OFFICIAL REPORT
AITHISG OIFIGEIL

Environment, Climate Change and Land Reform Committee

Tuesday 14 January 2020

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 14 January 2020

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ENVIRONMENT, CLIMATE CHANGE AND LAND REFORM COMMITTEE
1st Meeting 2020, Session 5

CONVENER

*Gillian Martin (Aberdeenshire East) (SNP)

DEPUTY CONVENER

*Finlay Carson (Galloway and West Dumfries) (Con)

COMMITTEE MEMBERS

*Claudia Beamish (South Scotland) (Lab)
*Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con)
*Angus MacDonald (Falkirk East) (SNP)
*Mark Ruskell (Mid Scotland and Fife) (Green)
*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Lloyd Austin (Scottish Environment LINK)
Professor Campbell Gemmell
Dr Sheila George (WWF Scotland)
Nick Halfhide (Scottish Natural Heritage)
Professor James Harrison (University of Edinburgh)
Bridget Marshall (Scottish Environment Protection Agency)
Hatti Owens (ClientEarth)
Dr Annalisa Savaresi (University of Stirling)
Vicki Swales (RSPB Scotland)
Joanna Waddell (UK Environmental Law Association)

CLERK TO THE COMMITTEE

Lynn Tullis

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Environment, Climate Change and Land Reform Committee

Tuesday 14 January 2020

[The Convener opened the meeting at 11:10]

European Union Exit

Environmental Principles and Governance

The Convener (Gillian Martin): Welcome to the Environment, Climate Change and Land Reform Committee's first meeting in 2020. I have a couple of housekeeping points. I ask everyone to switch off their mobile phones or put them on silent as they tend to affect the broadcasting system. There is no need for participants in our round-table discussion to touch the consoles as the broadcasting team will operate the microphones.

I ask that all our guests say who they are and what body they represent. Several Parliament clerks and staff are sitting at the table; they will not introduce themselves. We are joined by Professor Colin Reid, who is our adviser on this topic. He will not take part in the discussion. We will bypass committee members, because we often get to speak and people should know who we are by now.

Professor James Harrison (University of Edinburgh): I am from Edinburgh law school.

Vicki Swales (RSPB Scotland): I am the head of land use policy for RSPB Scotland.

Hatti Owens (ClientEarth): I am a lawyer in ClientEarth's United Kingdom environment team.

Professor Campbell Gemmell: I am here in no specific capacity or with any particular affiliation, but I am the author of the Scottish Environment LINK report entitled "Environmental governance: effective approaches for Scotland post-Brexit". Before that, I chaired the round-table sub-group established by the Cabinet Secretary for Environment, Climate Change and Land Reform to look into such issues.

Dr Sheila George (WWF Scotland): I am the food and environment policy manager at WWF Scotland.

Nick Halfhide (Scottish Natural Heritage): I am the director of sustainable growth at Scottish Natural Heritage. I have been taking an overview of our preparations for exit from the European Union.

Dr Annalisa Savaresi (University of Stirling): I am a Scottish Parliament information centre fellow and a senior lecturer in environmental law at the University of Stirling.

Joanna Waddell (UK Environmental Law Association): I am an environment lawyer from CMS, but today I am representing the UK Environmental Law Association.

Lloyd Austin (Scottish Environment LINK): I am a freelance environmental policy analyst. Today, I am representing Scottish Environment LINK, of which I am a fellow and convener of its governance group.

Bridget Marshall (Scottish Environment Protection Agency): I am the head of regulatory strategy and Government relations at the Scottish Environment Protection Agency. I, too, have been the lead for our organisation on our EU exit preparations.

The Convener: We will exit the EU on 31 January. The European Union (Withdrawal Agreement) Bill has passed its third reading in the House of Commons. There have been significant changes to that bill when compared with its previous iteration. In effect, the environmental parts of the bill have been removed. I want to use that as a springboard for discussion. What is your reaction to that? What might it mean in relation to environmental governance? What do you want to happen next? We are getting to the point at which we are definitely exiting the EU and all the attendant governance changes will start to happen.

Who wants to go first? You must have had a view when you saw that the bill had passed its third reading.

Lloyd Austin: Stewart Stevenson is encouraging me to contribute, so I will.

Any form of EU exit will create a governance gap, because all parts of the UK have benefited from various mechanisms that exist as a result of the work of the European Commission, the European Court of Justice and European agencies such as the European Environment Agency. We have benefited from a range of environmental activities that are carried out on a pan-EU basis, from monitoring and reporting through to monitoring and scrutinising implementation, as well as the investigation of complaints and judicial oversight. In the early days of the Brexit discussion, non-governmental organisations christened the lack of those activities as the "governance gap". In many ways, we are pleased that all the Governments across the UK have acknowledged that that gap will exist if and when we leave the EU completely.

11:15

There is an issue to do with what happens during the 11-month transition period, from February to December 2020. At the end of December, if we leave completely, there will be a governance gap unless something is put in its place. The important thing is to assess what we should put in its place in each of the jurisdictions, given that most of the environmental issues are devolved. A Scottish Government sub-group did a detailed analysis of those issues and the Scottish Environment LINK report built on that.

The key test will be the form of scrutiny and oversight, and the main issues are to do with the independence of that scrutiny and oversight, the powers of whatever body carries that out and the resources available to it. Those three important issues will need to be addressed for whatever mechanisms are created to fill the governance gap. That point was developed in Professor Gemmell's report, which LINK published at the end of last year.

Professor Gemmell: I am happy to say more about that. However, before I forget, I highlight that the other very obvious thing for me that the most recent statements and the developments in the bill have indicated is that non-regression is being forgone. In terms of keeping pace with the EU—depending on how far into the future we look—our losing sight of what is happening in the rest of the European continent is potentially one of the biggest risks before us.

There has been a lot of traffic to and fro, some of it behind the scenes, about the arrangements—that is, the scope of the proposed office for environmental protection, how it would be constructed and resourced, and how independent it would be. There is also the question of what is devolved and what is reserved under the UK model. If the office is not independent and if it is involved in Scottish business and there is a change in policy and how it is implemented across the UK nations, there is significant risk of oversight taking on a new format and being operated in a different way.

