

# ENCROACHMENT OF SOCIAL LICENCE IN AUSTRALIA'S TRADE AND INVESTMENT

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*This article examines the concept of social licence from the perspective of Australia's Trade and Investment. Social licence eludes specific definition while creating substantial compliance overhang for corporations and businesses in terms of meeting community expectations. The article uses the institutional theory to provide the conceptual foundation beneath the structuring of two original models (single-layered and dual-layered regulation) to explain the observable effects of social licence in Australia's trade and investment. The practical effects are explained through four carefully chosen sectors from Australia. Overall, the article argues that social-licence based narratives are encroaching into international trade and investment and that the current mechanisms are ill-equipped to deal with this trend.*

**Keywords:** *Australia, export controls, social licence to operate, international trade, international investment, institutional theory*

## I INTRODUCTION

In April 2017, the then Prime Minister of Australia, Malcolm Turnbull announced the introduction of the Australian Domestic Gas Security Mechanism (ADGSM) which affords the Commonwealth the power to impose export controls on gas companies when there is a shortage of gas in the domestic market. In justifying the proposed restrictions, he stated that “Gas companies are aware they operate with a social licence from the Australian people. They cannot expect to maintain that licence if Australians are short-changed because of excessive exports”.<sup>1</sup> The statement is an interesting indication of changes in the dynamics of international trade where an obscure concept of export control suddenly assumes greater importance.

This article presents a study of social licence and its likely ramifications, on Australia's trade and investment. To do so, the article firstly examines the general concept of social licence in light of the academic literature on the area. The article then briefly describes the concept of export controls under global trade norms and examines whether social licencing can be used as justification for controlling exports. This is an unconventional interpretation of social licence because,

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<sup>1</sup> Prime Minister of Australia, 'Delivering Affordable Gas for All Australians' (Media Release, 27 April 2017) < <https://www.pm.gov.au/media/delivering-affordable-gas-all-australians> >

traditionally, the concept has been linked to imperatives such as local employment, corporate social responsibility and environmental protection. The article offers a study from an Australian perspective on the issue of social licence to operate (SLO) and its likely effects on trade and investment. The observations made in the article may provide a useful point of contrast when examining the larger effects of SLO on an international scale.

There are no agreed definitions of SLO nor any international treaties or declarations delineate the concept. The definitions observable in academic literature affords us the only real opportunity to understand its nature. Even then the definitions are based on factors outside the international trade or investment regulation realms. The genesis of SLO can be linked to the ubiquitous corporate social responsibility (CSR) obligations that most modern corporations and multinational enterprises (MNEs) integrate within their business model.

SLO is commonly associated with large mining corporations.<sup>2</sup> In this context, Joyce and Thomson define SLO as "...an acceptability that must be achieved on many levels, but...must begin with, and be firmly grounded in, social acceptance of the resource development by local communities."<sup>3</sup> Another contrasting definition by Gunningham states that SLO "governs the extent to which a corporation is constrained to meet societal expectations and avoids activities that societies deem unacceptable, whether or not those expectations are embodied in law."<sup>4</sup> Prno and Slocombe note that local communities are the final arbiters of SLO because they are often directly affected by mining projects due to proximity. However, SLO can also be issued as a whole by other societal organs such as governments, community groups and the media.<sup>5</sup> This observation forms the basis of the article.

SLO is not a traditional tool of regulation based in legislation or enacted rules but rather revolves around the extent to which corporations may be bound to satisfy

<sup>2</sup> See e.g. Joel Gehman, Dara Thompson, Daniel Alessi, Diana Allen and Greg Goss, 'Comparative Analysis of hydraulic fracturing wastewater practices in unconventional shale development: Newspaper coverage of stakeholder concerns and social licence to operate' (2016) 8 *Sustainability* 912; See also discussion by Emmanuel Raufflet, Sofiane Baba, Claude Perras and Nolywe Delannon, 'Social License' in *Encyclopedia of Corporate Social Responsibility* (Samuel Idowu, Nicholas Capaldi, Liangrong Zu and Ananda Das Gupta Eds.) (2013, Springer, New York), 2223-30.

<sup>3</sup> Susan Joyce and Ian Thomson, 'Earning a Social Licence to Operate: Social Acceptability and Resource Development in Latin America', (2000) 93 *Canadian Mining and Metallurgical Bulletin* 49-53 referred to by Nina Hall, Justine Lacey, Simone Carr-Cornish, Anne-Maree Dowd, 'Social Licence to Operate: Understanding How a Concept has been Translated into Practice in Energy Industries', (2015) 86 *Journal of Cleaner Production* 301, 301-302.

<sup>4</sup> Neil Gunningham, Robert Kagan and Dorothy Thornton, 'Social Licence and Environmental Protection: Why Business go Beyond Compliance', (2004) 29 *Law and Social Inquiry* 307, 307 referred to by Jason Prno and Scott Slocombe, 'Exploring the Origins of 'Social Licence to Operate' in the Mining Sector: Perspectives from Governance and Sustainability Theories', (2012) 37 *Resources Policy* 346, 346-347.

<sup>5</sup> Prno and Slocombe, above n 4, 347.

the requirements of local communities, stakeholders and immediate societal groups that are affected by their commercial activities.<sup>6</sup> Originally developed as an extension of the CSR concept, SLO are now considered by some social scientists as the “key condition for successfully establishing and running a mining project”.<sup>7</sup> Nelsen states that SLO must be adaptable to changing social paradigms within the society.<sup>8</sup> Nelsen further comments that the evolving social paradigms extend into areas beyond the conventional CSR norms such as environmental protection and sustainability. The emerging paradigms include considerations such as impact on local businesses pre and post mining operations, local employment, training, contribution to social infrastructure (e.g. parks, schools, hospitals and other not for profit endeavours).<sup>9</sup> This means that businesses and corporations must constantly adapt to evolving social attitudes and expectations if SLO is to be maintained.<sup>10</sup> Brown and Fraser observe that business cases for mining projects are often planned under the assumption that there is a consonance of interests between managers, shareholders and other community stakeholders.<sup>11</sup> The observation underscores the complexity of determining a pre-planned strategy to obtain and maintain a SLO based on business case alone.

Additionally, SLO is not limited on a localised corporation-to-community interaction. Rather, the interactions are becoming increasingly looked at from a regional and a national context to determine if a single corporation has obtained and maintained SLO or is the privilege sector-wide.<sup>12</sup> The best illustration is the difficulties faced by the Australian Coal Seam Gas (CSG) operators. Lacey and Lamont note that the Australian CSG sector has consistently attracted public protest in regional areas due to the perceived impact on groundwater reserves, agricultural farmlands and economic activities.<sup>13</sup> Lacey and Lamont further point out that opposition to CSG activities has resulted in a coordinated and networked opposition that reaches beyond the site of development.<sup>14</sup> Lacey and Lamont observe that this is different from localised protests against infrastructure development (e.g.

<sup>6</sup> Hall et al, above n 3, 301-302.

<sup>7</sup> Hall et al, above n 3, 301-302; See also Eberhard Falck and Joachim Spangenberg, ‘Selection of Social Demand-based Indicators: EO-based indicators for Mining’, (2014) 84 *Journal of Cleaner Production* 193, 193-194.

<sup>8</sup> Jacqueline Nelsen, ‘Social Licence to Operate’ (2006) 20 (3) *International Journal Mining, Reclamation and Environment*, 161.

<sup>9</sup> Ibid.

<sup>10</sup> Judy Brown and Michael Fraser, ‘Approaches and Perspectives in Social and Environmental Accounting: An Overview of the Conceptual Landscape’ (2006) 15 *Business Strategy and the Environment* 103, 108.

<sup>11</sup> Ibid.

<sup>12</sup> Justine Lacey and Julian Lamont, ‘Using Social Contract to Inform Social Licence to Operate: An Application in the Australian Coal Seam Gas Industry’ (2014) 84 *Journal of Cleaner Production* 831 referred to by Hall et al, above n 3, 302.

<sup>13</sup> Lacey and Lamont, above n 12, 836.

<sup>14</sup> Ibid.

powerlines) where opposition remain within the proximity of development while outside communities may support the development in question if it benefits them.<sup>15</sup>

Studies have shown that SLO has now become an additional layer of regulation on top of the standard government licencing and regulatory regimes. For example, in their study of the pulp industry of selected jurisdictions in the US, Canada, New Zealand and Australia, Gunningham, Kagan and Thornton observe a common theme in that the SLO was constantly monitored and enforced by societal stakeholders who leverage the situation by exploiting the terms of the licence.<sup>16</sup> On the other hand, environmental groups may enforce the SLO through measures such as adverse publicity, shaming tactics, consumer boycotts, class actions and political pressure.<sup>17</sup> The terms of any government issued regulatory licences accentuate the effects of SLO through empowerment and access to information which can act as a powerful deterrent against errant corporations.<sup>18</sup> Where corporations fail to maintain their SLO, the local stakeholders can seek enhanced regulatory conditions by involving the regulatory authorities. Thus, the interplay between regulatory licences and the exponents of SLO determines the extent to which corporations are compelled to go beyond minimum legal compliance.<sup>19</sup>

The role of the regulators and the politicians are worth examining as well from the lens of SLO. Typically, the regulators are authorised to issue licences to corporations for carrying out mining or prospecting under a pre-defined standard. Such standards are drawn from international treaties, government directives, legislations or guidelines. Procuring a licence can potentially increase the wealth of the licence holder because it may limit access to and even constrict competition in markets.<sup>20</sup>

The role of the politicians, on the other hand, is more flexible. Politician's behaviour can be best described by the public choice theory. This theory explains the nexus between trade, commerce and politics by explaining the role of politicians in shaping policies.<sup>21</sup> From a purely economic and trade perspective, the public choice theory views politicians as producers of goods (meaning policy) and the voters, stakeholders and the various community groups are viewed as consumers of

<sup>15</sup> Ibid.

<sup>16</sup> Gunningham et al, above n 4, 336.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Arie Freiberg, 'The Tools of Regulation' (2010, The Federation Press), 143.

<sup>21</sup> The public choice theory was first introduced by Duncan Black in 1948 as the "median voter theory", which was later expanded by James Buchanan and Gordon Tullock (assuming its current form of the public choice theory) (See generally James Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1<sup>st</sup> ed. University of Michigan, Ann Arbor, 1965)).

that policy espoused by the politicians.<sup>22</sup> The relationship between the voters and politicians can, therefore, be summarised in terms of politicians attracting more votes for “better” policy initiatives. However, this simplistic summary belies the reality because the politicians may not always be concerned with welfare of the ordinary voter. In fact, their interests may be better served by allying with groups that are better endowed financially or the ones that act through lobbying.<sup>23</sup> These groups may sometimes prove to be better source of votes or political donations as compared to other segment of voters. The politicians may quite often be more concerned about effects of a particular transaction from a re-election perspective rather than be moved by considerations such as environmental protection, sustainability or preservation of status quo in regional areas. Conversely, if the local stakeholders prove that they wield a significant political clout and well-funded then the politicians may reconsider their position.

