COMPETITION LAW AND TRADE IN ENERGY VS. SUSTAINABLE DEVELOPMENT: A Clash of Individualism and Cooperative Partnerships?†

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ABSTRACT

At first sight the potential discrepancy between competitive behavior of market participants, trade rules and the basic notion of sustainable development may seem to be of a negligible importance. However, during the

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interactions of market processes with sustainability goals through various levels of support, provided by public or private entities problems arise, even more so in the light of the commitments of the Paris Agreement, the United Nations Sustainable Development Goals (SDGs) and corporate social responsibility principles. This Article aims to address the most obvious overlappings between these areas under the coverage of legal provisions regulating the grant of state aid, subsidies and policies related to mutual cooperation of private subjects towards achieving sustainability. The purpose is to draw conclusions regarding the criteria taken into consideration during the evaluation of competition distorting behaviors in case of environmental and sustainable energy state aid, subsidy- and contract-based cooperation and coalitions among private entities.

I. INTRODUCTION

The concept of sustainable development became a central issue of global political, legal and social debates immediately after the increase of environmental threats stemming from rapid industrial development beginning in the early twentieth century.[1] The protection of the environment, the fight against climate change, the United National Framework Convention on Climate Change (UNFCCC) negotiations, the successful achievement of the Paris Agreement and the United Nations Sustainable Development Goals (SDGs)[2] are multilevel and multiscalar[3] factors to be taken into account to have a full perception of the complexity of the issues at stake to balance sustainable development and competition law in energy. This is even truer when we take in consideration the likewise composite relation of energy and its trade dimension,[4] that it is complementary to the competition law side, and

1. *See generally* World Comm'n on Env't & Dev., Our Common Future, U.N. Doc. A/42/427 (1987).

2. DANIEL BODANSKY, JUTTA BRUNNEE & LAVANYA RAJAMANI, INTERNATIONAL CLIMATE CHANGE LAW 212 (2017).

3. *See* Paolo Davide Farah & Piercarlo Rossi, *National Energy Policies and Energy Security in the Context of Climate Change and Global Environmental Risks: A Theoretical Framework for Reconciling Domestic and International Law Through a Multiscalar and Multilevel Approach*, 20 EUR. ENERGY & ENVTL. L. REV. 232, 233–34 (2011); Paolo Davide Farah, *Global Energy Governance, International Environmental Law and the Regional Dimension*, *in* ENERGY: POLICY, LEGAL AND SOCIAL-ECONOMIC ISSUES UNDER THE DIMENSIONS OF SUSTAINABILITY AND SECURITY, 143, 143 (Paolo Davide Farah & Piercarlo Rossi, eds., 2015).

4. Paolo Davide Farah, *Trade and Progress: The Case of China*, 30 COLUM. J. ASIAN L. 51, 65 (2016); Paolo Davide Farah & Elena Cima, *Energy Trade and the WTO: Implications for Renewable Energy and the OPEC Cartel*, 16 J. INT'L ECON. L. 707, 708–09 (2013); Paolo Davide Farah & Elena Cima, *L'Energia nel Contesto degli Accordi dell'OMC: Sovvenzioni per le Energie*

we put it into context along with the effects of the recent decisions of the Trump Administration about the Paris Agreement and the application of trade barriers.

The contrast of sustainable development with the "classical" views of economic growth, free market and consumer-oriented policies is more than evident.

This Article will focus mainly on assessing how to configure various competition law-related issues with a careful consideration of the sustainable development principles, in the light of the broader discourses on Non-Trade Concerns (NTCs).[5] In other words, analyzing the dilemma: can trading of services and goods on a national and international level be carried out in a free and liberalized market providing equal opportunities for each participant, while supporting and promoting methods in compliance with sustainable development at the same time?

Under the coverage of this introductory baseline and keeping in mind the anti-globalization political discourses and the anti-liberal movements, we would like to focus on two main areas: subsidies supporting sustainable technologies and their capability to distort competition, providing advantages to a limited scope of market participants, and partnership agreements between private companies helping to carry out common goals set by sustainability principles, creating room for antitrust practices that do not violate competition law principles. Clear criteria should be set both in case of subsidies (national and international) and regarding private company partnerships emphasizing transparency, non-discrimination, equity, and fairness. Particular requirements, the current state of the art, and sphere of potential improvements shall be the main goals of our analysis and perspective in this Article.

Nevertheless, before we proceed to the presentation and analysis of current and new ideas regarding private, multilateral legal acts, it is necessary to gain certain momentum by stating the obvious, while finding the root of the controversy between competition law and sustainable development as a result of the latest tendencies of neoliberalism. This momentum can be partially

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Rinnovabili e Pratiche OPEC di Controllo dei Prezzi [*Energy in the Context of the WTO Agreements: Subsidies for Renewable Energies and OPEC Price Control Practices*], 2 DIRITTO DEL COMMERCIO INTERNAZIONALE 343, 344–45 (2013) (It.).

