

## BOOK REVIEWS

*Fossil Fuel Subsidy Reform: An International Law Response*, by Vernon J.C. Rive  
Edward Elgar, 2019, 320 pp, £90 hb  
ISBN 9781785360886

In studies of the role of law in the transition to a clean energy system, the emphasis commonly has been on regulatory instruments to shift consumption patterns towards sustainable forms of energy, such as carbon pricing or renewable energy support measures.<sup>1</sup> Much less attention has been paid to the ways in which law supports the ongoing production and consumption of fossil fuels. Put simply, the focus has been primarily on how to phase in the ‘good’ as opposed to phasing out the ‘bad’.

Vernon Rive’s book takes an important step in this respect by offering the first comprehensive analysis of the existing and possible future international legal framework governing fossil fuel subsidies and their reform. Linking with contemporary debates in international law on fragmentation and regime interaction, informal law, and experimentalist governance,<sup>2</sup> the book seeks to map the relevant legal framework and assess it in terms of its effectiveness, legitimacy, and fairness.

To sketch the necessary context, the book begins by discussing a few key preliminary questions concerning the definition and measurement of fossil fuel subsidies, their operation in practice, and their environmental and socio-economic effects. While the definition and measurement of fossil fuel subsidies may seem like technical matters at first blush, the book makes clear that it raises political and legal questions that permeate all international governance efforts. After all, if the very object of governance is subject to contestation, developing rules will be challenging. Rive offers an elucidating account of the varying definitions in place, including their differences<sup>3</sup> as well as their similarities and points of convergence.

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<sup>1</sup> See, e.g., A. Boute, ‘The Impossible Transplant of the EU Emissions Trading Scheme: The Challenge of Energy Market Regulation’ (2017) 6(1) *Transnational Environmental Law*, pp. 59–85; A.M. López-Rodríguez, ‘The Sun Behind the Clouds? Enforcement of Renewable Energy Awards in the EU’ (2019) 8(2) *Transnational Environmental Law*, pp. 279–302.

<sup>2</sup> See generally C.F. Sabel & J. Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press, 2010). For a critical discussion of experimentalist governance in the context of global climate governance, see H. van Asselt, A. Jordan & D. Huitema, ‘Global Climate Governance after Paris: Setting the Stage for Experimentation?’, in B. Turnheim, P. Kivimaa & Frans Berkhout (eds), *Innovating Climate Governance: Moving Beyond Experiments* (Cambridge University Press, 2018), pp. 27–46.

<sup>3</sup> The greatest difference stems from the inclusion in estimates by the International Monetary Fund (IMF) of the non-internalization of externalities, including road congestion, air pollution, and climate change impacts. This has led to estimates that are up to 10 times larger than other estimates; see, e.g.,

Next, the book discusses the myriad reasons why governments may put in place fossil fuel subsidies, which include poverty alleviation, energy security, and political stability. These rationales are then contrasted with the various adverse effects of fossil fuel subsidies. While the primary effect of such subsidies can be felt in the country that provides them – in that subsidies drain government budgets – fossil fuel subsidies also have transboundary impacts by distorting international trade<sup>4</sup> and, perhaps most importantly, driving climate change by encouraging the burning of fossil fuels.<sup>5</sup> It is these transboundary impacts that have turned fossil fuel subsidies into a relevant subject matter for international law and governance.

The book continues with a mapping exercise of the international governance of fossil fuel subsidies, outlining the activities and roles of the most relevant international instruments and institutions. As Rive points out, these include not only international environmental agreements such as the United Nations Framework Convention on Climate Change<sup>6</sup> and the Sustainable Development Goals,<sup>7</sup> but also a range of international economic institutions – notably, the International Monetary Fund, the World Bank, the Organisation for Economic Co-operation and Development, and the Group of 20 (G20), whose 2009 commitment to ‘phase out and rationalise over the medium term inefficient fossil fuel subsidies’<sup>8</sup> helped to put the issue on the international policy agenda. The overview provides a useful introduction to the complex web of laws and institutions, although a more systematic analysis – explaining, for instance, the various types of governance function carried out by institutions<sup>9</sup> – would have strengthened the chapter.