By way of comparison from an international trade perspective, Alan Sykes comments that this behaviour of the politicians may lead to policies that favour non-liberalisation of trade even where economic considerations dictate otherwise.<sup>24</sup> Unanticipated changes in the economy may often lead to circumstances where political dividends can be gained by protecting local industries.<sup>25</sup> Where politicians are aware that trade liberalisation is unpopular with import-competing local industries, and if such industries are well-organised and politically influential, few policy-makers will ever risk trade liberalisation. An example is the Australian automobile industry which for years thwarted attempts of reduction in government support by leveraging politicians to keep its operations running.<sup>26</sup>

The public choice theory can easily be extended to SLO. In instances where the local community groups and stakeholders achieve enough critical mass to influence local electoral outcomes, public choice-based conclusion may mean corresponding adjustments made by the politicians in governmental regulation and policies.

<sup>22</sup> Raj Bhala, *International Trade Law: Theory and Practice* (2<sup>nd</sup> Ed, LexisNexis, 2001), 1517.

<sup>23</sup> Buchanan & Tullock, above n 21, 298.

<sup>24</sup> Alan Sykes, ‘Protectionism as “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations’ (1991) 58 *University of Chicago Law Review* 255, 279.

<sup>25</sup> *Ibid*, 279.

<sup>26</sup> See generally ABC News, ‘Car Workers Step-up Federal Lobbying on Taxpayer Support’ (18 November 2013) <<https://www.abc.net.au/news/2013-11-18/car-workers-step-up-federal-lobbying/5098236>>; See also Joshua Dowling, ‘Holden Receiving Twice as Much Government Funding as Toyota and Ford to Build Cars’ (News.com.au, 4 April 2013) <<https://www.news.com.au/finance/business/holden-receiving-twice-as-much-government-funding-as-toyota-and-ford-to-build-cars/news-story/c210473a9395f6ea55fcf450492b713d>>; Bill Scales, ‘The rise and fall of the Australian car manufacturing industry’ (Financial Review, 19 October 2017) <<https://www.afr.com/opinion/columnists/bill-scales-the-rise-and-fall-of-the-australian-car-manufacturing-industry-20171018-gz3ky4>>.

This article proceeds as follows: Part II of the article introduces a discussion of the role of the regulatory institutions and the influence exercised by the non-institutional actors in “issuance”, “supervision” and “enforcement” of SLO. After adapting concepts from the institutional theory, the article devises two original regulatory models (i.e. single and dual-layered) which are driven through SLO. Part III then uses the single and dual-layered models of social licence-based regulation to discuss three sectors (live exports, gas exports and foreign investment in coal for exports) in Australia where the effect of regulation is becoming noticeable. The duality of non-institutional interpretation of SLO is the key takeaway point of this part of the article. Part IV, of the article contrasts SLO with another regulatory standard (i.e. “Australian National Interest” in regulation of foreign investment). Both standards are fluid and undefined. Part IV, in particular, highlights the conceptual similarities between standards that may be “appropriated” by non-institutional actors in an ethnocentric and inward-looking manner. This could mean that in absence of a clearly defined prescriptive standard, various stakeholders may interpret questions of SLO and the Australian national interest in line with their own interests. Following the observations of the effects of SLO on various sectors in Australia, Part V of the article transplants the Australian situation into possible ramifications encountered on an international level. Part V builds an argument that the current international trade and investment laws are not ready to withstand the effect of SLO based regulation, which has begun to emerge in Australia and will likely spread across the trade and investment realms, thereby creating potential for disputes. Part VI concludes. Note that this article is intended as a primer for more deeper studies into how social licences can be converted into a more prescriptive regulatory standard. Australia is presented as the initial case study.

## II INSTITUTIONAL AND NON-INSTITUTIONAL RESPONSES

Within the confines of this article, institutional response will refer to regulatory responses by governments or governmental bodies, while non-institutional reaction refers to actions, statements or policies adopted by non-governmental organisations, community groups, industry associations or environmental conservation groups.

In the usual course, government institutions administer regulatory or legislative standards through notions of legitimacy, morality and social norms.<sup>27</sup>

<sup>27</sup> “Legitimacy” is the normative concept that enables alignment with prevailing rules and cultural norms (see e.g. discussion in W. Richard Scott, *Institutions and Organizations* (1995, Sage Publications) 45; An alternative characterisation of “legitimacy” is offered by Mark Suchman who states that “legitimacy” is “a generalised perception or assumption that the actions of an entity are desirable...within some socially constructed systems of norms, values, beliefs and definitions” (Mark Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20 *Academy of Management Review* 571, 574); The conferral of “legitimacy” occurs when “...audiences affected by organizational outcomes endorse and

The environment in which the governmental institutions perform this function can be termed as the “institutional environment” which itself is composed of political, economic, social and legal conventions that forms the basis for production and exchange.<sup>28</sup>

The institutions may also incorporate the limitations and the incentive systems that a societal group has devised to regulate human interactions.<sup>29</sup> The institutions frame rules and prescribe enforcement mechanisms to that enable predictable outcomes for stakeholders.<sup>30</sup> The composition of the institutions was analysed in depth by W. Richard Scott. Scott’s analysis divides socio-political legitimacy into three components: regulative, normative and cognitive.<sup>31</sup>

In a foreign investment context, governments of the host state are the usual interpreters of non-institutional responses emanating from non-institutional stakeholders (the usual custodians of social licences). In the absence of a concrete definition, the concept of social licences seems to be malleable depending on the perceptions of the regulators or the local stakeholders.

Within the Australian context, however, both Institutional and non-institutional responses to social licence-based arguments can be observed in international trade and investment. Response to a question of social licence can come from either the institutional actors (for example, the Treasurer or various

support an organization’s goals and activities (Kimberly Elsbach and Robert Sutton, ‘Acquiring organizational legitimacy through illegitimate actions: A marriage of institutional and impression management theories’ (1992) 35 (4) *The Academy of Management Journal* 699, 700).

<sup>28</sup> Len Trevino, Douglas Thomas, John Cullen, ‘The Three Pillars of Institutional Theory and FDI in Latin America: an Institutionalization Process’, (2008) 17 *International Business Review* 118, 120. Trevino et al refer to Joanne Oxley, ‘Institutional Environment and the Mechanism of Governance: The Impact of Intellectual Property Protection on the Structure of Inter-Firm Alliances’, (1999) 38 *Journal of Economic Behaviour and Organisation*, 283-309 and Andrew Sobel, ‘State institutions, risk, and lending in global capital markets’ (2002) 11 (6) *International Business Review* 725-752.

<sup>29</sup> Trevino et al, above n 28, 120.

<sup>30</sup> Ibid.

<sup>31</sup> The regulative component is composed of the existing laws and regulations originating from a domestic setting that promotes or discourages certain types of behaviours, cognitive component is the common general perceptions of factors that are typically taken for granted in a society. The cognitive component of institutions reflects the structures and symbolic systems shared among individuals in a society or a nation. The normative component is the social norms, values, beliefs and assumptions in a society. Normative components of institutions define what is appropriate for the stakeholders in a society (W. Richard Scott, *Institutions and Organizations* (1995, Sage Publications) 34-52); Note that “socio-political legitimacy” is explained as “the process by which key stakeholders, the general public, key opinion leaders, or government officials accept a venture as appropriate and right, given existing norms and laws” (see discussion by Howard Aldrich and C. Marlene Fiol, ‘Fools rush in? The institutional context of industry creation’ (1994) 19 *Academy of Management Review* 645, 648); Later commentators such as Gehman, Lefsrud and Fast do not characterise SLO as a separate concept, rather, they see it as synonymous with the concept of legitimacy (see e.g. Joel Gehman, Lianne Lefsrud and Stewart Fast, ‘Social Licence to Operate: Legitimacy by Another Name?’ (2017) 60 (2) *Canadian Public Administration: New Frontiers* 293, 301-311; See also Trevino et al, above n 28, 121.

government bodies) or non-institutional actors (political parties in their non-governmental capacity, interest groups, lobbies or NGO's).

National institutions influence foreign investment and/or trade behaviour (such as increased exports or reduced imports or concluding FTAs) through the processes associated with the three components under Scott's analysis. Where the actions or business plan of the foreign investor's clashes with the institutional behaviour of the host nation (as reflected by the three components) national interest, national security or social licence arguments may be invoked as a *raison d'être* behind the regulatory response.

The institutional response can either be enactment of new legislation, guidelines or rules, refusal of permits/licences, requiring additional compliance measures or imposition of quantitative restrictions such as export quotas or import permit requirements. The institutional response originates from the regulative component of the institutions sphere of influence but retains some cognitive and normative elements.

The non-institutional response, however, is mainly cognitive and normative in nature. Non-institutional response may be perceived as exhortative and non-binding on the parties, but it often acts as a precursor to an institutional response. Arguably, from a social licence perspective, non-institutional response by stakeholders may not always be uniform or on the same level. This is observable in situations where one group of non-institutional actors opposes a foreign investment or developmental projects while the other group may be in favour of it because of potential employment opportunities or infrastructure development. Both groups of non-institutional actors may rely on the cognitive and normative arguments to support their stance. Two models can be devised to explain regulatory patterns linked to SLO. The two models (i.e. single-layered regulation and dual-layered regulation) consider the observable behaviour of the institutional actors and non-institutional stakeholders in the three selected sectors referred to in Table 1 below.

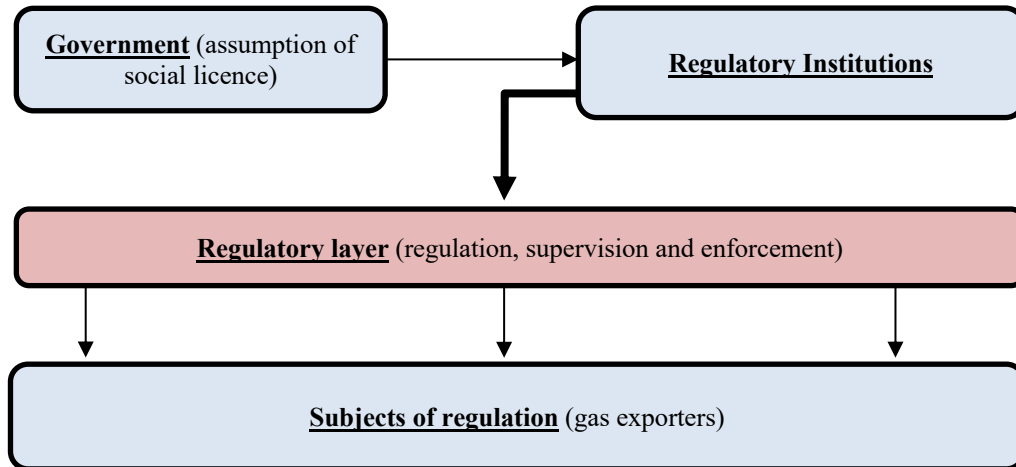
Single layer regulation, illustrated diagrammatically in Figure 1 below, occurs when the government, through its regulatory institutions interprets the SLO positions (regarding potential issues such as the environment or possible ramifications of a trade agreement). Under single layer regulation, the government can claim that it is acting under a social licence from the people that may be affected by the underlying triggers/causes but there may not necessarily be a trigger from a non-institutional side. The SLO assumes a stricter posture in terms of appearing as a legal licence rather than a mere assent couched in cognitive or normative sentiments.



Dual layered regulation (illustrated in Figure 2 below) occurs where the usual custodians of SLO i.e. local community groups, lobbies, stakeholders, trade unions etc. prompt the government to adopt regulatory measures. The regulation is justified based on SLO. However, the regulation continues even after a governmental regulatory measure is implemented. If this occurs, the institutional regulation is conducted within the defined framework of the regulatory response (e.g. guidelines or rules issued by a government body) whilst the original movers of the SLO continue to issue, critique, assess and “renew” the efficacy of the regulatory repose and the compliance behaviour of the target of regulatory measures. Therefore, the regulatory response comprises both ‘soft’ and ‘hard’ regulation by the institutions and non-institutional actors in a dual-layered fashion.

