



UKELA Brexit Task Force (TF) Inaugural meeting minutes
Tuesday 13 September 2016 at 9.30am

Kings' College, London

Task Force members

Richard Barlow	NatureConsWP
Karen Blair (apologies)	Trustee/NI
Andrew Bryce	Private Practice
Jill Crawford (apologies)	EnvLitWP
Cate Davey	WaterWP
Haydn Davies (apologies)	Trustee/Wales
Paul Davies	Private Practice
Angus Evers	WasteWP
Begonia Filgueira	Private Practice
Peter Harvey	WasteWP
Stephen Hockman QC	ClimateChangeEnergyWP
Sir Francis Jacobs (apologies)	Patron
Anne Johnstone	Trustee/Vice Chair
Penny Latorre	Trustee/WP Co-Ordinator
Bob Lee	Academic
Richard Macrory QC	Patron
Bridget Marshall	Trustee/public sector
Francis McManus (apologies)	NoiseWP
Kenneth Ross	Trustee/Scotland
Eloise Scotford	Academic
Stephen Sykes	UKELA Chair
Sarah Thomas	EnvironmentAgency observer
Stephen Tromans QC	Barrister
Richard Wald	Trustee/Barrister
Andrew Wiseman	ContamLandWP

UKELA Staff Support

Linda Farrow
Rosie Oliver
Alison Boyd

1 Introductions and Welcome – Stephen Sykes

Apologies were noted and all members of the TF were welcomed to this inaugural meeting. For the opening remarks from SS, see Annex A.

2 Brexit: Challenges and Opportunities for UKELA – Professor Richard Macrory

For Richard Macrory's statement see Annex B.

3 UKELA's work on Brexit to date - Rosie Oliver

Rosie Oliver gave details of this work, covering:

- Events
- Consultation responses and inquiry submissions
- Web information at ukela.org/Brexit
- UKELA's position statement (Annex 2, draft Terms of reference)

For Rosie Oliver's slides, see attachment at Annex C.

Rosie confirmed that the Brexit area of the website (ukela.org/Brexit) will continue to be maintained and updated. This includes adding links or references to relevant articles on Brexit and the environment. It was suggested that the area should include an explanation of the different situations in the devolved administrations.

Action: RO to add to website material on situation in devolved administrations.

Action: Task Force members to notify RO of good new articles on Brexit and the environment that they come across, that she can then upload to the website.

4 Brexit Task Force Terms of Reference – Stephen Sykes

Noted the TOR was a draft version at present and comments invited; those made at the meeting would be taken account of in revised TOR. It was agreed that the role of the TF as advisory body to Council, but acting in a proactive way should be made clearer.

TF indicated that SS should act as TF Chair. SS agreed subject to balancing his other work for UKELA and support from VC team.

LF reported that she and the Treasurer were reviewing UKELA's budget and staff resource to see if funds could be put aside for additional staff or volunteer time should the need arise.

Decision: Andrew Wiseman, Stephen Tromans, Begonia Filgueira and Bob Lee will act as VCs, with Stephen Sykes as Chair

Action: AB to add Begonia Filgueira, Andrew Bryce and Sarah Thomas to TF membership list

Action: SS to make clearer in TOR that TF is acting as advisory body to Council/proactive nature of TF

Action: SS to amend TOR to reflect relationship between environmental law and trade

Action: all TF members to let Linda Farrow know of any funding pots UKELA might access to fund the resources needed to cover this additional work

5 Government and Parliamentary work on Brexit and opportunities for UKELA engagement - Rosie Oliver

- **Update: state of play re Art 50 process (preliminary work, likely timeframes, possible negotiating position)**

- **Government work-streams (Defra, DBEIS, SG, WAG, DOENI etc)**
- **Parliamentary Committee inquiries**
- **UKELA's engagement: principles and process**

It was agreed that a proactive approach including early engagement with government was important, noting the different approach needed for Scotland in particular.

Action: SS to arrange meeting with Alan Evans, Head of Legal at Defra

Action: SS to write to other relevant UK/devolved administration departments (including DBEIS) and regulators, introducing UKELA, its work/position and that we are keen to help.

6 UKELA specialist Working Party analysis - Rosie Oliver

- **of the current national law in key areas to see how EU law is reflected to help clarify the sort of transitional models needed;**
- **of relevant international conventions which UK has ratified (Ramsar, Basel etc.) and how they may inhibit and influences changes that might be proposed.**

It was agreed that this kind of analysis would be helpful. Noted that some WPs already undertaken some activity in this area, see website. During meeting, a matrix was drafted, building on the two bullet points above, so as to give more detail of points to cover in this mapping exercise. The matrix is attached to these minutes.

