

ABSTRACT

With the environmental movement gaining traction, the interaction between competition, consumer protection and sustainability is increasingly coming under the spotlight. Globally, we see regulators greening existing rules and working on new rules to foster sustainability. As Singapore's competition and consumer protection authority, the Competition and Consumer Commission of Singapore ("CCCS") has to consider how it intends to incorporate environmental considerations into its policies to align with the national drive towards sustainability.

In the domain of competition, we examine the situations where anti-competitive conduct may benefit or harm sustainability. We then borrow the "sword-and-shield" analogy to elucidate how competition laws and policies may tackle unsustainable conduct while providing sufficient leeway for sustainability cooperation to flourish. In the latter case, we answer important *normative* and *technical* questions regarding the integration of environmental considerations into the traditional competition assessment. Through examining the local legal framework, we argue that environmental benefits should be considered "objective justification" to defend firms from antitrust liability. We then delve into *how* environmental cost-benefit analysis (CBA) should be conducted, with reference to relevant concepts like *shadow pricing*, *discounting*, and *standard of proof*. Yet, we acknowledge the limitations of a purely utilitarian approach and suggest the possibility of a *strong sustainability approach*.

Environmental Sustainability: The Role of Competition and Consumer Protection Laws and Policies

Concurrently, we identify the role of consumer protection policies in fostering sustainability through tackling greenwashing. Specifically, we propose a three-pronged approach. Firstly, we find that there is much legal uncertainty regarding greenwashing in Singapore and propose authorities to provide greater clarity through enacting new provisions or expounding on existing ones. Secondly, we leverage the economic concepts of *screening* and *signalling* and recommend authorities to mandate environmental disclosures as well as to implement an environmental certification and labelling scheme. Lastly, we argue that both top-down and bottom-up enforcement need to be stepped up to deter greenwashing.

(297 Words)

INTRODUCTION

Sustainable development is development that meets the need of the present generation without compromising future generations (Brundtland Commission, 1987). Given the irreversibility of global warming, environmental sustainability has taken centre stage in policymaking. Like other countries, Singapore has committed herself to the sustainability agenda. This essay serves to analyse the salient roles that competition and consumer protection laws and policies play in our climate change response.

A. COMPETITION LAW AND POLICIES

1. THE COMPETITION-SUSTAINABILITY NEXUS

Competition law may complement or conflict with sustainability. We will elucidate this across the 3 prohibitions of the Competition Act.

1.1 SECTION 34: ANTI-COMPETITIVE AGREEMENTS

Anti-competitive agreements harm the environment when firms collude to reduce the pressure to act sustainably. For example, the French *Floor Coverings Cartel* case involved firms colluding to restrict advertising on individual environmental performance, thereby disincentivising green investments. The recent European *Car Emissions Cartel* case saw car manufacturers cooperating to stymie sustainable technical development through slowing down the implementation of emissions-cleaning technology.

However, there are anti-competitive agreements that benefit the environment.

When companies are deterred from acting sustainably due to fear of being undercut (“first-mover disadvantage”), coordination to jointly set higher environmental standards or collective phase out unsustainable products can help avert a tragedy-of-the-commons scenario. The Dutch *Chicken of Tomorrow* case is a prominent example.

1.2 SECTION 47: ABUSE OF DOMINANCE

When pollutive incumbents adopt exclusionary practices against green rivals, abuse of dominance engenders environmental harm. Greece’s largest electric power company, *Public Power Corporation*, was recently investigated for using predatory bidding to hinder new entrants in green energy. Conversely, abuse of dominance can yield environmental benefits when green firms refuse to collaborate with or adopt unfair practices (e.g., price discrimination) against pollutive players.

1.3 SECTION 54: MERGERS THAT LESSEN COMPETITION

Anti-competitive mergers may stifle dynamic efficiency and hinder green R&D. An example is “green killer acquisitions” where incumbents acquire start-ups and hamper the development of green technologies to pre-empt future competition (Lewis, 2021). Conversely, mergers can also yield environmental efficiencies through resource pooling or know-how sharing. Recently, *Suez/Veolia* was touted as a green merger that would catalyse ecological transformation.

2. SWORD AND SHIELD

There is a moral imperative for competition law to foster sustainability. We explain its role through a “sword-and-shield” analogy (Holmes, 2020).