One noticeable difference between the two models is that the institutional actors (governmental regulators) under the dual-layered regulation “interpret” the SLO issued by non-institutional actors whereas in the single-layered model, the institutional actors assume both functions of issuance and regulation of SLO.

A (Figure 1) Single-lawyered regulation based on social licence narrative



(Figure 2) Dual-layered regulation based on social licence narrative

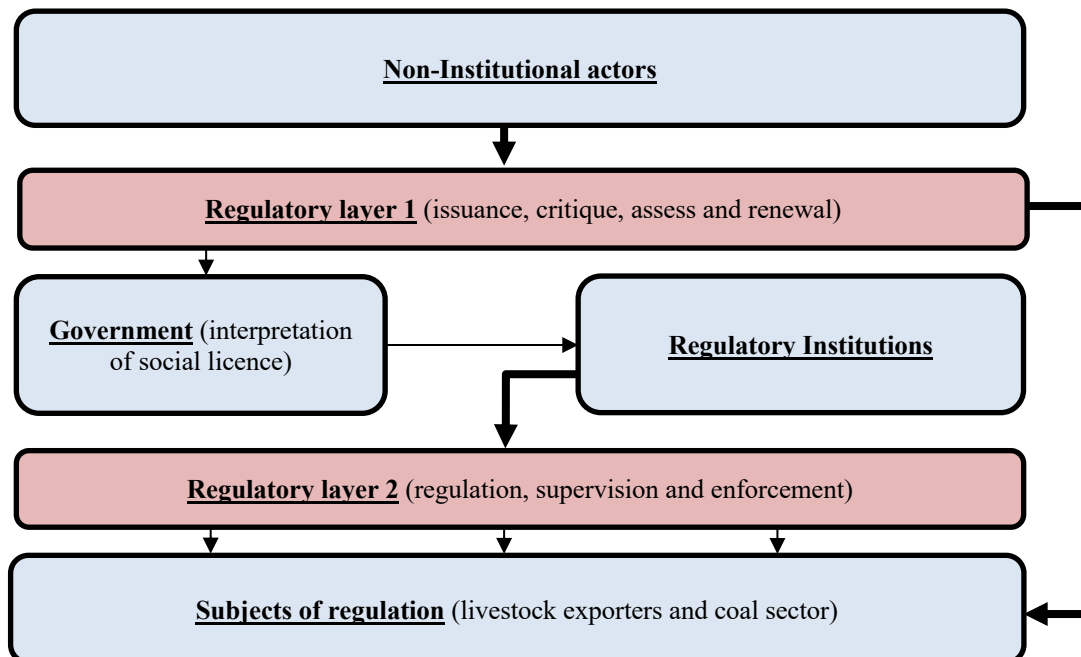


Table 1 below offers additional context by summarising the observation and central arguments in social licences from an institutional theory perspective.

B (Table 1) Overview of Regulatory Institutional and Non-institutional Responses in Australia with respect to Social Licences

<i>Year</i>	<i>Sector</i>	<i>Nature of Institutional Response</i>	<i>Realm</i>	<i>Comments</i>	<i>Social Licence status</i>	<i>Social Licence regulation</i>
2011	Livestock	Export control (ESCAS)	Trade (export)	Legislated response. Ban revoked due to negative economic effects. Resulted in sectoral reform on humane treatment of animals.	Ongoing – supervised by the government and animal rights group.	Dual layered
2017	Gas	Threat of export control (ADGSM)	Investment (FDI) and trade (export)	Threat of export control resulted in price stabilisation and legislated governmental response. Cooperation by gas companies. Continued oversight by the government	Ongoing – supervised by the government	Single layered
2018	Coal	Licence and funding	Investment (FDI)	Adani Carmichael coal mine. Ongoing state supervision, pending legal actions by local stakeholders, regulatory reviews and environmental assessments. Environmental approval obtained after extensive delay.	Ongoing – supervised by the government, environmental groups and local stakeholders.	Dual layered

### III INSTITUTIONAL AND NON-INSTITUTIONAL RESPONSES EXPLAINED FROM AN AUSTRALIAN CONTEXT

SLO influence regulatory institutions in a variety of ways. In this section, non-institutional responses triggering institutional (regulatory) response will be briefly examined. The idea is to distil common themes from seemingly disparate sectors to identify the central operative criteria behind SLO.

#### A *Live-Export Ban*

In 2011, the Australian government banned live export of sheep following images of cruelty from abattoirs in Indonesia<sup>32</sup> The government's response was triggered through sustained campaign by animal rights activists and sections of the society appalled by the treatment of animals.<sup>33</sup> The 2011 ban lasted barely a month before being lifted in July 2011 due to backlash from livestock breeders and allied industries such as transport companies and animal feed manufacturers.<sup>34</sup> In this instance, we see that non-institutional response from stakeholders shaped the contours of the regulatory response by government institutions. The response by the institutions can be divided into two stages. In the first stage, a knee-jerk export ban was imposed following revelations of animal abuse by non-institutional actors. The ban proved to be counterproductive and its effects were felt by businesses directly and indirectly related to the livestock industry.<sup>35</sup> The effects were also felt in Indonesia, a highly populated country that is a major importer of live cattle from Australia.<sup>36</sup> In the second stage, the government responded to the criticism and sought to achieve equilibrium between two competing narratives i.e. economic considerations and humane treatment of animals.

The government extended an assistance package to the affected producers and related businesses. It further lifted the ban and introduced new export permit

<sup>32</sup> See ABC Four Corners, 'A Bloody Business' <<https://www.abc.net.au/4corners/a-bloody-business---2011/2841918>>; See also a comprehensive tracking of Australia's live export trade in Parliament of Australia, 'Live Export: A Chronology' (18 July 2016) <[https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4700032/upload\\_binary/4700032.pdf](https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/4700032/upload_binary/4700032.pdf)>, 7-30.

<sup>33</sup> Parliament of Australia, above n 32, 17 (Ibid); See further discussion on the actual impact of live exports to Indonesia in Jessica Blanchett and Bruno Zeller, 'No Winners in the Suspension of the Livestock Trade with Indonesia' (2012) 14 *University of Notre Dame Australia Law Review* 55, 57-61.

<sup>34</sup> ABC News, 'Government Lifts Live Cattle Export Ban' (6 July 2011) <<https://www.abc.net.au/news/2011-07-06/government-lifts-live-cattle-export-ban/2784790>>

<sup>35</sup> See e.g. Richard Willingham, 'Farmers worried as Indonesia plans to cut beef imports', The Sydney Morning Herald (16 December 2011) <https://www.smh.com.au/environment/conservation/farmers-worried-as-indonesia-plans-to-cut-beef-imports-20111216-1ox74.html>; See further ABC News, 'Outback Families Still Recovering from Cattle Exports Ban' (23 November 2011) <<https://www.abc.net.au/news/2011-11-23/outback-families-still-recovering-from-cattle-exports-ban/3688282>>;

<sup>36</sup> See ABC News, 'Indonesia to Slash Aussie Beef Imports' (16 December 2011) <<https://www.abc.net.au/news/2011-12-15/indonesia-to-slash-beef-imports/3733776>>

requirements for Indonesia under the Export Supply Chain Assurance System (ESCAS) framework.<sup>37</sup> The ESCAS enabled exports of live animals in August 2011 and is being expanded to cover all major foreign export markets for Australian live exports.<sup>38</sup> The ESCAS is an assurance system that covers animal welfare considerations under the World Organisation for Animal Health (OIE) recommendations, control of the supply chain, traceability of the stock through the supply chain and independent audit of the supply chain in the importing country.<sup>39</sup> Under the ESCAS, the exporter of live animals must first seek approval for which the exporter must demonstrate that livestock handling is according to the OIE recommendations for animal welfare to the point of slaughter.<sup>40</sup> The ESCAS lodgement by the exporter must include results of an independent audit that demonstrates conformity with the OIE animal welfare recommendations throughout the supply chain.<sup>41</sup>

The 2015 ESCAS Report acknowledges that the system was put into place after a short development time. Hence, there were instances where the handling systems resulted in lax outcomes and led to poor treatment of animals.<sup>42</sup> The ESCAS Report also accepts that the implementation of the system is rigid and complex but claims that the introduction of the system has “ensured the continuation of the livestock export industry”.<sup>43</sup> The ESCAS system has continued to receive criticism from RSPCA, while the Department of Agriculture notes critical breaches where animals ended up in non-approved abattoirs.<sup>44</sup>

<sup>37</sup> Parliament of Australia, above n 32, 3. The ESCAS is in addition to legislative frameworks already in place. The Act and Regulations that relate to licences to export livestock, and Orders that relate to specific export destinations are: *Australian Meat and Live-stock Industry Act 1997*; *Australian Meat and Live-stock Industry (Export Licencing) Regulations 1998*; *Australian Meat and Live-stock Industry (Conditions on live-stock export licences) Order 2012*; *Australian Meat and Live-stock Industry Regulations 1998*; *Australian Meat and Live-stock Industry (Export of Live-stock to Saudi Arabia) Order 2005*; *Australian Meat and Live-stock Industry (Live Cattle Exports to the Republic of Korea) Order 2002*. Additionally, the Act and Orders that relate to the preparation of livestock for export by sea and air are: *Export Control Act 1982*; *Export Control (Prescribed Goods – General) Order 2005*; *Export Control (Animals) Order 2004*; the Orders that relate to standards for the export of livestock are: *Australian Meat and Live-stock Industry (Standards) Order 2005*; *Export Control (Animals) Order 2004*.

<sup>38</sup> Parliament of Australia, above n 32, 3.

<sup>39</sup> See generally Department of Agriculture and Water Resources (DAWR), Australian Government, ‘Exporter Supply Chain Assurance System (ESCAS)’ <<http://www.agriculture.gov.au/export/controlled-goods/live-animals/livestock/information-exporters-industry/escas>>;

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Australian Government, ‘Exporter Supply Chain Assurance System’ (January 2015) <<http://www.agriculture.gov.au/SiteCollectionDocuments/biosecurity/export/live-animals/livestock/escas/escas-report.pdf>>, 47-49.

<sup>43</sup> Ibid, 42.

<sup>44</sup> ABC News, ‘Livestock exporters argue animal welfare standards improved at their expense, while RSPCA slams Government report’ (11 March 2016) <<http://www.abc.net.au/news/rural/2016-03-10/rspca-slams-animal-welfare-breaches-of-exports/7235816>>.

In parallel to the regulated governmental response, the livestock exporters remain under continued pressure from the animal rights groups and the larger society to maintain their SLO.<sup>45</sup> This ‘soft’ regulation raises interesting issues for businesses both domestic and foreign owned. Livestock exporters recognise that given the chequered history of the sector there are no “...guarantees that the industry has greater freedom to operate in the future”.<sup>46</sup> Therefore, the livestock exporters seek to roll out a normative and cognitive strategy around “engagement at local community level, with the media, with policymakers, and with influential opinion leaders”.<sup>47</sup> For foreign investors in the Australian cattle and livestock sector, understanding the dynamics of ‘soft’ regulation and the underlying normative and cognitive elements is essential to operate under SLO.<sup>48</sup> This is in addition to the government mandated regulation which, in turn, refers the operators/businesses back to the importance of maintaining SLO.

