

A R T I C L E

# Free Trade, Fair Trade, and Selective Enforcement

by Timothy Meyer

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## I. Introduction

The notion of “fair” trade implies that trade agreements should protect values other than pure trade liberalization. But which values must be protected in order for trade to be “fair”? This Article makes two novel contributions. First, focusing on the environmental context, it demonstrates that selective enforcement in trade law today is pervasive. Notably, instead of selectively enforcing environmental laws to gain a trade advantage—the traditional concern of critics—governments selectively enforce trade laws in ways that hurt environmental interests. Second, this Article argues that this kind of selective enforcement slows the development of competitive environmentally-friendly products. In effect, selective enforcement of trade law acts as an implicit subsidy for products with large social costs. To illustrate these two arguments, this Article evaluates how governments enforce rules that limit subsidies and other forms of government financial support for industries against programs benefitting natural resources (such as fossil fuels) and their substitutes (such as renewable energy).

Lastly, this Article concludes by suggesting how governments can reform trade law enforcement to address the pernicious effects of selective enforcement. Ongoing efforts to renegotiate trade agreements to make them fair should include measures that limit selective enforcement to ensure that similarly situated products are regulated in the same fashion. In particular, World Trade Organization (WTO) members should consider creating an administrative enforcement process that would identify any products that compete with products at issue in formal WTO disputes and prima facie benefit from the same kind of unlawful conduct.

## II. What Is Selective Enforcement?

Virtually all laws are underenforced. Governments typically lack the resources to pursue all violators, and it is by no means obvious that striving for perfect enforcement

would make sense.<sup>1</sup> For these reasons, governments have discretion in choosing the violators against whom they will enforce the law. In the environmental context, regulators may choose to pursue the largest polluters in order to achieve the greatest environmental benefit.<sup>2</sup> Selective enforcement, as used in this Article, does not refer to this ordinary exercise of prosecutorial discretion, nor does it refer to random variation in how the laws are enforced. Instead, this Article defines selective enforcement as the systematic imposition of the law against one class of actors but not another that is similarly situated. For purposes of this definition, two actors are similarly situated if (1) they compete with each other in the marketplace and (2) both engage in or benefit from the unlawful practice to similar degrees.<sup>3</sup> Selective enforcement of this kind suggests that prosecutorial discretion is being exercised for reasons other than merely ensuring compliance with the law.

## III. Selective Enforcement of Environmental Trade Laws

This part provides evidence of a heretofore unremarked-upon kind of selective enforcement in trade law: selective enforcement that disadvantages environmentally beneficial products. In both the energy and fisheries sectors, trade law is actively used to regulate government support for natural resource substitutes (renewable energy and farmed fish) but rarely, if ever, used to challenge government support for production and consumption of the natural resources themselves (fossil fuels and wild fish).

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1. See Kevin M. Stack & Michael P. Vandenbergh, *The One Percent Problem*, 111 COLUM. L. REV. 1385, 1393 (2011).
2. *Id.* at 1393-94.
3. This definition is consistent with how the term is used in other contexts. See Pamela S. Kane, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 TUL. L. REV. 2293 (1993).

The existence of selective enforcement in these two sectors is important in and of itself—because fuels constitute the most traded commodity in the world,<sup>4</sup> and fish the most traded food.<sup>5</sup> Moreover, it also suggests a broader pattern in which trade enforcement systematically disadvantages products that compete with established natural-resource-intensive industries. This ultimately raises a question of fairness: is trade law in its current form undermining important nontrade values?

### A. Selective Enforcement in the Energy Sector

In 2014, governments subsidized fossil fuels—oil, gas, and coal—with approximately \$934 billion.<sup>6</sup> Renewables received only \$135 billion.<sup>7</sup> In recent years, governments have enforced trade law vigorously against renewable energy subsidies. Since 2008, governments have initiated at least 25 challenges to other nations' support for renewable energy—either directly before the WTO or through domestic mechanisms such as trade remedy investigations.<sup>8</sup>

In contrast to this robust history of challenges to renewable energy, not a single case has ever been brought before the WTO directly challenging government support for fossil fuels.<sup>9</sup> This absence of disputes against fossil fuels does not stem from any systematic differences between fossil fuel subsidies and renewable energy subsidies.<sup>10</sup> Disputes over government support for the energy sector thus show a clear trend: governments are willing to use WTO rules to challenge other governments' financial support for renewable energy, but not for fossil fuels, despite the fact that support for fossil fuels is many times that for renewable energy. This selective enforcement magnifies the discrepancy in subsidization between fossil fuels and renewable energy and reinforces the market dominance of increasingly scarce and environmentally harmful fossil fuels.

