Sustainability (ACCTS) initiative in January 2020.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, para. 11.

¹¹² WTO, *Meeting Report on 3 July 2020*, *supra* note 69, para. 1.9.

¹¹³ *Joint Leaders’ Statement*, *supra* note 6.

¹¹⁴ *Ibid.*, para. 8.

environment'.¹¹⁵ There have been four rounds of negotiations since the launch of the initiative in September 2019. The first was originally scheduled for March 2020 but was postponed due to the pandemic. Despite the interruptions, the signatories hope to conclude the negotiations 'as swiftly as possible'.¹¹⁶ No detail is currently available on the possible content and scope of the disciplines. The use of the term 'harmful' to qualify fossil fuel subsidies in the joint statement represents a major departure from previous intergovernmental initiatives, almost all of which limit the scope of the reform commitments to 'inefficient' fossil fuel subsidies, a term that emphasizes the economic over the environmental adverse effects. The term 'harmful' has a broader scope and allows negotiators to incorporate both economically and environmentally harmful fossil fuel subsidies. However, defining what is harmful may pose a significant challenge in the negotiations. Section 5 considers this and other key challenges facing the ACCTS negotiations.

5 The Long Road Ahead for the ACCTS

The ACCTS initiative is a major step towards disciplining fossil fuel subsidies. However, negotiating binding rules is more complex than negotiating non-binding commitments. The fact that the fisheries subsidies negotiations have been ongoing for two decades illustrates the challenges awaiting the ACCTS signatories. Key challenges include defining fossil fuel subsidies, targeting harmful subsidies, enhancing transparency, overcoming resistance and ensuring inclusivity.

A Defining Fossil Fuel Subsidies

Shaffer, Wolfe and Le, echoing the commonly held view in subsidy literature, noted that '[t]he first challenge for disciplining subsidies is defining them'.¹¹⁷ The term 'subsidy' evokes different meaning in different minds, and different actors define subsidies differently to suit their case. Existing definitions range from as narrow as a direct budgetary payment by a government to a producer or consumer to as broad as any government intervention that affects prices or costs. The IEA defines an energy subsidy as 'any government action directed primarily at 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'.¹¹⁸ This is a relatively broad definition that nevertheless excludes government support measures that do not affect energy prices or production costs. The IMF uses the broadest definition, which captures negative externalities from fossil fuel production and consumption. Using this definition, the IMF has estimated fossil fuel subsidies to be \$5.9 trillion in 2020.¹¹⁹ Its estimates have been useful

¹¹⁵ WTO, *Meeting Report on 30 March 2021*, *supra* note 70, para. 1.7.

¹¹⁶ WTO, *Meeting Report on 3 July 2020*, *supra* note 69, para. 1.10.

¹¹⁷ See Shaffer, Wolfe and Le, *supra* note 9, at 712.

¹¹⁸ See IEA, *World Energy Outlook 2010* (2010), at 570.

¹¹⁹ See Parry, Black and Vernon, *supra* note 25.

in drawing attention to fossil fuel subsidies, but they are unhelpful to any meaningful discussion of reforming those subsidies.¹²⁰ FFSR is about removing government measures already in place, not about introducing new ones to account for negative externalities. Such externalities are best addressed through carbon-pricing instruments such as carbon taxes and emission-trading schemes.

The only internationally agreed definition of a subsidy is contained in the SCM Agreement. A subsidy exists under the SCM Agreement insofar as a government support measure makes a ‘financial contribution’ or ‘income or price support’ that confers a benefit.¹²¹ Since the ACCTS negotiations take place within the aegis of the WTO, it is fair to assume that this definition will form the basis of defining fossil fuel subsidies.¹²² This definition captures a wide range of government support measures, but there is an important caveat in using it for fossil fuel subsidy regulation. This is the tendency to conflate the definition of subsidies with the specificity requirement contained in the SCM Agreement. This conflation has led to a widespread misconception that a government support measure constitutes a subsidy under the SCM Agreement only if it meets both the financial contribution and benefit elements of Article 1.1 and the specificity requirement of Article 2. It is worth underlining that the specificity requirement is not a definitional requirement. The specificity requirement serves to distinguish between subsidies that may and may not cause trade concerns.¹²³ Given that the rationale for disciplining fossil fuel subsidies is primarily environmental, specificity is of less relevance to the ACCTS. Moreover, the specificity requirement is one of the factors that undermines the effectiveness of the existing rules in disciplining fossil fuel subsidies.¹²⁴