In summary, we can see that the effects of normative and cognitive non-institutional response to the issue of mistreatment of animals triggers a dual layered response i.e. a legislated institutional response juxtaposed with SLO based operating environment for the sector in question. However, only one layer is prescriptive and tangible in that it prescribes concrete factors for compliance by the livestock exporters. The second layer (the social licence) remains unlegislated, fluid and abstract which the livestock exporters must constantly ‘renew’ or ‘fertilise’. Note that the non-institutional, SLO response acted as the precursor to a regulatory institutional response. For foreign investors in the sector and importers of Australian livestock, the challenge is not just to meet the audit and compliance requirements under ESCAS regime but also to engage with the custodians of the SLO.

### B *Threat of Export Controls on Gas Producers*

The use of threatened regulatory measures, based on a unilateral or single-layered SLO justification provides a contrast to the dual-layered nature of regulating live exports. In July 2017, Australian Government imposed new gas restrictions on Liquefied Natural Gas (LNG) exporters as a response to domestic

<sup>45</sup> Colin Bettles, ‘Celebrity Punch Needed to Safeguard Live Exports ‘Social License’ (Farmonline, 1 May 2017) <<https://www.farmonline.com.au/story/4629860/celebrity-punch-needed-to-safeguard-live-exports-social-licence/>>

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> ABC News, ‘Foreign Investment Flagged as Answer to Australia’s Livestock Shortage’ (27 February 2017) <<http://www.abc.net.au/news/rural/2017-02-27/foreign-investment-answer-to-australias-livestock-shortage/8301960>>; See also discussion in Department of Parliamentary Services, Parliament of Australia ‘Foreign Investment in Australian Agriculture’ (Research Paper Series 2013-14, 18 February 2014) <[https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/3006295/upload\\_binary/3006295.pdf;fileType=application/pdf](https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/3006295/upload_binary/3006295.pdf;fileType=application/pdf)>, 15-20.

gas price levels in the eastern region of the country.<sup>49</sup> The gas export restrictions known as ADGSM are not export controls per se. Rather, the ADGSM operates to generate regulatory leverage by using threat of export controls on LNG exports unless the gas exporters divert a certain proportion of their production to shore up domestic gas reserves.<sup>50</sup> The ADGSM, was enacted through amendment of the Customs (Prohibited Exports) Regulations 1958. Under the new amendment, a framework for restriction on the export of LNG is imposed where the Resources Minister determines there are prospects of a supply shortage in the domestic market for a particular year.<sup>51</sup> The measure of ADGSM is envisioned to last for an initial period of five years.<sup>52</sup> If, during this period, export controls are imposed on LNG exports then the export of LNG would require a permission from the Resources Minister.<sup>53</sup> The permission may have conditions attached with which the holder must comply with.<sup>54</sup> Such conditions may include annual exportable volume of LNG after considering the expected market needs or any factors triggering shortfall of LNG. The ADGSM is then reinforced through penalties in case of non-compliance with permission conditions, including revocation of export permissions.<sup>55</sup>

The ADGSM illustrates a single-layered SLO-based regulation. In this approach, the institutional regulator assumes the mantle of the “source” and the “interpreter” of the social licence. Using a combination of regulatory, cognitive and normative elements from an institutional theory angle, the regulatory institutions encourage the subject of the regulation to comply. More specifically, in devising the ADGSM, the regulators conveyed their expectations to the LNG producers that

<sup>49</sup> See generally Gilbert + Tobin, ‘Role Reversal – Commonwealth Government flags domestic gas restrictions on East Coast LNG exporters.’ (27 April 2017).

<<https://www.gtlaw.com.au/insights/role-reversal-commonwealth-government-flags-domestic-gas-restrictions-east-coast-lng-1>>; See generally Federal Register of Legislation, Explanatory Statement, *Customs (Prohibited Exports) Amendment (Liquefied Natural Gas) Regulations 2017* <<https://www.legislation.gov.au/Details/F2017L00826/Explanatory%20Statement/Text>>.

<sup>50</sup> The Explanatory Statement describes the purpose behind the ADGSM “...is to ensure that there is a sufficient supply of gas to meet the needs of Australian consumers, including households and industry, by requiring, if necessary, LNG exporters which are drawing gas from the domestic market to limit exports or find offsetting sources of new gas.” See Federal Register of Legislation, Explanatory Statement, *Customs (Prohibited Exports) Amendment (Liquefied Natural Gas) Regulations 2017* <<https://www.legislation.gov.au/Details/F2017L00826/Explanatory%20Statement/Text>>; The Explanatory Statement is further reflected in the *Customs (Prohibited Exports) (Operation of the Australian Domestic Gas Security Mechanism) Guidelines 2017*.

<sup>51</sup> The minister consults other regulatory agencies such as the Australian Competition and Consumer Commission (ACCC) and other ministers such as the Minister responsible for trade, industry and energy. See Regulations 13GC (1), 13GE (1)-(3) of *Customs (Prohibited Exports) Regulations 1958*.

<sup>52</sup> See Federal Register of Legislation, above n 50.

<sup>53</sup> Ibid.

<sup>54</sup> See Guidelines 11(3), 11 (15), 11 (18) *Customs (Prohibited Exports) (Operation of the Australian Domestic Gas Security Mechanism) Guidelines 2017*.

<sup>55</sup> See Regulation 13GC (4) *Customs (Prohibited Exports) Regulations 1958*.

compliance on part of the industry must come from their own volition.<sup>56</sup> Furthermore, the regulators interpreted the additional ongoing business costs incurred due to the ADGSM will be borne voluntarily by the industry and will constitute a part of the exporters' SLO.<sup>57</sup> Note that in contrast to the live-export ban of livestock (discussed above), the government has taken the liberty to classify the additional cost of doing business as part of the SLO. Under the live export ban of the livestock, and the situation following its revocation, the government regulators consistently updated their understanding of the SLO under the ESCAS through the interpretation proffered by animal rights groups and the civil society concerned about animal welfare, thus constituting a dual-layered regulatory environment revolving around a more flexible notion of SLO. For investors, traders and businesses engaged in export-oriented business strategy, a dual layered regulation may potentially prove to be more difficult to deal with as compared to a single-layered regulation that features a government spelling out its regulatory requirements through its understanding of the SLO. The SLO is ostensibly linked to the Australian Government's desire to ensure guaranteed supply of gas to Australian industries dependent on gas (such as chemical, glass, polymer, petroleum, coal, plaster and concrete manufacturing) as well as ensuring cost of living relief to households connected to the gas mains.<sup>58</sup>

In the impact analysis of the export controls built around the ADGSM, the Australian Government, Department of Industry, Innovation and Science (DIIS) observes that applying export controls may carry "high level of sovereign risk".<sup>59</sup> According to DIIS, LNG projects entail high exploration and infrastructure investment costs that may be in billions of dollars. Foreign investors in the Australian commodities and resources sector devise their investment decisions based on the stability of the domestic regulatory environment.<sup>60</sup> The DIIS warns that Australia's attractiveness as a preferred foreign investment venue may be affected by regulatory decisions.<sup>61</sup> The DIIS analysis acknowledges the difficulty in determining the extent of potential damage to Australia's outlook as a foreign investment venue in the LNG segment and that the frequency and the depth of

<sup>56</sup> Federal Register of Legislation, above n 50.

<sup>57</sup> Federal Register of Legislation, above n 50; See also Department of Industry, Innovation and Science (DIIS), Australian Government, 'Regulation Impact Statement – Australian Domestic Gas Security Mechanism' (June 2017) <[https://ris.pmc.gov.au/sites/default/files/posts/2017/11/regulation\\_impact\\_statement.pdf](https://ris.pmc.gov.au/sites/default/files/posts/2017/11/regulation_impact_statement.pdf)>, 15.

<sup>58</sup> The DIIS Regulation Impact Statement reports that 65000 Australians are employed in the manufacturing industries using gas (Ibid, 22, 30).

<sup>59</sup> Ibid, 21.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.



export controls may affect how Australia continues to receive foreign investment in the LNG sector.<sup>62</sup>

C *Impact of Social Licences on Regulation of Foreign Investment and Project Approvals*

Foreign investment for large mining and infrastructure projects is of critical importance to the success of any venture. The encroachment of SLO's in foreign investment within Australian natural resources sector has both long and short-term ramifications. In the realm of international investments laws, the main regulatory vehicles are the investment treaties or free trade agreements (FTAs) that aim to promote foreign investment. The promotion function of the investment treaties or the FTAs centres around providing legal protections to foreign investors from any abuse of public power by the governments of the host country. The investment treaties or the FTAs also enable arbitration tribunals to review conduct of the host country which affects or is likely to affect foreign investments. In short, the concept of investment regulation is well enshrined in international law and provides a well-established dispute resolution mechanism in the form of International Centre for the Settlement of Investment Disputes (ICSID).

Social licences, on the other hand, is a more ethnocentric and inward-looking phenomenon which is not regulated at any treaty level and yet, the international investor has to treat SLO as a parallel, almost quasi-legal regulatory regime before being granted the requisite regulatory approvals by the government of the host country. Within the SLO framework there are no settled dispute settlement norms in the form of ICSID or arbitral tribunals. The foreign investor must negotiate individually with local stakeholders and groups that have assumed the mantle of the custodians of the SLO in any given scenario. Negotiation and constant struggle to adapt and renew SLO may directly or indirectly increase the cost of doing business for the foreign investor.

The two preceding examples discussed export controls as a regulatory response couched in terms of SLO. The SLO process can greatly affect the regulatory approvals and financing of foreign investment in the natural resources sector. This is best illustrated through the Adani Corporation's Carmichael coal mine venture in Queensland, Australia.

Adani considered Queensland as a prime venue for establishment of large scale coal extraction and export operations.<sup>63</sup> The investment of AUD 17 billion is slated

<sup>62</sup> Ibid.

<sup>63</sup> For a general overview see Queensland Government, Department of State Development, Manufacturing, Infrastructure and Planning <<http://www.statedevelopment.qld.gov.au/assessments-and-approvals/carmichael-coal-mine-and-rail-project.html>>.

to be the largest mine in Australia.<sup>64</sup> The Carmichael mine infrastructure intended to transport coal will benefit not only the primary user (Adani) but also other coal mining operations in the region.<sup>65</sup> However, the project has encountered significant resistance before receiving final environmental approval in June 2019.<sup>66</sup> Even after receiving environmental approvals, the project has been criticised by climate change advocates and other environmental groups.<sup>67</sup> The project has also received criticism for its heavy use of groundwater (almost 12 billion litres of water per annum by Adani's own estimates)<sup>68</sup> and its impact on the surrounding water bodies.<sup>69</sup> Additionally, critics have also pointed out to the indirect effects of the project on the iconic Great Barrier Reef through the development and expansion of the Abbot Point port.<sup>70</sup> It is claimed that the terminal at Abbot Point will need significant dredging which will release plumes of soil and debris blocking sunlight vital for the existence of the coral reefs.<sup>71</sup> Furthermore, burning of the coal will generate large amounts of carbon dioxide into the atmosphere which will contribute to the overall increase in global warming thereby damaging the coral reef.<sup>72</sup>

<sup>64</sup> Michael Slezak, 'Why Adani's Planned Carmichael Coalmine matters to Australia – and the World?', *The Guardian* (16 August 2017) <<https://www.theguardian.com/business/2017/aug/16/why-adanis-planned-carmichael-coalmine-matters-to-australia-and-the-world>>.