The report that I produced for LINK—much like the work that had previously been done—highlighted the sorts of gaps that Lloyd Austin described. I looked at global best practice and the New Zealand model of an independent parliamentary commissioner for the environment and the role that that can play if it is adequately resourced and empowered to handle complaints and deal with other investigation issues. Ultimately, as the final station on the journey of environmental governance, it would be important to have a dedicated specialist and expert environmental court. However great or small the business load of that role, it would provide the equivalent of the Court of Justice of the European Union, which sits above the rest of the arrangements. If the top of the system that is proposed under the new UK arrangements is the office for environmental protection and that which we already have, most of us would be clear in saying that that would represent a significant continuing gap that must somehow be addressed.

We need dedicated arrangements in Scotland that would have those three components—the watchdog element of the parliamentary commissioner; the dedicated environmental court; and a significant assessment of the status quo ante—in order to ensure that, if there is to be any fundamental re-engineering of the arrangements that we have got, that is undertaken, because moving one bit of the set-up could have a knock-on impact elsewhere in the arrangements.

The Convener: I am conscious that ordinary Scots are watching us and we are using jargon in our discussion because we are familiar with the terms. Will you explain what not having a court in place to deal with environmental protections could mean to people in Scotland? How could that impact on their lives? What could possibly happen as a result of that?

Professor Gemmell: Others might want to offer their views on that, but, from my point of view, if something is not being legally delivered—if the Government itself is not observing the law—and an individual considers that they are disadvantaged because something has happened to them and they want to complain about it, there is question about to whom they would complain. At the moment, LINK members and others are considering ways in which environmental rights could be reinforced. That could involve a local planning case in which something has been overruled. Perhaps the matter has gone to a reporter, or the Government has decided to support or reject a case that has been made by a developer. If the public is aggrieved about that, where do they go?

We are not trying to put in place an overweening, overarching body that stops all business and becomes a great bureaucratic burden. We want to have, in extremis, a mechanism that enables people to pursue cases in which they consider that they have been wronged.

I used to be part of a Government agency—I was SEPA's chief executive for nine years or so. With that experience, I can say that it is not always in the interests of an agency to make all information about everything publicly available. Sometimes, the agency does not even have the information, so there are issues in that regard, too. However, the public want to know what a regulated entity is or is not doing. They want to

know whether it is legally compliant, whether it is doing what it said that it was going to do, whether the minister is holding that entity to account and whether Audit Scotland has said that it is doing something well or badly, or efficiently or inefficiently. Do I, as a citizen, have any right at all to pursue those questions?

At the moment, a vanishingly small number of cases move from first appeal, as it were, all the way to the second circle of the Court of Justice of the European Union. However, there are a lot of checks and balances in between those stages that give the citizen some access.

Our current arrangements are not fully compliant with the Aarhus convention, so there are weaknesses as things stand. Therefore, the third dimension that I mentioned—the robustness of the existing system—needs to be explored. However, the first and second components that are effectively replacing the existing European Commission and the Court of Justice mean that we have a redress option and citizens can chase something and find out what really happened in a case, whether it was legal and whether they have rights in that regard. If we take away the top of that structure, we are wholly dependent on the robustness of the internal Scottish-UK system, and the imperfections of that system are currently serious and could become far more serious.

Dr George: There are other examples of how citizens might get involved. At the moment, if the Government or a statutory agency is not undertaking action on air quality or water quality—things that really impact on people's lives—the European Commission allows them free and accessible opportunities to pursue a complaint. We know that we are failing in relation to the Aarhus convention with regard to affordability and accessibility when it comes to the ability of citizens' access to environmental justice. That is one of the gaps that would have to be plugged by whatever future governance arrangements might be developed.

On the question about whether we are disappointed that some of the environmental provisions have fallen out of the withdrawal agreement bill, yes, of course we are. That is one of the reasons why it is more important than ever that Scotland introduces its own strong governance arrangements. We know from the original iteration of the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill that that falls within Scottish competence. Nothing is stopping the Scottish Government and the Scottish Parliament introducing those provisions. That is the point at which we can get into some of the detail of the kind of things that Lloyd Austin and Campbell Gemmell have covered.

Professor Harrison: We are all in agreement that there will be significant gaps once we leave the EU. However, we should not lose sight of the potentially bigger picture: environmental governance is generally improving. The EU procedures are not perfect. The European Commission exercises a lot of discretion in deciding which complaints it considers. We would want there to be a much more transparent process that is designed at the national level. In addition, the European Commission considers complaints only about the implementation of EU environmental regulations, so there have always been gaps when it comes to compliance with purely domestic law. We want a system that covers everything. It is important that we keep that bigger picture in mind when thinking about how we move forward once we have left the EU.

Vicki Swales: On the governance arrangements, we need to make a distinction between the requirements for a watchdog and an environmental court. We might discuss some of the detail of that later, but it is important at this point to stress that a watchdog function and the potential for an environmental court, which would enable legal action to be taken against the Government, are two different things.

Nick Halfhide: It might be helpful if I gave some examples of what we have achieved in my area of work through European intervention.

European intervention required the UK to designate special areas of conservation for harbour porpoises and to ensure that we have site-specific conservation objectives for our European designated sites across all its parts. Europe intervention also forced Scotland, at a site-specific level—in this case, at the Muirkirk and North Lowther Uplands special protection area, which was an old open-cast mine—to do some restoration work that it was not planning to do. Those are three instances in which Scotland has taken action in nature that it would not have done without Europe telling it to do so.

My second point picks up on some of the other points that have been made. Brexit has been a rollercoaster for us—as it has been for everyone—and it will continue to be a rollercoaster. The Prime Minister says something, then changes his mind. We do not know what he is going to do next week. My immediate reaction on hearing the proposals that we have been discussing was to step back and think about what we all want to achieve. Brexit will continue to be a rollercoaster. We need to plan for a decade of success. We need to have a decade of ecological restoration, so we need mechanisms that will achieve that. There is a sense that, in previous decades, we have stopped things getting worse. That is not really good enough, and the Cabinet Secretary for

Environment, Climate Change and Land Reform has recognised that. Whether we are talking about ecological restoration or climate change—the two issues are linked—we need to plan to succeed in the next decade, not just hold the line; and whether we are talking about the principles or the governance, we need to have that goal in mind.