Agreed that UKELA should prioritise areas most at risk, including nature conservation (given Habitats and Birds Directives would cease to apply under a 'Norway/EEA model'). Working parties can then be asked to get on with the mapping exercise for priority areas. It could take six months. Noted that there is a need first to check what relevant work has already been done mapping various areas – so as to avoid duplication of effort, and make things easier for working parties. On question of strengths and weaknesses of current law, Aim 5 report would be a good place to start.

If any priority areas are not currently dealt with by working parties, Task Force will need to review how to address them.

The interaction between trade and the environment was identified as an area where there is currently a gap in understanding. Agreed an event on Brexit, trade and the environment would be good next step.

Action: all to consider the attached draft activity matrix and provide comments to AB and RO

Action: Peter Harvey to send to UKELA horizon scanning tool from PLC

Action: RO/LF to review TF TOR to ensure that they dovetailed well with WP TOR

Action: RM to make enquiries re Norway model to see if absence of Habitats Directive provision has caused any problems

Action: RO/AB to take forward arrangements for Brexit event on Trade & Environmental Law; ES to advise on academic contacts with WTO knowledge

7 Making connections with organisations and professional bodies working on Brexit - Penny Latorre

- **List: Draft Terms of Reference, Annex 1**
- **Opportunities for collaboration, priorities and contacts**

Action: RO to add City of London Law Society, CIWEM, CIEEM to Annex 2 of TOR; all TF members to advise RO of any other organisations to add

Action: TOR list to be split into government and non-government organisations

Action: RO to consider which other organisations websites to link to from UKELA Brexit pages

Action: staff team to complement existing intelligence with desk-based research to ensure no obvious organisational synergies were overlooked

8 Open Discussion re the focus of the Task Force - all

Covered in other agenda items

9 AOB

- **Should we consider polling our Members eg re which areas of law which work well and which require review**
- **Consultation for Law Commission's 13th Programme of law reform & areas of environmental law which may be in need of reform**

Action: a poll of members was agreed. RO to take forward

LF asked BTF for a view on whether they wished to make any public statement as a result of this first meeting. It was considered that it was too early but that this should be kept under review.

BM requested that the WP analysis (and suggested format for reporting) be reviewed to ensure it took account of Devolved Administration perspectives. She also suggested that WP membership be reviewed to ensure good lines of communication on Brexit matters with DA groups.

RW asked whether a judicial perspective on the BTF's work would be helpful. SS/Vice Chairs to consider in due course.

BL made the BTF aware that he would be giving evidence to the Welsh Assembly would liaise with LF & RO re relevant aspects.

KR reminded the TF that "The law will remain the law until it is changed" and that this calming message be promoted in relevant communications.

10 Concluding remarks and next steps - Stephen Sykes

SS thanked all participants for joining the meeting.

Action: All to advise SS asap if they DO NOT want to continue to be part of the group

Action: AB to organise next meeting for end 2016 at KCL

Action: UKELA Conference team to consider how Brexit is covered in 2017 programme

Action: SS/AB to circulate revised TOR to TF for sign off

Annex A

Stephen Sykes' opening statement

I am sure that we are all very grateful to Eloise for hosting today's meeting and I would like to thank everyone for participating. Today's meeting is to be minuted and, when signed off, they will appear on the Brexit pages of our website. Few meetings of UKELA Members in our near 30-year history can have been as important as this one.

I think we all sense that we have a responsibility to play our part. A responsibility to help to address the opportunities as well as the threats that Brexit represents to the UK's body of EU-derived environmental laws – and hence to our environment. And that is why we are here.

I have heard a range of views about the likely impact of Brexit. Some people think that very little will change. Others are fearful that environmental protections will be rolled back in a retrograde and damaging manner. The truth is that none of us know what kind of Brexit we are going to get - or what this will mean for the UK's environmental laws. That, however, is not an argument for inactivity.

Rather we should apply a well-known tenet of EU environmental law – the “precautionary principle” – the taking of measures to anticipate and reduce uncertain risks.

We can anticipate that the task of implementing Brexit will occupy a veritable army of lawyers, especially for colleagues working within the Government's Legal Service, for many years.

Sir Paul Jenkins, the former head of that service, has described the implementation of Brexit as “***the biggest legislative and administrative challenge in our nation's peacetime history***”.¹

It has been estimated that one sixth of our statute book is derived from EU law – and this excludes some 13,000 regulations².

Sir Paul believes that next two to five years are going to be completely dominated by Brexit.

The complexities arising from the interplay of our international treaty obligations, EU laws and the laws applying across our developed administrations are enormous.