5. Paolo Davide Farah, *The Development of Global Justice and Sustainable Development Principles in the WTO Multilateral Trading System Through the Lens of Non-Trade Concerns: An Appraisal on China's Progress*, in CHINA'S INFLUENCE ON NON-TRADE CONCERNS IN INTERNATIONAL ECONOMIC LAW 10, 17–18 (Paolo Davide Farah & Elena Cima eds., 2016).

used for the justification and the clearer explanation of the final remarks of this Article, together with creating a background for them as well.

Competition law in general has become an important structural part of the post-modern economical era in the context of globalization.[6] The individualism stated in the title of the Article reflects mainly through the term "compete" where every subject (market participant, private entity, new entrant, etc.) stands completely for itself, trying to follow and prioritize its own interests of profit maximization through the extreme interpretation of free trade, free markets and liberalism principles without the essential components of equity, liberty and equality. In fact, this pattern of behavior was considered natural on a free and open market, being supported through minimal regulations and obstacles ("deregulation") by liberal governments and different political structures opposed to mercantilist rules, barriers to trade and monopolies. However, further developments towards globalization in times of economic crisis and excessive powers attributed to private companies, with the risk of facilitating a world ruled by unelected, authoritarian, and profit-driven (as opposed to human development oriented) organizations such as some (not all) multinationals,[7] have shown the urgent need for a basic frame of equal conditions guaranteed by the monitoring of outside authorities (state, transnational coupling of states, international agreements and international organizations, etc.) in order to prevent antitrust behavior and distortion of fair competition in different market segments.[8]

The other side of the dilemma stated in the title of the Article is the cooperation required to tackle climate change, to address and eventually solve environmental risks towards sustainable development. The framework

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6. *See* Bruno Amable, *The Differentiation of Social Demands in Europe. The Social Basis of the European Models of Capitalism*, 91 SOC. INDICATORS RES. 391, 391–92 (2009) (discussing the importance of social model reform in European policy and arguing that the dominant theory is to alter European capitalism in favor of a less redistributive welfare state).

7. Paolo Davide Farah, *Foreword* to MARGARET STOUT & JEANNINE M. LOVE, INTEGRATIVE GOVERNANCE at xiii, xiv–xv (forthcoming 2018).

8. Antitrust regulation on a general level across different markets is not sufficient for trading processes to function properly. Further sector-specific rules are necessary to react on the special features of some partial markets—energy, goods, services, etc. In relation to this, precise distinction of these segments is of the utmost importance, especially when it comes to energy trading and service providing: "A proper definition of a relevant market is a necessary precondition for any assessment of the effect of a concentration and competition." Joined Cases C-68/94 & C-30/95, France v. Comm'n, 1998 E.C.R. I-1495. Regarding the possible impacts of general and sector-specific regulations on the level of market liberty and antitrust prevention, see Vassiliki Koumpli, *Competition Rules or Sector-Specific Regulation for the Liberalisation of the European Electricity Markets? With Reference to the English, Greek and German Third-Party Access Regimes*, 25 J. ENERGY & NAT. RESOURCES L. 168, 171 (2007).

set by different legal or political documents, at national and international levels, exists in this field as well. To solve the evident contrast between the individualistic behavior of all market participants, which is an ordinary and natural conduct for any profit-oriented organization, and the inevitable necessity of collaboration and partnership when pursuing such important societal values as environmental protection, the implementation of sustainable development principles requires a better balancing between business and human rights.[9] In the following paragraphs, the energy market will be the focus of our analysis.

First of all, it is essential to start this analysis pointing out that if the aim is achieving sustainable development objectives in the energy sector, it is necessary to improve every single phase related to the processing of natural resources and energy generated from other primary sources (such as wind, sun, water head, tidal, biomass, fuel and nuclear energy) in an environmental friendly way. In this perspective, all stages like production, transportation, supply—wholesale or retail—and commercialization of natural resources and energy must be assessed according to the best environmental practices. Improving even one of these stages, for example, with more advanced eco-friendly technologies used for the transportation or the production of energy[10] would have the potential of making energy utilization more and more effective and would positively impact the global ecology. This requires cooperation and prioritization of global public goods, global commons, and fundamental values instead of pure privately oriented general interests, as well as sufficient available funds. Nevertheless, the constant tension between these two sides of the same coin—individualism/common interests—requires specific attention of lawmakers and policymakers to carefully balance between maintaining a wide range of private liberties for market participants and providing adequate incentives to nudge participants to business policies leading to sustainability.[11]

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9. Paolo Davide Farah, *Foreword* to BUSINESS AND HUMAN RIGHTS IN EUROPE (Angelica Bonfanti ed., forthcoming 2019).

