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Introduction

The Law Society of Scotland is the professional body for around 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Trade Policy Working Group and Environmental Law Sub-Committee welcome the opportunity to respond to the International Trade Committee's inquiry into *Trade and the environment*.¹ We have the following comments to put forward for consideration.

Consultation questions and proposals

Q1. What is the relationship between trade and investment liberalisation and environmental outcomes?

Trade and investment liberalisation may help or hinder environmental outcomes, depending on the specific text of an agreement and the extent to or way in which it is enforced.

Economic development and environment protection are recognised as “interdependent components of sustainable development”² under Principle 4 of the Rio Declaration,³ which states that “*in order to achieve*

¹ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/international-trade-committee/inquiries/parliament-2017/trade-and-environment-inquiry-17-19/>

² George, C and S. Yamaguchi (2018), “Assessing Implementation of Environmental Provisions in Regional Trade Agreements”, OECD Trade and Environment Working Papers, 2018/01, OECD Publishing, Paris.
<http://dx.doi.org/10.1787/01aacfea-en> (OECD Trade and Environment Working Paper 2018/01)

³ Adopted at the 1992 UN Conference on Environment and Development.

sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”

The relationship between trade liberalisation and environmental outcomes has a number of different facets: from an environmental perspective, outcomes may be positive where specific protections are introduced or negative where an agreement curbs the ability of government to implement environmental regulations or causes regulatory chill.⁴

While trade liberalisation has often been associated with the so-called ‘race to the bottom’, the empirical evidence for this is somewhat mixed. Similarly, there is mixed evidence for the environmental Kuznet’s curve whereby once a certain level of economic development is achieved, pollution is said to reduce in line with economic growth.

We also note the growing awareness around the risks posed by climate change - for example, this is one of the key themes of this year’s WTO Public Forum. Environmental issues more generally are also generating further commentary.

Recommendation: In light of the growing awareness about climate change and the need to protect the environment, we recommend that if the UK seeks to include investor protection clauses in its future Trade Agreements, these provisions are carefully drafted in order to ensure clarity over whether such provisions limit the UK’s ability to introduce environmental protection measures. This may help to avoid any regulatory chill or investor uncertainty that would arise from lack of clarity. The same considerations apply to provisions that seek to promote positive environmental behaviours on the part of the UK’s trading partners.

Investment protection and investor state dispute settlement (ISDS)

One of the most high-profile areas of trade policy when examining the balance of, and possible conflict between, trade liberalisation and environmental protection, is in the field of investment protection. Investment protection provisions are designed to protect the “legitimate expectations” of investors from one party in the partner country and may give a level of protection and grant rights to those foreign investors which are not enjoyed by domestic investors or domestic companies. Investment protection clauses traditionally sit alongside investor state dispute settlement clauses, which usually mandate arbitration between investors and the state they see as having infringed their rights under investment protection clauses.

⁴ I.e. a reluctance on the part of regulators or other lawmakers to take action

A number of criticisms have been levelled at the current system. The first of these is the danger of “regulatory chill” if government actors are discouraged from regulating in a way that would enhance environmental protections (or other rights/protections) because they fear being sued by investors. While there is not conclusive evidence as to whether, or the extent to which, the threat of investment protection claims results in regulatory chill,⁵ as a relevant factor in legal risk analysis, it must be recognised that there is at least a risk of this chilling effect if provisions enshrining the right to regulate are not sufficiently robust.

A further point of contention is the differentiation between the treatment of domestic and foreign investors. It is also worth noting that where a company is operating in a number of jurisdictions, there is anecdotal evidence of “forum shopping” when structuring investments so that these are run through a country which has a bilateral investment treaty (or other trade agreement which grants investor protection) with the country in which the investment target is located to ensure that any such clauses can be taken advantage of if problems arise at a later stage. This additional capacity on the part of foreign investors to claim compensation for regulatory action by state parties where they suffer economic detriment is often seen as unfair by domestic investors who do not enjoy similar protections and by states that are less willing to agree the same level of investor protection. This perception of unfairness may be compounded by the fact that claims are often very high value, which in can cause particular problems for smaller economies. More recently discussion has been growing around ways to tackle the perceptions of unfairness with ideas around balancing rights with obligations gaining increasing traction. So, for example, environmentally responsible business practices could form part of the necessary conditions which must be met before a foreign investor could issue a claim under an investment protection clause.