<sup>65</sup> *Ibid.*

<sup>66</sup> See e.g. ABC News, 'Adani gets final environmental approval for Carmichael mine' (14 June 2019) <<https://www.abc.net.au/news/2019-06-13/adani-carmichael-coal-mine-approved-water-management-galilee/11203208>>

<sup>67</sup> One expert notes that burning the coal extracted by Adani will add 77 million tonnes of CO<sub>2</sub> gas into the atmosphere each year (See report by Associate Professor Malte Meinhausen, 'Individual Report to the Land Court of Queensland on Climate Change – Emissions' in *Adani Mining Pty Ltd v Land Services of Coast and Country Inc.* <<http://envlaw.com.au/wp-content/uploads/carmichael16.pdf>>, 2-3; Another report by the Climate Council argues that the coal extracted will be exported to India where it will be used for power generation in coal-fired power plants, doing so goes against Australia's commitment to climate change (see Climate Council, 'Risky Business: Health, Climate and Economic Risks of the Carmichael Coalmine' <<https://www.climatecouncil.org.au/uploads/5cb72fc98342cfc149832293a8901466.pdf>>, 3).

<sup>68</sup> Adani Corporation, 'Carmichael Coal Mine and Rail Project SEIS: Report for Water Balance' (22 October 2013) <<http://eisdocs.dsdp.qld.gov.au/Carmichael%20Coal%20Mine%20and%20Rail/SEIS/Appendices/Appendix%20K/Appendix-K2-Water-Balance-Report.pdf>>, 59.

<sup>69</sup> ABC News, 'Adani groundwater plan could permanently drain desert oasis, scientists say' (21 May 2018) <<http://www.abc.net.au/news/2018-03-21/adani-groundwater-plan-risks-permanent-damage-to-desert-springs/9569184>>

<sup>70</sup> See generally Felicity Millner, 'Abbot Point Port and the Great Barrier Reef', *Environmental Justice Australia* <<https://www.envirojustice.org.au/projects/abbot-point-port-and-the-great-barrier-reef/>>; See also Andy Coghlan, 'Anger as Coal Mine that Could Damage Great Barrier Reef Approved' (New Scientist, 5 April 2016) <<https://www.newscientist.com/article/2083116-anger-as-coal-mine-that-could-damage-great-barrier-reef-approved/>>; See further Michael Slezak, 'Mud Dump in Great Barrier Reef Park Could Choke Life' (New Scientist, 31 January 2014) <<https://www.newscientist.com/article/dn24983-mud-dump-in-great-barrier-reef-park-could-choke-life/>>.

<sup>71</sup> More recently, the Queensland Government has announced it will take action against a company owned by Adani that released sediment water near the Great Barrier Reef (see ABC News, 'Adani Prosecuted over Release of Sediment near Barrier Reef' (5 September 2018) <<http://www.abc.net.au/news/2018-09-05/adani-prosecuted-over-release-of-sediment-near-barrier-reef/10204374>>); See also Slezak, above n 64.

<sup>72</sup> Slezak, above n 64; See also Climate Council, above n 67, 3.

The project has run into some political opposition as well with one survey reporting 65.1% Australians opposed the mine.<sup>73</sup> Bill Shorten, the leader of opposition in the Australian Parliament (at the time) indicated that unless commercial and environmental benefits to the project are clear, his party will not support the project.<sup>74</sup> Moreover, local stakeholders, communities and environmental groups (all non-institutional actors) have pressured banks and financial institutions to withdraw or refuse funding for the project. In doing so, the non-institutional actors have used a combination of declared corporate social responsibility standards of the banks as well as pressure-tactics.<sup>75</sup> Major international banks such as JP Morgan Chase, Citigroup, Deutsche Bank to name a few have distanced themselves from the project while the four major Australian banks have declared that they will not be funding the project.<sup>76</sup>

The local indigenous population and traditional owners have staunchly opposed the project. In the case of *Adani Mining Pty Ltd v Adrian Burragubba, Patrick Malone and Irene White on behalf of the Wangan and Jagalingou People*,<sup>77</sup> Adani attempted to enforce the Indigenous Land Use Agreement (ILUA) with the traditional owners of the land to allow Queensland Government to acquire the land on which the mine will operate. In August 2018, the Federal Court upheld the ILUA which will enable the Queensland Government to cancel the native title over the site of the mine, thereby allowing Adani to seek funding from global funds willing

<sup>73</sup> James Massola, 'Big Surge in Opposition to Adani, New Polling Reveals' (The Sydney Morning Herald, 1 February 2018) <<https://www.smh.com.au/politics/federal/big-surge-in-opposition-to-adani-new-polling-reveals-20180131-p4yz4o.html>>.

<sup>74</sup> Ibid.

<sup>75</sup> Charis Chang, 'Green groups to target Commonwealth Bank over potential Adani financing' (News.com.au, 3 May 2017) <<https://www.news.com.au/finance/business/green-groups-to-target-commonwealth-bank-over-potential-adani-financing/news-story/94d9701fe05b3801612015bd33bf9ae>>; See also Joshua Robertson, 'Big Four Banks Distance Themselves from Adani Coalmine as Westpac Rules out Loan' (The Guardian, 28 April 2017) <<https://www.theguardian.com/environment/2017/apr/28/big-four-banks-all-refuse-to-fund-adani-coalmine-after-westpac-rules-out-loan>>; See further Lydia Feng, 'Adani Mine: Environment Group Ramps Up Pressure on Westpac' (NITV, 22 October 2015) <<https://www.sbs.com.au/nitv/awaken/article/2015/10/22/adani-mine-environment-group-ramps-pressure-westpac>>; Lucy Battersby, 'Anti-Adani Mine Protestors Disrupt Westpac's 200<sup>th</sup> Birthday Celebrations' (The Sydney Morning Herald, 10 April 2017) <<https://www.smh.com.au/business/banking-and-finance/antiadani-mine-protesters-disrupt-westpacs-200th-birthday-celebrations-20170409-gvgz5q.html>>

<sup>76</sup> Amanda Saunders and Ben Potter, 'National Australia Bank Rules out Funding Adani's Carmichael Coal Mine' (The Sydney Morning Herald, 2 September 2015) <<https://www.smh.com.au/business/companies/national-australia-bank-rules-out-funding-adanis-carmichael-coal-mine-20150902-gjdsfl.html>>; See also Peter Kir, 'Westpac Rules Out Adani Carmichael Coal Loan' (Financial Review, 28 April 2017) <<https://www.afr.com/business/mining/westpac-rules-out-adani-carmichael-coal-loan-20170428-gvuhp8>>; See further Peter Hannam, 'Desperate: CommBank Rules Out Lending to Adani's Carmichael Coal Mine' (The Sydney Morning Herald, 11 August 2017) <<https://www.smh.com.au/environment/climate-change/desperate-commbank-rules-out-lending-to-adanis-carmichael-coal-mine-20170811-gxughp.html>>.

<sup>77</sup> [2015] NNTTA 16 (08 April 2015)

to extend financing facilities.<sup>78</sup> While the traditional owners have declared their intention to appeal to the High Court of Australia, the dynamics of SLO affecting foreign direct investment paint an interesting picture.

Adani may have managed to secure a mining licence or other regulatory permits, however, it is yet to receive SLO from non-institutional actors concerned about the project.<sup>79</sup> Here, a similarity in operation to the regulation of live export of livestock is clearly visible i.e. live exports and coal are both driven by non-institutional oppositional narratives which then drive governmental (institutional) regulation. Thus, creating a dual-layered regulation based on the SLO argument.

It is also noticeable that the non-institutional opposition is not unified in both cases – there are beneficiaries when live exports go ahead, in terms of export revenue or where the Adani corporation succeeds in establishing its Carmichael mine, in terms of employment opportunities for locals alongside infrastructure development in the region.<sup>80</sup> The complication comes from claims by non-institutional actors based on SLO driving regulation, without clearly specifying what is incorporated within the said SLO. The institutional regulation, on the other hand, clearly manifests itself based on a defined criterion which may be found in legislation, rules and guidelines pertaining to issues such as environment protection, hiring of locals, protection of heritage areas and other regulatory standards specified from time to time. This enables the “applicant” of SLO to prepare its response accordingly.

There are instances, however, where SLO-based argument springing from a non-institutional claimant can disturb institutional regulation. The Adani saga provides an illustration for this proposition. Following the case of *Mackay Conservation Group v Commonwealth of Australia and Adani Mining*<sup>81</sup> (where the Commonwealth Environment Minister in approving the project was found to have not considered advice pertaining to threatened species, thereby breaching the

<sup>78</sup> See generally *Kemppi V Adani Mining Pty Ltd (No 4)* [2018] FCA 1245 <<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2018/2018fca1245>>; See also Stuart Layt, ‘Locals Lose Fight Against Adani in Federal Court’ (The Observer, 18 August 2018) <<https://www.gladstoneobserver.com.au/news/locals-lose-fight-against-adani-federal-court/3496597/>>; See further Josh Robertson and Talissa Siganto, ‘Adani Indigenous Challenge Dismissed by Federal Court, Government Could Cancel Mine Native Title’ (ABC News, 17 August 2018). <<http://www.abc.net.au/news/2018-08-17/adani-federal-court-traditional-owners-native-title/10131920>>

<sup>79</sup> Josh Meadows, ‘Adani Lacks a Social Licence’ (2017) 45 (1) *Habitat Australia*, 27-29.

<sup>80</sup> See e.g. Dana McCauley, ‘Mining Union Calls on Adani to Guarantee Local Jobs’, *The Sydney Morning Herald* (5 June 2019) <<https://www.smh.com.au/politics/federal/mining-union-calls-on-adani-to-guarantee-local-jobs-20190604-p51uer.html>>; See also David Murray, ‘Angry Locals Send Adani Protestors Packing’, *The Australian* (29 April 2019) <<https://www.theaustralian.com.au/nation/antiadani-convoy-rides-into-hornets-nest-in-mackay/news-story/e191f01460ca607ace2b902d24cd46cc>>.

<sup>81</sup> Environmental Law Australia, ‘Carmichael Coal Mine Cases in the Federal Court’ <<http://envlaw.com.au/carmichael-coal-mine-federal-court/>>.

requirements of Section 139 (2) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act)). The Minister in question agreed that an error had been made and that the approval should be set aside, the Australian Government moved a bill to repeal Section 487 of the EPBC Act in order to stave off future challenges by environmental groups and vigilantes. The move was ultimately unsuccessful in the Australian Senate.