10. Elena Cima, *The Role of Domestic Policies in Fostering Technology Transfer: Evidence from China*, *in* CHINA'S INFLUENCE ON NON-TRADE CONCERNS IN INTERNATIONAL ECONOMIC LAW, *supra* note 5, at 170, 173.

11. On the other hand, the defenders of competition law tend to emphasize the key role of a liberalized market in achieving sustainable development goals. MARKUS W. GEHRING, CTR. FOR INT'L SUSTAINABLE DEV. LAW, SUSTAINABLE COMPETITION LAW 1 (2003), http://cisdl.org/public/docs/news/Cancun_WTO_LegalBrief2.pdf ("By stimulating innovation and constant product improvement among companies, competition law and policy helps to achieve sustainable development. . . . More competitive conditions may also lead to companies developing safer, healthier, more environmentally sound or socially just products, should consumers demand such goods."). These statements however, do not oppose the dilemma of this

II. STATE AID—HOW CAN INCENTIVES MAINTAIN COMPETITION ON THE ENERGY MARKET?

In order to support and increase the volume of investments into sustainable technologies, as well as environmentally friendly solutions regarding products and services (not only) on the energy market, incentives, state aid, and other means of financial assistance are of utmost importance.

In general, financial aid provided to private entities by public authorities can be controversial in the light of the wider public/private dichotomy.[12] Prioritizing a particular private entity over the others by a public authority is not in compliance with this separation of collectiveness and individualism; moreover, it goes against fairness and equality.

For all these reasons, the essential criteria of granting compatible state aid are transparency, non-discrimination, and functionality (meaning societal or social scope and objectives). Transparency guarantees information accessibility for all private subjects when applying for and getting public funding.[13] Non-discrimination provides equal conditions and, from a competition law point of view, it eliminates the possibility of one subject becoming dominant on the market over others because of state support.[14] Last but not least, the principle of functionality limits the range of state aid to certain areas in which public intervention into the private sphere is inevitable. These areas are set by legal provisions, together with the process of determining whether a particular request falls within one or not.[15] In case of

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Article. They simply focus on different aspects of the issue: competition being prosperous granting constant innovative motivation, while requiring a certain level of cooperation between competing market participants. This time we are focusing on the latter.

12. This general term refers to the distinction between the private and public spheres in all modern models of society. Public and private matters, although mutually dependent with respect to effective functioning, also need to be independent enough to respect the diversity of individuals. For a more detailed overview of the dichotomy and the transformations of the public spheres, see Habermas's theory of the public sphere. *E.g.*, *Sphere*, *in* HABERMAS AND THE PUBLIC SPHERE 1, 2–9 (Craig Calhoun ed., 1992); JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 1–5 (Thomas Burger trans., 1989); Simon Susen, *Critical Notes on Habermas's Theory of the Public Sphere*, 5 SOC. ANALYSIS 37, 38–42 (2011).

13. *See* Susen, *supra* note 12, at 56–59.

14. *Id.* The non-discrimination requirement is limited by the notion of state aid including selectivity based on either regional or material conditions. Nevertheless, even in case of an aid scheme, the conditions need to be objectively defined. *See* Commission Notice on the Notion of State Aid as Referred to in Article 107(1) of the Treaty on the Functioning of the European Union, 2016 O.J. (C 262) 27.

15. These areas can be determined in general, which usually protects another key field from being influenced by the provided state aid—in our case the free liberalized market and competition. *See, e.g.*, Consolidated Version of the Treaty on the Functioning of the European

energy related aid, functionality involves all the common assessment principles, such as contribution to a well-defined objective of common interest, necessity, appropriateness, incentive effect, proportionality, limitation of negative effects on the internal market.[16] In spite of their detailed description within the Commission's Guidelines, their evaluation can cause difficulties, especially when it comes to aspects of functionality involving subjective behavior of private entities—e.g. in case of the assessment of the aforementioned incentive effect. Motivating a market participant (enterprise) to increase its level of environmental protection has to go hand in hand with the necessity of such incentives based on market analyses and not on an assumption of market failures prima facie.[17]

Perceptions on environmental state aid vary on a global scale. The European Union (EU) generally provides a wide range of financial support for and through Member States according to the Treaty on the Functioning of the European Union (TFEU),[18] while aiming for a highly sophisticated regulatory framework in order to limit market distortions and waste of public resources. In the United States, since the compatibility requirements are slightly more lenient and less organized compared to the EU,[19] voluntary incentives are more common, especially regarding environmental issues (cooperation mechanisms, terms strengthening the capacity of environmental protection of partners within free-trade agreements (FTAs) on a public level influencing companies on the market).[20] Other leading, but still developing, economies with serious environmental shortcomings as a result of rapid industrialization, like China,[21] have their state aid policies set in a

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Union art. 107, Dec. 13, 2007, 2012 O.J. (C 326) 47 [hereinafter TFEU]. Alternatively, the provisions can mark specific fields and regulate them in compliance with the general principles—in our case environmental protection and sustainable development. *See, e.g.*, Communication from the Commission Guidelines on State Aid for Environmental Protection and Energy 2014–2020*,* 2014 O.J. (C 200) 1, 10–11. These guidelines are some of the most detailed regarding environmental state aid on a global scale.