### B. Selective Enforcement in the Fisheries Sector

A remarkably similar story plays out in the world of fish. Like energy, fish can be divided into natural resources that must be captured (wild fish) and substitute resources that

are largely “manufactured” (fish produced through aquaculture, i.e., farmed fish). Fishing nations have for years granted huge subsidies to their fishing fleets to capture wild fish. The result has been widespread overfishing, leading to dangerously low stocks of certain breeds of fish.<sup>11</sup> Yet, nations do not invoke trade rules to challenge subsidies for wild fishing. No WTO member to date has ever directly challenged another WTO member's financial support for fisheries before the WTO.<sup>12</sup> Instead, nations—most notably the United States—regularly invoke trade rules to challenge government support for aquaculture, which seeks to provide an alternative to wild stocks while also achieving greater efficiency than fishing fleets. Thus, government support of aquaculture has driven trade remedies cases and associated WTO disputes, while trade disputes centered on wild fisheries—considerably more supported by governments—are conspicuously absent.

## IV. How Selective Enforcement of Trade Law Hurts Environmental Products

### A. The Financial Costs of Selective Enforcement

Selective enforcement creates costs that some market participants, but not others who are similarly situated, must bear. These costs create a market advantage for those firms not targeted for enforcement. This advantage, the result of government action, is an implicit subsidy. For example, defendants must bear potentially significant costs when defending themselves in litigation, and these costs can tax the resources of any country.<sup>13</sup> Defendants may also have to bear financial liability or other penalties if a tribunal finds they have acted unlawfully or engaged in “unfair” trade practices. Defendants may also spend more on precautionary measures in the future than those market participants that do not believe they are likely targets for enforcement action.<sup>14</sup>

The most important costs of selective enforcement, though, are decreased investment and increased costs of capital. Litigation and liability costs increase the minimum price a producer must charge to break even. If money coming in goes back out the door in response to enforcement efforts, businesses cannot use it to settle other debts, make further investments in their business, or simply to take a profit. This reduction in profits can create a vicious cycle. Investors direct money to firms that make profits. Increased costs reduce profits and therefore reduce investors' willing-

4. WORLD TRADE ORGANIZATION, INTERNATIONAL TRADE STATISTICS 72 (2015).

5. Martin D. Smith et al., *Sustainability and Global Seafood*, 327 SCIENCE 784, 784 (2010).

6. ELIZABETH BAST ET AL., OVERSEAS DEV. INST. & OIL CHANGE INT'L, EMPTY PROMISES: G20 SUBSIDIES TO OIL, GAS AND COAL PRODUCTION 11 (2015), <http://perma.cc/P3NM-ALJN> [hereinafter *Empty Promises*]; INT'L ENERGY AGENCY, WORLD ENERGY OUTLOOK 27 (2015), <http://perma.cc/Y2EM-YXYG> [hereinafter World Energy Outlook 2015].

7. World Energy Outlook 2015, *supra* note 6, at 343.

8. See Table 1, Timothy Meyer, *Free Trade, Fair Trade, and Selective Enforcement*, 118 COLUM. L. REV. 491, 506 (2018) [hereinafter Table 1].

9. Dirk De Bièvre et al., *No Iceberg in Sight: On the Absence of WTO Disputes Challenging Fossil Fuel Subsidies*, 17 INT'L ENVTL. AGREEMENTS 411, 412-13 (2017) [hereinafter *No Iceberg in Sight*]; Timothy Meyer, *Explaining Energy Disputes at the World Trade Organization*, 17 INT'L ENVTL. AGREEMENTS 391, 392-93 (2017) [hereinafter Meyer, *Explaining Energy Disputes*]. The domestic imposition of trade remedies is also virtually nonexistent. See Meyer, *supra* note 6, at 516.