The draft text of the fisheries subsidies agreement demonstrates the challenges of defining subsidies.¹²⁵ Instead of directly defining fisheries subsidies, the negotiators opted to define the ‘scope’ of the agreement at two levels. The first paragraph of Article 1 limits the scope of the agreement to measures that constitute a ‘specific’ ‘subsidy’ within the meaning of the SCM Agreement.¹²⁶ Fisheries subsidies that are not specific fall outside the ambit of the draft agreement even if they meet the definitional requirements of the SCM Agreement. The second paragraph creates an exception for ‘fuel subsidies to fishing and fishing related activities’ from the specificity requirement of the SCM Agreement.¹²⁷ In other words, fuel subsidies to fisheries fall within the ambit of the draft fisheries agreement even if they are not ‘specific’. Underlying the

¹²⁰ See J. Skovgaard, *The Economisation of Climate Change: How the G20, the OECD and the IMF Address Fossil Fuel Subsidies and Climate Finance* (2021), at 115–133.

¹²¹ SCM Agreement, *supra* note 32, Art. 1.1. For a detailed discussion on the subsidy definition, see L. Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (2009).

¹²² SCM Agreement, *supra* note 32, Art. 1.

¹²³ See Horlick and Clarke, ‘Rethinking Subsidy Disciplines for the Future: Policy Options for Reform’, 20 *JIEL* (2017) 673, at 690–692.

¹²⁴ See Asmelash, *supra* note 50, at 281.

¹²⁵ See WTO, *Fisheries Subsidies: Draft Consolidated Chair Text*, Doc. TN/RL/W/276 (2021).

¹²⁶ SCM Agreement, *supra* note 32, Art. 1.1.

¹²⁷ *Ibid.*, Art. 1.2.

exclusion of fuel subsidies to fisheries from the specificity requirement is the recognition that most fossil fuel subsidies are general in nature. Applying the specificity requirement to fossil fuel subsidies thus excludes most fossil fuel subsidies from the scope of the subsidy disciplines. It is therefore imperative that the ACCTS negotiators avoid incorporating the specificity requirement when defining the scope of application of the ACCTS rules.

B Targeting Harmful Fossil Fuel Subsidies

The literature on fossil fuel subsidies often conflates the issue of defining subsidies with that of distinguishing between harmful and harmless subsidies.¹²⁸ There has never been any attempt to discipline all forms of subsidies in the history of multilateral subsidy governance. International trade negotiations have always acknowledged that not all subsidies are detrimental. The ubiquitous use of qualifiers such as 'inefficient' in intergovernmental FFSR commitments also underlines a desire to distinguish between fossil fuel subsidies. The difficulty lies in establishing clear criteria to separate the wheat from the chaff.

The SCM Agreement employs a complex set of techniques to achieve this aim. First, the definition of a subsidy was carefully designed to capture only certain forms of subsidies.¹²⁹ The negotiating history and jurisprudence on the 'financial contribution' and 'benefit' elements of this definition illustrates an intention not to equate every government support measure to a subsidy.¹³⁰ This delimitation was further strengthened by the automatic exclusion of subsidies to trade in services and general infrastructure from the scope of the SCM Agreement.¹³¹ Second, it establishes a specificity test for government support measures that qualify as a subsidy to fall within its ambit.¹³² Third, it creates a taxonomy of subsidies based on their potential adverse effects on trade. The SCM Agreement does not prohibit all subsidies that meet the definitional and specificity requirements but only those that are contingent upon export performance or the use of domestic over imported goods.¹³³ Other government support measures that meet the definitional and specificity requirements were originally categorized into actionable or non-actionable subsidies.¹³⁴ The non-actionable category was provisional and expired at the end of 1999.¹³⁵ All specific subsidies that cause adverse effects to the interest of another member but are not prohibited under Article

¹²⁸ See Rive, *supra* note 27, at 245 (noting that such conflation is a prominent weakness of the literature on fossil fuel subsidies).