And yet it is this very complexity that presents UKELA with an opportunity and, I would suggest, a special obligation to engage with policymakers and to make a positive contribution to any resettlement of our environment laws which may result.

At this time of national need, it is only right that UKELA extends a helping hand. It is only right that we ensure that Government both understands and draws upon the considerable expertise and independent resources that we can deploy.

I see the role of the Task Force as, essentially, a standing committee – to act as UKELA's eye and ears on matters relating to Brexit. To help us to ensure that we are engaged – that we respond to opportunities, and that we address threats. To help the Association to make a positive difference.

¹ Radio 4, “Leavocrats”, August 31st 2016.

² See fn 1 above referencing House of Commons research.

Without more ado, I will hand over to Richard for his opening address to further set the scene.

Annex B

Richard Macrory statement

I want to say some brief words about three issues all of which will require UKELA engagement. A snap shot of the existing models of looser arrangements with the EU, particularly on the environment. This may provide insights on where we wish to be. Something about national transitional arrangements to preserve the acquis. And finally some thoughts on international environmental conventions.

Three key models

Norway

A member of EFTA and the European Economic Area as with Iceland and Lichtenstein. The EEA agreement entered into force in 1994 requires Norway and the other parties to implement most areas of EU law including the environment acquis. Agriculture and fisheries are excluded. As also are EU Habitats and Birds Directive. The exclusion of these directives appears to be been a result of negotiations and the power of Norwegian hunting lobby.

When it comes to enforcement and supervision there is a separate surveillance authority with equivalent powers to the European Commission and a separate EFTA court which largely follows the rulings and principles of the Court of Justice. But the EFTAs court has no powers of imposing penalties on countries who fail to comply with its judgments, equivalent to those available to the European Court of Justice.

Switzerland. Its relationship with the EU is governed by a series of 27 bilateral agreements beginning with free trade in 1972. They encompass areas such as agricultural products, technical barriers to trade, and free movement of persons (over which there is currently a dispute between the Commission and Switzerland). EU environmental legislation is not yet included, and the only agreement concerning the environment made in 2006 concerns the participation of Switzerland in the European Environment Agency.

As with Norway, Switzerland makes a financial contribution to the EU. When it comes to enforcement it is a strange position. You might think that since Switzerland is a member of EFTA, it would be subject to the jurisdiction of the EFTA Court but the EFTA court only covers those EFTA countries which are also members of European Economic Area (Norway, Iceland and Lichtenstein), and Switzerland is outside the EEA.

Most of the agreements are silent as to formal enforcement. Only the 2002 agreement of civil aviation states that the EU Court of Justice has exclusive competence to deal legal challenges of decisions of Community institutions. In 2013 the Court of Justice heard its first case concerning Switzerland concerning German restrictions on flights to Zurich.³ But it ducked the question as to whether Switzerland had clear locus before the court which has never been entirely clear.

³ Case C-547/10P 7 March 2013

In 2013 the European Council reviewed the general situation, and concluded that the extensive system of bilateral agreements with Switzerland had reached its limits, and wanted greater legal certainty including more general provisions on surveillance and judicial control.⁴ The Council was clearly pushing for EFTA type court supervision.

Canada/EU

The relationship is governed by the recently agreed trade agreement which covers access to the single market for both goods and some financial services. My prediction is that the UK will be aiming for something similar, though with a lot of different detail.

Chapter 24 is entitled trade and the environment, but goes further than just trade. It recognizes the right of each party to set its environmental priorities and to adopt environmental laws consistent with multilateral environmental agreements. It then states *"Each party shall seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to improve such laws and policies and their underlying levels of protection."*

It commits the parties to consult and cooperate on multilateral environmental agreements, and the parties explicitly recognize that it is inappropriate to encourage trade or investment that weakens or reduces levels of protection in their environmental law.

And interestingly access to environmental justice provisions have been included. Persons with a legally recognized interest must have the right of action against infringement so environmental law, and must ensure that such proceedings are not unnecessarily complicated or prohibitively costly, and do not entail unreasonable time limits. These provisions were clearly influenced by Aarhus but there is no mention of NGOs as such.

There is no explicit mention of the precautionary principle but the parties acknowledge that the lack of full scientific uncertainty shall not be used post one cost effective measures to prevent environmental damage in the case of threats of serious or irreversible damage.