Dr Savaresi: I will make a couple of observations in addition to the ones that are contained in my submission. One concerns Professor Harrison's point about the possibility of doing better. An outstanding issue is the UK's compliance with environmental rights under its international obligations and the Aarhus convention. Clearly, there is an opportunity to move beyond judicial review and all its shortcomings. Whether that means establishing a court is a larger political decision, and there are people in this room who have voiced opinions on that. However, regardless of whether a court is established, there is clearly a gap that needs to be addressed in the context of enforcement. Many people have been saying that on both sides of the border for some time.

The other issue that it is important to flag concerns the level playing field. There was, up to a point, an understanding that there would be a level playing field between the EU and the UK. Now that the UK Government's position on that issue has changed, it is important that Scotland understands what that means for its plans, especially in relation to the idea of keeping pace with EU standards on environmental matters. There are challenges in that regard, which I have flagged in my submission, but I think that the issue is quite new, compared with what we have been discussing so far in relation to environmental governance.

11:30

Hatti Owens: I whole-heartedly agree with much of what has been said across the range of issues that we have discussed. In particular, Annalisa Savaresi mentioned the enforcement gap. Although the governance proceedings—the oversight and monitoring and so on—are crucial, it is also important that if, at the end of that process, it is found that environmental law is not being complied with, serious potential sanctions and remedies are in place that act as a deterrent against continued non-compliance.

We see that through the available EU infraction proceedings, with their daily fines, although that is not to say that fines should always be the measure that is used. However, it is significant that that potential is there at EU level. Thought should be given to replicating that at the domestic level.

Bridget Marshall: It is important to think about these matters in a bigger-picture context. From SEPA's perspective, this is an important decade, as Nick Halfhide said, and we need to urgently tackle issues such as the climate emergency, biodiversity loss and overuse of resources.

There are two issues with regard to governance. One is the immediate need to plug gaps that will result from leaving the EU. Those are recognised and are largely to do with Government scrutiny and access for citizens to the complaints procedure. We also need to think more extensively about the governance that is needed to take us forward over the next decade in order to tackle those issues.

SEPA considers that we need to think about those two things carefully. The plugging of the EU gaps needs to be done on a short timescale. That could be done quickly and in a light-touch way—I do not mean that in a derogatory sense—but with an eye to a much larger consideration of our governance in order to take us forward as a nation to tackle those issues.

The Convener: You are saying that we need a strategy about what we want to achieve underpinning the whole approach. It is not just about doing the minimum.

Bridget Marshall: Yes. We consider that the law that is set out is the minimum that we expect business to achieve. "One Planet Prosperity—Our Regulatory Strategy" involves working with businesses to get them to achieve much more. To tackle the three issues that I have talked about, we have to motivate businesses to go way beyond compliance with the law. We operate in that voluntary space at the moment. It seems that the law is becoming a backstop and the minimum that we expect people to do. We do not want to tie up all our governance arrangements in achieving the minimum; we want to inspire and get people to move way beyond what is legally required.

The Convener: A number of members want to ask questions. I am taking note of who wants to ask questions, but I will give our guests a chance to come in first.

Lloyd Austin: I have a couple of supplementary points on what I said earlier, partly in response to your question, convener, about what it all means for the individual citizen or Scot. It is important to remember that, in the interventions that Nick Halfhide described, which I completely agree with—there are other examples thereof both in the nature area and beyond—the EU did not intervene of its own accord; it did so in response to those issues being raised with it by individual citizens or associations of citizens, community groups, NGOs and so on. As Campbell Gemmell described, those governance mechanisms benefit those of us who feel that their local environment is not being properly treated and that the environmental issues

that they care about are not being addressed by the Government or its agencies.

That leads us on to the question of citizens' rights. The whole debate needs to take place in parallel with and be cognisant of the work of the First Minister's task force on human rights leadership, which is led by Professor Alan Miller. Included within the range of human rights that the task force is considering are environmental rights and the rights of citizens to environmental justice. It will be important to ensure that those two processes understand and complement each other.

All that will achieve nothing unless the system of governance that is in place—whether it is bodies, courts or whatever—has, as Hatti Owens said, a full range of appropriate remedies that can address the issues that are raised. When an environmental problem has been highlighted, the environmental issue, rather than some process point, should be addressed, so that the pollution is prevented or cleaned up or the habitat is restored or whatever. The environmental outcome needs to be a key focus of the remedy.

The Convener: Some members want to ask questions. Finlay Carson was first to get in.

Finlay Carson (Galloway and West Dumfries) (Con): I would like opinions on whether it is realistic to expect Scots law to keep pace, given the devolved and reserved issues in the UK around the internal and external markets and so on. I am interested in Nick Halfhide's point that we should concentrate on a decade of success. That raises the question whether we in Scotland need to look at the policies to deliver that decade of success and then go to the UK Government and ensure that they fit in the UK framework, or is it the other way around? Where do we start? It is a chicken-and-egg situation. Do we decide what we need and then ensure that the UK Government understands that the framework has to be flexible enough to accommodate what we are looking for to keep pace?

Nick Halfhide: I am no expert on that, but I would say that we as a nation should set out where we want to be. It is a bit like how we approached climate change by setting out our ambition and working out how to get there.

There is a danger—Bridget Marshall alluded to it—that we look too much at the here and now. Although that is important, we need to look further ahead and say where we want to be and how we are going to get there. We then go to the UK Government and look at European law and decide whether we want to keep pace with it. Maybe it will not be ambitious enough for us. Perhaps it is a minimum standard.

We need to give our attention to those questions and not be unduly tied up in the fog that is Brexit.

Vicki Swales: I will answer both parts of the question, on keeping pace and setting out our ambitions. That brings us to the need for an overarching environment strategy. Bridget Marshall and Nick Halfhide have alluded to that by talking about what Scotland wants to achieve in the longer term.

The Scottish Government has already made some movement in its consultation, and we now expect a vision and outcomes for Scotland's environment to be published in February. However, in a sense, we want something longer term and more ambitious that sets legally binding targets for the recovery of nature, because it is clear that we need to do that, as we face a nature emergency. We have a legally binding target to deliver for the climate emergency, and those two things are inter-related: nature and nature-based solutions can help us to tackle climate change.

