

SUBSIDIES IN THE RENEWABLE ENERGY INDUSTRY UNDER THE WORLD TRADE ORGANIZATION REGIME AND SUGGESTIONS FOR VIETNAM

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Abstract

With the continuous increase in greenhouse gas emissions and global average temperature, the effects of climate change are predicted to grow. In Vietnam, growing demand for subsidy programs to attract renewable energy investments must be balanced with the government's obligation to ensure their conformity with the World Trade Organization (WTO) regulations. This article analyzes subsidy-related rules in WTO agreements and reviews countervailing investigations on renewable energy-related products from Vietnam. Based on the analysis, the authors propose that the Vietnamese government implement subsidy programs in accordance with the WTO's conditions.

Keywords: *subsidy, WTO, renewable energy, Vietnam, international trade, countervailing investigation*

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The core framework for future negotiations related to subsidies and countervailing measures within the World Trade Organization (WTO) member states include the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and Article XVI of the General Agreement on Tariffs and Trade (GATT). Determining whether a policy falls under the definition and specificity of subsidies is crucial because it forms the foundation for legal challenges brought by WTO members against a member's subsidy programs. Under the SCM Agreement, apart from enterprise-specificity, industry-specificity, and regional specificity, prohibited subsidies (subsidies provided for export promotion or provided based on domestic content requirements) are also considered specific. This specificity criterion is particularly relevant for Vietnam as it seeks to address the increasing effects of climate change through targeted subsidy programs.

With a continuous increase in greenhouse gas emissions, the effects of climate change are predicted to grow more widespread. Under this pressure, there is a growing demand for subsidy programs in Vietnam to attract investments in the renewable energy sector. These programs are crucial for incentivizing the transition to sustainable energy sources. However, as a

member of the WTO, Vietnam must ensure its subsidy programs comply with the WTO Agreements, particularly the SCM Agreement.

This paper analyzes the subsidy-related rules in WTO Agreements, examines different reports of the WTO dispute settlement body, and reviews countervailing investigations on renewable energy-related products from Vietnam. This comprehensive analysis aims to identify potential pitfalls and areas where Vietnam's subsidy programs could be vulnerable to challenges. Based on these insights, this paper proposes strategic suggestions for the Vietnamese government to design and implement subsidy programs that support the renewable energy sector while respecting WTO regulations.

1. Legal challenges against renewable energy subsidies under the WTO mechanism

1.1. Dispute settlement

Although subsidies for environmentally harmful fossil fuels are more prevalent than those for climate-friendly alternatives, only the latter have been challenged at the WTO level.¹ There are seven cases concerning renewable energy subsidies that were challenged under the WTO mechanism. This paper categorizes the disputed measures under the WTO regulations into two main groups: (i) the feed-in-tariff (FIT) programs with attached local content requirements (LCR) (as seen in the case of *DS246 Canada – Measures relating to the FIT Program* and *DS456 India – Certain measures relating to Solar Cells and Solar Modules*), and (ii) incentives other than FIT with attached LCR (as seen in the case of *DS510 United States – Certain Measures relating to the Renewable Energy sector*). Analyzing the consistency of these measures serves as the foundation for the Vietnamese government to provide subsidies without facing challenges through the WTO dispute settlement mechanism.

Regarding incentives other than the FIT program, the Panel in the *DS510 United States – Certain Measures relating to the Renewable Energy sector* only determined the violation of the measure with Article III:4 GATT. The Panel used judicial economy by choosing not to examine the subsidy nature of the measures under the SCM Agreement. Therefore, to maintain the study's relevance to subsidies in renewable energy under the WTO mechanism, the following section solely focuses on examining the consistency of the FIT Program with LCR.

1.1.1. National Treatment violation of the feed-in-tariff program with local content requirements

The National Treatment (NT) is specified in Article III:4 of the GATT. To assess the consistency of the FIT Program with the attached LCRs, the

¹ Shadikhodjaev, S. (2018), *Industrial policy and the World Trade Organization: Between legal constraints and flexibilities*, Cambridge University Press, p. 148.