10. See Meyer, *Explaining Energy Disputes*, *supra* note 10, at 399. Both, for instance, often contain local content requirements.

11. See MARGARET A. YOUNG, TRADING FISH, SAVING FISH: THE INTERACTION BETWEEN REGIMES IN INTERNATIONAL LAW 6 (2011).

12. See Table 2, Timothy Meyer, *Free Trade, Fair Trade, and Selective Enforcement*, 118 COLUM. L. REV. 491, 519 (2018) [hereinafter Table 2].

13. See, e.g., Marc L. Busch et al., *Does Legal Capacity Matter? A Survey of WTO Members*, 8 WORLD TRADE REV. 559, 560-61 (2009) (documenting the burdens of the WTO dispute settlement process).

14. See, e.g., Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1, 2-3 (1985).

ness to put money behind a firm. This investor reluctance itself translates into higher costs of capital.

### B. *What Kind of Relationship Between Products Makes Selective Enforcement Pernicious?*

Selective enforcement in trade law is unfair only if it disadvantages a competitor. But how similar do two products have to be for this harm to arise? In economic terms, selective enforcement becomes more pernicious the higher the cross-elasticity of demand between two products.<sup>15</sup> If a product has few close substitutes and the demand for a product is inelastic, producers can pass price increases to the consumer. Hence, if a product has relatively inelastic demand, the costs discussed above—litigation, liability, and lost investment—will not affect a product's bottom line. But as demand becomes more elastic, consumers will purchase less of the product as these costs force producers to raise prices. If the product has a high cross-elasticity of demand with another product, consumers will substitute that second product for the newly more expensive one. In this way, one producer's loss is another producer's gain.

### C. *The Social Costs of Selective Enforcement*

Critically, selective enforcement of trade law has its worst effects when targeted products have social benefits beyond those captured by producers, while similarly-situated, untargeted products have social costs. In these circumstances, selective enforcement reinforces a market failure. In economic terms, the law should encourage private actors to internalize the externalities created by their actions. Thus, governments should not subsidize products that have significant social costs. Government support for wild fisheries and fossil fuels keeps prices artificially low, increasing consumption and thereby increasing the overall costs on society. Ultimately, the failure of governments to eliminate these subsidies results in the market producing and consuming more fossil fuels and wild fish than it would without subsidies.<sup>16</sup>

## V. *The Effects of Selective Enforcement in Energy and Fisheries*

Selective enforcement has consistently undermined natural resource substitutes. Especially in developing countries, producers and their governments have struggled with the burden of defending themselves in trade actions brought by the United States and Europe. The imposition of trade remedies has closed markets and threatened to shutter entire industries, such as the Argentinian biofuel or Viet-

namese catfish farming sectors. And with no similar action nor costs imposed on them, the fossil fuel and wild fisheries industries win big.

### A. *The Effects of Selective Enforcement in Energy*

Despite the critical role of government support for clean energy innovation, selective enforcement has only reinforced the market position of fossil fuels. While subsidies have increased on the renewable side, fossil fuel subsidies continue to dwarf renewable subsidies. And trade law has not led to any reduction in fossil fuel subsidies. Fossil fuel subsidies have maintained their ratio vis-à-vis renewable energy subsidies and, in absolute dollar terms, have grown faster. To illustrate, using the combined estimate of both consumption and production subsidies (\$934 billion),<sup>17</sup> fossil fuels received approximately seven times the amount of subsidies today than renewables received in 2014.<sup>18</sup> Moreover, in absolute terms, renewable energy subsidies increased by only \$75 billion from 2009 to 2014, while fossil fuel consumption subsidies alone (not including production subsidies) increased by \$190 billion. This demonstrates a correlation between selective enforcement and a discrepancy in government support for renewable energy—a discrepancy that governments themselves have pledged to close by reducing fossil fuel subsidies.<sup>19</sup>

Selective enforcement is surely not the only cause of this policy failure. The power of the fossil fuel lobby and downstream industries that benefit from cheap fuels plays an important role. But part of the way in which lobbying affects subsidies policies is through the kinds of trade cases governments bring. And selective enforcement does demonstrably reduce the availability of government support for renewable energy. For example, in Canada,<sup>20</sup> China,<sup>21</sup> and Argentina,<sup>22</sup> governments and industry groups have incurred litigation costs defending themselves against trade claims. They have also incurred significant liability. The governments of Ontario and China have been forced to withdraw green subsidies, a significant loss for the renewable sector.