16. *Id.*

17. Erika Szyszczak, *Time for Renewables to Join the Market: The New Guidelines on State Aid for Environmental Protection and Energy*, 5 J. EUR. COMPETITION L. & PRAC. 616, 616 (2014).

18. *See, e.g.*, TFEU arts. 42, 107, 108, 109, *supra* note 115.

19. Diane P. Wood, *State Aid Management in the United States*, 1 EUR. ST. AID L.Q., 40, 40 (2013).

20. *Trade and Environmental Protection*, U.S. DEP'T STATE, http://www.state.gov/e/oes/eqt/trade/ (last visited May 26, 2018).

21. Yixiang Deng et al., *China's Water Environmental Management Towards Institutional Integration. A Review of Current Progress and Constraints vis-a-vis the European Experience*, 113 J. CLEANER PRODUCTION 285, 285–298 (2016); *see* Weidong He, *China's Environmental Legislation and its Trend Towards Scientific Development*, *in* CHINA'S INFLUENCE ON NON-

protectionist way, mainly supporting domestic companies,[22] and often not in full compliance with international standards.[23] Besides the domestic regulations and these transnational methods binding multiple states (such as the EU Member States), there is also an international framework regarding subsidies at the World Trade Organization (WTO).

III. THE WTO AGREEMENTS ON ANTI-DUMPING, SUBSIDIES, COUNTERVAILING MEASURES AND OTHER SAFEGUARDS AGAINST COMPETITION DISTORTING BEHAVIORS

Even though competition law regime in itself is not covered by the WTO law,[24] various WTO Agreements have an important role in maintaining the

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TRADE CONCERNS IN INTERNATIONAL ECONOMIC LAW 184 (Paolo Davide Farah & Elena Cima eds. 2016); Jiang Yue, *Regional Arrangements Tackling Climate Change and Emissions Trading*, *in* ENERGY: POLICY, LEGAL AND SOCIAL-ECONOMIC ISSUES UNDER THE DIMENSIONS OF SUSTAINABILITY AND SECURITY, *supra* note 3, at 161.

22. In one of the largest disputes regarding illegal state aid between the EU and China, the EU accused Chinese companies of importing solar panels harming European solar manufacturers with low prices and distorting competition due to illegal domestic state incentives. Robin Emmott, *EU Says China Guilty of Giving Illegal Aid to Solar Industry*, REUTERS (Aug. 27, 2013), https://uk.reuters.com/article/uk-eu-china-solar/eu-says-china-guilty-of-giving-illegal-aid-to-solar-industry-idUKBRE97Q0PU20130827. The dispute was resolved in 2013 by signing an agreement regulating Chinese solar panel imports and granting them lower import tariffs. Robin Emmott & Ben Blanchard, *EU, China Resolve Solar Dispute—Their Biggest Trade Row by Far*, REUTERS (July 27, 2013), http://www.reuters.com/article/2013/07/27/us-eu-china-solar-idUSBRE96Q03Z20130727. Nevertheless, the issue opened up again because of several violations of the original agreement by Chinese companies. Matthew Dalton, *EU Moves Against Three Chinese Solar Panel Makers*, WALL ST. J. (June 5, 2015), http://www.wsj.com/articles/eu-moves-against-three-chinese-solar-panel-makers-1433497822. *But see* Wai Ting, *China's Strategy Towards the EU: A Strategic Partner of No Strategic Significance?*, *in* ASIAN COUNTRIES' STRATEGIES TOWARDS THE EUROPEAN UNION IN AN INTER-REGIONALIST CONTEXT 3, 14–18 (Hungdah Su ed., 2015).

23. China's most pressing environmental problems (air and water pollution) call for a modern, well-balanced and widely supported incentive policy to promote green technologies and increase the pace of switching to renewables. A large part of the current environmental initiatives remain unenforced, despite the constant pressure of NGOs supported by foreign organizations. Eleanor Albert & Beina Xu, *China's Environmental Crisis*, COUNCIL ON FOREIGN REL. (Jan. 18, 2016), http://www.cfr.org/china/chinas-environmental-crisis/p12608. Nevertheless, China is one of the largest investors in green technologies, having pledged already in 2014 to spend $300 billion over five years to reduce carbon emissions. *Id.*