¹²⁹ SCM Agreement, *supra* note 32, Art. 1.

¹³⁰ See D. Coppens, *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints* (2014), at 39–99.

¹³¹ SCM Agreement, *supra* note 32, Art. 1.1(a)(1)(iii).

¹³² *Ibid.*, Arts 1.2, 2.

¹³³ *Ibid.*, Art. 3.

¹³⁴ *Ibid.*, Arts 5, 8.

¹³⁵ *Ibid.*, Art. 31.

3 are now actionable.¹³⁶ This categorization is the result of complex international negotiations and compromise in the trading system.

The complexity is even more pronounced in the world of fossil fuel subsidies where social, economic and environmental concerns overlap with one other. The starting point of any discussion of fossil fuel subsidies is the understanding that some subsidies have legitimate policy objectives. Virtually all the intergovernmental FFSR commitments acknowledge this by making an exception for the subsidization of fossil fuel to support poor and vulnerable groups. The problem is that most fossil fuel subsidies are inefficient in achieving their goal. They benefit wealthier households more than they benefit those in whose name the subsidization takes place.¹³⁷ Addressing this reality requires better targeting of the intended beneficiaries and/or using these resources in other pro-poor public services such as public education and health.¹³⁸ The difficulty is that not all countries have the necessary resources to implement such reforms. General fossil fuel subsidies are appealing to governments because they are easy to implement. Governments also have decades of experience and institutional memory in administering such subsidies. Better targeting requires more information, but governments in the developing world where a significant portion of the society engages in informal economic sectors lack the necessary data on household income. In the absence of robust and trustworthy data and institutional capacity, implementing targeted subsidy programmes exposes fossil fuel subsidies to even more corruption and risks entirely missing the targets. Any effort to establish formally binding rules on fossil fuel subsidies needs to grapple with these concerns.

Most intergovernmental FFSR commitments refer to ‘inefficient fossil fuel subsidies that encourage wasteful consumption’, echoing the language of the 2009 G20 leaders’ statement. However, none of these intergovernmental forums define what constitutes a subsidy, let alone what makes a subsidy inefficient. The use of the term ‘harmful’ in the ACCTS joint statement suggests a shift from an economic to an environmental orientation and a desire to differentiate between good and bad fossil fuel subsidies. The challenge is drawing the boundaries between the two. Past intergovernmental FFSR commitments overcome this challenge by carving out exceptions for fossil fuel subsidies to the poor and vulnerable, without defining the precise scope of these exceptions. Their voluntary nature may have obviated the need for such precision, but countries are less likely to undertake binding commitments without some clarity on the scope and content of the exception. This is most likely to cause friction among the ACCTS signatories. Their joint statement calls for the outcome of the negotiations to ‘recognise the particular challenge faced by Small Island Developing Countries and their vulnerability to the impacts of climate change’.¹³⁹ If the initiative is to realize its multilateral aspirations, it needs to recognize the challenges of developing countries in general.

¹³⁶ *Ibid.*, Art. 5.

¹³⁷ See D. Coady, V. Flamini and L. Sears, ‘The Unequal Benefits of Fuel Subsidies Revisited: Evidence for Developing Countries’, IMF Working Paper no. WP/15/250 (2015).

¹³⁸ See B. Clements *et al.* (eds), *Energy Subsidy Reform: Lessons and Implications* (2013).

¹³⁹ *Joint Leaders’ Statement*, *supra* note 6, para. 9.

C Enhancing Transparency

The new rules need to be much more precise and detailed than the existing commitments to be effective. They need to not only define what constitutes a fossil fuel subsidy but also distinguish between harmful and harmless subsidies. This requires detailed and reliable data on the extent, nature and adverse effects of fossil fuel subsidies. Such information allows for designing the new rules in such a way as to capture and discipline the various forms of environmentally harmful fossil fuel subsidies. It also helps with monitoring and shaping compliance with the agreed rules.¹⁴⁰ The challenge is to find the necessary data.

