

C O M M E N T

Selective Enforcement of Trade Laws: A Problem in Need of Fixing to Advance Environmental Goals?

by Jay C. Campbell

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I. Introduction

Prof. Timothy Meyer has written a thought-provoking article about how governments selectively enforce trade laws in ways that undermine environmental interests.¹ He argues trade enforcement against products with social benefits (i.e., renewable energy and farmed fish) slows their development and results in an implicit subsidy for products with social costs (i.e., fossil fuels and wild-caught fish)—at the expense of products with social benefits. Professor Meyer’s argument is convincing, and I agree that selective enforcement of trade laws results in an implicit subsidy for fossil fuels and wild-caught fish and is therefore problematic. To address the problem, Professor Meyer proposes ways to increase enforcement of trade laws against imports of fossil fuels and wild-caught fish. In other words, the author’s prescription “is to address selective enforcement of trade obligations by increasing enforcement.”² Here, my personal views diverge with Professor Meyer’s in two key respects. I question whether evenhanded enforcement (1) can be achieved, and (2) even if achievable, would help address the underlying problem: governments need to increase investments in renewable energy and aquaculture, and phase out investments in fossil fuels and fisheries.

II. Can Evenhanded Enforcement Be Achieved?

After establishing that trade laws are selectively enforced against imports of renewable energy products and farmed fish, Professor Meyer proposes two ways to encourage enforcement of trade rules against imports of fossil fuels and wild-caught fish: (1) the establishment of a centralized enforcement process at the World Trade Organization

(WTO), and (2) reforming trade remedy investigations.³ I question whether either proposal would lead to evenhanded enforcement.

A. Reforming the WTO Enforcement Process

Professor Meyer proposes a centralized enforcement process at the WTO, which would begin with “the WTO Secretariat identifying products that are *similarly situated* to products targeted by WTO dispute settlement or trade remedies.”⁴ In a strong version of centralized enforcement, a prosecutor’s office would be established within the WTO Secretariat authorized to investigate the similarly situated products. In a weak version, the WTO Secretariat would circulate the list of similarly situated products to WTO members, which, individually, could consider whether to initiate trade enforcement proceedings against imports of fossil fuels and wild-caught fish. I doubt, however, that the proposed WTO enforcement process would increase trade actions against imports of fossil fuels and wild-caught fish.

Start with the proposal that the WTO Secretariat be empowered to identify “similarly situated” products. Professor Meyer defines “similarly situated” products as those that (1) compete with the renewable energy or farmed fish products found to be subsidized or dumped, *and* (2) benefit from the same form of subsidization or are also dumped.⁵ With respect to identifying competitive substitute products, Professor Meyer suggests the WTO Secretariat employ a test similar to the “relevant market” analysis used in antitrust law.⁶ In the United States, for example, the Federal Trade Commission (FTC) and Department of Justice (DOJ) typically determine the relevant market by interviewing purchasers of the product at issue, and inquiring whether certain increases in price would lead them to shift to substitute products. Purchasers generally have an incentive to cooperate with FTC and DOJ investigations,

Author’s Note: The views expressed in this Comment should be attributed to the author alone.

1. Timothy Meyer, *Free Trade, Fair Trade, and Selective Enforcement*, 118 COLUM. L. REV. 491, 506 (2018).
2. *Id.* at 555.

3. *Id.* at Section V.A.
4. *Id.* at 556 (emphasis added).
5. *Id.* at 556.
6. *Id.*

because they understand that antitrust enforcement promotes competition, resulting in lower prices for purchasers. In contrast, trade enforcement *discourages* competition by raising import prices, resulting in *higher* prices for purchasers. Moreover, the FTC and DOJ have subpoena power to compel private companies to cooperate with their investigations. How would the WTO Secretariat, if faced with uncooperative private actors, be equipped to define the relevant market?

After identifying competitive products, assuming it could do so, the WTO Secretariat would next need to examine whether the competitive products benefit from or engage in the same unlawful trade practice found for the renewable energy or farmed fish products. In theory, the WTO Secretariat would have some basis to determine whether the competitive products also benefit from similar subsidies, as WTO members are required to notify the WTO of subsidies that they give. WTO members, however, decide what government programs constitute subsidies and are reportable in the first instance. Some subsidies, such as discriminatory grants and tax credits, are readily identified as potentially prohibited or actionable subsidies that must be reported under the WTO Subsidies and Countervailing Measures Agreement. Other forms of financial assistance, such as when the government “entrusts or directs” a private party to provide funding, are obscure, and may go unreported unless successfully challenged by another WTO member. In cases where the unlawful subsidization found for the renewable energy or farmed fish product is not of the type that WTO members would normally report as a subsidy in the first place, how would the WTO Secretariat determine whether WTO members potentially provide the same subsidies to the fossil fuel and wild-caught fish industries?