The book then turns to the World Trade Organization (WTO), particularly its Agreement on Subsidies and Countervailing Measures (ASCM),<sup>10</sup> which is the only

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D. Coady et al., *Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates* (IMF, 2019), available at: <https://www.imf.org/en/Publications/WP/Issues/2019/05/02/Global-Fossil-Fuel-Subsidies-Remain-Large-An-Update-Based-on-Country-Level-Estimates-46509> (estimating global subsidies at USD 5.2 trillion in 2017). Such estimates should not be considered financial transfers for fossil fuel production and consumption, but rather estimates of how much fossil fuels are underpriced.

<sup>4</sup> Although Rive does not discuss this in detail, a recent study sheds further light on this: T. Moerenhout & T. Irschlinger, ‘Exploring the Trade Impacts of Fossil Fuel Subsidies’, International Institute for Sustainable Development, Mar. 2020, available at: <https://www.iisd.org/sites/default/files/publications/trade-impacts-fossil-fuel-subsidies.pdf>.

<sup>5</sup> See also P. Erickson et al., ‘Why Fossil Fuel Producer Subsidies Matter’ (2020) 578(7793) *Nature*, pp. E1–E4.

<sup>6</sup> New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

<sup>7</sup> United Nations (UN) General Assembly, ‘Transforming Our World: The 2030 Agenda for Sustainable Development’ (21 Oct. 2015), UN Doc. A/RES/70/1, available at: <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

<sup>8</sup> ‘G20 Leaders Statement: The Pittsburgh Summit’, 24–25 Sept. 2009, para. 24, available at: <http://www.pittsburghsummit.gov/mediacenter/129639.htm>.

<sup>9</sup> See, e.g., C. Verkuijl & H. van Asselt, ‘Fossil Fuel Subsidy Reform Interactions between International Cooperative Institutions: The More, the Merrier?’, in F. Zelli et al. (eds), *Governing the Climate-Energy Nexus: Institutional Complexity and Its Challenges to Effectiveness and Legitimacy* (Cambridge University Press, 2020), pp. 131–55, at 136.

<sup>10</sup> Marrakesh (Morocco), 15 Apr. 1994, in force 1 Jan. 1995, available at: [https://www.wto.org/english/docs\\_e/legal\\_e/24-scm\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm).

global agreement that specifically disciplines the use of subsidies and thus the focus of much of the existing legal scholarship on fossil fuel subsidies.<sup>11</sup> Rive extensively discusses the extent to which existing trade agreements can effectively curb fossil fuel subsidies. Through a systematic analysis of the relevant rules of the ASCM, he identifies the various legal and political factors that may affect the chances of a possible WTO challenge to fossil fuel subsidies. The conclusion that ‘major categories of fossil fuel subsidies are highly unlikely to be subject to control’ (p. 141) perhaps may be sobering to those hopeful that the WTO can tackle fossil fuel subsidies, but the finding will not surprise close trade policy observers. The WTO is not concerned with the environmental effects of subsidies but merely with their trade effects. Nevertheless, as Rive discusses, the negotiation of a possible agreement on unsustainable fisheries subsidies at the WTO offers a glimpse of hope that fossil fuel subsidies can eventually be curtailed through trade rules.

Following the analysis of trade agreements, the book moves to a discussion of two relevant phenomena in the international governance of fossil fuel subsidies that more standard accounts of international law might have overlooked. The first is the role of the Friends of Fossil Fuel Subsidy Reform, a small coalition of countries led by New Zealand which, through diplomacy, expertise, and awareness raising, seeks to advance fossil fuel subsidy reform globally. Rive critically analyzes the activities of the Friends, drawing attention to the group’s seeming emphasis on the fossil fuel consumption subsidies of developing countries, as opposed to production subsidies that are more prevalent in developed countries, including Friends members New Zealand and Norway.