The self-reporting and peer review processes under the existing initiatives have shown that many governments remain reluctant to disclose their subsidization of fossil fuels. Lack of transparency is not specific to fossil fuel subsidies. Compliance with the notification requirements of the SCM Agreement has historically been low.¹⁴¹ Governments fail to notify subsidies for a broad array of reasons, from lack of capacity to fear of legal action and condemnation. Many developing countries lack the necessary institutional infrastructure to collect and process information on fossil fuel subsidies. The fear of condemnation from the environmental community that stems from growing public awareness of the adverse effects of fossil fuel subsidies is likely to increase their reluctance. The ACCTS signatories need to find ways of overcoming this information deficit in the early stages of the negotiations.

The literature on fossil fuel subsidies governance is replete with suggestions for strengthening transparency both in and outside the WTO.¹⁴² Some of these suggestions are particularly relevant to the ACCTS initiative. Kasturi Das and colleagues have underlined the importance of some countries taking the lead in improving compliance with the notification requirement of the SCM Agreement.¹⁴³ The ACCTS signatories could set a precedent by providing detailed information about their own fossil fuel subsidies under the SCM Agreement. It is hypocritical to demand transparency from others without also being transparent themselves. I have suggested elsewhere the need for more utilization of the cross-notification option under Article 25.10 of the SCM Agreement.¹⁴⁴ This provision allows the ACCTS signatories to notify the fossil fuel subsidies of other WTO members. International institutions such as the OECD and non-governmental institutions such as the Global Subsidies Initiative have already built databases to compile and analyse data on fossil fuel subsidies. The ACCTS signatories should work more closely with these institutions to shed more light on fossil fuel subsidies.

¹⁴⁰ See T. Laan, *Gaining Traction: The Importance of Transparency in Accelerating the Reform of Fossil-Fuel Subsidies* (2010), at 14.

¹⁴¹ See WTO, *Chair Cites 'Chronic' Low Compliance with Subsidy Notification Requirements* (2020), available at https://www.wto.org/english/news_e/news20_e/scm_27oct20_e.htm.

¹⁴² See Das *et al.*, 'Making the International Trade System Work for Climate Change: Assessing the Options', 49 *Environmental Law Reporter* (2019) 10553 (and the citation therein).

¹⁴³ *Ibid.*

¹⁴⁴ See Asmelash, *supra* note 29, at 14.

Another option for enhancing transparency is including fossil fuel subsidies in TPR reports. New Zealand described itself as ‘a strong proponent of fossil fuel subsidies reform’ in its 2015 TPR report.¹⁴⁵ Switzerland also mentioned that it was actively engaged in the FFFSR and wanted to ‘encourage governments to undertake voluntary peer reviews with a view to a phase-out of such subsidies by 2025’.¹⁴⁶ However, neither country provided any information on their own fossil fuel subsidies or on the actions they have taken to reform them. Including such information in their reports could help make the TPR an even more important forum for information and experience sharing. The reference to fossil fuel subsidies in the New Zealand report, for example, prompted Chinese Taipei to ask New Zealand to ‘elaborate on the content of fossil fuel subsidies reform as well as the effectiveness of this reform’.¹⁴⁷ Again, the ACCTS signatories could encourage others to follow suit by covering fossil fuel subsidies in their reports.

They can also urge the WTO Secretariat to give more emphasis to fossil fuel subsidies in its TPR reports. However, the Secretariat lacks the necessary mandate to undertake its own original study for the report. What goes into the Secretariat’s report largely depends on what is readily available. Indonesia’s TPR report has shown that the Secretariat is willing to give adequate coverage to fossil fuel subsidies when the information is readily available. The ACCTS signatories should work with other inter-governmental and non-governmental institutions to enhance the availability of such information to the WTO Secretariat.