So there a lot of interesting material which could be usefully replicated in any UK/EU trade agreements.⁵

⁴ Council of the European Union *Council Conclusions on EU relations with EFTA countries* 8 January 2013 5101/13 See further European Law Blog March 8 2013 *Court of justice rejects Switzerland's appeal concerning Zurich Airport*. <http://europeanlawblog.eu/?p=1614>

⁵ On the Canadian agreement see further the presentation by Stephen Tromans QC to the UKELA Annual Conference 2016 : *TTIP – What it is and should I be bothered?*

National Transitional arrangements – Once Art 50 is invoked, there is likely at some point to be legislative provision to ensure that the existing body of EU law remains stable until it is subject to revision and review.

A private members Bill in 2013 attempted an elegant solution by providing that the European Communities Act 1972 is repealed but that any secondary legislation made under it would continue in force unless subsequently repealed or amended. That is simple but of course does not deal with the more complex way that EU is integrated into the UK system⁶. It does not deal with EU regulations that are directly applicable, nor with regulations referring to Community legislation such as the Environmental Permitting regulations, nor with the status and authority of judgments of the existing Court of Justice interpreting the relevant EU legislation. So we should expect something rather more complex.

Assuming these challenges can be met, Government will then have to consider its mechanisms for introducing changes and amendments and repeals. Given the sheer amount of law involved, it is very likely to adopt powers of repeal and amendment by orders, including powers to amend primary legislation.

If this sort of model is adopted, it will require UKELA to scrutinize carefully the details of orders and regulations emerging, particularly if significant changes are hidden away. I think generally there is a case for greater Parliamentary scrutiny as to what is going on, and I would hope that UKELA can persuade relevant select committees (especially EFRA) to take a close interest.

I am not going to speculate how UKELA should address detailed substantive areas. But there will be opportunities. For example, those who feel that they could come up with a more coherent and elegant definition of waste than EU law here is the chance. We could even adopt the more radical solution and argue that lawyers made a great mistake in ever trying to define a legal category called waste. The environment itself does not distinguish between waste or a substance or product.⁷

International law

But that brings me to my third point, because there in practice there will not be a complete free hand. Again taking waste as an example, the UK has ratified the 1989 Basel Convention on the transport of hazardous wastes and that Convention itself contains definitions of waste which will at least apply where international transportation is involved.⁸

⁶ See on this point the paper by Richard Gordon QC and Rowena Moffatt *Brexit – The Immediate Legal Consequences* (Constitution Society 2016)

⁷ For many years East Germany appeared to be one of the few countries where the term 'waste' did not appear in its law, just 'secondary materials.'

⁸ Art 2.1 “Wastes” are substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law”

The UK has ratified over 40 international environmental conventions. But most are joint ratifications with the UK and the EU (and other member states) – the so-called mixed agreements because these environment treaties usually straddle national and EU competences.

So that raises the question is to whether the UK if it leaves the EU, will it still be bound by those mixed agreements. One might have thought it surely would at least in relation to those aspects within national competence. But it gets difficult because the instruments of ratification rarely define in a detail the division of competences.

I consulted a number of international law experts on the subject in preparing my recent think piece for ENDS.⁹ I have to say that I got three different answers. First, that we would automatically be bound by the whole agreement. Second, that one would have to look carefully at the provisions of each international treaty but that probably if the UK were to assume all the obligations new protocols would have to be agreed by all parties. and thirdly, “this is all very complex!”. I would suspect that the UK will wish to present itself as a good international player will adopt the second solutions if that is required legally and that other parties will be sensible about it.

I also speculated in the article various reasons why, post a true Brexit, the national courts may in future give more weight to international conventions which have not been transposed into national law than has hitherto been the case. I don't think we will become truly monist but they will have more impact.

This means that we are all going to have to become more familiar with the details of international conventions. Some EU legislation reflects the international conventions almost word for word – for example the ESPOO convention on transboundary environmental impacts. But other EU legislation goes further than the international conventions

UKELA will have an opportunity to critically examine some of the core international conventions and consider how they can be fleshed out in national law to improve their effectiveness. Some will have no specific national transposition because this will have been done by EU legislation, so that gap will at least need filling.

Let me give one example. The Habitats Directive was raised during the referendum campaign as a possible target. The UK has ratified the 1971 Ramsar Convention on Wetlands. As with the Habitats Directive, there is provision for parties to intrude on listed sites in the national interest but it is in broad terms and it contains no procedural requirements equivalent to those in the Habitats Directive:

Where a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources (Art 4.2)

⁹ *Brexit unlikely to give UK free rein over green laws* ENDS Report 499 Sept 2016

The core principle is there but any national transposing law might flesh out procedures to be adopted including public consultation, equivalent to those in Art 6 of the Habitats Directive.

So there is much to think about and I am sure UKELA will have a critical role to play in the years ahead.