



May 12, 2005

As a part of its fact-finding mission, the BIC met with the Foreign and Commonwealth Office in London on a wide range of issues relating to Bermuda's current constitutional position, as well as the pros and cons of Independence for Bermuda.

The following document represents the formal response from the FCO:

BERMUDA: ISSUES ON INDEPENDENCE

Introduction

1. This paper sets out the position on a number of the issues raised in discussion with the Bermuda Independence Commission during its visit to London on 14-16 March 2005.

Test of Public Opinion

2. As the grant of independence by the UK requires the prior approval of Parliament, the UK Government need to be satisfied that, if a territory moves to independence, it does so on the basis of the clearly and constitutionally expressed wish of its people. The move to independence is a fundamental step. Increasingly in the UK, major constitutional issues of this kind are being put to a referendum. At this time, the presumption of the UK Government is that a referendum would be the way of testing opinion in those territories where independence is an option. But a final decision on whether to go the referendum route, and what form the referendum might take, would need to be determined by the UK on a case by case basis, reflecting the uniqueness and individual characteristics of each territory.

Procedure to be Followed After a Request for Independence

3. Once it was established that there was a clearly and constitutionally expressed wish for independence, a meeting would be held in London between representatives of Bermuda and the FCO with the object of reaching agreement on the list of topics for discussion at the Constitutional Conference. The latter would be held at a later date, again in London, the main business of which would be the content of an Independence Constitution.

Legislation

4. Neither the Bermuda Constitution Act 1967, nor the Bermuda Constitution Orders 1968 to 2003 made under that Act, nor any other UK legislation, prescribes how Bermuda's current relationship with the UK may be terminated. An Act of the UK Parliament would be required to end the responsibility of the UK for the government of Bermuda, and to remove all limitations on the legislative power of the Bermuda Legislature. The same Act would confer power on Her Majesty to make an Order in Council containing the Independence Constitution. The same Act would also make any necessary amendments to UK statute law consequent on Bermuda's independence, and would deal with the citizenship consequences in UK law. The Bermuda Constitution Act 1967 and Orders in Council made pursuant to that Act would be repealed upon independence. Other pieces of UK legislation which form part of the law of Bermuda (e.g. certain UK Acts and Orders in Council) would remain part of the law of Bermuda until repealed or amended by the Legislature of an independent Bermuda.

Citizenship

5. Between 1983 and 2002 most people possessing British nationality by virtue of a connection with Bermuda would have been British Dependent Territories citizens, and some would have been British citizens, under the British Nationality Act 1981. The British Overseas Territories Act 2002 renamed "British Dependent Territories citizens" as "British overseas territories citizens". More substantively, that Act provided that all British overseas territories citizens who had that status by virtue of a connection with Bermuda automatically became British citizens as well, with effect from 21 May 2002. The Act also provided for the acquisition of British citizenship by persons born on or after 21 May 2002 by virtue of defined connections with Bermuda. The possession of British citizenship by any person by virtue of the 2002 Act does not depend on that person having acquired a British citizen passport. Accordingly, the vast majority of persons possessing British nationality by virtue of a connection with Bermuda are now British citizens (as well as British overseas territories citizens), irrespective of the passport they may hold and even if they hold no passport; there may also be a few persons who are British overseas territories citizens only, for example because they have been naturalised or registered as such in Bermuda since 21 May 2002, or because they have renounced their British citizenship but not their British overseas territories citizenship.
6. The criteria for granting citizenship of the new state would need to be discussed at the constitutional conference. The nationality consequences of independence would be dealt with in the independence Act of the UK Parliament and would therefore be looked at very carefully. In the past, the usual practice was to withdraw British nationality from the majority of those acquiring citizenship of the new state on independence but to provide for its retention where the person concerned had a residual connection - for example through a parent or grandparent - with the UK or a place that continued to be what nowadays would be referred to as a British overseas territory. We would not expect to take a different approach in Bermuda's case.