We need to set up an ambitious environment strategy for Scotland that is underpinned by legislation to secure real progress. We need to set out our longer-term goals. Nick Halfhide talked about 10 years, but we could go further. We do not always want to cast our eyes to those south of the border, but they are setting out a 25-year plan for the environment. Some of the things that we are talking about will be long-term things that will take time to deliver.

We also need to ensure that our approach is underpinned by an evidence base of where we are now and the science behind that. We need a clear action plan that sets out what we are going to do, when we are going to do it and how we are going to do it. The Scottish Government will need to provide funding to make all that happen. We need that strategy in order to have a joined-up approach across the departments and portfolios that have an impact on or can deliver for an environment strategy.

We might come on to more aspects of that shortly, but I want to make one point on Finlay Carson's question about keeping pace: those two things are partly separate. To an extent, we will have to think about keeping pace right from the off, because Europe is continuing to change all the time with regard to legislation on the environment. That is an immediate question, never mind whether we set our longer-term strategy and ambitions.

Dr George: I agree that a legislative underpinning will be key for the environment strategy. The Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 sets out interim and long-term targets. The climate change plan, which is being revised, will outline what

different sectors have to do to help deliver that, and there is a review of all policy to ensure that it is net zero-proofed and will help us to get there. We need the same approach for nature and the environment. There has been a step change in ambition to tackle climate change, but we have not had that in relation to tackling the biodiversity crisis that we face.

I am not sure where that legislation sits. We had been calling for dedicated legislation in the form of an environment act, but we might not get that now. We would like some form of duty in the continuity bill to bring forward legislation to underpin the environment strategy. That will be key to ensuring that we secure the outcomes, when we know what those are.

I had another point, but I cannot remember it.

The Convener: Let me know when you remember it and I will come back to you.

Professor Harrison: We need to be aware of other influences beyond the EU, and 2020 is important, because a big climate change conference is being hosted in Scotland and the Convention on Biological Diversity is about to adopt a new 10-year strategy to replace the Aichi targets, which come to an end this year. I hope that that will include a new set of ambitious global targets for biodiversity. We need to be aware of that type of thing in order to inspire domestic action. We need to look at the global picture as well as trying to figure out whether we want to keep pace with the EU. We must take all that into account in developing our Scottish strategy.

To come back to the question whether issues are UK or Scottish, that is complicated and there is no simple answer. It might depend on the issue. Many environmental issues have an international element. It is essential that there is good co-operation between the UK and Scottish Governments.

There are two aspects to that. One is political, and I will not comment on it. There is also an institutional element to co-operation. I am not convinced that the institutions that we have in place to facilitate that co-operation are fit for purpose. It has come up a lot during the Brexit negotiations that the joint ministerial committee has not been working well. We need UK institutional reform in order to ensure that our institutions and Administrations are at least working in the same direction, even if there is divergence between the policies. They need to co-operate.

Dr George: I remembered my point, convener.

Common agreement on minimum standards will be key, so that the only way that we can move forward is up the way. That provides the flexibility for Scotland to aim higher if it wishes, but it means that the UK has agreement that there will be no rolling backwards on standards. We might come on to discuss environmental principles in a minute, but we need to agree on the interpretation and implementation of those environmental principles. Again, that will be key for ensuring how we interpret the law and what cases we can take forward. In practical terms, we need collaboration with regard to management of shared resources, such as cross-border water bodies and protected areas.

Another example of where we will need some level of co-operation is emissions trading schemes, which Annalisa Savaresi mentioned in her briefing. That will have implications for Scotland. For example, the climate change plan relies heavily on participation in EU emissions trading schemes, which is one of the key policies for reducing industry emissions. That is one of quite a few examples of where decisions that are made at UK level could influence Scotland's ambitions. Co-operation will be key across the board, and we need to ensure that we create a race to the top rather than to the bottom.

11:45

Lloyd Austin: I will make a couple of additional points on keeping pace. I agree with a lot of what has been said, particularly in relation to not only keeping pace with Europe but following best practice internationally. We also need to link whatever keeping-pace provision we have with a commitment to non-regression. I know that the Cabinet Secretary for Environment, Climate Change and Land Reform has hinted that non-regression is her policy ambition. Bodies such as the International Union for Conservation of Nature, which is a United Nations-type body that involves Governments and NGOs, have done good international policy development about what non-regression is. That links non-regression to environmental outcomes—so not necessarily to legal processes but to the state of the environment. That way, as Sheila George says, we can move upwards but not downwards when it comes to the state of the environment.

On non-regression and keeping pace, we need to recognise where Scotland has done better than some of the European minimums, such as on the water framework directive. We do not want to regress to the European minimum; we want to keep ambitions high where we have already set them high. As we have said when talking about the strategy, maybe we can set them still higher in some areas.

Hatti Owens: We very much support keeping pace—as a commitment, it is the kind of

progressive and ambitious approach that our environment desperately needs at the moment.

To pick up on James Harrison's points about influences beyond the EU, 2020 is a significant year for international environmental law. Another area of influence beyond the EU is the trade agreements that the UK Government will be negotiating over the next few months and years. That is a complicated issue, and the role of the Scottish Government is complex. I simply highlight that it is important that the Scottish Government can investigate ways in which it can continue to be ambitious and have a role in those negotiations. The extent to which keeping pace is reflected in Scots law has to be part of the conversation and part of those negotiations.

To touch on Lloyd Austin's point, it is really important that non-regression is legislated for. That is slightly different from the four EU environment principles, but it is helpful for it to be in that cloud of things that need to be included in legislation. A reason for that is that, although we anticipate that the EU will continue to be progressive in its approach to the environment, there is a risk that the EU backslides. If we have a policy of keeping pace and non-regression, those issues will have to be carefully thought about and the legislation carefully drafted. We need to adopt a belt-and-braces approach. That way, we will provide a strong base for Scotland to continue to progress and be world leading in environmental law and governance.

Joanna Waddell: As far as we are concerned, we certainly agree with Lloyd Austin's and Hatti Owen's comments about non-regression. In fact, in our response to the Scottish Government's consultation, we suggested that non-regression be adopted as a principle in Scotland as part of that. That is on the back of the Scottish Government's commitments

"to maintain or exceed existing environmental standards"

post-Brexit, and its statement that the four EU environmental principles will

"continue to sit at the heart of environmental policy and law".

However, we wonder whether a duty "to have regard to" environmental principles goes far enough and whether that in itself is a regression. Perhaps the duty should be stronger; perhaps a duty to have regard to would result in a minister being able to ignore the principles when making a decision.