Panel and Appellate Body (AB) in *DS246 Canada – Measures relating to the FIT Program* answered the following questions: (i) Is the FIT Program with the attached LCR a trade-related investment measure?² (ii) Can Canada rely on Article III:8(a) of the GATT to negate the application of Article III:4 of the GATT, and (iii) Does the FIT with attached LCRs violate the NT under Article III:4 of the GATT as well as Article 2.1 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement)?

In response to the first question, the Panel concluded that the FIT with LCRs was qualified as an investment measure involving trade in accordance with the TRIMs Agreement. This measure encourages investment in the production of equipment that can be used to generate renewable energy in Ontario. Moreover, the measure also affects the trade of this equipment by favoring the ones that originated or were assembled in Ontario over the imported ones.³

Concerning the second question, the AB concluded that Canada could not depend on the application of Article III:8(a) of the GATT. This provision excludes regulations related to government procurement from Article III's application. The AB's reasoning suggested that the requirements for the exclusion outlined in Article III:8 needed to be interpreted, considering the commitments stated in other paragraphs of Article III. Accordingly, imported products, which were less favorable than national ones, and the products procured by the government must be in a competitive relationship.⁴ However, in this dispute, the government of Ontario procured electricity, which did not compete with the product given a preference under the LCRs contested by the complainants under Article III:4 (equipment utilized to generate renewable energy). As a result, the AB concluded that the LCRs were under the coverage of Article III:4 of the GATT.⁵

In response to the final question, the Panel concluded that the FIT Program and the LCRs attached violated both Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT. The Panel used judicial economy to determine that the disputed measure was inconsistent with Article III:4 of GATT, based on the inconsistent conclusion of the measure under Article 2.1 of the TRIMs. This was done because Article 2.1 requires Members not to apply any investment measures involving trade that violate the NT principle.⁶ In addition, measures inconsistent with the NT requirements are regulated in Article 2.2 of the TRIMs Agreement. The Panel concluded that the FIT with LCRs falls under the first category of the list, which is the utilization or acquisition by a business of products with domestic origins or from domestic sources. In more specific

2 Panel Report, *Canada – Measure relating to the FIT Program*, WT/DS412/R, WT/DS426/R (adopted 24 May 2013), paras. 7.108 – 7.112.

3 *Ibid.*, para. 7.112.

4 Appellate Body Report, *Canada – Measures relating to the FIT Program*, WT/DS412/AB/R, WT/DS426/AB/R (adopted on 24 May 2013), para. 5.75.

5 *Ibid.*, para. 5.79.

6 *Ibid.*, para. 7.155.

terms, the Panel found that the LCRs require electricity generators to utilize a specific proportion of equipment generating renewable energy originating from Ontario.⁷ Moreover, when meeting this requirement, electricity generators can obtain an advantage, which is participation in the FIT Program.⁸ Based on the Panel's findings, it can be concluded that the FIT Program with LCRs does indeed violate the NT principle.

1.1.2. The feed-in-tariff program with local content requirements is not a prohibited subsidy

In *Canada – Measures relating to the FIT Program*, the complainants also alleged that the FIT with LCR was a prohibited subsidy under Article 3.1 of the SCM Agreement. As a result, Canada broke its obligation outlined in Article 3.2 (SCM Agreement) when it implemented the FIT program with LCRs in the country. The Panel and the AB must first decide whether the measure qualified as a subsidy to assess whether it was a prohibited subsidy. A measure is a subsidy if it satisfies both of the following criteria: (i) the measure is a financial contribution from the government or other public entities, and (ii) the financial contribution is accompanied by a benefit.

The AB had a different perspective when examining the benefit conferred. However, it agreed with the Panel in describing and determining that the FIT Program constituted a financial contribution under the form of government procurement of goods.⁹ Article 14 of the SCM Agreement served as the foundation for the analysis of the benefit by the Panel and the AB.¹⁰ Accordingly, government purchase of goods confers benefits if recipients are “better off” than they would be in the market without this purchase.¹¹ Therefore, a comparison between the purchase and a benchmark from a relevant market is required to determine the benefit. As the demand side sees no difference between electricity generated from different energy sources, the Panel did not accept the market of electricity generated from wind and PV as a relevant market to analyze the benefit provided.¹² Instead, the relevant market was the market of power from all energy sources.