Dual Nationality

7. A large number of countries, including some Commonwealth countries, do not accept dual nationality and insist on persons renouncing their other nationalities as a condition for retaining theirs. UK nationality legislation contains no such provisions. It would be entirely a matter for the Government of an independent Bermuda to decide for themselves where the balance of advantage lay.

Entry to the UK post-independence

8. A national of Bermuda would be subject to the provisions of the Immigration Rules which govern the entry to and stay in the UK for various purposes (visit, study, work etc). The requirements vary from category to category. Decisions on whether to introduce a visa regime for a particular nationality are taken on the basis of the immigration threat to the UK. A judgement could only be taken in respect of Bermudian nationals after independence and based on the circumstances at that time. Factors that would be taken into account include any evidence of irregular migration (including asylum applications), illegal working, overstaying by those who enter legally, the security of the Bermudian passport and passport issuing arrangements, and the adequacy of return arrangements for Bermudian nationals removed from the UK.

Membership of the Commonwealth

9. If Bermuda wished to be a member of the Commonwealth, it would be usual for the legislature to pass a resolution in favour of Commonwealth membership. Admission to the Commonwealth is a matter for collective decision by the existing members. Consultation is carried out by the Commonwealth Secretary-General. If an application was made before independence (as is usual), it would be appropriate for it to be made through the British Government, which would convey the request to the Commonwealth Secretary-General. If the application was made after independence, the Prime Minister of the newly-independent country concerned could approach the

Commonwealth Secretary-General direct, or might ask a Commonwealth member to approach the Commonwealth Secretary-General for him.

10. At the 1997 CHOGM (following Mozambique's request to join), the criteria for Commonwealth membership were spelt out more clearly. The qualifying criteria are that "an applicant country should, as a rule, have had a close constitutional association with an existing Commonwealth member state; that it should comply with Commonwealth values, principles and priorities as set out in the Harare Commonwealth Declaration of 1991; and that it should accept Commonwealth norms and conventions". These would include accepting the Queen as Head of the Commonwealth. Bermuda would also have to contribute to the Commonwealth budget.

11. If it was Bermuda's intention to become a monarchical member of the Commonwealth, recognising The Queen as Head of State, the Bermudians would need to select their first Governor-General. Unless the Independence Constitution provided otherwise, he or she could only be appointed by The Queen at the request and on the advice of the Premier of Bermuda.

Appeals to the Privy Council

12. It would be open to an independent Bermuda within the Commonwealth to choose whether it wished the Privy Council to continue as Bermuda's final court of appeal. Even if Bermuda chose to become a republic at independence, on the basis of previous precedents arrangements could be made with the UK Government for final appeals to continue to lie to the Judicial Committee of the Privy Council, and provision would need to be included in the independence Act of Parliament to deal with that.

Consular Assistance

13. In Commonwealth countries where another Commonwealth country maintains no diplomatic or official representation, the host Government is responsible for consular or quasi-consular services to citizens of Commonwealth countries. When a host Government does not automatically accept that responsibility, it is for unrepresented Commonwealth countries to make bilateral arrangements for the protection of their nationals, either with the host Government or with another country which is represented. The United Kingdom continues to represent the interests of newly-independent former British territories for up to one year after independence. Apart from this concession, the United Kingdom takes no responsibility for other Commonwealth citizens in Commonwealth countries. If a Bermudian were to seek assistance from a British mission in a Commonwealth country, he would be referred to the host Government. Likewise, any unrepresented Commonwealth nationals in difficulty in Bermuda would be the responsibility of the Bermudian authorities.
14. British Missions have traditionally been responsible for the protection of the interests of all unrepresented Commonwealth countries in foreign countries, with certain exceptions. In some cases this is shared with other Commonwealth countries.
15. At present (given our own resource constraints we cannot guarantee that this will continue), the UK will assist unrepresented Commonwealth nationals as much as we can, by providing general advice, access to the lists of lawyers, interpreters, doctors and hospitals which we make available to British nationals, visiting those in prison where it is practicable and passing on requests for further assistance to the Government of the Commonwealth national. However, no financial assistance is given to, or incurred on behalf of, an unrepresented Commonwealth national without the prior authority of their country's government (who are expected to meet such costs without delay).
16. If an independent Bermuda did not opt to join the Commonwealth, we would consider providing assistance to Bermudian nationals for a limited transitional period, certainly no more than one year after which we would expect the Bermudian authorities to

negotiate other arrangements for assisting their nationals overseas, either independently, with the UK, or with some other friendly country.

