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Our ref

Your ref

Date

12 February 1993

*Dear Sir,*

**ARTICLE 11, PARA 6**

I attach a draft Chairman's note and provisions giving expression to the ideas raised by the Polish delegation at the last meeting of Working Group II. I should be very grateful for your advice and comments by close of play Wednesday 17 February.

I am sending copies of this letter and enclosures also to Andrew Young, Martin Bourke, Michael Johnson, Stuart Gill and Henry Bottomley for their advice and comments. Since direct knowledge on transit disputes is rather scanty in Whitehall, I am also approaching OFGAS and OFFER and Mr Dieter Helm in case they have any bright ideas.

*Yours sincerely,*

*Sds*

S W Fremantle

**ARTICLE 11: TRANSIT**

(NOTE BY THE CHAIRMAN)

During the meeting of Working Group II on 5 February, Poland outlined the general idea for a fast track procedure to be applicable to transit disputes. They proposed that such a procedure should involve primarily conciliation but, if necessary, arbitration with clear times limits. Poland was supported by Belaruss, Russia and Hungary; no-one opposed.

I attach draft provisions which might give effect to such an idea. I shall be establishing a sub-group to examine the attachment during the meeting of Working Group II on 22-27 February. The questions which such a sub-group particularly needs to consider are:

- (i) should the proposed procedure be applicable only to disputes where the flows are not covered by contracts with satisfactory procedures for resolving disputes? My initial view is that it would be difficult to distinguish between contracts with a satisfactory dispute procedure and contracts with no or unsatisfactory dispute procedures. Indeed for some flows contractual terms may not exist or be implicit rather than explicit. In fact if the flow is covered by a contract with satisfactory dispute procedures, it is very unlikely that a dispute requiring special procedures for conciliation and resolution would arise;
- (ii) do we need a meeting of the Charter Conference? The representatives of contractual parties at such a meeting would probably need rather special expertise if the meeting is to achieve its objective of reconciliation. It might be simpler and more satisfactory for the Secretary General himself to appoint a conciliator;
- (iii) for the procedures for arbitration, the draft proposes use of those proposed in Article 24 TER. It may be that those, or a selection from those, provided in Article 23 is more appropriate;
- (iv) the draft proposes that the award in respect of tariff terms and conditions, but in respect of procedures, should be interim and not final. That is because I believe that a fast track procedure for arbitration would not have sufficient authority to be accepted by Contracting Parties for a final award on tariffs, terms and conditions;

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- (v) I have not proposed a time limit for the arbitration procedures: it may be appropriate to do so;
- (vi) it may be sensible to include a request in the accompanying document to provide the Secretary General with a list of bodies which have expertise relevant to the conciliation or arbitration stage. I believe some private consultants have experience in advising on transit terms and conditions; regulatory authorities in some Contracting Parties also have relevant expertise in establishing fair terms for transit arrangements.

TRANSIT DISPUTES: POSSIBLE PROVISIONS BASED ON POLISH PROPOSAL

ARTICLE 11

Para 6: Delete all after energy materials and products in line 10; substitute "except in accordance with paragraph 7 below".

Para 7:

- (a) Such a dispute shall be referred to the Secretary General with a note summarising the matters in dispute;
- (b) within 30 days of receipt of such a note, the Secretary General shall convene an extraordinary meeting of the Charter Conference without regard to the requirement in Article 29(2) of support by at least one third of the Contracting Parties. The representatives of Contracting Parties shall not disclose the proceedings of such meetings except to the extent permitted by the parties to the dispute;
- (c) the Charter Conference at such extraordinary meetings shall seek to reconcile the parties in dispute and obtain their agreement to a solution or to a procedure for obtaining a solution. If such agreement has not been obtained within 48 hours of the start of the extraordinary meeting, the Charter Conference, acting by simple majority, shall appoint a conciliator to

mediate between the disputants. Such a conciliator shall have experience in matters subject to dispute and shall not be a citizen of or resident in the domains through which the transit occurs, from which the energy materials and products being transported originate or to which such energy materials and products are being supplied;

- (d) the conciliator shall mediate between the parties and seek their agreement to a resolution to the dispute or to procedure for so resolving the dispute. If within 60 days of his appointment he has failed to secure such agreement, the parties to the dispute shall refer the dispute to an ad hoc tribunal constituted in accordance with sub-paragraphs (a), (b), (c), (d), (e), (g), (h), (j) of Article 24 TER, paragraph 1;
- (e) the arbitrator appointed under sub-para (d) above shall recommend the procedures to be employed for the final resolution of the dispute and decide the interim tariffs and other terms and conditions to be observed until such final resolution;
- (f) Contracting Parties undertake to observe or ensure that the entities under their control observe such tariffs, terms and conditions for 12 months following the arbitrator's award or until final resolution of the dispute, whichever is earlier.