Although there was no difference in electricity source demand from customers, from the supply side, there were differences in cost, structures, and characteristics of technologies, equipment, and systems that did not allow electricity suppliers to change from generating conventional energy to renewable ones.¹³ Hence, unlike the Panel, the AB decided that the relevant market in this dispute to compare the costs and returns of producers was the market of electricity generated from wind and PV itself rather than the general

⁷ *Ibid.*, paras. 7.158–7.163.

⁸ *Ibid.*, paras. 7.164 – 7.166.

⁹ *Ibid.*, para. 5.129.

¹⁰ *Ibid.*, paras. 5.169–5.171.

¹¹ *Ibid.*, paras. 5.160–5.163.

¹² *Ibid.*, para. 5.168.

¹³ *Ibid.*, para. 5.174.

market of electricity produced by all energy sources.¹⁴ According to AB's study, the action taken by the Ontario government aimed to create a market for electricity generated by renewable sources such as wind and solar PV. This market creation ensured the reliability and stableness of the electricity supply through an energy supply mix, which increased electricity generated from wind and PV and phased out electricity generated from fossil fuels.¹⁵ Using this logic, the AB concluded that a government's development of a market did not automatically result in a subsidy under the SCM Agreement.¹⁶

According to the analysis presented above, the FIT program served as a tool to create a market for electricity generated from wind and PV. Therefore, the creation of this market did not result in a subsidy, and thus, no prohibited subsidy existed under the SCM Agreement. However, the risk of countervailing investigations lies in the scrutiny of government measures designed to support renewable energy. Countries implementing such FIT programs must carefully design them to avoid violations under WTO rules, as countervailing investigations can lead to the imposition of duties, disrupting the development and competitiveness of the renewable energy sector.

1.2. Countervailing investigation

Unilateral countervailing investigations challenge green subsidies under the WTO mechanism. These investigations depend on petitions from the domestic industry and competent authorities. To be more specific, Part V of the SCM Agreement governs countervailing investigations, which can begin only from a written request by or on behalf of the domestic industry, supported by companies representing over 50% of total production and at least 25% of the industry's total production supporting the application.¹⁷ The application must demonstrate three criteria in order for an investigation to be initiated: (i) the presence of a subsidy and amount of subsidy provided (if possible); (ii) the damage to the domestic industry; and (iii) the demonstration that the subsidized imports cause the damage. According to Article 15 of the SCM Agreement, the damage occurs in three contexts: significant damage to the domestic industry, a threat to the competing domestic industry, and the hindrance of the establishment of the domestic industry due to subsidized imports.

Since 2009, WTO members have imposed duties on subsidized renewable energy products only if these imports harm the domestic industry, allowing subsidies to remain by imposing duties without requiring their removal. With the increase in subsidies given to the renewable energy sector, these subsidies provided by the Vietnamese government are likely to be challenged by other WTO members.

¹⁴ *Ibid*, para. 5.178.

¹⁵ Appellate Body report, *Canada - Measures relating to the FIT Program*, *supra* note 4, para. 5.187

¹⁶ *Ibid*, para. 5.188.

¹⁷ Article 11.4 of the SCM Agreement.

Until now, utility wind towers in Vietnam have been the subject of one anti-dumping investigation and one countervailing investigation, respectively. Utility-scale wind towers originating from Korea, Canada, Vietnam, and Indonesia are the subject of an anti-dumping and countervailing investigation by the United States International Trade Commission (USITC) launched on 29 July 2019. Arcosa Wind Towers Inc. and Broadwind Towers Inc. submitted petitions as the basis for the initiation. On 29 June 2020, the U.S. Department of Commerce released the investigation's findings, which found the existence of dumping prices for the products under investigation and given subsidies.