Dumping presents a bigger problem. Dumping is investigated on a company-specific basis, and requires a detailed examination of the company’s corporate structure, sales accounting data, and cost accounting data. How would the WTO Secretariat make findings of dumping—even on a preliminary or *prima facie* basis? It is hard to imagine WTO members agreeing to give the WTO Secretariat the authority to examine private companies within their jurisdictions, and equally hard to imagine private companies voluntarily granting the WTO Secretariat access to proprietary business information. How would the WTO Secretariat have the authority to compel private companies to cooperate? Yet another problem is one of scope. How would the WTO Secretariat identify potential dumping by companies in all the WTO member countries that export fossil fuels or wild-caught fish?

Assuming the obstacles to identifying the list of similarly situated products could be overcome, Professor Meyer offers two versions of the next stage of centralized WTO enforcement: a strong version and a weak version. Under the strong version, a prosecutor’s office would be established within the WTO Secretariat, charged with conducting investigations of the similarly situated products to determine whether the merchandise is unlawfully sub-

sidized or dumped. Given the Donald Trump Administration’s hostility toward the WTO (including its refusal to reappoint WTO Appellate Body members, which are needed for the WTO dispute settlement system to function), the creation of a WTO prosecutor is highly unlikely for at least the near-term, as Professor Meyer also acknowledges. Moreover, even setting the Trump Administration’s criticisms aside, it is questionable whether other WTO members would embrace the concept of a WTO prosecutor, which would empower the WTO to act as both prosecutor and adjudicator with respect to subsidization and dumping issues.

In response to possible concerns of WTO overreach, Professor Meyer notes that the WTO’s system of retaliation would “operate as a check on the prosecutor.”⁷ In other words, it would remain up to individual WTO members to decide whether to enforce WTO rulings against the offending member through the suspension of trade concessions to that member. This strikes me as a significant problem. If WTO members are already reluctant to enforce trade rules against imports of fossil fuels and wild-caught fish, why would they be willing to enforce adverse WTO rulings against imports of such products? WTO members would remain subject to the same political and diplomatic pressures that prevent them from enforcing trade rules against imports of fossil fuels and wild-caught fish in the first place.⁸

Under the weak version of Professor Meyer’s proposal, the WTO Secretariat would circulate the list of similarly-situated products to WTO members, which, individually, would decide whether to initiate proceedings (either direct challenges to subsidization at the WTO or their own countervailing duty or antidumping investigation). Although the list of similarly-situated products would provide WTO members (including smaller members) with initial information concerning fossil fuels or wild-caught fish products that are potentially subsidized or dumped, the WTO member would still need to engage in the fact-finding and legal analysis necessary to present a direct case to the WTO (in the case of a subsidy) or undertake its own countervailing duty or antidumping investigation. Consequently, the weak version suffers from the same concern mentioned above. That is, WTO members would remain subject to the same

7. *Id.* at 560.

8. *Save Domestic Oil* provides an example of the political pressures that can prevent an authority from investigating oil imports. In June 1999, a group of independent oil producers in the United States, dubbing themselves Save Domestic Oil, Inc., filed petitions requesting that the U.S. Department of Commerce conduct antidumping and countervailing duty investigations of imports of crude petroleum oil products from Iraq, Mexico, Saudi Arabia, and Venezuela. *Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1280 (Fed. Cir. 2004). Because major U.S. oil producers—with foreign oil field operations—opposed, however, the U.S. Department of Commerce dismissed the independent oil producers’ petitions for lack of domestic industry support. *Dismissal of Antidumping and Countervailing Duty Petitions: Certain Crude Petroleum Oil Products From Iraq, Mexico, Saudi Arabia, and Venezuela*, 64 Fed. Reg. 44480 (Dep’t Commerce Aug. 16, 1999). The perceived importance of cheap petroleum to industrialized nations’ economies is another factor discouraging trade enforcement against imports of fossil fuels. See William C. Smith, *Save Domestic Oil, Inc.’s Crude Oil Market Dumping Petition: Domestic and International Political Considerations*, 8 TULSA J. COMP. & INT’L L. 147, 149 (2000).

political and diplomatic pressures that prevent them from investigating and enforcing trade rules against imports of fossil fuels and wild-caught fish in the first place.

B. Reforming Trade Remedy Investigations

Professor Meyer also argues “any trade remedy reforms aimed at reducing selective enforcement should focus on ensuring evenhanded enforcement.”⁹ The question is how to achieve this. As an example, the author proposes that trade remedy investigations not only consider whether the unfairly traded imports injure the domestic industry, but also the collateral consequences of imposing a trade remedy, such as the impact on consumers of the imports. Although I, personally, would welcome this change to trade remedy laws, I fail to see how it would ensure evenhanded enforcement. That is to say, the proposed change to trade remedy investigations might reduce the imposition of countervailing and antidumping duties on imports of renewable energy and farmed fish products, but seemingly would do nothing to encourage trade remedy investigations of fossil fuels and wild-caught fish.