Flag and National Anthem

17. It would be for Bermuda to design and compose respectively a flag and national anthem for the independent country. If Bermuda opted for Realm status both flag and national anthem would need Royal Assent obtained via the Governor if their form was decided before independence or via the Governor-General thereafter.

Maritime Issues

Shipping Register and Red Ensign Group

18. The Bermuda shipping register operates within the Red Ensign Group (REG) of British shipping registers, which consist of the UK, the British overseas territories and the Crown Dependencies. Bermuda is designated by the UK Secretary of State for Transport as a 'Category 1' shipping register (ie unrestricted by weight or type of vessel). The Secretary of State has delegated responsibility to the Maritime and Coastguard Agency (MCA) for oversight of the REG registers and ensuring that the highest international maritime standards are maintained consistently throughout the Group. The MCA carries out its responsibilities on the basis of Memoranda of Understanding signed with each of the REG members. The REG provides a forum for discussion and information sharing aimed at strengthening maritime relations and promoting best practice within the Group. The REG focuses on development of technical and policy issues in the areas of maritime regulation, safety, security, pollution prevention, and the welfare of seafarers for ships on their registers worldwide and for visiting ships in their waters.

19. On independence Bermuda would withdraw from the REG. The United Kingdom would cease to have legislative oversight of Bermuda's maritime affairs and would no

longer represent the interests of Bermuda in international discussions and negotiations, nor oversee its compliance with international maritime conventions (e.g. Safety of Life at Sea (SOLAS), Marine Pollution (MARPOL) etc).

20. Given the long-standing maritime links between Bermuda and the UK it is feasible that existing contacts would be maintained in one form or another, at least in the short term. Technical advice and support is at present provided through the MCA on the basis of a service agreement. At independence the MCA, as an agency, could continue to provide its services to Bermuda, but that would need to be on an entirely commercial basis.

Fisheries

21. Bermuda might wish to join various fisheries bodies such as NAFO (Northwest Atlantic Fisheries Organisation) and ICCAT (International Commission for the Conservation of Atlantic Tunas) in its own right, especially in the light of the likely outcome of the UN Conference on Straddling Stocks. Bermuda would also probably wish to become a state Party to the UN Convention on the Law of the Sea.

Aviation

22. As a British overseas territory, Bermuda's aviation relations and international obligations are overseen by the UK. In many areas it has been possible to transfer operational responsibility and control to the Bermudian authorities. In October 2000 the UK and Bermuda agreed a statement that provides a mechanism for Bermuda's economic interests to be protected and enhanced when the UK is taking part in international negotiations on air services.
23. At independence, Bermuda would become fully responsible for all liabilities and would have to arrange appropriate insurance cover. This would be particularly important as far as safety and operational oversight of the Bermuda Aircraft Register

are concerned. Bermuda would also have to decide whether to accede to the various international treaties and conventions, such as the Chicago Convention, but it would be almost impossible to maintain any level of international civil aviation activity without doing so. Adherence to the Chicago Convention would require Bermuda to contribute to the financing of the International Civil Aviation Organisation. Bermuda's contribution would be about US\$31,000 pa. Technical support and advice on aviation security issues, currently provided by the UK, would also cease.

24. None of the Air Services Agreements (ASAs) negotiated by the UK with other countries would continue to apply to Bermuda after independence. Bermuda would have to negotiate its own network of bilateral ASA's (including with the UK). Services from the UK would no longer be Cabotage (that is, flights which begin and end in UK Territory).