D *Overcoming Resistance to Change*

Another potential challenge to the success of the ACCTS initiative is opposition from fossil fuel-producing and -exporting members, who consistently object to discussions on fossil fuel subsidies within the WTO. Saudi Arabia has also objected to the ACCTS initiative, noting that ‘climate change issues were discussed under the Paris Agreement and could not be discussed or even open for interpretation under any forum other than the United Nations Framework Convention on Climate Change (UNFCCC)’.¹⁴⁸ The ACCTS signatories have opted for a plurilateral approach to help overcome these challenges. Opponents of disciplining fossil fuel subsidies at the WTO cannot prevent the ACCTS signatories from negotiating such an agreement under the aegis of the WTO. Article II:3 of the WTO Agreement recognizes plurilateral agreements as legally binding upon the members that accept them.¹⁴⁹

The opponents, however, may engage in activities that frustrate the negotiations. They may actively work to discourage other countries from joining the initiative. They may also contest the use of WTO resources for negotiations and implementation.

¹⁴⁵ WTO, *Trade Policy Review: New Zealand*, Report by New Zealand, Doc. WT/TPR/G/316 (2015), para. 5.22.

¹⁴⁶ WTO, *Trade Policy Review: Switzerland and Liechtenstein*, Doc. WT/TPR/G/355 (2017), para. 1.72.

¹⁴⁷ WTO, *Trade Policy Review: New Zealand*, Minutes of the Meeting, Doc. WT/TPR/M/316/Add.1 (2015), at 53.

¹⁴⁸ WTO, *Meeting Report on 3 July 2020*, *supra* note 69, para. 1.13.

¹⁴⁹ Marrakesh Agreement Establishing the World Trade Organization 1994, 1867 UNTS 154, Art. II:3.

One of the main arguments against plurilateral agreements has been the concern that they ‘impose additional costs on the rest of the WTO membership by utilizing the WTO “infrastructure” – including operation of a committee, making use of the WTO facilities, potential invocation of the DSU [Dispute Settlement Understanding], calling on the Secretariat for support’.¹⁵⁰ The opponents may invoke the limited Secretariat resources as an excuse to push the ACCTS initiative outside the WTO. Bernard Hoekman and Petros Mavroidis have suggested that requiring signatories to make an additional contribution to the WTO is a straightforward solution to this problem.¹⁵¹ It will effectively address concerns about the additional costs needed for the negotiation, administration and implementation of the ACCTS. However, financing will not quiet all opposition. The goal must be to find ways to accommodate the views and interests of such countries. Overcoming their resistance is essential to the successful conclusion of an agreement that eventually applies to the wider WTO membership.

E Ensuring Inclusivity

The ACCTS is the latest in a growing list of plurilateral initiatives in the WTO. Such initiatives promise to overcome the problem of reaching consensus by allowing ‘sub-sets of countries to agree to commitments in specific policy areas that only apply to signatories’.¹⁵² The deadlock in multilateral trade negotiations has prompted several plurilateral initiatives.¹⁵³ The central promise of plurilateralism is that it enables a subset of likeminded countries to push forward in an area where a genuine global consensus is yet to emerge. There is widespread recognition of the need to phase out fossil fuel subsidies, but substantial differences exist on a wide range of issues. The minutes of CTE meetings also indicate that not all countries agree to the disciplining of fossil fuel subsidies in the WTO. Such disagreements and the urgency of tackling fossil fuel subsidies may justify the ACCTS’s plurilateral approach.

However, urgency and convenience should not come at the expense of inclusivity. The ACCTS initiative is an important step in the right direction, but its practical impact depends on its ability to attract the participation of other countries. The signatories have explicitly stated their multilateral ambitions and laid the groundwork for this by envisaging the ACCTS as a ‘flexible agreement’ that is ‘open to all who can meet the established standard’.¹⁵⁴ This aspect makes the ACCTS’s approach what has come to be known as ‘open plurilateralism’, whereby non-signatories can join a plurilateral agreement later on insofar as they meet the terms and standards set out in

¹⁵⁰ Hoekman and Mavroidis, ‘WTO “à La Carte” or “Menu Du Jour”? Assessing the Case for More Plurilateral Agreements’, 26 *European Journal of International Law* (2015) 319, at 335; Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, 1869 UNTS 401.