Other issues are more closely related to the processes and procedures surrounding investment arbitration. We do not discuss these in detail here but it is worth noting that one of the key issues identified in relation to private arbitration as an ISDS mechanism is the lack of transparency. This can create a general suspicion of decisions which are not open to scrutiny. However, a further aspect relevant to legal certainty is that such private arbitration does not facilitate the creation of a body of jurisprudence, which usually serves to give greater clarity and certainty in more complex areas of law. This is of particular relevance in the context of regulatory chill referred to above as it serves to exacerbate the risk factor (for example where regulators cannot be confident that success in one case will prevent the same complaint being brought again, because other investors are not aware that the issue has already been considered).

Recommendation: We therefore recommend that the interaction between investment protection and dispute settlement on the one hand and environmental protection on the other merits further

⁵ See Van Harten, Gus and Scott, Dayna Nadine, *Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada* (December 7, 2015). Osgoode Legal Studies Research Paper No. 26/2016. Available at SSRN: <https://ssrn.com/abstract=2700238> or <http://dx.doi.org/10.2139/ssrn.2700238>; and Tienhaara, K. (2018). *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*. *Transnational Environmental Law*, 7(2), 229-250. doi:10.1017/S2047102517000309

consideration to balance all the relevant interests. This should involve consideration of alternative and innovative approaches which might prove more beneficial than current mechanisms.

Q2. How effectively do trade and investment agreements address environmental issues, including climate change?

Trade and investment agreements routinely address environmental issues, but the effectiveness of those provisions in achieving tangible environmental outcomes is inextricably tied to implementation and enforcement. As far as we are aware, this kind of comprehensive analysis of the impact of those provisions has not been carried out to date.⁶ It is also worth noting that trade agreements may offer an enforcement mechanism for provisions contained in international environmental agreements, where those provisions are incorporated into trade agreements through one of the devices referred to below. The summary below outlines some of the kinds of provisions to be found in international trade law agreements but the extent to which environmental clauses or implementation of particular measures bring about tangible outcomes will always be difficult to assess because of the various potential factors that could have contributed to a particular result.⁷

Environmental issues generally

WTO law

WTO law recognises the potential conflicts which might arise between trade liberalisation and environmental protection. A range of provisions exist under WTO law which Members can utilise as a defence, should their use of environmental protection measures (including trade-specific measures) result in a breach of their WTO obligations.

One such provision is Article XX of the General Agreement on Tariffs and Trade (GATT) which allows WTO Members to take measures which are 'necessary to protect human, animal or plant life or health' or which 'relat[e] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.' Such measures must, 'not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.'

⁶ [http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/603877/EXPO_IDA\(2018\)603877_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/603877/EXPO_IDA(2018)603877_EN.pdf) at p 12

⁷ See OECD Trade and Environment Working Paper 2018/01 at page 8

A number of WTO disputes have helped to clarify the content of GATT Article XX as it pertains to the environmental protection⁸ but the concept of “necessity” may still be open to interpretation. We also note that while GATT Article XX can only be used as a defence to breaches of the GATT, a similar provision exists under the General Agreement on Trade in Services (GATS).

The WTO Agreement on Technical Barriers to Trade (TBT) also provides that where technical regulations applicable to goods results in detrimental treatment of imports, such detrimental treatment may nonetheless be justifiable provided if it, ‘stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products’.⁹ Not all WTO Agreements, however, contain such provisions: the WTO Agreement on Subsidies and Countervailing Measures (SCM) notably does not contain any current defence for so-called ‘green’ subsidies.

Domestic regulation and the impact on third parties

At a domestic or regional level, trade law may be used to leverage external changes in third countries, as can be seen in the EU’s seal regime which largely prohibits, with a number of exceptions, the placing on the market of seal products within the EU. This ban was instituted in response to public morality concerns regarding animal welfare. Trade law may also be used as a ‘carrot’, with certain countries conditioning enhanced market access under the so-called ‘generalised system of preferences’ - which allows countries to grant enhanced tariff treatment to developing countries - upon such recipient countries adhering to certain key international environmental agreements (eg the EU’s GSP+ regime).¹⁰

Regional trade agreements

Environmental measures are also relatively common in regional trade agreements, although enforceability of such provisions is somewhat mixed. More recent trade agreements such as USMCA have seen ‘new’ environmental issues such as fisheries subsidies included within their scope, thereby underlining the progressive range of issues that may be included in modern trade agreements. Negotiations on fisheries subsidies are ongoing within the WTO.