The Convener: Trade deals have been mentioned. Those will probably occur before we have in place any environmental principles, because they are not in the European Union (Withdrawal Agreement) Bill. Does anyone want to comment on the risks in that regard?

Professor Gemmell: That is a serious issue. In a sense, I am quite happy to be critical of the Government from that perspective. We have been slow to harden up what is potentially beneficial in this area. Collectively, we have taken rather a long time to come to a decision, partly because we have been waiting to see what the whole Brexit shambles looked like in order to work out a meaningful path through it.

We have lost quite a lot of time—most of the key points that we are making now were made when the original round-table work was done. It would have been good not only to progress with an environmental strategy at that point but to get the vision right. The strategy is to do something. It is the deployment of the resources to deliver the intended outcomes, but what are the intended outcomes? It would have been extremely helpful to say what Scotland's aspirations were. I always go back to the example of the so-called "15" in Sweden, which was delivered 20-odd years ago and through which the Swedes set out the nation's objectives for the next 50 years. They have been working systematically towards those objectives. We have had a number of opportunities to set out our objectives. Bridget Marshall and I were talking about the environmental strategy early on in SEPA's life, which was a strong visionary document that helped to guide a lot of the practical one-year and three-year programmes that followed.

At this point, we are likely to be blown off track by trade deals, because we will have to react to what they mean both at the UK level and potentially for Scotland. We need to quickly get ourselves some hardened, clear objectives and put them into a coherent vision framework, which can be amended subsequently. Getting those down now would be extremely constructive, as we are losing time.

The Convener: At Scottish and UK level.

Professor Gemmell: Yes, absolutely.

To go back to my and Scotland's experience of regulatory practice and the way in which we have operated, there have been times when Scotland has had a very different context from the UK. There have been times when the UK's submission of material to the EEA on environmental performance has left out Scotland, because Scotland was inconveniently better or had a different set of arrangements, or the whole of the UK was left out of the report because Scotland looked rather good and England looked rather bad.

There have been whole periods in which we have had to tiptoe through such challenges. We are still there, but we are likely to be forced into a position of having to work out the potential

consequences of a trade agreement that has environmental consequences for which we do not have a protection. In my view, there is no time to waste. We need to get on with having a clearer vision, a strategy and the mechanism to ensure that we can protect ourselves, or at least know the nature of the problems that we are facing. We could be going into the fog without particularly good navigation.

Dr Savaresi: That brings me to the point that I wanted to make earlier. Presently, EU law is the means by which we comply with many of the UK's international obligations on a number of environmental issues. It has been flagged in some of the inquiries at Westminster that there is a risk of the UK sleepwalking into non-compliance because of a lack of capacity to keep pace. One such issue is ozone-depleting substances and chemicals. There is an urgent need to build capacity somewhere in the UK to address those important, extremely technical issues, which are really only for the experts. It is very urgent.

The Convener: We will throw another member's question into the mix, but the witnesses might want to address some of the other issues as well. That is fine—just raise your hand and I will put you on the list.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): Forgive me, I want to go back to structures and I am essentially addressing Professor Gemmell.

I am assuming that, if we contemplate an environmental court, it will be part of the court system and responsible to the Lord President. I am getting a nod from Professor Gemmell. Rather than an environmental court, could we instead think of an environmental tribunal? I make the comparison between the Scottish Land Court and the Lands Tribunal for Scotland, in particular because tribunals have different and wider rights of appearance and there are substantially lower barriers to using them in terms of cost and opportunity.

Related to that, on the other side of the equation are the custodians of the policies, outside of the Government. I think that that is what is being proposed by the commissioner mechanism. We have a number of bodies, such as SEPA, SNH and Marine Scotland, that are responsible for policy and for administrative enforcement that might lead to financial penalties. How would that fit together in a framework and make the things that we do, which we have just been discussing, work in the real world?

Professor Gemmell: That is a good question. Right at the start, I make the caveat that that was not my mission; I was not asked to design what that future court-type system would be. There was a significant consultation in 2015-16 that looked at people's views on environmental courts. It needs quite a bit of consideration. It might need to be done relatively quickly, depending on perceived need, but there is no component of the existing system that serves well enough to be modified into that space if we were to conclude that the model that is used in New South Wales or New Zealand is desirable.

In parallel with the comments about the value and the nature of the process of the Court of Justice of the European Union, I stress that it is designed to deal only with the cases that cannot be resolved at an earlier point. The pressure should continue to be down through the system in order to find modes of resolution at an earlier point and force agencies and authorities to deal with such cases.

It has been evident in the New Zealand and New South Wales systems, in particular—and in one or two others—that the role of court officers in doing preparatory work is valuable. The independence of those officers and the powers that they have to investigate without fear or favour, and without any risk of being viewed as being part of the existing system, is one of the most powerful parts of the arrangement.

In the *Scottish Planning and Environmental Law Journal,* I recently referred to the fact that, during my career, I have had a number of tussles with the Crown Office and Procurator Fiscal Service at times when there were certain fiscals who had particular views about what was and was not appropriate to discuss and there were sheriffs who had different responses to what happened at the point of disposal. There is a rich area of discussion to be had about how best to handle complaints.

On Lloyd Austin's point, the focus through judicial reviews and other parts of the pre-court system on the proper nature of a procedure, rather than on the merits of the case, has been a particular problem. In New South Wales, in particular, they have focused seriously on identifying an issue and then finding ways to resolve it, often passing cases to be resolved back from the courts to a commissioner or an agency under direction.

At this point, I do not want to advocate that the design of the court mechanism is our priority; getting the rest of the system right would almost make the court unnecessary. However, with supreme power, the court has to exist at the end of that process chain to resolve those cases that have not previously been able to be resolved.

That might sound like a long-winded response to avoid Stewart Stevenson's question. I am not trying to avoid it, but better minds than mine and more experienced individuals should be involved

in designing what the court model needs to look like. However, that should only be done having got the rest of the system right.

Hatti Owens: I want to go back to principles and to pick up on Joanna Waddell's point on the legal duty.