III. Even if Achievable, Would Evenhanded Enforcement Solve the Problem?

Setting aside the obstacles to achieving evenhanded enforcement, I question whether eliminating selective enforcement would solve the problem, which is this: Despite the crises we face from climate change and depleting fisheries, governments are *underinvesting* in renewable energy and aquaculture (industries with social benefits) and *overinvesting* in fossil fuels and wild-caught fish (industries with social costs). Although evenhanded enforcement, in theory, would mitigate the implicit subsidy problem identified by Professor Meyer, it would likely fall short of addressing the underlying problem defined above. Even with evenhanded enforcement, trade actions against renewable energy and farmed fish would continue to discourage government investments in these socially beneficial goods, while trade enforcement actions against fossil fuels and fisheries would likely fail to significantly reduce or eliminate government subsidization of these socially costly goods.¹⁰ Dumping is practiced by private companies, and therefore raises a separate issue.

So, as long as we are dealing in the realm of theory, what *would* work? Regarding ways to encourage governments to increase investments in renewable energy and aquaculture, there is no one-size-fits-all answer because each industry faces different circumstances. In the case of renewables, Professor Meyer recognizes government support is needed to make renewable energy products more competitive with fossil fuels.¹¹ Consequently, WTO members should agree

to permit government subsidies that help renewable energy producers reduce their production costs or otherwise charge lower prices. To be sure, despite calls for the “green lighting” of such subsidies, no action has been taken. But, as an initial matter, we are looking for solutions that would work in theory. Prohibiting trade enforcement actions against certain renewable energy subsidies would encourage—or at least not discourage—needed government investment. In contrast, with evenhanded enforcement, trade enforcement actions against renewable energy subsidies could continue.

Dumping raises a different problem. If, for example, an exporter of solar products is dumping (*i.e.*, unfairly pricing) shipments of the merchandise in another country, should not the importing country have the right to impose antidumping duties? Here, I would favor a reform to WTO members’ antidumping investigations. In cases where an investigating authority finds foreign exporters of renewable energy products are dumping, the authority may impose antidumping duties only if it makes an additional finding: that imposition of the duties would be unlikely to curtail supply or demand for the renewable energy product in the importing country’s market.

With respect to farmed fish, price competitiveness with wild-caught fish is not an issue. This is because harvesting fish through aquaculture tends to be more efficient and productive than catching fish in the wild.¹² Although government support is thus unnecessary to enhance the price competitiveness of farmed fish, government investment *is* needed to make aquaculture a more environmentally sound practice.¹³ Consequently, WTO members should agree to “green light” government subsidization of the research and development needed to promote environmentally friendly innovation in aquaculture. Regarding dumping of farmed fish products, I would propose that the investigating authority be permitted to impose antidumping duties only if it makes an additional finding: to the extent the imported farmed fish products are priced lower than the domestic product, a significant portion of the price differential does not arise solely because the foreign industry has lower production costs.

Regarding how to discourage or eliminate government subsidization of fossil fuels and wild fisheries, the theoretical answer is simple: Governments must pledge to phase out subsidies to fossil fuels and wild fisheries and hold violators to account. To be sure, such a coordinated international response would be bold and politically difficult due to the power of the fossil fuel and wild fishery lobbies.¹⁴ Considering the climate and fishery crises we face,

9. See Meyer, *supra* note 2, at 562.

10. The problem is largely one of scope. As Professor Meyer points out, governments gave over \$900 billion in subsidies to fossil fuels in 2014, compared to only \$135 billion for renewables. *Id.* at 506.

11. *Id.* at 541.

12. Gunnar Knapp, *Implications of Aquaculture for Wild Fisheries: The Case of Alaska Wild Salmon* at 242-43 (comparing the economics of salmon farming to salmon fishing) (published by Food and Agriculture Organization of the United Nations, Global Trade Conference on Aquaculture, May 2007).

13. See Meyer, *supra* note 2, at Section IV.B.

14. As Professor Meyer notes, certain governments already have pledged to reduce subsidies to the fossil fuel and fishery industries, but progress has been slow. With respect to fisheries, WTO members have been negotiating an agreement to prohibit certain forms of fisheries subsidies that contribute to overfishing, overcapacity, and illegal fishing, with a goal to adopt the agreement by the Ministerial Conference in 2019.

however, bold action is exactly what the moment demands. Moreover, governments might fare better against political pressure by acting in unison to confront these issues. In contrast, individual trade enforcement actions against imports of fossil fuels or wild-caught fish might leave the acting governments more exposed and susceptible to lobbying pressure.

IV. Conclusion

Professor Meyer has made an important contribution to the field by calling attention to selective enforcement of

trade laws, and the advantage it creates for fossil fuels and wild-caught fish at the expense of renewable energy and aquaculture. I worry, however, that complications would prevent evenhanded enforcement—even as a theoretical matter—from addressing the underlying problem. Sometimes the simple and obvious solution remains the best solution. Unless WTO members agree to permit government investment in renewable energy and aquaculture, and phase out subsidization of fossil fuels and wild fisheries, we will likely fail to prevent climate change and depletion of wild fishery stocks from reaching catastrophic levels.