24. H. C. Claus-Dieter Ehlermann & Lothar Ehring, *WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body's Experience*, 26 FORDHAM INT'L L.J. 1505, 1505–60 (2002); Julian Epstein, *The Other Side of Harmony: Can Trade and Competition Laws Work Together in the International Marketplace?*, 17 AM. U. INT'L L. REV. 343, 343–68 (2002); David J. Gerber, *Competition Law and the WTO: Rethinking the Relationship*, 10 J. INT'L ECON. L. 707, 707–24 (2007); Mitsuo Matsushita, *Basic Principles of*

free market competition when it comes to foreign exports. These agreements include anti-dumping provisions[25] as a part of the General Agreement on Tariffs and Trade (GATT). However, the concept of "dumping" raises some controversies in the light of the unfair competition rules and practices. According to the WTO's anti-dumping regulations, if a company sells a product on a foreign market for a lower price than within its home market,[26] it can be considered predatory pricing if the following general conditions are fulfilled simultaneously:

- Alikeness of the product—the dumped product shall be comparable to other products with same or similar features sold on the same market.[27]
- Determined price—the price needs to reflect the costs of production per unit, plus other administrative, selling and general costs.[28]

The Anti-Dumping Agreement reflects concerns regarding competition distortion through price reductions,[29] and regulates possible reactions and preventive methods to deal with such market behavior protecting domestic competitors.

Additionally, the subsidies regime of the WTO stands on the provisions of the Agreement on Subsidies and Countervailing Measures (ASCM).[30]

The anti-dumping measures can be activated when a foreign manufacturer sells product for less than fair value, so under the production costs, causing injury to the importing country industry. Anti-dumping measures are company and industry specific; the level of the measure is calculated to cover the discrepancy between the real value of the product's production costs and its cost on the market. Countervailing duties (CVDs) or measures are established when a foreign government (an agency or an organization which

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the WTO and the Role of Competition Policy, 3 WASH. U. GLOBAL STUD. L. REV. 363, 363–85 (2004); Brendan Sweeney, *Globalisation of Competition Law and Policy: Some Aspects of the Interface between Trade and Competition*, 5 MELB. J. INT'L L. 375, 375–433 (2004); *Interaction Between Trade and Competition Policy*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/comp_e/comp_e.htm (last visited May 19, 2018).

25. *See* Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 [hereinafter Anti-Dumping Agreement].

26. *Id.* art. 2.1.

27. *Id.* art. 2.2.

28. *Id.* arts. 2.2.1, 2.2.2, 2.3, 2.4.

29. *Id.* arts. 2.1, 2.2, 2.2.1, 2.2.2, 2.3, 2.4; *see* Agreement on Subsidies and Countervailing Measures arts. 5–6, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 18 [hereinafter ASCM].

30. *See* ASCM, *supra* note 29.

is a ramification of a government) provides assistance and subsidies, such as tax breaks in favor of the producers that export goods to an importing country enabling the manufacturers to sell the goods cheaper than domestic producers. CVD cases are country specific, and the duties are calculated according to the value of the subsidy.

A CVD can be adopted when these subsidized imports cause an injury to a domestic industry, and a causal link between the subsidized imports and the injury can be proved.[31]

The combination of these provisions creates the general criteria for state subsidy evaluation in compliance with the principles of transparency, non-discrimination, and functionality. The applicability of Article 8.2(c) of the ASCM, regulating environmental subsidies as non-actionable, expired in 1999 and has not been renewed,[32] and it would be advisable for the WTO Members to negotiate the resumption. Currently, only two types of subsidies remain within the ASCM: prohibited and actionable.[33] Actionable subsidies, which are not prohibited, are enjoyed by an exporting country and eventually assessed through adverse effect to an importing country's interests, which in some cases can mean the so-called serious prejudice.[34] For this reason, the ASCM subsidy regulation is based on a negative effect approach and consequently, in the context of the WTO dispute settlement system, the burden of proof in cases of violations lays on the complainant which intends to challenge the subsidy measure.[35] If the complainant, the importing country, fails to present sufficient evidence of the injuries to its domestic industry or nullification or impairment of a benefit caused by a subsidy, the subsidy is permitted to support a particular product.[36] The eventual involvement of an

31. *See* Chien-Hsun Chen, Chao-Cheng Mai & Hui-Chuan Yu, *The Effect of Export Tax Rebates on Export Performance: Theory and Evidence from China*, 17 CHINA ECON. REV. 226, 235 (2006).

32. ASCM, *supra* note 29, art. 31.

33. *Subsidies and Countervailing Measures: Overview*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/scm_e/subs_e.htm (last visited Feb. 8, 2018); *see also* Paolo Davide Farah & Elena Cima, *World Trade Organization, Renewable Energy Subsidies and the Case of Feed-in Tariffs: Time for Reform Toward Sustainable Development?* 27 GEO. INT'L ENVTL. L. REV. 515, 521–23 (2015); Paolo Davide Farah & Elena Cima, *Il Sistema OMC di Risoluzione delle Controversie, le Sovvenzioni alle Energie Rinnovabili e le Feed-In Tariffs* [*WTO Dispute Settlement System, Renewable Energy Subsidies and the Feed-in Tariffs*], 2 DIRITTO DEL COMMERCIO INTERNAZIONALE 381, 385 (2015) (It.).