2.1 AS A SWORD

Competition law can be a “sword” to tackle unsustainable conduct. Conventional theories of harm need to be expanded in scope to incorporate sustainability as an anti-competitive effect. For instance, Mueller sees sustainability as a “non-price dimension” of competition – unsustainable conduct is therefore anti-competitive since it reduces product quality (Mueller, 2021). Correspondingly, harsher punishments may be imposed for cases with environmental dimensions.

2.2 AS A SHIELD

Should competition law “shield” sustainable conduct from antitrust liability? This is less straightforward. Like other jurisdictions, Singapore’s competition law offers the “Net Economic Benefit Exemption” (NEBE) for anti-competitive conduct that generate wider benefits to society. However, the link between sustainability benefits and NEBE remains “less direct” (Allen & Gledhill, 2020).

Such legal uncertainty may lead to a “chilling effect” – research shows 60% of businesses refrain from green cooperation due to unfounded fear of breaching competition law (Holmes, 2020). To prevent inhibiting sustainability cooperation, the CCCS should publish guidelines to explain how environmental considerations will

enter the competition assessment and establish the permissible scope for sustainability cooperation.

Prior to doing so, however, two questions need to be answered – a **normative** question of whether environmental efficiencies *should* be considered as “objective justification”; and a **technical** question of *how* to assess environmental efficiencies.

2.2.1 THE NORMATIVE QUESTION

Where environmental benefits do not correspond to any traditional effect on consumer welfare, integrating environmental considerations into the competitive assessment is controversial. Under a “strict interpretation of the consumer welfare standard”, environmental effects that arise outside the relevant product market (“out-of-market efficiencies”) or to future generations would not be considered (OECD, 2021). For instance, EU Competition Law requires defendants who claim the NEBE to prove that consumers receive a “fair share of the resulting benefit.”

However, this discussion needs to be contextualised to the local constitutional setting. Given the broader macroeconomic context, Singapore’s competition regime adopts the total welfare rather than consumer welfare standard. This is corroborated by an examination of legal authority which reveals minimal mention of non-efficiency considerations (Khoo & Sng, 2019).

“The purpose of (the Competition Act) is ... ultimately (to ensure) a competitive economy ... We must remember this is a means to an end.”

Dr Vivian Balakrishnan, Second Reading of the Competition Bill

Correspondingly, the requirement of “consumers receiving a fair share of benefits” has been removed from our equivalent NEBE in the Third Schedule. Hence, we argue that environmental efficiencies that benefit society should be considered “objective justification” even if they do not accrue to “in-market” consumers.

That being said, we should not allow sustainability to be exploited as a façade to mask anti-competitive behaviour. Hence, while sustainability may be considered, this should be predicated on the additional criteria of *indispensability* – meaning that the same objective cannot be attained through less restrictive alternatives. Where possible, remedies should also be imposed to mitigate restrictive impacts.

2.2.2 THE TECHNICAL QUESTION

Several difficulties arise when we attempt to integrate environmental effects into traditional Cost-Benefit Analysis (CBA).

(1) NON-MARKET VALUE

The value of environmental goods is not reflected through the price mechanism. In the absence of market prices, shadow pricing is necessary to express environmental benefits in monetary terms to facilitate comparison.

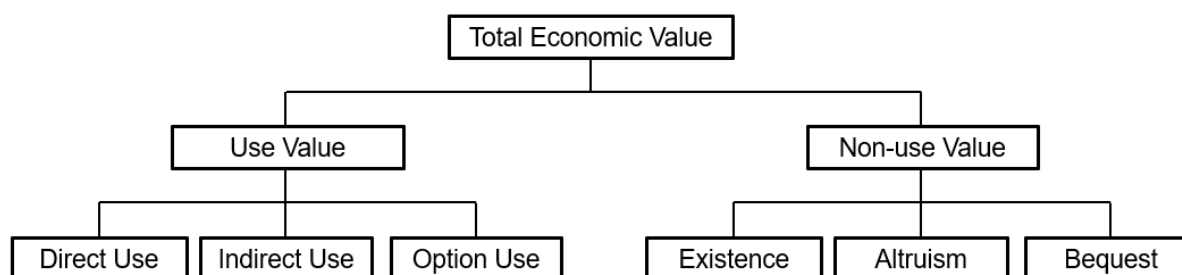


Figure: The Total Economic Value framework disaggregates environmental value into (i) Use values; and (ii) Non-use values – utility not directly derived from production and consumption (Pearce & Howarth, 2000)

There are well-accepted methods of shadow pricing, broadly categorised into:

- 1) Revealed Preferences (RP)** involves making inferences about environmental value from actual data in related markets. RP techniques like *avoidance and abatement costs* help us map out damage functions that measure the economic impacts that result from climate change. Correspondingly, we are able to calculate the Social Cost of Carbon (cost of emitting additional tonne of GHG) – a widely-used concept in quantifying environmental efficiencies.