The EU agreements (in which the UK currently participates) contain chapters on Trade and Sustainable Development, one pillar of which is environmental sustainability. In light of the agreement on the 17 Sustainable Development Goals adopted in 2015 through the UN Agenda 2030 and Paris Agreement on Climate Change the same year, the European Commission was prompted to renew its TSD position. So,

⁸ eg *US – Shrimp*, *US – Shrimp* (Article 21.5), *Brazil – Tyres*

⁹ See *US – Clove Cigarettes*

¹⁰ Generalised Scheme of Preferences - see https://ec.europa.eu/trade/policy/countries-and-regions/development/generalised-scheme-of-preferences/index_en.htm for further information

for example, the EU-Japan EPA reaffirms that both parties “recognise the importance of promoting the development of international trade in a way that contributes to sustainable development”,¹¹ specifically recognises the right to regulate in order to establish environmental protections at a domestic level and guards against encouraging trade by lowering those protections.¹² Article 16.4 centres around affirmation of commitments to international environmental obligations stemming from the agreements the parties have signed. However, this is tempered by 16.4(5) which states that “Nothing in this Agreement prevents a Party from adopting or maintaining measures to implement the multilateral environmental agreements to which it is party, *provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination against the other Party or a disguised restriction on trade.*”¹³ Arguably the level of protection provided by the TSD does not therefore go significantly above what the Parties would otherwise be able to do in terms of implementing regulations generally. As a matter of WTO law, regulations are allowed so long as they are not applied in a discriminatory manner and do not constitute disguised restrictions on trade.

Another mechanism for strengthening environmental governance through regional trade agreements is by reference to stand-alone multilateral environmental agreements (MEAs). This practice is increasing.¹⁴ Where reference is made to MEAs they may also be given greater protection by legal precedence provisions clarifying that the MEA is to be followed in cases of inconsistency. Furthermore, it may also be possible to use trade agreements as a catalyst to ensure MEAs enter into force more quickly or even to specifically require implementation.¹⁵

Enforcement mechanisms also vary between agreements. As an example, Chapter 24 of CETA states that any dispute arising under that chapter is subject to the procedure in that chapter and thus not to the dispute settlement provisions in Chapter 29. We note that this (and other environmental aspects of CETA)

¹¹ Article 16.1 of the EU-Japan EPA available here:

http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157228.pdf#page=440

¹² Article 16.2

¹³ Emphasis added -see http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157228.pdf#page=440

¹⁴ Morin, Jean-Frédéric & Bialais, Corentin (2018) *Strengthening Multilateral Environmental Governance through Bilateral Trade Deals* - <https://www.cigionline.org/publications/strengthening-multilateral-environmental-governance-through-bilateral-trade-deals>

¹⁵ See eg *ibid* and Jinnah, Sikina & Morgera, Elisa. (2013). Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda. *Review of European, Comparative & International Environmental Law*. 22. 10.1111/reel.12042. -

https://www.researchgate.net/publication/259555312_Environmental_Provisions_in_American_and_EU_Free_Trade_Agreements_A_Preliminary_Comparison_and_Research_Agenda

have been subject to criticism¹⁶ but, for example, the CPTPP is seen as providing a stronger enforcement mechanism for environmental standards.¹⁷

Climate change

Climate change is not included in the wording of the WTO covered agreements. To the extent that a country may wish to utilise trade measures for climate change mitigation purposes, progressive interpretation of GATT Article XX would likely encompass climate change measures as being necessary to protect human, plant life or health (Article XX (b)). However, as noted above, such measures must, 'not (be) applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.'

The real challenge with climate change related trade measures is the fact that although they may help with progress towards climate change mitigation, if they are not country-neutral and end up providing a competitive advantage to one WTO Member over another, justification may be problematic. This has arguably led to a chilling effect whereby Members may be reluctant to use trade measures to pursue climate goals, or indeed climate change measures more generally.

The Paris Agreement on Climate Change does not specifically mandate the application of trade measures for mitigation purposes although individual countries in their nationally determined contributions (NDCs) may of course wish to utilise trade measures. There has been much discussion on the application of border tax adjustments to take into account the carbon content of imports but to date, we are not aware that any country has instituted such measures and there have certainly been no disputes over the application of such measures. This means there is a lack of clarity as to their WTO legality. The design of such measures would arguably be integral to the question of their compatibility or otherwise with WTO law. As it stands, the only WTO disputes so far with a climate change 'flavour' relate to renewable energy subsidies.