¹⁵¹ Hoekman and Mavroidis, *supra* note 150.

¹⁵² *Ibid.*

¹⁵³ Wu, ‘The WTO Environmental Goods Agreement: From Multilateralism to Plurilateralism’, in P. Delimatsis (ed.), *Research Handbook on Climate Change and Trade Law* (2016) 279, at 279–301.

¹⁵⁴ *Joint Leaders’ Statement*, *supra* note 6, para. 9.

the agreement.¹⁵⁵ The problem with such arrangements lies in the standard setting. Hoekman and Mavroidis observed that plurilateral agreements enable small subsets of countries ‘to define the rules of the game in a specific area’.¹⁵⁶ They argue that plurilateral agreements ‘are likely to reflect the interests and current practices of the initial signatories, which may not be appropriate for all countries’.¹⁵⁷ Without the participation of a diverse group of countries, the ACCTS standards are likely to reflect the views and interests of the initial signatories only. Not one of the ACCTS signatories is a major subsidizer of fossil fuel consumption. Disciplining fossil fuel subsidies in the WTO requires the support of some of the more powerful economies. New Zealand has acknowledged this fact, stating that ‘eliminating these wasteful subsidies is a major challenge that would benefit from further leadership from the United States’.¹⁵⁸ Moreover, none of the ACCTS signatories represent the views and interests of least developed countries (LDCs) and most other developing countries.

The current lack of diversity and representation has at least three major implications. First, it will lead to bias towards a particular category of fossil fuel subsidies. Vernon Rive has shown how the nature of fossil fuel subsidies within the FFSR has influenced the scope of their initial advocacy against fossil fuel subsidies.¹⁵⁹ Much of their initial advocacy was focused on consumption subsidies, which are more prevalent in developing countries. Second, unless the rules reflect the interests and perspectives of countries beyond the initial signatories, it discourages others from joining the agreement later. This eventually undermines the multilateral ambition of the initiative and its practical impact. Lessons from previous plurilateral agreements illustrate that it is difficult to amend or renegotiate the terms of such agreements to accommodate the interests of later signatories. Hoekman and Mavroidis argue that ‘clubs will define the rules of the game in an area that will be difficult to change if and when the initial non-signatories decide to participate’.¹⁶⁰ Third, the lack of inclusivity further perpetuates inequality in international rule-making. It allows a small group of mostly advanced economies to set rules that have significant implications for developing countries. An agreement negotiated in their absence is less likely to address issues that are of particular concern to most developing countries. The active engagement of developing countries and LDCs at the initial stage of the negotiations is essential to ensure that their interests are reflected in the negotiated rules.

There are at least four practical ways of overcoming the lack of inclusivity. The first is to make a concerted effort to convince other countries to join the initiative at

¹⁵⁵ The Agreement on Government Procurement (GPA) is a perfect example of such agreements in the WTO. It originally had only 12 parties, but nine more parties have acceded to the GPA since its entry into force in 1996. Agreement on Government Procurement, 1994, 1869 UNTS 508.

¹⁵⁶ See Hoekman and Mavroidis, *supra* note 150, at 333.

¹⁵⁷ See *ibid.*

¹⁵⁸ WTO, *Trade Policy Review: United States*, Minutes of the Meeting, Doc. WT/TPR/M/382 (2019), para. 4.173.

¹⁵⁹ See Rive, *supra* note 40.

¹⁶⁰ See Hoekman and Mavroidis, *supra* note 150, at 330.

the early stages of the negotiations. Such an effort needs to focus initially on WTO members that have already expressed interest in disciplining fossil fuel subsidies at the WTO. Members such as the EU,¹⁶¹ Canada,¹⁶² Chile,¹⁶³ Nigeria,¹⁶⁴ Chinese Taipei,¹⁶⁵ Pakistan¹⁶⁶ and Mexico¹⁶⁷ have expressed their support for discussions on fossil fuel subsidies within the CTE. The United Kingdom joined the Friends in their statement on global fossil fuel subsidies on the fifth anniversary of the Paris Agreement and the FFSR communiqué.¹⁶⁸ Mexico, Iceland, Lichtenstein, Moldova, Samoa and Chinese Taipei are signatories to the Buenos Aires Ministerial Statement on fossil fuel subsidies.¹⁶⁹ Other signatories to the FAST and the TESSD initiatives have also expressed their willingness to tackle fossil fuel subsidies in the WTO, albeit via informal mechanisms. Getting these countries on board from the outset will contribute to a diversity of perspectives.