Ultimately, renewable subsidies have been reduced, and their effectiveness undercut, by trade enforcement actions pursued under the current international trade regime. Fossil fuel companies benefit from substantial government support without suffering any consequences, and their fos-

15. Gregory J. Werden, *The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 131 (1992).

16. Indeed, many argue that a tax further raising the cost of fossil fuels is necessary to align the price of fossil fuels with their total social good. See, e.g., Dennis W. Carlton & Alan S. Frankel, *Transaction Costs, Externalities, and "Two-Sided" Payment Markets*, COLUM. BUS. L. REV. 617, 622 (2005).

17. See *Empty Promises*, *supra* note 6, at 11. World Energy Outlook 2015, *supra* note 6, at 27.

18. World Energy Outlook 2015, *supra* note 6, at 343.

19. LEADERS' STATEMENT, THE PITTSBURGH SUMMIT ¶ 24 (Sept. 24-25, 2009), <https://perma.cc/V8ZZ-6M8F>.

20. See, e.g., Appellate Body Report, Canada—Certain Measures Affecting the Renewable Energy Generation Sector, ¶ 6, WTO Doc. WT/DS412/AB/R (adopted May 6, 2013) [hereinafter Canada—Renewables Appellate Body Report].

21. See, e.g., Doug Palmer & Leonora Walet, *China Agrees to Halt Subsidies to Wind Power Firms*, REUTERS (June 7, 2011), <https://perma.cc/Q9MX-N4XR>.

22. See, e.g., PANEL REPORT, EUROPEAN UNION—ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA, ¶ 7.179, WTO Doc. WT/DS473/R (adopted Oct. 26, 2016) [hereinafter EU—Biodiesel].



sil fuel prices can be lower and profits higher because of these subsidies. Renewable subsidies, on the other hand, continue to lag behind fossil fuel subsidies, despite the beneficial environmental impacts of such subsidies. While this type of enforcement might well improve competitiveness among renewable energy sources, it severely disadvantages renewable energy against its primary competition, fossil fuels.

### B. *The Effects of Selective Enforcement in Fisheries*

In 1992, the Food and Agriculture Organization of the United Nations (FAO) sounded the alarm: fisheries subsidies were leading to dangerous levels of overfishing, putting the world's fish stocks at risk of extinction.<sup>23</sup> The FAO initially estimated global fisheries subsidies at approximately \$54 billion per year.<sup>24</sup>

Because the environmental benefits of contemporary aquaculture are mixed in practice,<sup>25</sup> and in light of 31.4% of the world's fisheries being overfished,<sup>26</sup> the long-term viability of fish as a source of human food depends on investment and innovation. Governments and international organizations have recognized this need,<sup>27</sup> but despite these ambitions, current selective enforcement practices allow government support for aquaculture to be dwarfed by government support for wild fisheries. And just as with fossil fuels, trade cases—in particular trade remedies that target government support without the need to bring a WTO case first—have resulted in withdrawn support for aquaculture. For example, most recently, Turkey agreed to withdraw subsidies for farmed sea bass and sea bream.<sup>28</sup>

## VI. Reforming Trade Law Enforcement

Fixing selective enforcement is imperative if we are to have a fair trade policy, one that does not undermine core non-commercial values. Thus, this Article makes two proposals. For both, the goal of reform is to address selective enforcement of trade obligations by increasing enforcement, asking member states to look for ways to ratchet enforcement up, rather than down.

23. See UN FOOD & AGRIC. ORG., *MARINE FISHERIES AND THE LAW OF THE SEA: A DECADE OF CHANGE 1*, 6-7 (1992), <http://perma.cc/UM32-CF38>.