34. ASCM, *supra* note 29, art. 5; *see also* Paolo Davide Farah & Elena Cima, *WTO and Renewable Energy: Lessons from the Case Law*, 49 J. WORLD TRADE 1103, 1105–06 (2015).

35. ASCM, *supra* note 29, art. 7.2.

36. ASCM, *supra* note 29; Procedures for Developing Information Concerning Serious Prejudice ¶¶ 2–7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex V, 1869 U.N.T.S. 53.

independent, neutral and specialized team from the WTO into the evidence gathering process may be counterproductive, possibly increasing the complaints filed against subsidized exports due to the lower level of required activity of the involved parties. Still, without the resumption of Article 8.2(c) or a renegotiation of this principle, it can happen that an actionable subsidy with green objectives might be considered in violation of the WTO rules, when evidence of an injury is brought by the complainant importing country.[37]

For the same reasons, since environmental protection and sustainable development are specific areas of public interest, the approach to antitrust issues should also be adequate to these features as to other social objectives and effects.[38] This means that a different balance structure should be applied to assess all the factors in play—including sustainable development, the environmental protection and the fight against climate change—when it comes to determining whether there has been a distortion of competition on a particular product market. This structure should be framed with a higher tolerance for subsidies when their main scope is to effectively support the usage of innovative green technologies during the production and the trading of eco-friendly products. In particular, when it comes to assessing the adverse and damaging effect of environment-focused aid[39] generally granted to private companies based on competition law and free market mechanisms, these requirements should step aside, and endure a higher range of limitation

37. Steve Charnovitz & Carolyn Fischer, *Canada—Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies*, 14 WORLD TRADE REV. 177, 180–81 (2015).

38. *See* U.N. Conference on Trade and Development, *The Role of Competition Policy in Promoting Sustainable and Inclusive Growth*, U.N. Doc TD/RBP/CONF.8/6 (Apr. 27, 2015); Radu Musetescu, *Competition Policy: Between Economic Objectives and Social Redistribution*, 5 ECON. & SOC. 115, 120–22 (2012).

39. This aid is according to EU, WTO or other regulations. *See* ASCM art. 8.2(C), *supra* note 29 (providing that "assistance to promote adaption of existing facilities to new environmental requirements" are non-actionable so long as the assistance: "(i) is a one-time non-recurring measure; and (ii) is limited to 20 per cent of the cost of adaption; and (iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and (iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and (v) is available to all firms which can adopt the new equipment and/or production processes"); *see also Subsidies and Countervailing Measures: Overview*, *supra* note 33.

for sustainability purposes,[40] as for other NTCs.[41] As it has been pointed out before, the main goal of the WTO anti-dumping and countervailing regulations is to protect domestic companies from what we can define in general terms as unfair competition, even though competition law is not part of the WTO Agreements.

In the framework of the WTO dispute settlement understanding, the decision—whether a subsidy, state aid, or other financial support distorts competition, harms domestic producers, or negatively influences the free market in any other way—should be based not merely on the level of such adverse effect. On the contrary, this decision should be based on the benefits—whether the particular subsidized good provides for sustainable development, and should not be considered in conflict with the WTO case law on extraterritorial effect.[42]

In WTO cases like *United States—Tuna and Tuna Products from Canada*,[43] the *Tuna/Dolphin Case I*[44] and the *Tuna/Dolphin Case II* of 2011 ("*Dolphin-Safe*"),[45] the principles of extraterritoriality and the extraterritorial

40. *Subsidies and Countervailing Measures: Overview*, *supra* note 33. Related to balancing between principles and rights when it comes to dispute settlement and decision-making, it is interesting to remark Ronald Dworkin's work. Dworkin was against balancing through limitation of rights, and moreover in his work claimed that it is wrong to use the rights of the majority to justify the overruling of individual rights. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 196, 269 (1977); *see also* JONAS CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS 196 (2009). Despite Dworkin's view advocating individual rights, we also have to take into consideration the duality of the right to live in a clean and healthy environment, sustainably protected for future generations, which besides being a wider public interest (interest of many), is also an individual basic right of each and every one of us. These two aspects are of the same importance. On the side of free competition, with liberal and free trading on different markets, this duality is reduced or completely missing. We can speak only about rights of individual private companies, who under certain conditions can benefit from public finances when contributing to certain areas of public society development. We tend to understand this as a justification of the aforementioned shift of balance towards sustainability. *See supra* text accompanying notes 25–29.

41. *See generally* Farah, *supra* note 4.

42. *Id*. at 94.

43. Report of the Panel, *United States–Prohibition of Imports of Tuna and Tuna Products from Canada*, ¶¶ 4.10–4.12, L/5198 - 29S/91 (Dec. 22, 1981).