- 2) Stated Preferences (SP)** relies on surveys to elicit consumer preferences in hypothetical or “surrogate” markets. An example is the Contingent Valuation (CV) method which involves asking individuals their willingness to pay (WTP) or willingness to accept compensation (WTA). SP is often preferred due to its ability to capture non-use values (Watson, 2021). Despite behavioural biases like *endowment effect* that may skew survey outcomes, these methods are “reliable enough to be used in judicial proceedings” (Arrow et al., 1993).

(2) TIMEFRAME

Environmental efficiencies may arise at different points in time. This is problematic as the outcome of competition assessments may vary depending on the timeframe adopted. Hence, timeframes may need to be adjusted “depending on when environmental benefits materialise” (OECD, 2021). Correspondingly, discounting is necessary to calculate the present value of future benefits which are given less weight due to uncertainty. Given the long-term nature of climate change, we recommend adopting “discount rates that decline over time” to achieve intergenerational equity (OECD, 2018).

(3) STANDARD OF PROOF

We should be cognisant of the complexities of environmental valuation. The standard of proof (amount and strength of evidence required) in assessing environmental efficiencies may be adjusted to prevent overlooking sustainability effects just because they are harder to prove. For instance, the Netherlands Authority for Consumers and Markets (ACM) allows for qualitative assessment under certain circumstances.

(4) LIMITATIONS OF CBA

Detractors argue that the CBA approach, where only the aggregate matters, leads to a *weak sustainability approach*. In reality, not all environmental effects can be monetised. Hence, some suggest a *strong sustainability approach*. Instead of

considering sustainability under the broader framework of efficiency, sustainability-specific defences may be developed. For instance, China's Anti-Monopoly Law exempts agreements that "serve public interests in ... environmental protection." Given the existential threat of climate change to Singapore, we may consider this approach to go a step further in promoting sustainability.

B. CONSUMER LAWS AND POLICIES

3. THE SPECTRE OF GREENWASHING

The modern, environmentally conscious consumer promotes sustainability through dollar voting. 85% of global consumers have shifted towards sustainable purchasing decisions (Simon-Kucher, 2021) and 66% are willing to pay a green premium (Nielsen, 2015). To harness green demand, firms are increasingly communicating about their environmental credentials. Concurrently, greenwashing – the practice of creating false or misleading environmental claims regarding a company or its products – has grown to "epidemic proportions" (Hsu, 2011). Recently, the International Consumer Protection Enforcement Network found that 40% of global websites displayed elements of greenwashing (ICPEN, 2021).

Greenwashing inhibits sustainable consumption when consumers struggle to differentiate true green claims from misleading ones and become sceptical of green goods. 23% of Singapore consumers "do not trust" businesses' green claims and 29% would buy more green products if they had more information (WWF, 2020). This signals partial market failure, or *adverse selection* (Akerlof, 1970), arising from greenwashing.

Greenwashing also harms consumers by deceiving them into making sub-optimal choices and paying a premium for fake “eco-friendly products.” Given the interplay between consumer protection and green consumption, we explore the role of consumer protection laws and policies in promoting sustainability through tackling greenwashing.

3.1 PLUGGING LEGAL GAPS

Lax and uncertain regulatory environments are a key driver of greenwashing (Delmas & Burbano, 2011). While Singapore has relevant laws like the Consumer Protection (Fair Trading) Act and Misrepresentation Act, they do not explicitly cover greenwashing. Exacerbated by the dearth of legal precedents, this gives rise to legal ambiguity which is inimical for effective regulation (Loh & Yock, 2021).