UN Membership

25. UN membership would be the natural course. Observer status is an option, but it should be noted that there are now no UN observers that are States.
26. To apply for UN membership, an independent Bermuda would need to write to the Secretary-General, who would refer the application to the Security Council, which in turn would recommend membership to the General Assembly.

Cost of UN Membership and Specialised Agencies

27. Based on average GNP figures and the current UN scale of assessments, Bermuda could expect its annual contribution to the UN to be in the region of 0.012% of the total UN budgets. Bermuda's assessments for Regular and Peacekeeping budgets would be approximately US\$200,000 and \$350,000 respectively. The total for UN membership would therefore be about US\$550,000.
28. An independent Bermuda might give consideration to membership of the following UN Specialised Agencies: ITU (International Telecommunications Union); UPU (Universal Postal Union); IMO (International Maritime Organisation); UNESCO (UN Educational, Scientific and Cultural Organisation); WHO (World Health Organisation); ILO (International Labour Organisation); WMO (World Meteorological Organisation); FAO (Food and Agriculture Organisation); ICAO (International Civil Aviation Organisation); WTO (World Tourism Organisation). An estimate for the total cost of membership of these agencies would be in the region of a further \$450,000, for a total of US\$1 Million.
29. In addition many member states give additional voluntary contributions to UN bodies and programmes which are of particular importance to them.

Defence

30. This is an area that would need to be discussed during a constitutional conference. The UK's existing responsibilities for the defence of Bermuda would cease with independence. The UK is not able to say what arrangement might be possible without knowing what Bermuda itself would wish to see.

Membership of NATO

31. Bermuda is currently covered by the NATO umbrella under the NATO Treaty as a British overseas territory, north of the Tropic of Cancer. There is a Status of Forces

Agreement (SOFA) extended to Bermuda. But if Bermuda became an independent country, then it would no longer be covered by the NATO umbrella, nor would it have the Article 5 defence guarantee. (Only full members (or those territories who are defined in the Treaty) of NATO are covered under Article 5's collective defence clause.)

32. If Bermuda were to ask for membership status, then this would have to be considered on an individual basis. Bermuda would need to meet all of the NATO requirements for membership. This process can be lengthy - the current aspirants are some years along the path to opening accession talks, which have yet to start.
33. Bermuda would not be eligible to join NATO's Partnership for Peace (PfP), as this is dependent on membership of the Organisation of Security and Co-operation in Europe (OSCE), of which Bermuda is not a member. But Bermuda could, in theory, engage with NATO as a contact country. This is a loose engagement that has no formal standing, but does allow participation in some PfP activities on a case by case basis. Australia, New Zealand and Japan are designated contact country status. Such a relationship would be subject to North Atlantic Council agreement.

Treaty Succession

34. Treaty succession is usually on the agenda of the Constitutional Conference, held after the Territory has indicated it wishes to become independent. At the Conference, all the political and legal implications are considered.

Customary International Law

35. Under customary international law, a successor State is not obliged automatically to inherit treaty rights and obligations of an existing State.
36. It is accepted practice for a Successor State to deposit an instrument of Accession with the depositaries for treaties on membership of International Organisations.

Unilateral Declarations

37. In the past many new States have on independence given notice of their intentions concerning treaties applicable in respect of their territory immediately before independence by means of a unilateral declaration. Almost all the former UK dependent territories made this unilateral declaration. The declaration is sent to the Secretary General of the United Nations and circulated to Members by him, followed by a disclaimer of responsibility by the United Kingdom. Article 9 of the Vienna Convention on Succession of States in respect of Treaties provides that unilateral declarations do not alone effect a succession of treaty rights or obligations. Articles 27 and 28 of the Convention allow for a form of unilateral declaration whereby the new Government may notify its intention to apply all treaties provisionally until it has had time to indicate to which of them it wishes to succeed on a more permanent basis. This notification would be effective vis-à-vis any party to a treaty which expressly agreed to such provisional application or which by reason of its conduct was considered as having so agreed.