The "have regard to" duty, which was the drafting in the 2019 Westminster Environment Bill and the proposal for the Scottish principles, is weak. We have seen that in relation to the Natural Environment and Rural Communities Act 2006, which was heavily criticised by the House of Lords select committee that investigated it in 2018. That matters because, as it stands under EU law, the role of the principles is broad and varied: they are locked in through the Lisbon treaty, they play a role in the development of policy, and they are important in individual administrative decision making and for legal challenges. It is important that we get the legal duty right and that it is both sufficiently strong and sufficiently broad.

12:00

I suggest that, rather than a duty to "have regard to" or "have due regard to", a better duty might be to apply the principles and act in accordance with them in relation to any associated policy statements. On the breadth, rather than the duty applying just to the Scottish ministers, it should apply to all public authorities. Moreover, rather than the principles applying only in the development of policy and legislation, they should apply across the piece whenever relevant functions are exercised. It is crucial that the legal framing of that is right, so that the principles can continue—that is all it is—to perform the role that they have been performing.

Lloyd Austin: I agree with that and with much of what Campbell Gemmell said earlier. I want to comment on a couple of things that Stewart Stevenson said and also on your earlier question about timing, convener.

In arguing for environmental courts as part of long-term governance arrangements, we often talk about environmental courts and/or tribunals. It is important that both are part of the courts system, with the Lord President at the apex. The parallel with the Scottish Land Court and the Lands Tribunal for Scotland is pertinent. In many of the analyses of how it might be done, it has been suggested that expanding the remit and expertise of the Scottish Land Court and the Lands Tribunal might be a way to achieve an environmental court or tribunal—in other words, we could call it a land and environment court, which happens to be the name of a similar body in some parts of Australia. Many of the issues could be resolved in a tribunal-type way by the land and environment tribunal before they went to the court and before they go through the appeal processes, ending up in the Court of Session.

On the question on the parliamentary commissioner as a custodian of policy, no suggestion has ever been made that the watchdog, whatever it is called, would be the custodian of policy. Policy is determined by the Government with parliamentary oversight. The commissioner's role would be to scrutinise whether various bits of government—the Government and its agencies, local authorities and others—are complying with that policy and whether they are doing so in a way that is consistent with whatever international obligations the Government has signed up to. The commissioner's role would be to provide advice and oversight of whether those things are being carried out and not necessarily to determine the policy. The commissioner might be able, on the basis of their investigations, to give advice on what might be good for or harmful to the future policy objectives. However, the custodian of policy is the Government and the commissioner's role is one of oversight and being able to investigate and respond to citizens' concerns.

On timing, the crucial date is the end of the year—the end of the transition period. That is why it is welcome that the Government has committed to putting provisions relating to principles and governance in the continuity bill that was announced in the programme for government. It is important that that happens and that it is as strong as possible—as Hatti Owens described. It should also at least flag up, if not start to deliver, the statutory underpinning for the strategy and the legally binding targets that Sheila George talked about. A commitment to legally binding targets is fundamental to ensuring that we move along the path to ambitious recovery.

It is worth pointing out that the UK Environment Bill includes some mechanisms of environmental targets and that all parties at Westminster are supporting those targets for the UK Government in relation to England. It would be odd not to seek to set our own targets for Scotland.

Joanna Waddell: I would like to pick up on the duty "to have regard" to environmental principles. A weakening of the obligation will happen through a move toward such a duty. What will happen in practice is that developments will get consented in Scotland that would not be consented under the current regime. Projects will go up that people will object to and will not be happy about. That is what will happen if the obligation regarding those principles is weakened.

In the case of the English system versus the Scottish one, if it is easier to get a project consented in one jurisdiction, then that is the one

that developers will look at, and an imbalance may therefore be generated. One very good example is that development can be very restricted under the habitats directive. If there is a chance of an effect on a Natura site or a site that is designated a special area of conservation or a special protection area under the habitats directive or wild birds directive—an effect on the ecology of that site or on the species that use it—a habitats regulations appraisal has to be done. As any developer who has had to do an HRA will tell you, it is very difficult to get beyond that very strict test of showing that it is beyond reasonable scientific doubt that there is no significant adverse effect. It is a very tight test.

A public interest option is also provided by the habitats regulations. I know that it is used in other member states, but it is rarely used in the UK. I have spoken to lawyers in other countries who have said that, if they cannot get their development through the habitats directive requirements, they will use the public interest option, but that does not happen in the UK at the moment. We have to get through that very tight test wherever there is a protected site. In the future, if there is not more than a duty "to have regard" to those principles, the chance is that that will get weakened and that developments will get built that should not be because of their impact on the environment.

Bridget Marshall: With regard to the environmental court, SEPA would agree with Professor Gemmell that we need to get the rest of the system right and see where that leaves us. As a matter of practicality, we have appeals that go to the land court in relation to enforcement measures; a lot of cases go through the criminal courts; and we have a few judicial reviews against us in the civil courts. In all of those courts, the most important thing is that the judge has knowledge, is a specialist and is supported to make good decisions. That is perhaps a weakness of the current system that we could address. SEPA is ambivalent about the structure and whether an environmental court is needed, but recognises that there is a need to bolster the experience and expertise of our judiciary across the three forums that we see cases going to.

My understanding of the principles and how they apply currently slightly differs from that of Hatti Owens. As far as we are concerned, the principles currently apply to the legislative policy-making functions, rather than to administrative decision-making functions. That is not to say that, as a matter of practice, we do not have regard to those principles when making decisions. However, they are fed down to the regulators through legislation that takes the principles into account. Therefore, as a matter of law, we do not have to have regard to the principles when we are making individual decisions. That appeared in Dr Savaresi's document from the Scottish Parliament information centre and I have seen that in other documents, and I have also checked with my colleagues in SEPA. The rolling over of that would be similar, in that it would apply to the legislation-making functions of the Government rather than to the administrative decision-making functions of the regulator.