To provide legal clarity on greenwashing, authorities may implement environmental-specific marketing provisions. France’s newly enacted Climate and Resilience Law, for instance, specifies sustainability-related misrepresentation as “misleading practice” that will be taken to task. Alternatively, authorities can delineate, through soft law, how general consumer protection laws apply specifically to greenwashing. For instance, the US’ Green Guides was issued to help businesses avoid violating the FTC Act in making misleading environmental claims. More recently, the UK released the Green Claims Code that sets out 6 principles to help businesses comply with consumer protection laws in making green claims. While such guidelines are not independently enforceable, they decrease regulatory uncertainty as any deviation can serve as evidence of legal violation.

Similarly, the CCCS should publish guidelines governing environmental claims. Apart from broad principles regarding what constitutes greenwashing, specific guidance should be provided on commonly used vocabulary in green claims. Given the proliferation of overly generic, undefined environmental terms like “eco-friendly” and “biodegradable,” CCCS should regulate the list of acceptable green claims and spell out the corresponding criterion needed to substantiate them.

3.2 EQUALISING INFORMATION

Where asymmetric information is concerned, economists advocate for the equalizing of information via screening or signalling.

3.2.1 ENVIRONMENTAL DISCLOSURES

The most direct way to promote transparency is through mandating environmental disclosures. Given the credence attributes of green goods, individual consumers face high costs in evaluating environmental characteristics. Information disclosures are beneficial in transforming credence attributes into search attributes that aid consumers in pre-purchase screening (Teisl & Roe, 1998).

It can be a blanket requirement that requires certain environmental information to be published for a certain product or industry. An example is California Energy Commission’s *Power Source Disclosure* programme which requires electricity suppliers to disclose their energy sources and pollution discharge data. This

engenders the additional benefit of pressurising brown firms to improve their environmental performances.

It may also be claims-based, meaning that firms are only required to disclose a particular type of information when a certain green claim is made. For instance, the French Environmental Code prohibits firms from claiming carbon-neutrality unless they publish a GHG emissions assessment report.

To facilitate environmental disclosures, authorities should provide clear guidelines on the methodologies and standards required. For example, many countries including Korea and Canada require environmental declarations to follow the Life Cycle Assessment approach in accordance with International Organization for Standardization (ISO) standards.

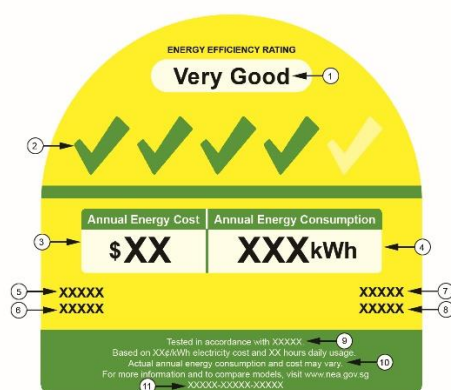
3.2.2 ENVIRONMENTAL CERTIFICATION AND LABELLING

In reality, consumers are boundedly rational and face time and cognitive constraints in evaluating environmental information. Given that 44% of Singapore consumers seek easy verifiability and comparability of green claims (WEF, 2020), authorities may implement an environmental certification and labelling scheme to help firms convey credible signals.

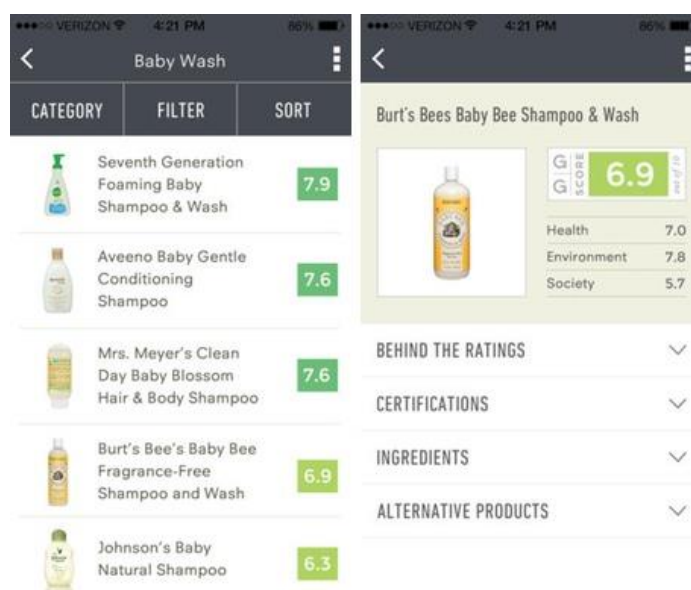
The rigorous evaluation of data by a trusted third-party like the government ensures reliability. The result of this evaluation is then presented to consumers through a standardised eco-label that can be simply understood and easily compared vis-à-vis complex environmental data. Labels are especially effective as they are visually striking and appeal to consumers' saliency bias (Taylor & Fiske, 1975). Hence,

Environmental Sustainability: The Role of Competition and Consumer Protection Laws and Policies

Singapore should push out a government-backed eco-label scheme similar to successful examples like the *EU Flower* and *Nordic Swan*. Though we already have the Mandatory Energy Labelling Scheme, this is limited in the domain of energy efficiency and should be expanded to include other dimensions of sustainability.



