

Commonwealth Conversation

*Legal Implications of Brexit - Advancing Commonwealth
Trade and Agriculture*

Part Four

Meeting of UK-based High Commissioners

Report: June 2017



THE ROYAL COMMONWEALTH SOCIETY

About this Report

The Royal Commonwealth Society, in partnership with the General Council of the Bar of England and Wales, convened the latest in its series of Brexit Roundtables on the 8th June 2017. The event was kindly hosted at the Australian High Commission and co-chaired by H.E. Ms. Yamina Karitanyi, High Commissioner of Rwanda and H.E. The Hon. Alexander Downer AC, High Commissioner of Australia. The guest speakers were Hugh Mercer QC, barrister at Essex Court Chambers and Chair of Brexit Working Group of the Bar; and Edmond McGovern, barrister, expert in World Trade Organisation (WTO) law and European trade regulation.

Rollercoaster year for the legal world

Mr. Mercer opened the discussion by stating that the previous 12 months have been a 'rollercoaster' for the legal profession with regards to 'Brexit'. This ranged from the Supreme Court decision on a Parliamentary Vote to triggering Article 50 and the consequent reactions to this from politicians, the media, and the public. Getting off the rollercoaster looks unlikely as Brexit will be a 'legally complex process'. He also added the view that the European Union (EU) as the 'ivy attached to our Common law edifice' is now a misconception as EU law has fundamentally altered the UK's historic system over the last 40 years.

The UK will withdraw from the four cornerstones of EU law and the Government's commitment is to bring the secondary EU law into English law. He then questions how these laws will be modified in the future – by Parliament or through Statutory Instrument. Mr. Mercer went on to predict that the regulatory regime will stay the same for the foreseeable future with minimal difference. However, he noted that it is possible that UK law may then evolve differently to EU law through interpretation.

The UK's WTO seat

Mr. Edmond McGovern spoke about the UK's future tariff schedule at the WTO. It currently is part of the EU's schedule and in his view the UK will replicate these 'bindings' when the UK retakes its seat in the WTO. A tariff 'binding' is a legal commitment not to increase a rate of duty beyond an agreed level. Once it is bound it may not be raised without compensating the affected parties. Notably the current EU bindings are domiciled in Euros and he

suggested this may be problematic if the UK decides to convert to Sterling and thus be subject to exchange rate fluctuations.

One specific way the UK can lower a binding is through future free trade agreements. The other is to create a new schedule which will need to be ratified through the WTO which is time consuming. However, Mr. McGovern said that the UK may wish to be more liberal to other Commonwealth nations.

Free Trade Agreements

Mr. Mercer clarified that trade agreements cannot be signed before the UK leaves the EU; however, there is nothing from a legal stand point to prohibit discussion. That said the UK may not wish to sour any future EU trade deal, although Mr. Mercer thought it was a 'far reaching principle' for the EU to say the UK cannot negotiate with others while it remains in the EU - much like an employee having the right to seek a new employer while under contract.

Furthermore, the UK is an actor with two hats. It remains an EU member so cannot jeopardise ongoing EU trade negotiations even if it seeks its own deal with the country in question.

Mr. McGovern posed the question of what will happen to those existing deals the EU has with Commonwealth nations of which the UK is bound. These may fall away during Brexit, but his view was that parallel agreements would be put in place.

He also touched upon Mutual Recognition Agreements (MRAs) which relate to product standards. The UK would need to accept all the existing EU standards if non-EU countries continued to export to the UK then onwards to the EU. Mr. McGovern also highlighted the precedent for MRAs outside a Free Trade Agreement. The Quebec and French legal bars had one before the EU-Canada Comprehensive Economic and Trade Agreement (CETA). It also looks at legal judgements in the two jurisdictions.

Agriculture

Mr. Mercer said that the UK has high level standards in areas such as labelling, animal welfare, hygiene etc. It risks being a highly regulated market entering a global market place which is less so. He questioned how the UK will compete. One option offered would be to carve out a sub-market for high-end agricultural produce akin to the Duchy brand.

There is also a question of EU quotas and their legacy. High-end beef was used as an example. The UK receives a percentage of the EU quota each year. It is expected the UK would retain this percentage if it replicated the EU tariff arrangements.

Another area of concern is over the Generalised System of Preferences that the EU has with other nations and its application with the UK post-Brexit. Mr. McGovern informed the meeting that both India and Kenya have reached their respective limit in the EU for goods sold. He asks whether the UK will be more generous on these limits. A more free trade approach espoused by the UK would present this opportunity for Commonwealth nations.

Q&A session

One High Commissioner asked about tariff rates and how these will be transferred to the UK. The response was that often the mechanism used is to look at historic patterns of trade over a three to five year cycle to determine the percentage the UK would receive in quotas.

A further question posed was whether the UK had a legal obligation to retain existing EU trade deals. The response given as two international lawyers was that these deals could remain as trade agreements are mixed competence issues. Each member state has to agree to the terms in their own respective Parliaments. This was seen with the delay from Belgium over CETA earlier this year. Mr. Mercer then asked why would the UK leaving the EU mean leaving these arrangements since these agreements were already in UK law? One option for Commonwealth nations could be to ask the UK to legally honour these EU agreements or offer an even better deal.