Treaty Lists

38. The UK Government would be able to provide Bermuda with a list of its international treaty obligations. This would draw upon information already posted on the FCO website (www.fco.gov.uk/treaty), but much additional research would be necessary. It would not, however, be possible to guarantee that this list was fully comprehensive or accurate, though every effort would be made to render it so. Such lists cannot therefore be regarded as definitive, and have not been published.

Relations with the EU

39. If an independent Bermuda had an interest in becoming a member of the ACP (African, Caribbean and Pacific group of states) and was successful in doing so, it would have a relationship with the EU as set out in the Cotonou Agreement. If it was

not a member of the ACP, Bermuda could benefit from the relationship with the EU that Small Island Developing States (SIDS) have. It would theoretically be possible for Bermuda to form an individual partnership agreement between itself and the EU. However, the case for doing this as opposed to joining an existing agreement like Cotonou would have to be very strong, and EU buy-in to this idea would most likely be limited.

Training and Development: Establishment of a Ministry of Foreign Affairs

40. This is an area that would need to be discussed in the lead-up to independence or afterwards. Meanwhile DFID have advised that the BIC may wish to consult the Commonwealth Secretariat or CMPS (formerly the Civil Service College) for advice on public administration training and development. Contact details for these organisations are:

Commonwealth Secretariat,
Marlborough House, Pall Mall,
London SW1Y 5HX, UK
Phone: +44 (0)20 7747 6500
Fax: +44 (0)20 7930 0827

CMPS
Sunningdale Park
Larch Avenue
Ascot
SL5 0QE
Reception: +44 (0)1344 634000,
Direct dial: +44 (0)1344 63 +ext,
Fax: +44 (0)1344 634233
customer.services@cmps.gsi.gov.uk

Annex A

CONSTITUTIONAL ARRANGEMENTS OTHER THAN INDEPENDENCE

Integration

1. Integration into the UK would be a major step for any British overseas territory. It would mean the loss of the territory's separate constitutional status and of its separate legislative, executive and judicial powers and systems. Instead the territory would be integrated into the UK's constitutional, political, economic and legal system, and would be subject to UK legislation. This would involve application of the UK tax system, including income tax. It would also mean that the territory concerned would be subject to laws providing unimpeded access by both other British citizens based in the UK and elsewhere, and European Union citizens. Integration into the UK would also involve integration into the European Union and (in the absence of exemptions, the negotiation of which could not be guaranteed) the full application to the territory of European Union law.
2. In recent years there has been no significant support for integration in any of the territories. The UK's policy is that integration is not an option which is on offer to the territories.

Free Association

3. The UK's approach was spelt out in a letter of 21 December 2004 from the Minister for the Overseas Territories, Bill Rammell to OT Chief Ministers. In this he said the UK Government, given its responsibilities to the British Parliament and internationally, could not accept "free association". As long as a territory retained its links with the UK, the Government could not accept a situation whereby the territory could freely determine its own Constitution as suggested under UNGA Resolution 1541. Even if the respective powers of both parties were formalised in an association agreement, the moral and political responsibility would still be on the UK to intervene if things went wrong, and the UK would remain internationally responsible for the territory. Therefore free association was not an option.

De-listing: UNGA Resolutions 1514(XV) and 1541(XV)

4. The UK's international responsibilities towards the British overseas territories are spelled out in Articles 73 and 74 of the UN Charter. The UK Government fully meets the responsibilities placed on it by the Charter.
5. The UK does not consider itself bound by UNGA Resolution 1541(XV), which states that a full measure of self-government can be said to have been reached by:
 - a) emergence as a sovereign independent state;
 - b) free association with an independent state; or
 - c) integration with an independent state.

While General Assembly Resolutions can carry significant moral weight, they are not legally binding and cannot themselves modify the UK's international obligations.