To add some colour to that point, the way in which we make decisions under the legislation is extremely complex. We take into account layers and layers of duties. For example, in the first place, we have to do everything within the context of our statutory purpose, which requires us primarily to protect the environment but then to have regard to health and wellbeing and sustainable economic growth. That is the framework within which all our functions are exercised. Then, in making a decision, we have to weigh up a number of often competing factors under individual bits of legislation, around which there is a lot of complexity. For example, under regulation 15 of the Water Environment (Controlled Activities) (Scotland) Regulations 2011, in determining an application, we have to consider the risk to the water environment and other users of the water environment, the steps that have been taken to ensure efficient and sustainable water use and the impact on ground water. Once we have done that, we have to consider other statutory duties under the Water Environment and Water Services (Scotland) Act 2003. We must consider five things under that act, which mean that we must have regard to the social and economic impact of exercising the functions, promote sustainable flood risk management, act in the best way to achieve sustainable development and adopt an integrated approach by co-operating with other responsible authorities and Scottish ministers. We then have another layer of general statutory duties in other acts, which mean that we have to further the conservation of biodiversity and contribute to the delivery of emissions reduction targets in the way that we consider to be most sustainable. Finally, we have to take a step back and consider any impact on the human rights of an individual.

In all of that, there is a lot of complexity and a large number of things to weigh up. At the same time, we consider environmental principles. We do not have to do that as a matter of law, but the precautionary principle quite often comes into play when we are making individual decisions.

We are concerned about the complexity of the decision making and whether applying those principles to the administrative functions of our regulatory decision would make us make different decisions or have any sort of purpose, because they are already included in that long list of things

that we have to consider that has been filtered down to us. In a way, it just adds another layer of complexity.

We have policy-making functions in addition to those regulatory decision-making functions, and there is an argument that the principles should filter through the legislation and apply to our policy-making functions. We are in discussions with the Scottish Government about how that could be achieved in a way that makes it straightforward for us. However, as a matter of practice, we would consider those principles when considering and developing our policies. All our policies are based on those principles, in any event.

I thought that that would be helpful and give clarity.

Vicki Swales: I want to come back to a point that has been made a couple of times about the statutory underpinning of the environment strategy, and why that is important. Whether it is done through the proposed continuity bill or a separate bill that is specifically about the environment, it important to fix those legally binding targets.

We have seen in Scottish law requirements to bring forward strategies that are not then implemented and so have no effect. For example, the Climate Change (Scotland) Act 2009 set out a requirement to lay before Parliament a land use strategy. RSPB Scotland and many others are very supportive of the strategy that we have and its principles and objectives, but it has not been implemented. The act has had no effect on other areas of policy in many cases because it has no legally binding underpinning to make it implementable. It is only now, a decade later, that we are starting to see some movement, with the establishment of regional partnerships and regional land use frameworks.

We need to avoid that kind of mistake, and we need to be clear about what Scotland's environmental ambitions are and put them on a statutory footing, then set out the plans and funding that will deliver.

I will stop there. I have some more points about what we might want to see in the strategy but members might have questions that we can come back to.

The Convener: We could come back to that. I am watching the clock and we have about 15 minutes left for our discussion. I will go to Mark Ruskell, who has been waiting ages to ask a question.

12:15

Mark Ruskell (Mid Scotland and Fife) (Green): I have too many questions now, but I will pick one.

I was struck by the points that were made about non-regression being linked to environmental outcomes. I was also struck by the point about how an environment commissioner should potentially have powers to consider the merits of certain decisions, and not just whether due process has been followed. Are there any more comments about the role of an environment commissioner and how that would work?

I am also struck by the issue of the Future Generations Commissioner for Wales, and by some of the dynamics around the decision on the M4 relief road in Wales. That is an interesting space, because there is a body that is, effectively, a watchdog but which is also providing an independent assessment of Government decisions that are outside of legal duty and are more about strategy and vision. How does that work in practice? Are there good examples of where such a watchdog goes beyond the question of whether due process has been followed?

Lloyd Austin: The key thing is the question whether the commissioner has an advisory role, in the way that the Children and Young People's Commissioner does, or has powers such as those that the Information Commissioner has to enforce duties or instruct Government and agencies to provide information when requested. If you are seeking to fill a gap that is left by the loss of the European institutions, a watchdog body—whether it is headed by a commissioner or a group of commissioners—needs to have both. As I said at the beginning of the meeting, it needs to be independent of Government: that is why there is an emphasis on its being a parliamentary body, like the Information Commissioner and other commissioners. It also needs to be empowered to be free and frank in the advice that it gives, and to respond to citizens' complaints in a way that ensures that they can be addressed, by being empowered to ask for information, to make comments on that information and, as a last resort, to refer any examples of inappropriate action to a court.

That does not mean that every case goes all the way through to a court-type showdown—very few will. That is the case with many European issues. They are resolved much earlier in the process, perhaps simply by informal phone calls between officials and the European Commission, or by a formal letter from the European Commission. In a similar fashion, a future case in the context that we are discussing might be resolved by a parliamentary commissioner sending a formal letter to the Government or to an agency. The

examples that Nick Halfhide quoted were not the result of court decisions; they were the result of far earlier informal processes that resulted in changes in direction domestically. That is the kind of role that a parliamentary commissioner should have. It needs to be advisory and empowered. In order to do that, it must have resources—that is the third buzzword that I used earlier. Those resources include not only money, although money is necessary; they also include expertise in environmental matters and in legal interpretation, so that a commissioner is well informed.

Mark Ruskell talked about merits. Everything that the commission does needs to deal with merits. At the moment, if a commissioner referred an issue to the existing domestic courts, that would be dealt with only under a judicial review system. Merits are not part of the assessment there. That is one of the key issues about Aarhus compliance in Scotland, and is one of the arguments, as I think that Bridget Marshall pointed out, for informed judiciary and court systems, potentially with expert assessors assisting the judge, which is the way in which environmental courts in other jurisdictions work. That is important, because one of the key aspects of the Aarhus rights is that citizens have a right to independent judicial review of decisions not only on process points but on merits as well.

Professor Gemmell: My research showed that there are several different kinds of commissioner model. There is great variation between the Future Generations Commissioner for Wales model, a similar model in Hungary and the model that we see in the form of various commissioners in Canada, at state, province and dominion level. However, they have one thing in common: if they are not adequately designed and protected, they are vulnerable to falling out with the Government of the day and therefore to being disempowered in some shape or form. Where there where First Nations issues in Ontario and the commissioner came out on the wrong side—as far as the new Government was concerned—the commissioner was almost immediately emasculated and effectively turned into a quantitative audit body that no longer had responsibilities to consider the substance of the case. A similar thing happened at the federal level there.