44. Report of the Panel, *United States–Restrictions on Imports of Tuna*, ¶ 45, DS21/R - 39S/155 (Sept. 3, 1991).

45. Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by Mexico*, WTO Doc. WT/DS381/RW (adopted Apr. 14, 2015) [hereinafter 2015 Panel Report on Tuna]; Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012); Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/R (adopted Sept. 11, 2011).

effect were examined with a gradual evolution that started in the first two disputes with a very narrow interpretation, stating that a given State's regulations cannot be enforced in another State's jurisdiction on the basis of international trade rules under the general exceptions of Article XX of the GATT.

According to Article XX of the GATT, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: "necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[46] In the last dispute, *Dolphin-Safe*,[47] which was actually adopted after the creation of the WTO and after the inclusion of the WTO Preamble, the interpretation favored measures that have the sole objective of protecting the environment and promoting sustainable development. It remains to be seen whether this last interpretation of the extraterritoriality principle will be consistently applied in the future to trade measures adopted for promoting sustainable development, for the protection of the environment, human rights or other areas of NTCs.

Simply, sustainable development should be constantly maximized, while proportionally maintaining the basic mechanisms of the market without excessive protectionist tendencies.

To sum it up, there needs to be a considerate balance when anti-dumping, subsidy and antitrust cases[48] are assessed to include as an additional and important criterion the positive or negative impact of these practices on sustainable development.[49]

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46. General Agreement on Tariffs and Trade, art. XX, Apr. 15, 1994, 1867 U.N.T.S. 187.

47. 2015 Panel Report on Tuna, *supra* note 45.

48. Harvey M. Applebaum, *The Interface of the Trade Laws and The Antitrust Laws*, 6 GEO. MASON L. REV. 479, 479 (1998).

49. Most of the disputes settled by the WTO Dispute Settlement Body through its panels do not include a direct environmental dimension (the dimension of sustainable development is also more wide and indirect, being present mostly in the background of the cases with the possibility of deduction). *See, e.g.*, Panel Report, *United States—Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WTO Doc. WT/DS383/R (adopted Feb. 18, 2010); Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WTO Doc. WT/DS291/R, WT/DS292/R, WT/DS293/R (adopted Sept. 21, 2006). These cases can influence the course of sustainable development. However, the mentioned anti-dumping dispute regarding imported solar panels between the EU and China has a clearer ecological projection. Especially in such cases should the positive impact of the increased amount of cheap, green products be considered the key factor in assessment process.

IV. COOPERATION AND COALITION AMONG COMPANIES SUPPORTING SUSTAINABLE DEVELOPMENT AND THEIR EFFECT ON MARKET COMPETITION

Cooperation in the field of sustainable development and environmental issues is another key area where private or publicly owned enterprises can contribute through their proactive initiatives to achieve sustainability and positive changes towards environmental protection. This cooperative work nonetheless might exceed the range of private companies and might involve other subjects from NGOs, to governmental institutions to small organizations supported by philanthropists, independent foundations, etc.[50]

Agreements between private companies aiming directly/indirectly towards fulfilling sustainable development goals, either having trans-border features or existing within the same national market and no matter how unusual and scarce, can create an effective network of environmentally aware and responsible entities, according to the best corporate social responsibility and accountability principles.[51] These agreements, having a mutually beneficial contractual basis (bilateral/multilateral) can include, for example, an exchange of technologies[52] supporting environmental protection and

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50. *E.g.*, U.S. AGENCY INT'L DEV., STRATEGIC SUSTAINABILITY PERFORMANCE PLAN SUMMARY 3 (2016) https://www.usaid.gov/sites/default/files/documents/1868/2016StrategicSustainabilityPerformancePlan.pdf; EUR. SUSTAINABLE DEV. NETWORK, www.sd-network.eu (last visited May 27, 2018). For a list of several agencies of the United Nations, see *UN Action on Climate Change*, COOLPLANET 2009, http://www.coolplanet2009.org/un-action-on-climate-change.html (last visited May 27, 2018). The list of NGOs active in the field of sustainability and preventing climate change can be found at *Organisations, Foundations and NGOs Working on Climate Initiatives*, COOLPLANET 2009, http://www.coolplanet2009.org/climate-change-links-and-partners/ngos-for-sustainable-development.html (last visited May 27, 2018).