Section 487 of the EPBC Act enables challenges to ministerial decisions on resources and developments by allowing individuals or organisations, otherwise not connected to a proposed development, to establish standing by demonstrating engagement conservation and environmental protection activities within the previous two years.<sup>82</sup> Repeal of Section 487 would have removed the standing of environmental protection groups from seeking judicial review of decisions.<sup>83</sup> Following a repeal, claimants could have only applied for judicial review under the common law position which would have meant that the applicants would have to show a direct impact on their interests.<sup>84</sup> Clearly this would have meant that the environmental groups and public interest litigants would not be able meet the standards.<sup>85</sup> Following rejection in the Australian Senate in 2015, the incumbent Prime Minister Malcolm Turnbull also attempted to reintroduce the bill to repeal Section 487.<sup>86</sup>

The Australian Government's tussle with environmental groups and attempts to modify the regulatory environment shows that dual-layered regulation based on SLO is an uncomfortable course of action. Conversely, however, non-institutional actors and other deemed custodians of SLO will likely appreciate the power of scrutiny available to them in challenging regulatory decisions. Hence, such actors will be more inclined to favour the continuation of the current "open", more malleable yet uncertain approach to SLO. Adani's experience shows the vulnerability of foreign investors in a dual-layered SLO environment. If the government (both Commonwealth and the State) assume the sole mandate of interpretation and setting of the SLO standards, then this may cure the difficulties in the dual layered approach. Governments can accomplish this goal through statutory enactments and/or issuance of sector-specific guidelines exclusively reserving the regulatory space for itself to the exclusion of non-institutional actors.

<sup>82</sup> See e.g. discussions in Samantha Hepburn, 'Turnbull Wants to Change Australia's Environment Act – Here's What We Stand to Lose' *The Conversation* (31 October 2016) <<https://theconversation.com/turnbull-wants-to-change-australias-environment-act-heres-what-we-stand-to-lose-67696>>

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> At the time of writing, the provision remains active, and with the resignation of Prime Minister Turnbull in August 2018, the fate of the provision remains undecided (Ibid).

Furthermore, statutory enactments or sector-specific guidelines can then form the basis of any linkage with next generation of international investment treaties or FTAs that can allude to incorporation or acknowledgment of SLO

The three examples discussed in this section sheds light on the divergent nature of SLO across various segments of the Australia's trade and investment. The decisions made by the institutions in response to non-institutional reactions can significantly affect how quickly the foreign investor can begin commercial activity. This fact, in itself, is important in terms of local employment, generation of revenue by the investors and export of commodities from Australia, amongst a host of other factors that are considered by the foreign investors.

Any cursory review of media reports on the Adani issue or live exports shows that the 'decisions' or 'policy positions' by the custodians of SLO are often conveyed through expressions of concerns and protest, prompting adaptation by the investors or regulatory institutions. The aim behind the adaptation process is to convert the uncertainty and vagueness created by SLO into codified standards that can be implemented. The adaptation in the dual-layered regulatory scenario is evident where standards may be codified in the form of certification plans such as the Social Impact Management Plan (SIMP) by the Queensland Government used by mining companies such as Adani<sup>87</sup> or the ESCAS certification system exporters of livestock. However, foreign investors may still have to grapple with another, equally vague and uncertain regulatory standard in Australia i.e. the national interest test in regulation of foreign investment. Similar to SLO, the national interest test is unwritten and opaque. Curiously, SLO and the national interest test share similar conceptual pedigree in that they can be made the basis to promote precepts such as public welfare, national interest or "our way of life". The vague standard of national interest can also be a vector where social licence-based concerns can re-enter the regulatory landscape, which needless to say, can potentially continue to haunt any foreign investor keen on conducting business in Australia.

The following section discusses the overlap of SLO and the Australian national interest. Through brief discussion of several examples, Part IV seeks to demonstrate that after the custodians of the SLO spell out the terms of engagement with the foreign investor, institutional actors (regulators) respond by crystallising the demands as regulatory policy being in the national interest.

<sup>87</sup> See generally Queensland Government, Department of Infrastructure and Planning (DIP), 'Draft Social Impact Management Plan', *Adani Carmichael Coal Mine and Rail Project* <<http://eisdocs.dsdip.qld.gov.au/Carmichael%20Coal%20Mine%20and%20Rail/EIS/EIS/Project%20Wide/04-social-impact-management-plan-project-wide.pdf>>

#### IV OVERLAP OF SOCIAL LICENCE TO OPERATE AND THE AUSTRALIAN NATIONAL INTEREST

While SLO is graduating to a more specific and defined regulatory standards (illustrated through the reform of the SIMP, ESCAS and the ADGSM), the national interests analysis conducted by the Foreign Investment Review Board (FIRB) in generating advice to the Treasurer remains undefined and vague. Yet, we can see conceptual similarities and the duality of institutional and non-institutional regulatory responses in issuance of social licence or approval by the Treasurer affirming that a foreign investment transaction is in the national interest.

As the starting point of the comparison, we can consider political statements made in major agribusiness transaction in order to synthesise the institutional and non-institutional application of the national interest argument. In the 2012 Cubbie Station transaction, responses by non-institutional actors to the proposed investment preceded the institutional response and influenced the outcome somewhat similar to the ESCAS mechanism in the live exports. The Cubbie Station transaction involved a consortium consisting of Shandong RuYi Scientific & Technological Group Co Ltd (“RuYi”) (a clothing and textile company owned by Chinese and Japanese investors) and the Lempriere Group (“Lempriere”) (an Australian company engaged in wool trading and agricultural property management) proposing to acquire a large agricultural estate. The response by non-institutional actors (based on the national interest argument) comprised of possible job losses, loss of control over Australian agricultural land and possible loss of investment opportunities for local investors. The non-institutional response preceded the institutional response that emerged from the FIRB recommendation to the Treasurer.

The Treasurer’s decision called for additional compliance measures for bringing the transaction in line with the Australian national interest (which included divestment of shareholding by RuYi’s from 80% ownership to 51% to an independent third party). The continuation of water use licence conditions protections for the employed labour from redundancies.<sup>88</sup> This example illustrates the institutional actor exercising the regulative component under the institutional theory to spell out additional compliance to be taken by the foreign investors while the non-institutional actors, acting in a cognitive and normative manner, cited employment, social and economic rationales to resist possible loss of control due to the inward foreign investment. The Cubbie Station transaction is considered to a

<sup>88</sup> The Treasurer, ‘Foreign Investment Decision by Wayne Swan’ (31 August 2012) <<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/079.htm&pageID=005&min=wms&Year=2012&DocType=0>>.



be a rather successful example of regulated foreign investment into Australia. According to one report, the attributable factor behind the success of the transaction in terms of social licence is the adoption of the joint venture approach rather than following a traditional foreign direct investment (FDI) route.<sup>89</sup> By 2017 (five years after the transaction received the green light), RuYi had invested \$ 30 million locally for lifting the production of cotton and took concrete actions on issues such as hiring local employees, sourcing from local businesses, careful resource management and measures to promote sustainability.<sup>90</sup> Thus, what we see from the Cubbie Station transaction is the effect that dual layered regulation carries for a foreign investor. The custodians of the SLO spell out the terms of engagement with the proposed investor which is then crystallised as regulatory policy by the institutional actors as being in the national interest. Investors or local businesses that continue to adhere to the regulatory requirements do so not just because of the underlying legal binding force but also to continuously maintain/renew their SLO. The same lessons can be broadly transplanted into the Australian livestock sector, which as discussed above, is struggling to meet its social licence obligations even where an institutional mechanism such as the ESCAS is in place. Non-institutional actors continue to monitor the performance of the Australian meat industry and live export sectors which then informs updated regulatory policies. Therefore, we can see the first indicators for the proposition that the concepts of Australian national interest and social licence to operate have similar conceptual foundations. Both concepts are inward looking, ethnocentric in nature and remain non-prescriptive.

The second proposition is that SLO and national interests do not receive uniform consideration by non-institutional actors, leading to uncertainty and confusion in a dual-layered environment due to institutional regulation being predicated on the responses by non-institutional actors. Similar to the discussion comparing the ESCAS and Cubbie Station transaction, the contrast between national interest arguments cited in the proposed \$3.4 billion acquisition of GrainCorp by Archer Daniels Midland (ADM)<sup>91</sup> (discussed in the previous

<sup>89</sup> [Darren Gray](https://www.smh.com.au/business/chinese-investors-in-australian-farms-urged-to-win-a-social-licence-20170517-gw6smc.html), 'Chinese Investors in Australian Farms Urged to Win a Social Licence', *The Sydney Morning Herald* (18 May 2017) <<https://www.smh.com.au/business/chinese-investors-in-australian-farms-urged-to-win-a-social-licence-20170517-gw6smc.html>>; See also Powell Tate, 'The Licence that Matters: Beyond Foreign Investment Review Board Approval for Chinese Investment in Australian Agriculture and Agribusiness' (May 2017) <[http://powelltate.com.au/wp-content/uploads/2017/05/PT-Report\\_SP\\_FINAL.pdf](http://powelltate.com.au/wp-content/uploads/2017/05/PT-Report_SP_FINAL.pdf)>, 11

<sup>90</sup> Powell Tate, above n 108, 11 (Ibid).

<sup>91</sup> Sophie Morris, 'Abbott faces GrainCorp sale row', *Australian Financial Review* (27 August 2013) <<https://www.afr.com/news/abbott-faces-graincorp-sale-row-20130826-jh91c>>; ABC News, 'GrainCorp Takeover Bid Extended' (27 August 2013) <<https://www.abc.net.au/news/rural/2013-08-26/adm-offer-extension/4912526>>; GrainCorp Limited is a public company listed in Australia. It acts as a receiving company and stores grain and related commodities. GrainCorp also provides logistics and marketing of agriculture produce and commodities ([www.graincorp.com.au](http://www.graincorp.com.au)); Archer Daniels Midland is a global food-processing and commodities-trading corporation ([www.adm.com](http://www.adm.com)).



section) paint a scenario where non-institutional actors are the catalysts of conflict. In the case of ADM's proposed acquisition of GrainCorp, one non-institutional actor (the National Party) opposed the transaction on the grounds of national interest. The National Party, purportedly representing local farming interests, argued that handing over control of an Australian public company that engaged in transport and warehousing service to US-based investors can negatively impact purchase prices for the farmers while increasing service fee.<sup>92</sup> The ACCC (an institutional actor) approved the offer from a competition perspective but the FIRB decision was impacted by the negative debate during election season where various non-institutional actors consistently claimed that the transaction will be contrary to the national interest.<sup>93</sup> The Liberal Party, on the other hand, viewed the transaction in line with its perspective of promoting a freer trade and investment environment.<sup>94</sup> In the Liberal Party's view, this transaction was in the Australian national interest because it will lead to capital injection and create employment opportunities.<sup>95</sup> Breaking down the conflicting views, it is observable that the non-institutional actors opposed to the transaction sought to demonstrate to the institutional actor that the proposed transaction went against the Australian national interest, while the non-institutional actors in favour of the transaction cite incoming investment as being in the Australian national interest. Arguments from both camps root their narratives in cognitive and normative components. The final decision from the Treasurer rejecting the transaction reflects the regulative component.<sup>96</sup>

Experience has shown that where non-institutional response is concerted and focussed on an issue then the institutional response becomes easier to establish. This is illustrated through rules regulating foreign acquisition of agricultural estates in Australia, where it is observable that the regulative response (rules on foreign acquisition of agricultural land) were imposed because of the cognitive and normative behaviour of non-institutional actors seeking protection of Australia's purported national interest in the agricultural sector by calling for stringent terms of investment and land acquisition by foreign investors.

<sup>92</sup> Morris, above n 110 (Ibid).