24. *Id.* U. RASHID SUMAILA ET AL., *DIRECTORATE-GEN. FOR INTERNAL POLICIES*, EUR. PARLIAMENT, *GLOBAL FISHERIES SUBSIDIES 11* (2013), <http://perma.cc/VW35-QD7C>.

25. For example, natural habitats are often destroyed to make way for fish farms. See J.H. Primavera, *Overcoming the Impacts of Aquaculture on the Coastal Zone*, 49 OCEAN & COASTAL MGMT. 531, 533 (2006).

26. UN FOOD & AGRIC. ORG., *THE STATE OF WORLD FISHERIES AND AQUACULTURE 38* (2016), <http://perma.cc/LGC5-8TNP> [hereinafter *State of World Fisheries 2016*].

27. See, e.g., *About the Platform*, FISHERIES AND AQUACULTURE INNOVATION PLATFORM (Oct. 17, 2017), <http://perma.cc/AN36-EMK9>.

28. See, e.g., Commission Implementing Decision 2016/1360 of Aug. 8, 2016, *Terminating the Anti-Subsidy Proceeding Concerning Imports of European Sea Bass and Gilthead Sea Bream Originating in Turkey*, 2016 O.J. (L 215) 31, 32 (EU) [hereinafter *Turkey Bass and Bream Decision*].

### A. *Reforming the WTO Enforcement Process*

The WTO should consider the creation of a centralized enforcement process. The cornerstone of this process would involve the WTO Secretariat identifying products that are similarly situated to products targeted by WTO dispute settlement or trade remedies. In a weak version, the list of similarly situated products would be circulated to WTO members. In a stronger version, a WTO prosecutor could be empowered to bring cases to remove the pernicious effects of selective enforcement.

The development of this list of similarly-situated products would follow a two-step process. First, when a WTO member prevails in a dispute or notifies the WTO that it has levied antidumping or countervailing duties, the WTO Secretariat would identify products that compete with the product at issue in the dispute.<sup>29</sup> Officials should not apply the ordinary WTO “like products” test because it unduly privileges a variety of extraneous factors, such as the physical composition of two products or their tariff classifications.<sup>30</sup> Instead, officials should focus on whether two products are substitutes within the marketplace. In conducting this analysis, officials should employ a test like the “relevant market” analysis used in antitrust law.<sup>31</sup> The relevant market includes all products that are “reasonably interchangeable by consumers for the same purposes.”<sup>32</sup> Cross-elasticities of demand are used to mark out the boundaries of relevant markets. Competition agencies throughout the world—such as the Federal Trade Commission in the United States and the European Commission in the EU—are familiar with this basic inquiry, suggesting that the WTO Secretariat could credibly perform this task without significant difficulty.

Second, after defining the universe of relevant products, the Secretariat would identify which products in the relevant market benefit from the same conduct that either the WTO found unlawful, or a trade remedy investigation targeted. The result would be a list of identified measures that the Secretariat has preliminarily determined both violate WTO rules and affect the competitive conditions for the product subject to the original dispute.

To illustrate this two-step process, in the energy context, imagine a WTO finding that local content requirements discriminate against foreign producers. The Secretariat would then look to see whether fossil fuels or other forms of renewable energy in the relevant jurisdiction also benefit from local content requirements. In each example it identified, the Secretariat would make a preliminary determination as to whether the allegedly unlawful measure is sufficiently similar to the measure found illegal by the

29. Antidumping and countervailing-duty investigations are already subject to WTO oversight, so including them within the scope of the centralized enforcement process does not expand the WTO's reach.

30. See, e.g., Appellate Body Report, Japan—Taxes on Alcoholic Beverages, 18-19, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS411/AB/R (adopted Oct. 4, 1996) (discussing the factors used in a like-products analysis).

31. See, e.g., *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956).

32. *Id.*

WTO, and hence illegal itself. This determination would be based upon an unbiased analysis of both the similarities and the differences between the two measures.