Q3. How does and should the Government approach issues of the environment and climate change in its trade and investment policy, and its work on export promotion?

The Government should be mindful of its international obligations, both within the WTO and also in terms of its commitments under the Paris Agreement. What this means in practice is that if, for example, the UK

¹⁶ See eg https://www.transportenvironment.org/sites/te/files/publications/2016_11_CETA_Gold_Standard_FINAL.pdf

¹⁷ <http://e15initiative.org/blogs/addressing-interstate-dispute-settlement-concerns-in-mega-regional-agreements/>

wishes ultimately to reach a net-zero-carbon economy, ambitious climate measures will be required and trade measures may well play a role in this.

We note that the EU currently uses trade sustainability impact assessments (SIAs) and there are some UK commentators suggesting the UK should do the same.¹⁸

Due to the lack of clarity as to the relationship between WTO law and climate change agreements, the UK should exert efforts at the WTO to clarify further this relationship so as to provide more by way of legal certainty. There have been numerous calls for the introduction of disciplines within the WTO on fossil fuel subsidies and this is perhaps something the UK would wish to support and champion, to the extent it wishes to play a leadership role in climate change mitigation.

The UK may also wish to play a leadership role in its future regional and bilateral trade relations and refuse, for example, to negotiate trade agreements with countries which have not ratified the Paris Agreement. On a related note, a large number of regional trade agreements include provisions to enhance cooperation between member countries on environmental concerns. The UK may wish to take cognisance of such provisions in its future trade relations.

On a more granular level, all trade negotiations engaged in by the UK should be underpinned by a formal process for impact assessment which would review, among other things, the environmental impacts of any future trade agreement.

We also note that environmental law is a devolved area under the Scotland Act 1998. The issue of cooperation and engagement with the Scottish Government therefore requires further consideration in this context.¹⁹

Q4. How might the Government seek to address environmental issues, including climate change, at the multilateral and plurilateral level as part of its trade policy post-Brexit?

As above, the government should be mindful of its international obligations when negotiating future trade agreements and aim to ensure coherence across those agreements.

¹⁸ <http://blogs.sussex.ac.uk/uktpo/publications/integrating-sustainable-development-objectives-into-uk-trade-policy/>.

¹⁹ For further discussion around governance arrangements and devolved participation see our previous response to this committee's previous inquiry into trade policy transparency and scrutiny - <https://www.lawscot.org.uk/media/360663/22-06-18-con-tra-trade-policy-transparency-and-scrutiny.pdf>

We note that “according to the TREND dataset on environmental provisions found in 630 trade agreements signed between 1947 and 2016 (Morin, Dür and Lechner, 2018: Figure 1), the most frequent provisions are exceptions to trade for the conservation of natural resources and similar exceptions for the protection of the health and life of plants or animals, found in almost half of the FTAs, followed by reference to environmental institutions and agreements as well as the right to technical barriers to trade related to the environment. Many norms such as the commitment to invest in climate adaptation, the exclusion of water from trade, and the requirement to ratify the Rotterdam Convention on hazardous chemicals and pesticides appear only in a handful of trade agreements.”²⁰

Q5. How can the imposition or reduction of tariffs on trade in goods be used to pursue environmental aims?

See above.

Q6. How can coherence be ensured between trade and environmental policy across Whitehall?

See above and, in particular, the importance of ensuring coherence not just across Whitehall but through communication and cooperation with devolved administrations also.

As noted above, environmental matters are largely ones that fall within the responsibilities of the devolved administrations across the UK. Communication, collaboration and coherence must therefore be considered not just across Whitehall but with all the devolved administrations. Ensuring an effective relationship in this regard requires being alert to the devolution aspect from an early stage. It may be promoted through training and regular communication to build up a greater awareness and understanding on all sides of the legal and policy frameworks which are involved,²¹ so that consideration for these is an integral part of policy formation.

²⁰ See [http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/603877/EXPO_IDA\(2018\)603877_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/603877/EXPO_IDA(2018)603877_EN.pdf) p.12 at para 2.5

²¹ See chapter 5 of the House of Commons Scottish Affairs Committee’s report, *The relationship between the UK and Scottish governments* (8th report of 2017-19 HC 1586) - <https://publications.parliament.uk/pa/cm201719/cmselect/cmsscota/1586/1586.pdf>

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