The UK Government does not believe that Resolution 1541(XV) exhausts the possibilities for de-listing (ie the removal of a territory from the UN list of non-self-governing territories), as it implies. When considering de-listing, it is important to remember that it is only a procedural reflection of the substance of the relationship

between the UK and the territory. The UK Government considers it far more important to reach a constitutional arrangement that is acceptable to the territory and the UK.

Annex B

GALILEO SATELLITE SYSTEM

The EU and United States have reached an agreement over the interoperability of Galileo and GPS which means that the two systems will complement each other and that there will continue to be full co-operation to ensure that neither has an adverse impact on the other. Galileo will be a fully global system like GPS and its services will be available to any country or organisation that wishes to use them, either free at the point of use for the Open Service or with an appropriate payment through the Galileo operating company for the added-value services that will offer enhanced accuracy and integrity. The UK supports the development of Galileo but we envisage that dual-system GPS and Galileo applications will increasingly become the norm because of the significant benefits to be gained from the larger constellation of satellites. Our support for Galileo does not imply any tension with the United States; but rather we welcome and encourage the continuing development of both systems. We would expect any developments in satellite navigation in Bermuda to follow a similar path.

21 March 2005

Dear Mr Perinchief

Air Services Agreements

At the session the Commission held in the Foreign and Commonwealth Office on 15 March, I undertook to respond to a question about the availability of routes to Bermuda in UK Air Services Agreements. The panel referred, as an example, to the apparent widespread belief in Bermuda that the development of a Germany-Bermuda route had been blocked by the UK on the grounds that it was not possible to gain from Germany a reciprocal arrangement that would be of sufficient value for the UK. Consequently Bermuda had not been able to benefit from a scheduled service by Lufthansa.

I have not been able to find evidence that Lufthansa or the German authorities have approached the UK about the possibility of a scheduled service to Bermuda, though I understand that the German carrier Condor has operated to Bermuda under a charter permit. Bermuda is not a point in the UK/Germany Agreement. But I can confirm that the UK would be willing to seek to amend the Agreement or grant on an extra-bilateral basis permission for an airline designated by Germany to operate to Bermuda. The UK would be prepared to make similar arrangements with other bilateral partners for the benefit of Bermuda.

You will be aware of the statement on international air services signed by the UK and Bermuda in October 2000. The UK remains committed to that undertaking which provides for Bermuda's participation in relevant air services negotiations and that Bermuda's advice would normally be accepted when creating any new route rights to and from Bermuda. We recognise the importance of good air services to Bermuda's economic, commercial and social interests.

Yours sincerely

JAMES GILDEROY

31 March 2005

The issue of revenue from overflights of Bermuda was raised by the Bermuda Independence Commission at the meeting I attended on 15 March. I explained that the UK did not receive any revenue for Bermuda overflights and promised to provide a written explanation of the situation.

Article 15 of the Chicago Convention provides that “No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting state or property or persons thereon.” Charges may however be levied for the provision of air traffic control services. In accordance with this requirement the UK does not charge airlines for overflying the UK or any of its Overseas Territories.

Annex 11 to the Chicago Convention provides that “those portions of the airspace over the high seas or in airspace of undetermined sovereignty where air traffic services will be provided shall be determined on the basis of regional air navigation agreements. In accordance with such an agreement the United States provides air traffic services for the Oceanic airspace around Bermuda.

As an Overseas Territory the UK is responsible for the sovereign airspace above Bermuda. However, as Bermudan territorial airspace is relatively small it is not sensible or cost effective for the UK or Bermuda to provide an air traffic control service to en route traffic. Bermuda lies wholly within US Domestic Airspace and therefore falls within Flight Information Regions belonging to the United States, for which the Federal Aviation Administration (FAA) provides air traffic services for en-route traffic. It therefore makes sense for the FAA to provide en-route service for Bermudan territorial airspace and there has been an agreement in place with the United States under which the FAA provides the en-route air traffic control service for flights thorough Bermudan territorial airspace for many years. The FAA collects charges from airlines for providing

this service. The UK receives no payment from the US in respect of these overflights of Bermudan territory.

I hope that this is helpful

Duncan Nicholls