In both investigations, the Vietnamese companies had to bear the highest duties in comparison to companies from other investigated countries. A rate of 2.84% for the subsidy rate,¹⁸ along with 65.95% for anti-dumping duty,¹⁹ would be imposed on the entry of the products when they are brought into the U.S. market. The subsidy rate imposed on Canadian companies was only 1.18%. At the Final Determination, there was a 5.90% subsidy rate imposed on PT Kenertec Power System – the only Indonesian company participating in the investigation. However, the company and the Indonesian Wind Tower Trade Coalition appealed this Determination at the U.S. Court of International Trade (CIT). Article 23 of the SCM Agreement requires each WTO member to maintain judicial procedures in national legislation (if national legislation contains regulations regarding countervailing measures) to review the Final Determination of the countervailing investigation. Therefore, the Indonesian company and Wind Tower Trade Coalition relied on Article 5, Section 777, Title VII Tariff Act of 1930 of the U.S. to request the CIT to review the application of trade remedies duties under the Final Determination. After the review, the CIT concluded that the way USITC calculated the subsidy rate was improper.²⁰ Hence, the subsidy rate imposed on Indonesia was amended from 5.90 % to 0.85 %, which was *de minimis*. With this conclusion, the USITC revoked the countervailing duty order on wind towers from Indonesia.²¹

To initiate the countervailing investigation, the USITC examined the material damage caused by subsidized imports from Vietnam and Canada. They defined similar domestic products and the domestic industry, assessed import volumes, and analyzed price effects. Considering product characteristics, distribution channels, consumer perceptions, and prices, the USITC determined all domestic wind towers as a single domestic like product for the investigation.²² From the domestic like product determination, the domestic industry was

18 *Ibid.*, para. 40230.

19 *Ibid.*, para. 40228.

20 Federal Register, Vol. 87, No. 9, 13 January 2022, p. 2137.

21 *Ibid.*, para. 2138.

22 U.S. International Trade Commission, *Utility Scale Wind Towers from Canada, Indonesia, Korea, and Vietnam*, Investigation No. 701-TA-627-629 and 731-TA-1458-1461 (Preliminary), pp. 1-18.

comprised of all domestic producers of the like product.²³ During the period of data collection (2016 to 2018), quantity of the product under investigation decreased in the first three years, from 1,182 towers in 2016 to 912 towers in 2017, before reducing to 848 towers in 2018.²⁴ With these data on imports, the confirmation from the domestic purchasers that there was a lower price of the imports when compared with the price of domestic wind towers, and the data of relevant economic factors of domestic industry (e.g. market shares, profits, investment, etc.), the USITC concluded that there was a material injury caused by imported wind towers.²⁵ The USITC also found that various subsidy programs (such as financial guarantee, export promotion, exemption of land rent fees and income tax for renewable energy projects) were given to Vietnamese and Canadian companies.²⁶ A material injury caused by subsidized imports became the basis for the USITC to conduct the countervailing investigation.

This conclusion, however, was not in accordance with Article 15 of the SCM Agreement regarding the volume of imports. Article 15.2 of the SCM Agreement requires the investigating authorities to illustrate the import increase to analyze the material injury of the domestic industry, not only the significant presence as determined in this countervailing investigation. Moreover, the period for submission of the questionnaire response did not comply with the requirements outlined in Article 12.1.1 of the SCM Agreement. In trade remedies investigation cases, the investigating authorities collect information and data from domestic producers/importers, foreign producers/exporters, and other related parties via questionnaires.²⁷ Even though Article 12.1.1 requires at least 30 days given to foreign producers/exporters to complete the questionnaire response, the Commission only gave foreign exporters/producers 17 days (from July 6 to July 23) to complete the questionnaire.²⁸ Only one Vietnamese company participated in both investigations, which was CS Wind Vietnam Co., Ltd. If the Vietnamese government and the company had carefully analyzed the case and the SCM Agreement, they could have requested the CIT to review the application of the subsidy rate under the Final Determination (like the way the Indonesian company could use the regulations to request the CIT to appeal the final determination). It would be possible for the CIT to find these inconsistencies during the investigations and reverse the result of the final determination.

23 *Ibid.*, p. 4.

24 *Ibid.*, p. 24.

25 *Ibid.*, p. 32.

26 *Ibid.*, pp. 1-7 – 1-8.

27 Both Article 12.1.1 of the SCM Agreement and Article 6.1.1 of the Anti-dumping Agreement regulates that the Investigating Authorities collect information from foreign producers/exporters and other interested parties through Questionnaires.

28 The U.S. trade remedies-related regulations are silent on the time for questionnaire submission. Sec.201.9 of the Commission's Rules of Practice and Procedure only requires the Commission to collect data from foreign producers/exporters through questionnaires. In this situation, Article 12.1.1 of the SCM Agreement is applicable.