<sup>93</sup> For example, Fiona Nash from the Nationals terms the proposed transaction "absolutely contrary to the national interest."; Andrew Broad from the Nationals comments that "...this decision will be railroaded by the free-market ideology coming out of city-based Liberals. There are times when they should entrust decisions to those whose constituents are affected by it and that's what will create an interesting discussion in the party room." Morris, Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> The transaction was eventually rejected by the Treasurer because grains was considered a "critical industry" and Graincorp handles 85% of bulk grain exports which was viewed as potentially anti-competitive (See Lincoln Feast and Colin Packham, 'Australia surprises with rejection of \$ 2.55 billion GrainCorp Takeover by ADM', *Reuters* (29 November 2013) <<https://www.reuters.com/article/us-graincorp-adm/australia-surprises-with-rejection-of-2-55-billion-graincorp-takeover-by-adm-idUSBRE9AR0SG20131128?feedType=RSS&feedName=businessNews>>).

As regards the single-layered regulation based on social licencing, the best comparator between the ADGSM and a national-interest based regulation comes not from Australia but Argentina (a country similarly dependent on natural resources sector). In a well-documented and highly visible decision the Argentinean government announced nationalisation of YPF (a major oil company) in which Repsol (a Spanish oil and gas giant) held 57.4% shares.<sup>97</sup> The Argentinean government (an institutional actor) unilaterally declared that Repsol violated its investment undertakings by underinvesting in further explorations and by funneling profits out of the country by regular issuance of dividends.<sup>98</sup> Repsol's shareholding in YPF were declared as public interest and expropriated.<sup>99</sup> The matter was eventually settled for a USD 5 billion settlement between Repsol and Argentina.<sup>100</sup> Note that similar to the ADGSM and the Prime Ministerial statement on the gas companies owing a SLO to the people of Australia, there was no non-institutional action which prompted the institutional action of gas export control and yet, Argentinean President Kirchner cited arguments in favour of nationalisation, rooted deeply in a narrative close to SLO.

The examples cited hereinabove illustrate how institutional actors in Australia are frequently influenced by non-institutional actors in determining questions of regulation based on abstract and undefined regulatory concepts such as SLO and the Australian national interest. Since the definition of the two concepts does not appear anywhere, the non-institutional actors tend to view the questions of national interest and SLO in a rather inward looking, ethnocentric manner.

To put it differently, lack of specific definition means that non-institutional actors interpret SLO and national interests in line with their interests. When this does occur, it leads to a situation where a dual-layered regulatory environment is created where institutional actors take active cues from non-institutional actors. The exception is a single-layered regulation (illustrated through the ADGSM) based on SLO whereby the government assumes the mantle of interpreting possible social licence arguments. This may be based on indicators such as public opinion,

<sup>97</sup> See for example, Simon Romero and Raphael Minder, 'Argentina to Seize Control of Oil Company', *The New York Times* (16 April 2012) <<http://www.nytimes.com/2012/04/17/business/global/argentine-president-to-nationalize-oil-company.html?pagewanted=all>>; See also Repsol, *Situation of YPF* (17 April 2012) <[http://www.repsol.com/es\\_en/corporacion/prensa/expropiacion-ypf.aspx](http://www.repsol.com/es_en/corporacion/prensa/expropiacion-ypf.aspx)>; BBC, *Argentina to expropriate Repsol oil subsidiary YPF* (16 April 2012) <<http://www.bbc.co.uk/news/business-17732910>>.

<sup>98</sup> See for example Agustino Fontevicchia, 'Shale Gas Wars: Argentina Fracks Repsol, Kirchner Takes YPF', *Forbes* (17 April 2012) <<http://www.forbes.com/sites/afontevicchia/2012/04/17/shale-gas-wars-on-argentinanationalization-of-repsol-ypf/>>.

<sup>99</sup> Paula Dittrick, 'Repsol calls Argentina's nationalization of YPF unlawful', *Oil and Gas Journal* (23 April 2012) <<http://www.ogj.com/articles/print/vol-110/issue-4c/general-interest/repsol-calls-argentina-s.html>>.

<sup>100</sup> See e.g. <https://www.reuters.com/article/us-repsol-argentina/spains-repsol-agrees-to-5-billion-settlement-with-argentina-over-ypf-idUSBREA1O1LJ20140225>

available market data, economic statistics or other relevant considerations to construct the regulatory environment.

The challenge with managing a regulatory policy based on dual layers is that it projects uncertainty into international trade and investment. This uncertainty stems from the role of the regulatory institutions themselves. The institutional environment combines laws, regulations and enforcement systems (regulative component) with social perceptions (comprising of normative and cognitive components).<sup>101</sup> In case of foreign investment, these components combine to project “predictable organisational outcomes”<sup>102</sup> for foreign investors to base their plans on. Therefore, when considering trade and investment policies, the policymakers must consider the regulative, cognitive and normative components to construct a predictable regime for domestic stakeholders, traders and foreign investors.

#### V THE ENCROACHMENT OF SOCIAL LICENCES – NO EASY ANSWERS

SLO is primarily a non-institutional construct which usually evades centralised regulation. The arguments made above state that non-institutional actors inform the usual development of social licence paradigms which typically results in a dual-layered regulatory environment. The baseline, however, remains rooted in the fluid, non-institutional interpretation of SLO. The exception to this proposition is the ADGSM where a single-layered institutional regulation is established by the government based on the presumed SLO.<sup>103</sup>

Another notable feature is that regardless of whether the regulation is single or dual-layered, the resulting responses can evolve into a prescriptive form. For example, the ADGSM and the ESCAS are both examples of prescriptive regulatory institutional response to social licence based non-institutional response. Therefore, for prescriptive regulation to materialise it becomes important to track the non-institutional responses to issues of social importance in any given economy. The problem, however, is that social licence (like the ‘national interest’ test) is difficult to define in a prescriptive manner. Interpretation of national interest in Australia in regulating foreign investment may be the sole domain of institutions, but analysis by non-institutional actors often informs the national interest analysis amongst a

<sup>101</sup> Trevino et al, above n 28, 129.

<sup>102</sup> Ibid.

<sup>103</sup> Case in point: the prime ministerial statement, referred to in the introduction of this article, on gas companies owing a social licence to the people of Australia regarding prices whereas the non-institutional social licence narrative mainly revolves around impact on surrounding communities and environmental protection narratives (Prime Minister of Australia, above n 1).

host of factors (e.g. Cubbie Station and GrainCorp transactions in Australia and the YPF expropriation in Argentina) (discussed in the previous section).

While the challenges in domestic regulation remain, there is a very real risk that the domestic uncertainty and fluidity in social licence paradigms will soon begin to flow over into the realms of international trade and investment laws. This article offers a “sneak peek” into the Australian view of the encroachment of SLO into trade and investment in finance, gas, coal and livestock sectors. There may be similar experiences in other economies. Therefore, the overarching question that emerges from the discussion so far is when the encroachment of social licencing paradigms crosses a certain threshold, what response will emanate from a multilateral trading and investment system? There are no easy answers to this query. Possible responses can, at best, be estimated as per the existing international trade and investment ordering.

Note that International trade law and international investment law are regulated at two different planes but are often classified under the common umbrella of international economic law. Hence, any adaptation of social licencing concepts within each branch of International economic law will have to assimilate within the regulatory environment of international trade law and international investment law accordingly.

#### A *International Investment Laws*

For international investment laws, the primary noticeable factor is that it is not regulated by any multilateral treaties that can provide a global regulatory norm. Rather, investment is regulated either through regional treaties or BITs/FTAs. This creates a complicated web of commitments and obligations owed by signatory states to each other. BITs/FTAs, like other treaties, often go through their own cycles which means that after passage of a certain term it is either renegotiated, amended or subsumed within a newer, more modern treaty framework. For any country interested in controlling and streamlining the ethnocentric concept of SLO by implementing a prescriptive approach, the change must be at the BIT/FTA level through negotiations at a time when a BIT/FTA is due for renewal or renegotiation.

The rationale behind prescription of SLO is to counteract the possible effects of ethnocentrism due to attempts by non-institutional actors to define the contours of SLO to suit own interests. As things stand today there are no direct examples of SLO leading to a case of expropriation of foreign investments. However, in limited circumstances, and with a theoretical lens, if a host state decides to impose regulatory measures on foreign investors as a result of a perceived SLO violation, it can potentially amount to expropriation if the standards enshrined in the BIT/FTA are breached. Again, the example of ADGSM can be considered here where the

Australian Government threatened to impose export controls if the gas companies did not agree to a solution mandating diversion of gas output for domestic reserves. The argument was couched in terms of SLO even when the primary consideration was price and did not concern damage to the environment or disturbance caused to the local communities. Theoretically, if the primary aim and business strategy behind the foreign investment in the Australian gas sector was to extract, refine and process the gas for exports then any governmental restriction that impedes the business strategy of foreign investors can potentially amount to indirect expropriation or at a minimum expose the government to a challenge by a foreign investor, similar to the Phillip Morris claim on plain-packaging laws.

For conflict avoidance and regulatory clearance, consensus between BIT/FTA parties assumes critical importance. Consensus is also important if a prescriptive understanding of SLO is to emerge within the BIT/FTA. Once the BIT/FTA parties agree to common SLO norms, such norms will become equally applicable to all BIT/FTA parties through the ubiquitous National Treatment (NT) and Most Favoured Nation (MFN) obligations that are integral for modern trade and investment regimes. The prescriptive approach is essentially converting the dual-layered social licence regulation into an institutional mechanism where the government of a BIT/FTA party state ensures enforcement of SLO imperatives on a foreign investor from another BIT/FTA party state. The obvious advantage of a prescriptive approach is that it will afford a foreign investor an opportunity to clearly show how it can take measures to procure a SLO and maintain it throughout the investment term. The other advantage is that governments, in consultations with the stakeholders, can devise sector-specific SLO policies which can delineate the expectations for foreign investors in various sectors where social licence-based opposition is typically encountered.

The other option is to retain the current transactional system where foreign investors will have to deal with non-institutional actors directly on a community level in order to procure, maintain and renew their SLO. While flexible and autonomous in terms of community involvement, the discussion of coal, gas and livestock sectors in Australia shows the increasing compliance costs associated with SLO. Once such costs and transactional barriers cross a certain threshold a chilling effect on incoming FDI will not be far-off. Thus, it may be argued, that for international investment laws the transition from an ethnocentric to a prescriptive model in terms of SLO may create the advantages of certainty and predictability for foreign investors provided standards are devised on a negotiated basis between BIT/FTA parties.

For international trade law, the primary regulation occurs under the GATT/WTO framework which is comprised of the Agreement Establishing the WTO ('Marakesh Agreement') and their antecedent agreements that regulate the trading commitments of WTO Members. Here, the challenge is to initiate reform at the base level of the Marakesh Agreement or the underlying agreements forming the GATT/WTO framework by introducing a new multilateral agreement setting minimum baselines for protection of cultural heritage, environmental protection, safeguarding of local minority groups and their interests or other considerations that typically form the basis of SLO arguments. Negotiating a multilateral agreement on SLO is clearly an improbable prospect given the delays in the conclusion of Doha Round of multilateral trade negotiations and the increasingly protectionist outlook created by the recent events such as Brexit, US policy decisions on trade and the environment and aggressive investment by China into the resources sector of developing countries. WTO Members and their trade negotiators would obviously not be very keen in adding new agenda items. Critics may further argue that the WTO is a trade promotion body and that it cannot be made to bear with additional goals such as environmental protection or similar non-trade considerations. The multilateral reform route can, therefore, be dismissed as unfeasible in the near future.

