RL-124

OCDE
OECD

cc: Directors
Mr. Vlaanderen
Mr. Starling

MEMORANDUM

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To: Mrs. Steeg
Mr. Ferriter

De
From: Craig Bamberger Craig B.

9 February 1993

Objet
Subject: European Energy Charter Treaty Negotiations of 1-6 February 1993

Reference: IEA/OLC(93)26

Progress was made at these meetings, but it continued to come incrementally and without any dramatic breakthrough, and there was a potentially significant setback. Only one more week of Working Group II meetings presently is scheduled (Chairman Fremantle is trying to arrange a prolongation of these meetings into the following week), and it will be a real challenge for the Working Group, within this amount of time, to bring the Basic Agreement text to a stage that would enable the Plenary sessions that are scheduled to start in late March to address only major issues of policy.

The Working Group spent two days on trade, two days on investment, a day on the Article 11 "Transport and Transit" provisions, and a half day on the Article 24 state-to-state dispute resolution procedure designed for investment and non-GATT trade issues. As explained below, the entire GATT reference approach to trade was put in jeopardy on February 2 by the interpretation which the EC Commission gave to the trade dispute resolution compromise that had been struck at the December Working Group meetings. With respect to the Article 23 private investor dispute resolution provisions, there were numerous comments to be considered; a fair number were resolved, but substantial negotiations remain over this article. Article 11, "Transport and Transit," was markedly improved by the Working Group, but notwithstanding these efforts it is still somewhat confusing and potentially troublesome; moreover, proposals for conciliation of transit disputes will be considered at the next Working Group meetings. Article 24 on state-to-state dispute resolution was brought close to finalisation, but then a previously settled issue on compelling investor election between different international agreements reappeared and was left hanging.

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February 3

By prearrangement the Working Group now turned from trade to investment, with Article 23 concerning private investor dispute settlement with Contracting Party governments at the top of the agenda. Fremantle started gradually working his way through a list of 32 footnotes to this article that had been registered by participating countries, as well as through other comments; by 7 pm he had not completed the article, despite skipping over several issues (including some assigned to a new sub-group that he asked me to chair).

The EC Commission said it had no firm position on Article 23 as yet, but that none of its members was very happy with it. Norway objected most strenuously to the article, submitting objections so sweeping that Fremantle declined to address them individually and said he would refer them collectively to the Plenary. This position itself provoked exchanges with Norway, in the course of which Norway asserted somewhat vaguely that it was constitutionally prohibited from agreeing to an arbitral procedure that would allow examination of state actions having expropriatory effects. In addition, Norway argued for a correlative right on the part of a Contracting Party to initiate Article 23 dispute resolution against an investor. Neither position drew support, and indeed, both met with some puzzlement, particularly the latter since Article 23 applies only to breaches of obligations under Part IV on Investment, none of which are investor obligations.

The Working Group decided to accept a Romanian amendment to Article 23(3) which clarifies the right of an investor to elect whether to pursue dispute resolution: in a host country tribunal; under a contractually agreed procedure; or in accordance with the procedures set out in Article 23. However, the Working Group had considerable difficulty in agreeing on the exact rule to control the investor's right to Article 23 dispute resolution.

There was disagreement over the BA-31 requirement (Article 23(3)(b)) that, to be eligible for Article 23 dispute settlement, an investor must waive its right to a domestic action, or discontinue before judgment any domestic action it had initiated, in relation to the same subject matter. The US wanted, instead, a condition that the investor not have initiated such an action within the preceding six months, and that it waive its right to do so, but this met with considerable resistance, including the point made by Germany and Russia that under the US formulation, if the investor's domestic action was more than six months old, the investor could take its domestic action to or close to judgment, and

then file under Article 23 if it didn't like the way things had gone in the domestic action. There also was debate over the obligation to discontinue domestic litigation in light of court rules or penalties that could preclude or hinder such discontinuation. Fremantle's solution was to make discontinuation of the domestic action "subject to national law." The EC Commission voiced dissatisfaction with the solution.

The single most controversial provision was Article 23(3)(c), stating that an investor may submit its dispute to arbitration in accordance with Article 23 only if "not more than three years have elapsed from the date on which the Investor first acquired, or should have first acquired knowledge of the alleged breach [and knowledge that the Investor has incurred loss or damage.]" Russia asked for deletion of the bracketed language on the ground that it was too hard for a government to disprove a claim of lack of knowledge of loss, and Fremantle sympathised with the Russian position. The US strongly disagreed, but the comments of other governments focused on the three year limit, which they thought was too short. Norway interjected (and later repeated) that this provision interfered in domestic law matters, but this view was not seriously entertained. Closing the discussion, Fremantle adopted language substituting, for the bracketed words, ", or the date on which the Investor incurred loss or damage, if later. Such a period may exceed three years if the Contracting Party so permits."

By this time the EC had arrived at and the Commission had circulated a proposal covering paragraph (4) of Article 23. Its proposal would have required that Article 23 dispute resolution be in ICSID rather than UNCITRAL or other arbitral fora if the investor was a national of a signatory to ICSID's Washington Convention, and the State where the investment was located was also a signatory. No clear reason ever was given for limiting the investor's choice to ICSID, and Russia and Hungary quickly joined the US in attacking the proposal as disadvantageous to investors. And so, on the only part of Article 23 as to which the EC was able to reach internal consensus, it was isolated and immediately defeated.

February 4

Consideration of Article 23 resumed, with attention being given principally to a series of Canadian proposals to impose stipulations on the procedures of ICSID and other arbitral fora. While final decisions were not taken, the predominant view was against altering the established rules of these fora for Basic Agreement purposes.