I homed in on New Zealand as an example, because the skills of the succession of post holders—and their locus as independent but strongly tied to their parliamentary officers—has meant that they have thus far been effective, irrespective of the Government of the day. They have commanded respect and they have had authoritative, technical support. However, in my LINK report, I pointed out that those are necessary but not sufficient conditions to ensure that the environment is protected adequately in the longer term, because there is still a need to have a strategy that is robustly implemented by all parties and for them to be held accountable for that. If everything else fails, that can be policed through a court-type system.

The merits of a parliamentary commissioner outweigh the disadvantages of the weak versions that we have seen. They are versions of the European Commission, because they have the ability to receive complaints, to investigate, to scrutinise, to receive data, to opine on data, to inform policy and so on. It might be asking a lot of a commissioner to play those various roles but, effectively, Audit Scotland is doing so within a financial and non-financial domain. When I interviewed Audit Scotland, I was interested to learn that it could see an exact parallel, but it did not have the resources to take on that role. If it focused on one thing but did not focus on transport—or whatever—in the same way, that would distort its locus and deployment.

The key is the combination of those skilled resources—as Lloyd Austin suggested, it is not just about money; it is also about the access to talent and experience. The powers that it has and the ability of the citizenry to have transparent and affordable access to it are fundamental components of what a good commissioner looks like. It is important that Parliament and committees such as this one design the commissioner in a robust way, so that it can operate safely, independent of the tides of the day.

Clearly, if there are not protections around it, Governments and other parties within an Administration can apply pressures that could knock the independent view off course. Protection is not just for the commissioner but for the citizenry at large and, thus, the environment.

Hatti Owens: I will make a quick comment on the principles point. The committee might want to come back to that issue in a follow-up session; therefore, I draw your attention to an article by Professors Maria Lee and Eloise Scotford, whose view of the principles differs slightly from Bridget Marshall's. They explained that the environmental principles are binding on all public authorities when they are applying EU law in all relevant cases, including administrative decisions. There appears to be a difference of opinion but I am happy to share that article with the committee, so that you can form your own view.

The Convener: We would be happy to have that sent on to us.

Nick Halfhide: I want to stand back a little and make a slightly broader point. The discussion so far has, quite understandably, focused quite a lot on compliance. It is really important that we get that right but, if we are going to succeed,

compliance alone is not enough. We have already recognised that.

It strikes me that there are many routes to success, but working with business will be absolutely key. Businesses are key emitters, key managers of the land and key generators of the wealth that pays for all of this, and they are absolutely stakeholders. I make a plea to ensure that their voice is heard in the debate.

The question that I would want to ask businesses—farming businesses, processors or whatever—is: what support do businesses need to in order to make the next 10, 15 or 20 years a success in reducing their emissions and ensuring a nature-rich future for our country? We cannot talk to them about compliance only because, although that it is important, it is a really negative thing. If we are really going to be successful, we need all of them to work for success. That was Bridget Marshall's point. Going beyond compliance, what support do businesses need to do the right thing beyond being told what not to do?

From talking to businesses, my experience is that the mood has changed fundamentally over the past couple of years. It is no longer about what they can get away with; there is a realisation that the business opportunity lies in the nation and individual businesses going beyond compliance. However, the whole system—whether we are talking about incentives, advice, regulation or the court system—has not really caught up with how businesses can be helped to do that.

The Convener: I am conscious that we have three minutes left. If anybody wants to make any points about anything that we have talked about, now is their chance to do so. Earlier, on another theme, I cut off Sheila George before I let in Mark Ruskell.

Dr George: What I will say is still about principles, if that is all right. The robust application of the principles is a protective measure for the Government and agencies. One example in that context is the Scottish Coal case in 2013. Scottish Coal went into liquidation and, if it had been allowed to walk away from a site, that would have been left and would have caused environmental damage and degradation. Scottish Coal would not have been responsible for it, and the Scottish Government or the local authorities would have had to pick up the bill. The application of the polluter-pays principle ensured that the liquidators had to continue to manage that site and carry the costs.

There is a burden in the application of those principles, but that application is also incredibly protective, and it is a bottom line. It is therefore important that the application is robust.

Dr Savaresi: I have a final point about principles. I second what was said. There has been a mainstream interpretation of the value and role of principles in EU law. We are now moving away from that design, which should prompt us to think about what the principles have done in the context of governance in Scotland. It is clear that that issue needs to be looked at as we move forward. Whatever we think of the present value and role of the principles, what will we use next? That is one of many questions that are up for discussion for Scotland.

I should have said at the beginning that whatever I was going to say in the evidence session would be in my personal capacity, and not as a SPICe fellow.

Vicki Swales: I want to pick up on what Nick Halfhide said about thinking about where we want to go. It is absolutely not just about compliance, but I think that we all recognise that most, if not all, businesses ultimately depend on the natural environment in one form or another for the assets that they use to produce food, timber or whatever. In a 10-year, 20-year or even longer timeframe, we need to look at key areas in which we are not doing very well. The "State of Nature 2019" report is clear that biodiversity is declining and that we have big problems. We should set out our stall in the strategy, and we need to bring it forward quickly. I think that Campbell Gemmell made that point. We have wasted quite a lot of time. We should be setting out how nature can help us to meet the climate targets and what we will do about native woodland expansion, peatland restoration, and coastal and marine habitats. We have targets for peatland restoration, but we are going to restore only about a third of the 650,000 hectares of degraded peatland. If we made a commitment to restoring all of that and to working out how to do that, that would take us a long way towards meeting our climate targets.

12:30

We need to improve our protected areas—our designated sites—in Scotland. In many cases, they are already in an unfavourable condition and failing. We could create a Scottish nature network that restores and connects habitats. We need to do things in our marine environment to stop overfishing and pollution. All of those things connect into the land use strategy. We also need to eradicate wildlife crime. I know that the committee has considered that issue on a number of occasions. Let us get the strategy, set that ambition, and be clear about where Scotland wants to be to benefit businesses that depend on the natural environment.

The Convener: That seems to be good note to end on. I thank everybody. Obviously, we will

continue to have this conversation. It is not over today, and it has been very helpful to have your input as we start 2020.

That concludes the committee's business in public. At the committee's next meeting, on 21 January 2020, it expects to take evidence on the grouse moor management group's report and to consider in private a draft of its stage 1 report on the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill.

12:31

Meeting continued in private until 12:45.

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