Having compiled the list, what should the Secretariat do with it? In the weak version of the enforcement process, the Secretariat would circulate the list of identified measures to all WTO members.<sup>33</sup> At that point, its involvement would end. Individual member states could then consider whether to initiate further proceedings challenging any of the identified measures.<sup>34</sup> These proceedings could take an adversarial form, such as a formal complaint, or a less adversarial form—member states could act through various WTO committees, which serve as party-led forums for, among other things, informally resolving disputes. This weak version of the enforcement process preserves the fundamentally party-driven nature of WTO dispute settlement. The Secretariat would provide a public good to members in the form of information, which is especially valuable to the majority of smaller members that lack the resources to conduct this kind of inquiry themselves but might nevertheless be interested in the result. Additionally, members themselves would still have to choose to act on this information, allowing dispute settlement to retain a more diplomatic character. This feature makes the weak form of centralization more politically feasible. It is also more consistent with a view of the WTO in which the agreements are contracts among parties. Whether the parties to a contract enforce their rights is, at the end of the day, up to them.

The stronger version of this enforcement process would call for a prosecutor's office within the Secretariat with the authority to initiate WTO disputes challenging identified measures.<sup>35</sup> This mechanism would remove the political filter that prevents some meritorious cases from being brought. The prosecutor's mandate, then, would be limited to addressing identified similarly situated measures. Hence, the prosecutor would not have the authority to investigate just any potential violation of WTO law. The office's focus would be on ensuring that the normal operation of the rules governing dispute settlement do not distort the development of socially beneficial products. In this sense, the prosecutor would supplement the state-driven dispute settlement system, rather than replace it.

Recent criticism of the WTO's Dispute Settlement Body (DSB) has focused on claims that it has overstepped

its mandate.<sup>36</sup> This criticism likely means that the creation of a prosecutor's office within the WTO is not politically viable. However, the existence of prosecutors in international law in general suggests that even if the creation of one is ill-advised or unlikely now, members might come to view it more favorably in the future. Several additional safeguards could also limit the possibility of overreach by the prosecutor.

First, as part of bringing a case the prosecutor could be required to demonstrate harm to the development of socially-beneficial products in the absence of the case. For instance, using the energy example from above, before bringing a case against a local content requirement for fossil fuels, the prosecutor would have to show that failing to do so would harm renewable energy products benefitting from local content requirements. This requirement is a departure from the norm in most WTO cases, in which "nullification and impairment" (trade speak for injury) is presumed.<sup>37</sup>

Second, a pretrial chamber could be created to evaluate the merits of disputes that the prosecutor wishes to initiate. The pretrial chamber would authorize the prosecutor to initiate a dispute upon a preliminary showing that the identified measure is both WTO-inconsistent and affects the competitive conditions for similarly situated products involved in other disputes. Absent such authorization, the prosecutor could not initiate a dispute. The initiation of a dispute would also be subject to the DSU's ordinary reverse consensus rule—the prosecutor would notify member states of her intention to initiate a dispute. Member states could then block the prosecutor from proceeding by consensus.<sup>38</sup>

Finally, the WTO's system of retaliation would also operate as a check on the prosecutor. Under ordinary WTO rules, sanctions for violations are imposed by individual member states after receiving WTO authorization.<sup>39</sup> The creation of a prosecutor would not change that. The prosecutor would have no independent ability to seek or impose sanctions against a respondent state that refused to comply with an adverse decision of the DSB. If the respondent did not remove the unlawful measure, a member state would have to come forward and seek authorization to retaliate on the basis of the decision. The state seeking authorization to retaliate would not have to relitigate the legality of the measure, though. In this way, the prosecutor provides a public good to members by establishing that a nation's measures violate a WTO obligation. That finding alone would subject the member state to reputational sanctions.<sup>40</sup> But the reciprocal suspension of trade concessions—the

33. Others have called for similar kinds of transparency-based measures to compensate for underenforcement at the WTO. See Chad P. Bown & Bernard M. Hoekman, *Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement Is Not Enough* (World Bank Dev. Research Gp., Policy Research Working Paper No. 4450, 2007), <https://perma.cc/ZGK4-HA2T>.

34. This process is "weak" precisely because it leaves open the possibility that states would do nothing at this stage. States may be captured by, for instance, their fossil fuel industries in a way that drives them to use enforcement as an implicit subsidy for fossil fuels (and a weapon against renewable energy). The weak enforcement does not prevent this outcome. It merely creates public information that can encourage nations to take action.