The second phenomenon is the use of international peer reviews through which countries can scrutinize each other’s subsidies and reform efforts. The reviews, which are undertaken on an ad hoc and voluntary basis, involve pairs of states agreeing to disclose fossil fuel subsidies, with a team of experts (including members from other states) assessing this information, and offering suggestions for reform. Rive connects the emergence of this mechanism – employed in the context of both the G20 and the Asia-Pacific Economic Cooperation (APEC) economies – to the literature on experimentalist governance, which stresses the importance of peer review for learning and, ultimately, improved governance. Rive carries out an original ‘high-level audit’ of the reviews (p. 219), and concludes that the impression that peer reviews ‘amount to little more than rubber stamping of pre-determined positions’ is inaccurate (p. 232).

While the book discusses the WTO at length, and also pays due regard to the role of regional trade agreements, the publication of the book preceded – by just a few months – the announcement by a small group of countries (Costa Rica, Fiji, Iceland, New Zealand, Norway, and Switzerland) of the launch of negotiations on a new

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<sup>11</sup> See, e.g., H.B. Asmelash, ‘Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies Are Challenged’ (2015) 18(2) *Journal of International Economic Law*, pp. 261–85; C. Verkuijl et al., ‘Tackling Fossil Fuel Subsidies through International Trade Agreements: Taking Stock, Looking Forward’ (2019) 58(2) *Virginia Journal of International Law*, pp. 309–68; H. van Asselt & T. Moerenhout, ‘Fit for Purpose? Toward Trade Rules that Support Fossil Fuel Subsidy Reform and the Clean Energy Transition’, Nordic Council of Ministers, TemaNord 2020:539, Nov. 2020.

Agreement on Climate Change, Trade and Sustainability (ACCTS), which would contain rules that limit fossil fuel subsidies.<sup>12</sup> Given the role of New Zealand in other initiatives on fossil fuel subsidy reform discussed in the book – including founding the Friends and driving a WTO Ministerial Statement on the topic – Rive’s views on the prospects of this agreement would have been most welcome. More specifically, in what can be considered one of the book’s few shortcomings, it would have been valuable if Rive had spelled out what any rules on fossil fuel subsidies could or should look like. Would such rules need to be based on the environmental effects of specific types of subsidy (including on climate change), or should specific types of fossil fuel subsidy (for example, for coal mining or oil sands) be targeted? Also, could possible exceptions be crafted so as to ensure that subsidy reform does not jeopardize energy access for the poor? Although Rive identifies these questions as relevant areas for further research (p. 252), it nonetheless feels like a missed opportunity that the book does not give at least some preliminary answers.

Rive’s book offers a timely look at the emerging international law and governance of an issue that cried out for a comprehensive analysis. The study complements an emerging body of literature from political science and international relations,<sup>13</sup> and highlights that the subject matter of fossil fuel subsidy offers fertile ground for engaging with various debates in international law, including the interaction between different international regimes governing the issue, the use of international peer review, and the increasing importance of informal law. A minor quibble is that the book’s engagement with the theoretical literature on these debates is rather limited. Moreover, the book’s ambition to assess the relevant legal framework against high-level criteria of effectiveness, legitimacy, and fairness is not fully carried through. What the book lacks in theoretical engagement, however, it more than makes up for through its level of empirical detail.<sup>14</sup>

Overall, Rive’s book is an indispensable resource for any scholar, student, or practitioner interested in understanding how international legal frameworks could promote or hamper fossil fuel subsidy reform.

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<sup>12</sup> See New Zealand Government, Foreign Affairs & Trade, ‘Agreement on Climate Change, Trade and Sustainability (ACCTS) Negotiations’, available at: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/climate/agreement-on-climate-change-trade-and-sustainability-accts-negotiations>.

<sup>13</sup> See, e.g., J. Skovgaard & H. van Asselt (eds), *The Politics of Fossil Fuel Subsidies and Their Reform* (Cambridge University Press, 2018).

<sup>14</sup> Going beyond collecting publicly available data, Rive has also employed freedom of information requests to gather information, leading to interesting insights into the domestic politics of fossil fuel subsidy reform in his home country, New Zealand. This means of data gathering can be of particular value where levels of transparency are generally low, as is the case for fossil fuel subsidies.