51. Farah, *supra* note 9.

52. According to EU regulation, technology transfer between companies in general creates an exemption from antitrust provisions if it meets certain requirements. Commission Regulation 316/2014 of Mar. 21, 2014, On the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Technology Transfer Agreements, 2014 O.J. (L 093) 17, 17. These requirements have been newly set in 2014, within the Technology Transfer Block Exemption Regulation (TTBER). *Id.* This new set of rules labels agreements on technology transfer and licensing between private companies as complying with competition law conditions, if the combined market share for the parties, in case they are competitors in the relevant market(s), does not exceed twenty percent, and if they are not competitors, the market share for each of the parties does not exceed thirty percent. *Id.* at 18. Nevertheless, the agreement must be without any of the "hardcore restrictions" for TTBER to apply. *Id.* This exception is justified on the same grounds and is in accordance with the suggestions made regarding environmental state aid assessment previously—the positive effects of such agreements outweigh the negative impacts on competition. *Id.* at 17. For an overview of the main changes in this field, see also Martin Coleman et al., *New EU Competition Rules on Technology Transfer Agreements*, LEXOLOGY

increasing competitiveness of all participating parties. On the other hand, these agreements might have a competition distorting potential because they would prioritize only a narrow amount of companies on the market. The biggest threats for competition are the creation of cartels and concentrations based on these initial contractual relations between companies leading to their ability to control the market through monopolistic positions. The actual effect and impact on the product market have to be assessed to consider the eventual relevance against competition rules.

In order to avoid this kind of negative result for the competition of the market, state authorities should supervise the agreements and the following development of the legal relationship directly or indirectly through international organizations.[53] The agreements should also fulfill certain conditions, which exclude the possibility of unwanted distortive effects influencing competition.

Within the necessity of compliance with antitrust provisions on every regulatory level and to avoid accusations of creation of cartels, these cooperative agreements between private companies should not contain any clauses regarding price setting of the products sold on the market having features of predatory pricing. They should clearly state and number the positive impacts of such agreements on sustainable development on a regional and wider level as well. If such agreements would create a basis for a closer cooperation between the contracting parties potentially leading to a merger or concentration, an analysis of the impact on the market should be included, together with a long-term effect description of market structures and mechanisms and a report of the expected sustainability goals.

Such conditions ensure that even small-scale cooperation between private entities would contribute to the expansion of green technologies in production processes without limiting the liberty of free competition and deforming one of the basics of modern trading.

(Apr. 4, 2014), https://www.lexology.com/library/detail.aspx?g=bddcf893-a11f-495f-bef4-c9e7dcb76081. The conditions set by TTBER don't repeal the principle of free and liberalized market; they only create a more acceptable environment for sustainable technologies to prevail. *See id.*

53. This task belongs to the competence of different government institutions enforcing antitrust regulation (general/sector specific) within state borders, or institutions on a transnational level adopting merger control provisions if a particular state market is a part of a wider coupling of states. For EU merger regulations and remedies, as one of the possible considerations balancing the negative effects of mergers on the market, see Michele Piergiovanni, *EC Merger Control Regulation and the Energy Sector: An Analysis of the European Commission's Decisional Practice on Remedies*, 4 J. NETWORK INDUSTRIES 227, 227–30 (2003).

V. CONCLUDING REMARKS

This analysis has pointed out some possible goals and achievements of sustainable development in the framework of the trade and competition rules. The reasoning on the dilemma between individualistic market behavior and cooperation to protect public goods and to achieve common interests necessary for fulfilling sustainability objectives globally and eventually other NTCs have showed a potential dimension where they both can coexist proportionally.

This Article has focused only on very specific and narrow areas of environmental and energy friendly regulations, its relations with trade and competition regulations and also on inter-corporation agreements and coalition forms. The main idea is the possible modification or a broader flexibility to interpret the state aid and subsidy assessment criteria from competition and trade law perspectives, in order to take into account a wider range of sustainability goals and environmental concerns as possible exceptions to justify eventual market distortions. The basis of this reasoning can be found in the importance of long-term environmental protection, this being a common good and a public interest as well as an individual right simultaneously. On the other hand, private interests pursued via competition constitute sometimes little or no public asset beneficial for a wide range of individuals, in particular if sustainable development, sustainable energy and other NTCs are to be balanced or taken into account.

Inter-corporation agreements and coalition forms oriented on sustainability facilitation cover only a small part of the cooperative possibilities. Most of the companies are more and more aware of the current global ecological issues, using it as an advantage to gain market shares via corporate social responsibility. This is feasible even through creation of multilateral platforms, where private entities can work hand in hand towards creating a more livable planet for future generations. Corporate social responsibility has indeed many different forms and manifestations, some of which also create a connecting bridge between profit-oriented and environmental policies.[54]

Another important thing to remark on is the voluntary based subsidies from privately owned organizations granted within various environmental programs in order to support the shift to sustainable energy, eco-friendly processes and production methods. These can be out of the scope of antitrust

54. Jennifer Tharp & Prosenjit Dey Chadhury, *Corporate Social Responsibility: What It Means for the Project Manager*, PROJECT MGMT. INST. (May 19, 2008), https://www.pmi.org/learning/library/corporate-social-responsibility-means-project-manager-8368.

regulation since they are a result of spontaneous private law relationships under the coverage of contractual freedom. In the future, this can be another cease-fire between individualism and collectivism, both of them heading the same direction—towards a better tomorrow.