35. Cf. Claus D. Zimmermann, *Rethinking the Right to Initiate WTO Dispute Settlement Proceedings*, 45 J. WORLD TRADE 1057, 1068-69 (2011) (arguing for centralized enforcement of WTO rules).

36. Statement by the United States at the WTO Dispute Settlement Body's First "Dedicated Session" on the Issue of Reappointments of Appellate Body Members (Sept. 26, 2016), <http://perma.cc/V68J-PMHX>.

37. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.8, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

38. See, e.g., *id.*, art. 17.14.

39. See *id.*, art. 22.2.

40. See generally ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008).

backbone of the WTO's relatively effective enforcement procedures—would remain subject to states' political and diplomatic calculations.

### B. Reforming Trade Remedy Investigations

Reforming antidumping and countervailing-duties law would also reduce the pernicious effects of selective enforcement. Selective enforcement against environmentally beneficial products relies primarily on trade remedy investigations. Consequently, limiting the role of trade remedies would curtail the most prevalent tool of selective enforcement.<sup>41</sup>

Given their role as a safety valve, however, doing away with antidumping and countervailing-duty investigations is neither possible nor, indeed, necessarily advisable.<sup>42</sup> Instead, proposals should focus on reforming the requirements for the findings governments must make before imposing trade remedies. For example, trade remedy investigations might be required to focus on the collateral consequences of imposing trade remedies, rather than only on whether the “unfair” trade practice injures a domestic entity. Consumers benefit, after all, from dumped or subsidized goods. The only time they do not benefit is if the dumped or subsidized goods force competitors out of business and lead to monopoly prices.<sup>43</sup> This, in turn, can only happen when barriers to entry prevent competition from re-emerging. A focus on competition, rather than discriminatory pricing or subsidies, would thus allow the continuation of antidumping and countervailing-duty investigations, but would target them at behavior that

actually reduces the welfare from liberalized trade.<sup>44</sup> Transparency measures, such as the weak version of centralized enforcement proposed above, would also deter some of the most egregious uses of trade remedies.

## VII. Conclusion

The question of what a fair-trade policy should look like—what noncommercial values trade law should protect and how it should do so—is currently on the table, and addressing the market distortions that selective enforcement creates must be part of the answer. Free trade agreements are supposed to open markets to competition. The great irony is that the process through which these rules are enforced can have the opposite effect. While substantive trade rules promote competition, government enforcement policies curtail it. Worse, they do so precisely for those products that have the largest social benefits—environmentally sustainable products that could reduce the burden imposed by natural resource-intensive industries. Governments should ultimately look at ways to make enforcement more even-handed across products that compete with each other—like fossil fuels and renewable energy, or wild caught fish and farmed fish. A global trade prosecutor may not be in governments' interests today, but a multilateral process to coordinate enforcement actions would go a long way towards rebuilding the trade regime's legitimacy. As Hunter S. Thompson once said, “We cannot expect people to have respect for law and order until we teach respect to those we have entrusted to enforce those laws.”<sup>45</sup>

41. See MARK WU, E15 INITIATIVE, RE-EXAMINING “GREEN LIGHT” SUBSIDIES IN THE WAKE OF NEW GREEN INDUSTRIAL POLICIES 10 (2015), <http://perma.cc/M9HU-FUGN>.

42. For an in-depth description of the arguments for and against antidumping and countervailing-duty investigations, and their reform, see Timothy Meyer, *Free Trade, Fair Trade, and Selective Enforcement*, 118 COLUM. L. REV. 491, 562-64 (2018).

43. ANDRÉ SAPIR, SOME IDEAS FOR REFORMING THE COMMUNITY ANTI-DUMPING INSTRUMENT 2 (2006).

44. See Bernard M. Hoekman & Petros C. Mavroidis, *Dumping, Anti-Dumping, and Antitrust*, 30 J. WORLD TRADE 27, 27-29 (1996).

45. Hunter S. Thompson: *In His Own Words*, GUARDIAN (Feb. 21, 2005), <http://perma.cc/558Q-MMCK>.