The second approach is making the negotiations transparent and open to all interested parties. This will make the negotiated outcome relatively more reflective of the interests of countries beyond the initial signatories. This is particularly useful for an initiative that currently involves only six mostly advanced economies, which have long championed FFSR. Without external insight, negotiations among the current signatories will be preaching to the choir. Opening plurilateral negotiations to all parties is not new. The GPA negotiations were open to every interested contracting party.¹⁷⁰ Such an 'open-to-all' approach may exacerbate the very problem that plurilateralism seeks to address – deadlocks. The underlying assumption behind the open-to-all approach is that parties participate in the negotiations in good faith.¹⁷¹ However, some countries may participate in bad faith. Oil-producing countries have already expressed their strong opposition to disciplining fossil fuel subsidies in the WTO and may join the initiative specifically to frustrate the negotiations. This is a major challenge that the ACCTS signatories will face, balancing their plurilateral approach and multilateral ambitions.

The third approach to ensuring inclusivity is the provision of technical assistance and capacity building, particularly for interested LDCs. Most LDCs have either no permanent mission in Geneva or seriously understaffed missions to attend the numerous parallel meetings and negotiations that take place at the WTO Secretariat in Geneva. It is also likely that their Geneva mission staff are trade experts with limited insight into

¹⁶¹ WTO, *Meeting Report on 30 June 2014*, *supra* note 70, para. 1.34.

¹⁶² See *ibid.*, para. 1.34; WTO, *Meeting Report on 22 June 2015*, *supra* note 70, para. 1.110.

¹⁶³ WTO, *Meeting Report on 30 June 2014*, *supra* note 70, para. 1.39.

¹⁶⁴ See WTO, *Meeting Report on 30 June 2016*, *supra* note 70, para. 1.51.

¹⁶⁵ See WTO, *Meeting Report on 28 June 2018*, *supra* note 70, para. 1.9.

¹⁶⁶ *Ibid.*, para. 1.12.

¹⁶⁷ See *ibid.*, para. 1.6.

¹⁶⁸ See FFSR, *Statement on Global Fossil Fuel Subsidy Reform on the Fifth Anniversary of the Paris Agreement and FFSR Communiqué* (2020).

¹⁶⁹ WTO, 'Buenos Aires Statement', *supra* note 42.

¹⁷⁰ See Lawrence, 'Rulemaking Amidst Growing Diversity: A Club-of-Clubs Approach to WTO Reform and New Issue Selection', 9 *JIEL* (2006) 823.

¹⁷¹ See Hoekman and Mavroidis, *supra* note 150, at 337.

the complex world of fossil fuel subsidies. If the ACCTS signatories are committed to negotiating an inclusive agreement, they need to find ways of enhancing the negotiating capacity of LDCs. Here, they can draw from the experience of the fisheries subsidies negotiations to establish a special trust fund to support the participation of LDCs in the ACCTS negotiations. The WTO created the special ‘fisheries trust fund’ in 2019 to ‘assist LDCs in bringing their capital-based delegations to Geneva to participate in the clusters of fisheries subsidies meetings’.¹⁷² The establishment of the fisheries fund was relatively late in the negotiation, but it is imperative that the ACCTS signatories create such a fund early enough to encourage the effective participation of LDCs.