Mr. Ervik of the Charter Conference next reported on the proposals of a sub-group he had chaired, for a definition of "Investment." These proposals will not be discussed substantively before the next set of Working Group II meetings, but a disagreement did surface over whether petrochemical investment should be covered, with Norway for coverage and Japan the most vocally opposed country. Discussion moved on from there to other investment-related definitions. Then Fremantle closed out the day by jumping from one specific investment topic to another.

On the question of a balance of payments exception, Ervik reported on behalf of another sub-group that more time was needed to see if agreement could be reached on a limited exception. Ireland reported on the conclusions of a sub-group it had chaired, that Article 21 on "Assignment of Rights" could be deleted as superfluous, provided that the definition of "Investor" covers state agencies and the definition of "Make Investment" includes the acquisition of an investment.

The next discussion, on Article 13, "Access to Capital," at first revolved around whether the article was needed in light of the coverage of Article 16 on investment. Russia argued that it was needed to cover trade financing, but its explanation of the need was unclear. Then there was a difference of interpretation between the US, which read Article 13 as establishing broad new requirements, and Germany, which read it as establishing a softer obligation than otherwise would apply. Fremantle finally acknowledged uncertainty about the purpose of the article and called for bilateral consultations on it.

February 5

Again by prearrangement, on this day the Working Group moved to a new subject. It now took up the controversial Article 11 on "Transport and Transit," despite previous statements that this article had been removed from the Working Group and referred to the Plenary. Consideration of the article consumed the entire day. Hungary and Poland, which had recently participated in a meeting of Central and East European countries to discuss this article, said that they needed still more time to think through their positions, but Fremantle warned that the subject would not be discussed again in the Working Group after this week.

The Working Group agreed that this article and GATT Article V on transit were to coexist without derogation in either direction.

A Hungarian amendment accepted to the paragraph (1) obligation to "take the necessary measures" to facilitate transit, carves out an exemption for situations covered by "existing" international agreements, but only so far as third-country rights are unaffected. Considerable time was spent establishing, in response to Japan's inquiry, that no meaningful obligations were intended by paragraph (2), calling on Contracting Parties to "encourage relevant entities to co-operate...." Chairman Fremantle answered Canada's concerns on paragraph (3) by offering his interpretation of its national treatment obligation on the movement of energy goods, that it: covers exports; goes beyond GATT; and would only extend to monopolies to the extent that a Contracting Party's provisions governing the behaviour of a monopoly offended against the Agreement.

Article (4) is rather novel, providing in a less than clear manner that if access to high-pressure transmission pipelines or high-voltage transmission grids cannot be obtained for transit on commercial terms, countries "shall not place obstacles" in the way of obtaining viable new capacity. But this is subject to "applicable" legislation, with an exemplary list of laws, and Hungary worried about the fact that "concession" laws weren't among the examples, for the reason that its concession law requires a competitive tender. This led to numerous questions over just what the paragraph meant; the answers were not fully enlightening.

Paragraph (5) of the BA-31 version of Article 11 is the most controversial part of this ground-breaking article. It provides that when a dispute occurs over transit of energy goods (natural gas and electricity, possibly oil, an outside chance the Working Group will agree to cover other things), the transit state won't interrupt or reduce the flow until after some -- as yet undefined -- dispute conciliation. Norway argued in that case for Article 24 binding arbitration, but Poland won support from Russia, Ukraine, Beloruss, Hungary and the Czech Republic with an argument for fast-track conciliation.

Paragraph (6) was a convoluted one excusing Contracting Parties from compliance with the article under some circumstances but vaguely implying an exception from the exculpatory provision for "the protection of existing flows." Discussion of this paragraph drew from an exhausted Fremantle the unusual admission that he had lost the thread of analysis, leading to a lucid historical explanation of the article from the UK's Bottomley, followed by adoption of an intelligent Irish proposal to reorganize paragraphs (5) and (6), that together saved the day.

At the end of this day Fremantle reported that there were three important outstanding issues with respect to the article: whether to cover harbour facilities as argued by Australia; Poland's dispute conciliation proposal, which depended on finding a technically feasible methodology; and a troublesome Armenian and Greek proposal late in the day to provide for transit country sharing in natural gas supplies in emergency circumstances, an idea Fremantle strongly discouraged but that may not yet have expired.

February 6

We convened at 8 am on Saturday to discuss the Article 24 provisions for resolution of non-GATT, state-to-state disputes (including trade issues arising under Basic Agreement provisions that differ from GATT provisions). Substantial progress was made toward finalising the article. However, an important question whether to defer to the dispute resolution provisions of a separate bilateral agreement, which had been resolved in the past against constraining investor dispute resolution choices, was resurrected by Japan; it seemed that the history of the issue was unremembered, and so it will be reconsidered at a later meeting.

Fremantle thereafter returned to the Polish proposal for conciliation of Article 11 transit disputes suggesting a fast-track arbitration procedure along the lines of Article 41 Ter. Poland replied that it wanted fast-track conciliation, not arbitration. Suggestions were heard that no provision was needed because the subject was adequately addressed contractually, but Russia said that was not so. Finally, Fremantle undertook to prepare a paper on this subject.

Other Points of Interest

1. During the Portuguese Presidency of the EC, the EC was represented in Working Group II by a staff team from the Presidency and the Commission. The UK, in its Presidency, kept the Commission on a very short leash. The Danish representative of the Presidency rarely spoke in the Working Group and then usually to schedule EC coordination meetings. The Commission's trade export from DG-I took a highly combative approach, advancing in categorical terms arguments that occasionally were transparently fallacious. An example was the insistence that it was impossible as