To further subsidise search costs, the CCCS may develop a one-stop platform that aggregates the aforementioned environmental disclosures and certifications. For instance, GoodGuide was a US website that provided sustainability scores and third-party reviews for over 60,000 household products.



3.3 STEPPING UP ENFORCEMENT

For effective deterrence, both bottom-up and top-down enforcement are pivotal in ensuring the certainty and severity of punishment for greenwashing firms.

3.3.1 BOTTOM-UP ENFORCEMENT

Research shows that consumers with higher environmental knowledge are more discerning of greenwashing practices. Given that current consumer education initiatives are “limited in reach” (WWF, 2020), we advocate for a campaign to raise awareness about environmental terms, claims, and relevant government policies.

Nonetheless, individual effort may be limited. Non-governmental organisations (NGOs) are therefore important watchdogs that monitor firms and reveal greenwashing practices (Lyon & Montgomery, 2015). For instance, environmental group ClientEarth released the *Greenwashing Files* to expose fossil fuel companies including BP and ExxonMobil for greenwashing.

Hence, there must be accessible procedural mechanisms for private actors to act against greenwashing. For example, Columbia’s *Consumer Protection Procedures Act* allows NGOs to bring legal action on behalf of the public. Consumers may also be empowered to take class-action lawsuits against greenwashing firms.

3.3.2 TOP-DOWN ENFORCEMENT

Concurrently, authorities need to step up public enforcement through conducting random sweeps and systematic investigations. To detect greenwashing more efficiently, authorities can leverage new Artificial Intelligence technologies like natural language processing to sieve through copious amounts of information in corporate green claims and reports.

Harsher penalties must be meted out for greenwashing firms. For instance, France has ruled that greenwashing firms can be fined up to 80% of the cost of the advertising campaign, as opposed to 50% for other non-environmental misleading claims. The CMA has also recently conducted greenwashing investigations in UK's fashion industry and will "name-and-shame" serious offenders. The consequent reputational risks resulting from possible consumer boycott will serve as a strong deterrent.

CONCLUSION

As the world tackles climate change, business activities and consumption habits are undergoing paradigm shifts. Correspondingly, our competition and consumer protection laws and policies must be reviewed quickly to keep pace with these nascent changes and build a robust environment for sustainability to flourish.

(2498 Words)

BIBLIOGRAPHY

Akerlof, G. A. (1970). The Market for “Lemons”: Quality Uncertainty and the Market Mechanism. *The Quarterly Journal of Economics*, 84(3), 488–500.

<https://doi.org/10.2307/1879431>

Allen & Gledhill (2020). “The Great Convergence between Sustainability and Competition Law: Recent Developments.” Accessed from:

<https://www.allenandgledhill.com/sg/publication/articles/16777/the-great-convergence-between-sustainability-and-competition-law-recent-developments>

Arrow, K., Solow, R., Portney, P. R., Leamer, E. E., Radner, R., & Schuman, H. (1993). Report of the NOAA panel on contingent valuation . Retrieved May 23, 2022, from

https://edisciplinas.usp.br/pluginfile.php/4473366/mod_folder/intro/Arow_WTP.pdf

Delmas, M. A., & Burbano, V. C. (2011). The Drivers of Greenwashing . Retrieved May 19, 2022, from

https://www0.gsb.columbia.edu/mygsb/faculty/research/pubfiles/14016/cmr5401_04_printversion_delmasburbano.pdf

Holmes (2019). “Climate Change, Sustainability and Competition Law.” Accessed from:https://www.law.ox.ac.uk/sites/files/oxlaw/simon_holmes.pdf

Holmes (2020). “Climate Change and Competition Law.” Accessed

from[https://one.oecd.org/document/DAF/COMP/WD\(2020\)94/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)94/en/pdf)

Hsu T (2011) Skepticism grows over products touted as eco-friendly.