Even though the difference between the subsidy rate imposed on the wind tower from Vietnam and Canada was not significant, the dumping margin for Vietnamese products was significantly higher compared to those from other countries under investigation. As a result, the competitiveness of the wind towers originating from Vietnam in the U.S. market was affected. CS Wind Vietnam could not submit the information and data of the company as requested within the time given (two days later than the deadline) in the anti-dumping investigation, thus the USITC did not conduct verification and applies the facts available (data submitted by petitioners) to calculate the dumping margin. According to Sections 776(a)(1) and 776(a)(2)(A)-(D) of the 1930 U.S. Tariff Act, the USITC has the right to use facts available to calculate the dumping margin if an interested party is incapable of providing the information required by the deadline.

2. Current policies for renewable energy subsidies in Vietnam

On 25 November 2015, the Vietnamese government issued Decision No. 2068/QĐ-TTg, approving the renewable energy development strategy through 2030 with a vision to 2050. This strategy aims to expand renewable energy sources, including hydropower, biomass, wind, and solar energy. By 2030, nearly all rural residences are expected to use sustainable renewable energy at reasonable prices. The percentage of homes with solar energy equipment is projected to increase from 12% in 2020 to 26% in 2030, and 50% by 2050. The strategy also targets 60% technology usage by 2030 to meet domestic and regional demands by 2050. The strategy highlights five main subsidy groups: government financial support, fiscal incentives, the FIT Program, Renewable Portfolio Standard (RPS), and Net Metering.²⁹

The government provides financial incentives to renewable energy production and utilization projects. The strategy includes land preferences and R&D funding. Renewable energy projects receive land rent exemptions and deductions under land-related regulations, such as the non-agricultural land use tax and Decree No. 118/2015/ND-CP. For instance, these projects are exempt from land rent fees for 11 years.

In terms of fiscal incentives, the government grants corporate income tax (CIT) and import duty incentives for renewable energy production projects. Regarding CIT, if a set of criteria concerning scale, personnel, land demand, facility, capacity, and technology under Decree No. 218/2013/ND-CP are satisfied by an energy production project (producing clean energy from wind, solar, tides, biology, and/or destruction of environmental pollutant), this project will be defined as a project protecting the environment. Following that, based on the location of the project, it will be eligible for a preferential

²⁹ Nam, P. K., Quan, N. A., and Binh, Q. M. Q. (2013), 'Investment incentives for renewable energy in Southeast Asia: Case study of Vietnam', *Manitoba: The International Institute for Sustainable Development*, pp. 9-20.

CIT at the rate of 10% for the duration of 15 years (while the current tax rate is 20%), or an exemption of CIT for four years, or a 50% deduction from five to nine years from the beginning of the project. Furthermore, exemption from import duty will be given to renewable energy projects within five years if imports are used to create fixed assets, such as raw materials and semi-finished goods unavailable on the domestic market.³⁰

Another type of government incentive given to renewable energy production projects is the FIT Program. Electricity utilities are required by the strategy to purchase all of the electricity produced from renewable sources in the places under their authority. The purchasing activities are executed via model contracts regulated by the Ministry of Industry and Trade (MOIT). To implement the strategy, the FIT Program was introduced in Vietnam in 2017 and has been applied to solar- and wind-electricity generation projects.³¹ Regarding solar energy, the Vietnamese government issued Decision No. 13/2020/QĐ-TTg that regulates different FIT regimes for (i) grid-connected solar power (including floating systems (7.69 US Cent/kWh), and ground-mounted systems (7.09 US Cent/kWh), and (ii) rooftop system (8.38 US Cent/kWh). In terms of wind energy, the Vietnamese government issued Decision No. 39/2018/QĐ-TTg which regulates FIT regimes for wind energy projects (onshore (8.5 US Cent/kWh) and offshore projects (9.8 US Cent/kWh). However, FIT prices under Decision No. 13/2020/QĐ-TTg were only applied to projects that had been completed and started running from 1 July 2019 to 31 December 2020. Similarly, Decision No. 39/2018/QĐ-TTg was only applied to wind projects that had been completed and started running before 1 November 2021. Under this Decision, buyers refer to Vietnam Electricity Group (EVN), member entities authorized by the EVN, other organizations, and individuals assigned with rights and obligations to the organizations and individuals mentioned above. Under the model Power purchase agreement (PPA), the period is set for 20 years from the day the grid-connected solar power projects operate commercially (Clause 2, Article 4 of the Decision No. 13/2020/QĐ-TTg). In terms of rooftop solar projects, if the purchaser is the EVN or its authorized units, that period will not be more than 20 years from the day the grid-connected solar power projects operate commercially (Clause 5, Article 8 of the Decision No. 13/2020/QĐ-TTg). For solar projects running after 31 December 2020 and wind projects running after 1 November 2021, the FIT prices are applied according to Decision No.