There are, however, existing grounds under GATT Article XX that appear as exceptions within the broader GATT/WTO framework which, in limited circumstances, can become applicable in social licence-based regulation. GATT Article XX enable WTO Members to derogate from their obligations under the GATT/WTO framework under specifically recognised exceptions. In certain circumstances, WTO Member states can, in a single-layered scenario, theoretically cite SLO to avoid or bypass their trade obligations. Although there are no recorded instances of SLO used as an argument in WTO jurisprudence so far. In this context, social licence is beginning to intrude into previously uncharted territory in the regulatory field. The GATT Article XX exceptions are further subjected to additional requirements in the chapeau to the provision. The chapeau states that any derogatory measures adopted by WTO members under the general exceptions must not be arbitrary or discriminatory 'between countries where the same conditions prevail'. The chapeau clearly states that the GATT Article XX exceptions must not be used as 'disguised' forms of restrictions on international trade. The connection between SLO-based regulation and the use of GATT/WTO framework for regulatory application is hitherto unproven and there are no existing policy decisions by individual WTO Members that may provide a basis to test the proposition. However, on a closer look the exceptions may be of limited application in circumstances where SLO-based arguments are used by one WTO Member to suspend or withdraw trade obligation owed to other WTO Members. For present

purposes, GATT Article XX (b), (d), and (j) may appear relevant, although other exceptions may become linked through creative interpretations of the undefined term “social licence”. These exceptions can be used as a starting point for further exploration.

The GATT Article XX exceptions have received systematic treatment in the trade disputes brought before the WTO. Some exceptions have seen more use than others and this has resulted in emergence of WTO jurisprudence on the area which can inform future international trade practices of WTO Members. However, SLO-based arguments in applying the GATT Article XX exceptions are non-existent. Therefore, the present analysis, while brief in nature, is an original estimate of possible deployment of GATT Article XX exceptions by a government of a WTO Member under the social licence overhang.

Exception (b) provides that WTO Members can adopt any measures to protect human, animal or plant life provided the requirements of the chapeau are met. The overarching goal is to protect the environment for human, animal or plant life. In the context of the brief case studies examined in this article, Exception (b) may enable an exporting country to restrict the exports of natural resources (coal or gas for example) if the aim of such regulation is to protect human, animal or plant life. This exception has been argued before in several WTO to justify wide ranging regulatory measures beyond the natural resources sector such as banning of cancer-causing construction material (Asbestos) and discriminatory extension of trade concessions to countries that have adopted measures to counter drug-trafficking (EC GSP scheme).<sup>104</sup> Under the analysis forwarded in this article, the government of the exporting country can be constrained to act under a dual-layered regulatory scenario where the calls for regulation emanates from local communities and stakeholders directly impacted by a activities associated with mining or extraction. Alternatively, the government can act under a single-layered regulatory scenario where it justifies its action under a presumed SLO. This may occur where, for example, the government of a WTO Member use SLO arguments to justify their trade restraints under their declared policies or environmental conservationist agenda for reducing carbon emissions.

Exception (d) enables WTO Members to adopt measures that enable enforcement of domestic laws and regulations that are not GATT-inconsistent. The conceptual overlap with Exception (b) is immediately apparent. However, the usage

<sup>104</sup> See e.g. See Panel Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/R (1 December 2003) [7.195] – [7.199] (*‘EC — Tariff Preferences’*); See also Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) (*‘EC — Asbestos’*).

history of Exception (d) within GATT does show that countries attempting to avail derogation from their WTO obligations have encountered significant systemic and interpretative challenges.<sup>105</sup> The main challenge in attempting to construct regulatory measures that do not fall afoul of WTO obligations is to satisfy the “necessity” requirement. In other words, the WTO Member attempting to adopt a SLO justification in constructing trade restrictive laws must demonstrate that the measures are necessary to achieve an overarching aim that is not GATT-inconsistent. This is easier said than done. In the past, dispute settlement panels have either prescribed stringent procedural challenges or have ruled that measures adopted by the restraining countries were not “necessary” in achieving the stated aim of the trade-restrictive measures. For example, in the context of tobacco control legislation, the dispute settlement panel in Thailand – Cigarettes case rejected Thailand’s argument that foreign brands of tobacco products contain significantly higher toxic content, therefore it is necessary to impose trade restrictions.<sup>106</sup> The Panel in rejecting Thailand’s defence of its measures suggested less-trade restrictive measures that could be employed to achieve Thailand’s health objectives.<sup>107</sup> In a more recent example, India attempted to avail GATT Article XX (d) defence in *India – Solar Cells* case where it argued that domestic content requirements (DCRs) for solar cells and modules, as mandated by its National Solar Mission program, were necessary to secure compliance with its declared national and international obligations regarding sustainable development.<sup>108</sup> In furtherance of its arguments, India referred to several international legal instruments to which it was a signatory while justifying its DCRs against which the US had lodged a claim in the WTO. However, the Panel and the Appellate Body disagreed with India’s arguments and held that GATT Article XX (d) is applicable to the “laws or regulations” which are part of the domestic legal ordering of the WTO Member. Therefore, adoption of a necessity argument by alluding to existing laws and regulations finds little support from a GATT/WTO angle.

Exception (j) allows a WTO Member to derogate from their WTO obligations by justifying trade restrictive measures in order to secure or distribute products which are in short supply nationally or locally. The main challenge in citing this as a justification are two-fold. Firstly, Exception (j) has not been claimed as a

<sup>105</sup> Deborah Ky notes that only one of 44 attempts of availing GATT Article XX exception prior to 2015 succeeded (Deborah Ky, ‘Safeguarding Tobacco Control Measures from the Tobacco Industry’s Trade-Related Challenges through Trade Treaty Design’ (2016) 11 *Asian Journal of WTO & International Health Law & Policy* 325, 332.

<sup>106</sup> See generally Panel Report, *Thailand Restrictions on Importations of and Internal Taxes on Cigarettes*, WTO Doc. DS IO/R-37S/200 (adopted Nov. 7, 1990), [52] & [77].

<sup>107</sup> *Ibid.*, [77].

<sup>108</sup> See generally WTO, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc WT/DS456/AB/R (one page summary) <[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds456sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds456sum_e.pdf)>.



justification frequently in the WTO. In fact, it has only been adjudicated once in the *India – Solar Cells* case along with Exception (d). The WTO jurisprudence is obviously undeveloped in this area. Secondly, the concept of SLO is not acknowledged directly within the GATT/WTO, therefore, any country citing SLO argument in securing or distributing goods in local short supply will be forwarding this argument for the first time. Whether the dispute settlement panels acknowledge the concept and push the boundaries of WTO jurisprudence is unknown. What we do know is that in *India – Solar Cells*, the Appellate Body stated that GATT Article XX (j) is reflective of different elements that must be considered in determining the question of general or local short supply.<sup>109</sup> Such elements include domestic production levels of the goods or resources in question, the nature of goods/resources in ‘general or local short supply’, geographical market, price, domestic purchasing power, demand from foreign consumers, role played by domestic and foreign producers in the market including ‘the extent to which domestic producers sell their production abroad’.<sup>110</sup> Additionally, the Appellate Body stated that in determining the question of ‘local and short supply’, the total quantity of imports that may be available to meet in a particular geographical area or market may also be considered.<sup>111</sup> This further means determining/assessing stability and accessibility of international supply of the product which are based on factors such as ‘distance between a particular geographical area or market and productions sites’ and ‘the reliability of local or transnational supply chains’.<sup>112</sup>

The Appellate Body acknowledged that relevancy of the factors is linked to the peculiarities of each case.<sup>113</sup> There may be factors that affect availability of imports in particular cases or in a situation where despite the existence of manufacturing capacity, domestically manufactured products are not available in all parts of the country or are available but not in sufficient quantities to satisfy demand.<sup>114</sup> Regardless of the factors that may be applicable or relevant, the respondent (i.e. party adopting the impugned measure) has the burden of demonstrating that ‘available’ supply from both domestic and international sources are insufficient to meet demand.<sup>115</sup>

The criteria espoused by the Appellate Body is open and adaptable lacks clarity on the relative importance of the factors vis-à-vis each other. By the look of things, the question of importance is to be determined on a case-by-case basis. The risk

<sup>109</sup> Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc WT/DS456/AB/R (16 September 2016) (*India – Solar Cells*), [5.83].

<sup>110</sup> *Ibid.*, [5.83], [5.89] & [6.4].

<sup>111</sup> *Ibid.*, [6.4].

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

with such an approach is that it may leave the policymakers confused when imposing trade restrictions because factors that are deemed as essential or critical domestically might not be perceived as such internationally. This is where a more robust claim of SLO for acting in public interest becomes relevant because the WTO Member imposing trade restraint or export control can claim a single-layered regulatory argument based on SLO narrative similar to the ADGSM in Australia.

## VI CONCLUSION

SLO displays a multi-faceted façade. On one hand, SLO are used by various non-institutional actors in a domestic setting to exert pressure on corporations and the government to achieve desired outcomes. While, on the other hand, governments can potentially “adopt” a SLO argument on behalf of the people to justify regulation of trade or investment in line with its policy preferences. This has been demonstrated within the Australian context through the construction of the ADGSM. Resultantly, this article endeavours to qualify SLO-based regulation into two models i.e. the single-layered and the dual-layered model. The single-layered regulatory model enables the government an opportunity to capitalise on the fluid and vague nature of the concept of social licence to utilise and mould it to their needs.

In retrospect, almost any arguments can be reinforced through a SLO justification by the government e.g. regulation of tobacco products can be justified under a single-layered scenario by simply alluding to the notion that the tobacco companies owe SLO obligations to the people of Australia and hence, any new regulation curtailing their marketing conduct can be legitimised. If this new view is accepted, it elevates the governments and its regulatory institutions as users of SLO – an entirely new paradigm indeed, and one that moves away from the standard dual-layered SLO regulation typically observable in the natural resources sector. The article explains that in the dual-layered scenario, the custodians of the SLO (non-institutional actors) issue, critique, assess and renew the licence and that this process directly affects not just the subjects of regulation (e.g. gas or mining corporations) but also influences the dynamics of the regulation by government institutions. The examples cited to reinforce this argument are that of the ESCAS and Adani’s difficulties with the Carmichael coal mine where the non-institutional actors are continuously invigilating both the subject of the regulation and the effectiveness of the regulatory action taken by the government institutions.

To reinforce the thrust of the central argument, Part IV of the article contrasted the open-ended concept of SLO with an equally vague and open-ended regulatory concept of the Australian national interest. The comparison of the two concepts shows that open-ended regulatory standards are often malleable and that both

institutional and non-institutional actors frequently interpret the standards to suit their own interests. Using the brief case studies of four sectors within the Australian economy, the article further argues that the open-ended nature of the concept will gradually intrude into international trade and investment system when governments begin to cite social licence-based arguments for expropriation or trade regulatory measures that may violate GATT/WTO norms. The international investment and trade systems are not ready for this change. Part V of the article has argued that the only way social licences can be considered as a policy imperative is through the acknowledgment and adaptation within the underlying BIT/FTA. As for international trade law, governments can attempt to rely on creative interpretations of some of the exceptions in GATT Article XX in order to derogate from their trade obligations or to justify trade restrictive measures. Such measures, for example, can be for enforcement or achievement of aims in line with domestic laws that are not GATT-inconsistent or for alleviating general or local short supply. However, there are no known instances of use of social licence-based justifications by countries in derogating from their multilateral trade or investment obligations. Therefore, the potential impact of SLO can at best be anticipated through proxy analysis.