EUROPEAN ENERGY CHARTER CONFERENCE SECRETARIAT
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I M M E D I A T E

T E L E F A X

DATE:
Date: 18.2.93

FOR THE ATTENTION OF:
A l'attention de: MR C JONES

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FROM:
De la part de: MR FREMANTLE

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TIME:
L'heure:

PAGES: 1+
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Our ref
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Date 18 February 1993

Dear Clive,

ARTICLE 11: TRANSIT

I attach a redraft of this Article and covering note which takes account of some of your comments and also some of Greg McGregor's from OFGAS. I attach a copy of the latter's comments since they are relevant also to how the Secretary General would go about his business supposing the proposals win favour. The redraft was worked up by Henry Bottomley after discussion with me in which it became clear that use of the "arbitration" for what is essentially an interim, time-buying process was likely to lead to misunderstanding/confusion. As a result, two of your points fall. The point you make in paragraph 2 I had considered earlier and reconsidered in the light of your note. I believe it would be more invidious and more difficult for the Secretary General to select a few Charter countries than to select a conciliator particularly since the countries would almost certainly have to be from the OECD faction and, to avoid any interests in the dispute, probably North America and the Pacific. It is just those countries which have least interest in a procedure for buying time in transit disputes.

However we do not need to resolve all questions now, just provide the right hooks for a sensible discussion by the Sub-Group. If you are happy with the note, would you ask Leif to have it circulated?

Could you also tell Leif that I am minded not to proceed with the idea of adding a second paragraph to Article 4. After closer examination here I feel that a provision acknowledging

that contracts ought to be observed would be so hedged around with ifs and buts that it would give less comfort to investors than no provision at all. In fact they have the comfort of the last sentence of Article 16 para 1 and I don't think we can improve on that in the Treaty. We may be able to do something in a Ministerial declaration.

Yours ever,

Sydney

S W Fremantle

cc Dr A Young, FCO
Mr M Bourke, ESED FCO
Mr M Johnson, ITP DTI
Mr S Gill, ITP DTI
Mr H Bottomley, IEU DTI

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, if necessary, with clear times limits. Poland was supported by Belarus, Russia and Hungary; no-one opposed.

I attach draft provisions which might give affect 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? It could 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. An alternative might be to permit reference of a dispute where either:

- there are no contractual dispute procedures which must be applied before transit is interrupted; or

- such procedures have failed to resolve the dispute.

(ii) do we need an early 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 or conciliators;

(iii) for the procedures for fast track conciliation, should we use some similar to those proposed in Article 24 TER?

(iv) the draft proposes that a decision in respect of tariff terms and conditions, should be interim and not final. This 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;

(v) it may be appropriate to propose a time limit for such an interim decision;

(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.

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."

Para 7:

(a) The parties to the dispute shall exhaust any contractual or other dispute resolution remedies they have previously agreed;

(b) If this fails to resolve the dispute, a party to the dispute shall refer it to the Secretary General referred to in Article 29 with a note summarising the matters in dispute;

(c) within 30 days of receipt of such a note, the Secretary General shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or 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 the Energy Materials and Products are being supplied;

(d) the conciliator shall conciliate between the parties and seek their agreement to a resolution to the dispute or upon a procedure to achieve such resolution. If within 60 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for transit until such resolution;

(e) If the parties to the dispute then fail to agree a resolution to the dispute or upon a procedure to achieve such resolution, the Secretary General shall convene an extraordinary meeting of the Charter Conference referred to in Article 29 to consider the dispute and the conciliator's recommendations, without regard to the requirement in paragraph (2) of that article for support by at least one third of the Contracting Parties. The Charter Conference at such extraordinary meetings shall seek to reconcile the parties in dispute and obtain their agreement to a resolution to the dispute or upon a procedure to achieve such resolution. The proceedings of such meetings shall be confidential except to the extent agreed by all the parties to the dispute;

(f) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under paragraph (d) on tariffs, terms and conditions for 12 months following the conciliator's decision or until resolution of the dispute, whichever is earlier;

(g) [Standard provisions on conciliator's expenses, location, etc.]

Direct line 071 828 4110
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Your Ref
Date 17 February 1993

RL-126

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Dear Mr Fremantle

EUROPEAN ENERGY CHARTER: BASIC AGREEMENT: TRANSIT

Thank you for your letter of 12 February.

I hope you appreciate that I have a less than full understanding of the Charter and the discussion surrounding it, but I hope you find the following comments helpful:

- once a dispute has escalated to the point where Charter provisions are being invoked, it is likely to be as much a political disagreement as an economic/technical one. I would reinforce your comment that any special procedures should only come into play once whatever existing contractual arrangements for dispute resolution had been exhausted. In our experience, there is quite an incentive on both the pipeline operator and the customer to arrive at a negotiated commercial conclusion - where the dispute is genuinely commercial - rather than to invoke outside regulatory authorities. The cumbersome nature of even the "fast track" resolution procedure - perhaps I have a different concept of time - would seem to me to be an incentive to use it as a last resort only but some more direct exhortation to use all available procedures first might be useful;

- if the dispute is as much about politics as commercial terms then the fast track procedures would need to have enough political clout behind them to make them stick; I doubt if it would be enough to rely on the disinterested wisdom of technical experts to resolve the issues. You will be able to judge whether such clout can best be provided by the Secretary General or a meeting of the Charter Conference, although I agree strongly with your comment that the Charter Conference would be ill-equipped to offer any detailed guidance. A possibility may be to offer the conciliatory services of the Secretary General in the first instance but to hold open the prospect of a full meeting of the Charter Conference before which the warring parties would have to explain why they were not prepared to go along with whatever the conciliator had proposed. This might help to sort the political arguments from the commercial ones;

- once a procedure like this is triggered - and assuming that the dispute is a major one - the process will inevitably be looked upon as setting precedence for a pan-European system of common pricing and terms for the transit of gas or electricity. The burden placed on any arbitrators would therefore be considerable - the EC discussions have amply demonstrated the complexity of them trying to develop even the most basic principles that might eventually lead to a common approach. A fast track procedure may well need to be interim but if any final award were to be viewed as a precedent it could be many years before that point was reached;

- I think it would be necessary to set a time limit for arbitration. Without a firm timetable our experience is that these disputes can drag on for ever and a day.

A slightly re-arranged fast track procedure could look something like:

- first, exhaust all existing contractual or other remedies;

- second, for the Secretary General to appoint an expert conciliator who within a couple of months would seek to identify commercial/technical terms which he believed appropriate to both parties;

- third, failing agreement for there to be a meeting of the Charter Conference for the parties to explain why they could not reach agreement;

- lastly, if agreement still cannot be reached, for the Conference to trigger arbitration (I have no idea as to the relative merits of Articles 23 and 24).

I would not recommend the use of private consultants as conciliators or arbiters. There is more than enough experience of the commercial and technical issues involved within governments and utility operators and representatives from one or more of these would carry much greater respect and have more of an eye to the political nuances.

I am in Palace Street talking to Mike Atkinson tomorrow morning and in my absence I have asked my Secretary to fax these comments over to you. I expect to finish with Mike about lunchtime and if you are around I will call in to say "hello" and to see if a quick discussion would be helpful.

L Ladbrook

for Greg McGregor
Director of Competition and Tariffs
(Dictated by Mr McGregor and signed in his absence)