<https://www.latimes.com/business/la-xpm-2011-may-21-la-fi-greenwash-20110521-story.html>. Accessed 23 May 2021

International Consumer Protection and Enforcement Network. (2021, January).

Screening of websites for 'greenwashing': Half of green claims lack evidence. News.

Retrieved May 19, 2022, from <https://icpen.org/news/1146>

Environmental Sustainability: The Role of Competition and Consumer Protection Laws and Policies

Khoo, K., & Sng, A. (2019). *Singapore's Competition Regime And Its Objectives: The Case Against Formalism*. Singapore Journal of Legal Studies. Retrieved May 24, 2022, from <https://law1.nus.edu.sg/sjls/articles/SJLS-Mar-19-67.pdf>

Lewis, A. (2022, February 18). Antitrust M&A snapshot Q1 2021. McDermott Will & Emery. Retrieved May 23, 2022, from <https://www.mwe.com/insights/antitrust-ma-snapshot-may-2021/>

Loh, L., & Yock, Y. (2021). Time for better consumer safeguards in s'pore over 'greenwashing' products that are not sustainable. TODAY. Retrieved May 21, 2022, from <https://www.todayonline.com/commentary/time-better-consumer-safeguards-over-greenwashing-products-are-not-sustainable>

Lyon, T. P., & Montgomery, A. W. (2015). The Means and End of Greenwash. *Organization & Environment*, 28(2), 223–249. <https://www.jstor.org/stable/26164732>

Mueller. (2021). *Green Deal and Merger Control | Sustainability – A Killer Deal Rationale?* Hengeler Mueller. Retrieved May 24, 2022, from <https://www.hengeler.com/de/2021-03-brussels-a-jour>

Nielsen. (2015, October). The Sustainability Imperative - New Insights on Consumer Expectations . Global Sustainability Report . Retrieved May 18, 2022, from https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/Global20Sustainability20Report_October202015.pdf

OECD. (2018, June 25). *Cost-Benefit Analysis and the Environment*. OECD iLibrary. Retrieved May 24, 2022, from https://www.oecd-ilibrary.org/environment/cost-benefit-analysis-and-the-environment/discounting_9789264085169-11-en

OECD (2020). “Sustainability and Competition.” <https://www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf>

OECD (2021). “Environmental Considerations in Competition Enforcement.” Accessed from: [https://one.oecd.org/document/DAF/COMP\(2021\)4/en/pdf](https://one.oecd.org/document/DAF/COMP(2021)4/en/pdf)

Pearce & Howarth (2000). "Technical Report on Methodology: Cost Benefit Analysis and Policy Responses." Accessed from:

https://ec.europa.eu/environment/enveco/economics_policy/pdf/studies/methodology.pdf

Simon-Kucher. (2021, October 25). Recent study reveals more than a third of global consumers are willing to pay more for sustainability as demand grows for environmentally-friendly alternatives. Simon-Kucher & Partners Strategy & Marketing Consultant . Retrieved May 21, 2022, from <https://www.simon-kucher.com/en-sg/about/media-center/recent-study-reveals-more-third-global-consumers-are-willing-pay-more-sustainability-demand-grows-environmentally-friendly-alternatives>

Taylor, S. E., & Fiske, S. T. (1975). Point of view and perceptions of causality. *Journal of Personality and Social Psychology*, 32(3), 439–445.

<https://doi.org/10.1037/h0077095>

Teisl, M., & Roe, B. (1998). The Economics of Labeling: An Overview of Issues for Health and Environmental Disclosure. *Agricultural and Resource Economics Review*, 27(2), 140-150. doi:10.1017/S1068280500006468

United Nations Brundtland Commission. (1987). Report of the World Commission on Environment and Development: Our Common Future. UN Documents. Retrieved May 24, 2022, from

<https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>

Watson (2021). "Measuring Environmental Benefits in Competition Cases."

Accessed from:[https://one.oecd.org/document/DAF/COMP\(2021\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2021)14/en/pdf)

WWF-Singapore, & Accenture. (2020). Sustainability in Singapore: Consumer and Business Opportunities. Retrieved May 19, 2022, from

https://wwfasia.awsassets.panda.org/downloads/sustainability_in_singapore_wwf_accenture.pdf