The fourth approach is to allow the participation of non-governmental stakeholders in the negotiations to ensure the fair representation of diverse interests. The role of non-governmental actors in international rule-making and particularly in the field of environmental law has significantly increased over the last few years. The latest and most advanced of such experience is the negotiations for the Escazú Agreement whereby non-governmental stakeholders played an active role.¹⁷³ The participation of non-governmental actors in international trade rule-making is relatively less advanced and the subject of ongoing debate in both academic and policy circles. The ACCTS signatories can set a powerful precedent, the relevance of which will extend beyond trade and environment, by making the negotiations open to non-governmental stakeholders, living up to their promise to pursue ‘open and flexible negotiating approaches’.¹⁷⁴

These four means of overcoming the lack of inclusivity are not mutually exclusive. The ACCTS signatories need a combination of these and other measures to ensure the inclusivity of their initiative. The inclusivity of the initiative is essential for its legitimacy, the realization of its multilateral ambition and, most importantly, real practical impact.

6 Conclusion

Environmentally harmful fossil fuel subsidies have gained considerable attention over the last few years. This article has attributed their rise to prominence in the multilateral trading system to a combination of factors – from increased recognition of their adverse socio-economic and environmental effects and the rise of trade disputes over renewable energy support measures to the establishment of anti-fossil fuel subsidies informal country groupings. The latter has been particularly influential. The FFFSR has withstood strong opposition from oil-exporting countries to establish fossil fuel subsidies as one of the first agenda items within the CTE. They have also increasingly

¹⁷² See ‘DG Azevêdo Announces New Fund to Help LDCs Participate in Fisheries Subsidies Talks’, WTO, 3 May 2019, available at https://www.wto.org/english/news_e/news19_e/tnc_03may19_e.htm.

¹⁷³ Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (‘Escazú Agreement’) (signed 4 March 2018, entered into force 22 April 2021) No. 56654.

¹⁷⁴ *Joint Leaders’ Statement*, *supra* note 6, para. 9.

used the TPRM to raise questions and concerns. The organization of public events and the adoption of ministerial statements on fossil fuel subsidies have been instrumental in raising awareness and building political consensus. The limited but increasing use of the notification and surveillance system of the SCM Agreement is crucial in filling the transparency deficit. However, the use of such informal mechanisms both inside and outside the multilateral trading system falls short of effectively combating the continued prevalence of fossil fuel subsidies across the world. Governments have continued to introduce new fossil fuel subsidies and renege on their reform commitments. The ACCTS initiative aims to address this issue and complement the informal mechanisms with formally binding rules.

The legally binding approach of the ACCTS initiative will bring much needed credibility and urgency to FFSR initiatives. It will reinforce the informal compliance mechanisms and offers some protection against reform slippages and reversals. A legally binding approach also has the potential to remedy the structural deficiency of existing intergovernmental initiatives that made reform commitments voluntary for some and de facto binding for others. However, there are significant hurdles, most prominently defining fossil fuel subsidies and distinguishing between harmful and harmless subsidies (notoriously difficult tasks in subsidy governance). The ACCTS signatories can use the subsidy definition of the SCM Agreement but without its specificity requirement, which has little relevance to fossil fuel subsidy governance. Their primary focus should be distinguishing between environmentally harmful and harmless fossil fuel subsidies, not between trade-distorting and non-trade-distorting ones. Drawing any such distinction is a 'difficult and contested terrain' that 'requires an awareness of assumptions, contexts and values' and hence depends on who makes the distinction.¹⁷⁵ This is exactly where the plurilateral nature of the ACCTS initiative raises concerns. The signatories present their initiative as a 'pathfinder to multilateralism' that is 'open to all who can meet the established standard'. It is imperative that these standards reflect the interests not just of these six mostly advanced economies but also of the wider WTO membership. This article has outlined a wide range of options to ensure the inclusivity of the initiative. It is in the interest of the signatories to consider such options, not least to realize their multilateral aspirations. Such options are also useful in overcoming the continued opposition to addressing fossil fuel subsidies in the WTO. New rules that fail to incorporate the views and interests of the main fossil fuel subsidizers and emitters will have little practical impact that extends beyond their symbolic function.

¹⁷⁵ See Young, 'Energy Transitions and Trade Law: Lessons from the Reform of Fisheries Subsidies', 17 *IEA: PLE* (2017) 371, at 373.