30 Article 5, Section V of the Decision No. 2068/QĐ-TTg approving the Development Strategy of renewable energy of Vietnam by 2030 with a vision to 2050.

31 Huy, P. (2022), 'The feed-in tariff mechanism for electricity purchase in Vietnam – Current status and solutions', *Vietnam Trade and Industry Review*. Retrieved from: <https://tapchicongthuong.vn/bai-viet/co-che-gia-mua-ban-dien-fit-tai-viet-nam-thuc-trang-va-giai-phap-97509.htm> [accessed 15 July 2024].

21/QD-BCT dated 7 January 2023 of the MOIT.

Table 1. FIT prices under Decision No.21/QD-BCT

No	Type	Maximum price (US Cent/kWh)
1	Ground-mounted solar power plant	4.89
2	Floating solar power plant	6.22
3	Onshore wind power plant	6.55
4	Offshore wind power plant	7.49

Source: Decision No. 21/QD-BCT dated 7 January 2023 of the MOIT

Regarding RPS, the strategy requires electricity generators and distributors to satisfy the standard amount of renewable electricity. For generators with a size of over 1,000 MW (not including entities under Build-Operate-Transfer projects), the percentage of renewable energy produced (excluding hydropower projects with capacity over 30 MW) is at least 10% in 2030 and not lower than 20% in 2050. The target percentage for electricity distributors is also higher than 10% in 2030 and 20% in 2050. Annually, the MOIT sets the minimum percentage of clean electricity produced or distributed by electricity producers and distributors. End users who self-generate renewable energy are eligible for compensation through the Net metering program. Utilities must sign purchase contracts and compensate them, while the generated energy counts towards the utilities' RPS obligations.

In general, the financial support, fiscal incentives, FIT Program, and other incentives provided under Vietnam's renewable energy strategy can be seen as financial contributions that confer benefits to renewable energy producers. Consequently, these measures could be classified as subsidies under the WTO legal regime. The potential classification as actionable subsidies would depend on further analysis of their specific impacts and compliance with WTO rules.

3. Suggestions for the Vietnamese government regarding renewable energy subsidies

First, the incentives should be provided without LCRs. In all disputes regarding renewable energy, the LCRs attached to the incentives were challenged. In *DS426 Canada – Measures relating to the FIT Program*, the Panel and the Appellate Body came to the same conclusion that the use of the FIT Program in conjunction with LCRs violated the NT obligation outlined in Article III:4 of the GATT as well as Article 2.1 of the TRIMs Agreement. Similarly, the WTO's judicial bodies also came to the same conclusion.³² Therefore, if the government provides incentives without

³² Geoffrey, C. (2017), 'India – Certain measures relating to solar cells and Solar modules (India–Solar Cells), DS456', *World Trade Review*, Vol. 16, pp. 549–550.

requiring generators to use or purchase a certain amount of generation equipment from local sources, the likelihood of being challenged under the WTO mechanism is relatively low.

Second, the government strongly supports Vietnamese renewable energy exporters by encouraging thorough market research to avoid countervailing investigations, which can occur if subsidized imports harm the domestic industry of the importing member. To mitigate risks, exporters should monitor export volumes and pricing carefully, consult with the government on product diversification, and seek guidance on potential investigations and products likely to be scrutinized by importing members. ●

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Author Contribution

All authors contributed to the study conception and design. All authors read and approved the final manuscript.

Declarations

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