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Date: 17 June 1994

Sending 4 pages plus leader

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PLEASE DELIVER AS SOON AS POSSIBLE

FROM: ANDREW YOUNG

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COMMENTS

cc Lin Weiss Energy Charter Secretariat
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cc Dr John Hughes BE Oslo (to NOTE para 6)
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By Fax 010-33-1-45 24 79 21

Dear Craig,

LEGAL SUB-GROUP: BRUSSELS 20-24 JUNE 1994

1. Unfortunately the week selected for the (possibly) last meeting of the Legal Sub-Group is also my last week open for business in the office here in London before going off on posting to Hong Kong for three years. In these circumstances my attendance in Brussels next week has been vetoed.

2. Nevertheless, I will be available by telephone and fax Monday to Wednesday of next week (possibly Friday also though this is doubtful) in the event that you need to contact me. You should note that the number of the nearest fax to me is 44-71-270-2280.

3. I have been reading through the various room documents from last week's plenary meeting and have some comments. Rather than take them by room document number I shall set them out in the order in which the articles appear in the version of the Charter Treaty received from the Charter Secretariat this week.

4. <u>Article 1(6) "Investment"</u> - The new defined term in the penultimate line of the last paragraph *viz.* "Charter Efficiency Projects" does not appear to be a term used in the Treaty again and is not defined in this paragraph in any event. Should it not appear in lower case only to avoid confusion with genuine defined terms used in the Treaty?

5. <u>Article 1(7) "Investor"</u> - In sub-paragraph (b) the term "third state" will need to be replaced with the words "state which is not a Contracting Party" in view of the fact that the negotiators have eschewed the former term in Part III for some reason which I cannot fathom.

6. <u>Article 1(10) "Area" and Article 8</u>

(a) There has been an inordinate amount of debate about this definition. The key point to note is that it is used throughout the Treaty as a means of defining its application with precision. Any move to delete it would precipitate re-drafting of all those articles where it appears, articles around which consensus has gradually accreted over a period of two and a half years. It would take an overwhelmingly convincing argument to disturb this position and I detect no mandate to go down that road in any event.

(b) I am aware of the concerns of one delegation about the effect of the Treaty upon the ability of non-coastal States to lay pipelines on the continental shelf of coastal States. The only article where this is relevant is article 8 on transit. Wording in paragraph (8) of

that article was painstakingly hammered out last Friday. I consider that it is much wider than it needs to be in order to meet the difficulty identified. It may embrace all sorts of agreements whose provisions were drafted in a different era, while it is only really aimed at preserving the Law of the Sea. However, I find no fundamental legal impediment to proceeding with the draft as it is. It might be advisable to add the words "Subject to paragraph (8)" at the beginning of article 8(5).

(c) If any member of the Group wishes to discuss this matter with me I will be happy to do so. It should be noted that it has never been the policy of the UK to solve bilateral difficulties in this area through the vehicle of the Treaty and we do not interpret it as having done so inadvertently.

(d) On a drafting note, in the penultimate line of sub-paragraph (b) the word "may" should be inserted after "Party", "exercises" should read "exercise" and "and" should be replaced with "or".

7. Article 1(14) "Freely Convertible Currency" - As discussed before in the Legal Sub-Group I consider that the conjunctive formulation might be interpreted as excluding the ECU, should it not read "or widely used"?

8. Article 5 - There is no article 5!

9. Article 7; Ministerial Declaration - In the Ministerial Declaration with respect to this article I am instructed to suggest that the words "abuses of market power" be substituted for the words "exploitative abuses" in the first paragraph and that the words "of an arrangement, agreement, conduct or practice" be inserted at the end of the second paragraph. I am told that this brings greater clarity to the statement.

10. Article 21 - I understand that this article was the subject of fierce debate leading up to much compromise in the watches of last Friday night. There are certainly deficiencies and ambiguities in it but I do not consider that the Group has the mandate to interfere with this article in any significant way. It is not unusual in a treaty, particularly one of this ilk, for such provisions to be cobbled together in order to conclude negotiations.

(a) Paragraph (1) states the obvious and, although otiose, is harmless.

(b) The sutures of compromise can readily be seen in paragraph (2). The two parts of the sentence (that up to an including the word "basis" and that after it) have the potential to cause a dispute as they can be read as being mutually contradictory. However, I consider that we can do no more than point this out and respect the policy decisions which have been reached; perfection is not of this world. It will be up to a future tribunal to settle what this paragraph really means in the light of the circumstances of the case then at issue. A minimalist response would be to suggest moving the paragraph to follow the current paragraph (4) since paragraphs (1) and (2) go together and paragraph (2) could be said to relate more to

paragraph (4).

(c) In paragraph (3) should "state" in the first line not read "Contracting Party"? I know you will make the point but the words "in particular" appear to serve no useful purpose in line one. I would also mention my hobby horse of "optimalization" in the fourth line, which appears to be a neologism in English. Could it be changed to "optimisation"? The whole paragraph seems unwieldy to me and I would set it out as follows:

> "(3) Each Contracting Party continues to have the right *inter alia* to decide upon the following matters:
>
> (a) the geographical locations within its Area to be made available for exploration and development of its energy resources;
>
> (b) the optimisation of recovery of those energy resources, including the rate at which they may be depleted or otherwise exploited;
>
> (c) the amount of any taxes, royalties or other financial payments due to it by virtue of such exploration or exploitation;
>
> (d) the regulation of environmental and safety aspects of such exploration and exploitation within its Area; and
>
> (e) participation in such exploration and exploitation, including directly by the government or by state enterprises".

11. <u>Article 26(2)</u> - This formulation does not quite work for me since it is unclear what its effect is. This is not helped by my ignorance of the policy point at issue, perpetuated by the inscrutable text itself. Nevertheless, I would suggest the following as an alternative in the hope that this is what was intended:

> "(2) The dispute settlement provisions in Parts II, IV and V of this Treaty may be invoked in respect of measures affecting the observance of the Treaty by a Contracting Party which have been taken by regional or local governments or authorities within the Area of that Contracting Party".

12. <u>Article 28(2) and (3)</u> - I suspect that this was a vexed issue in last week's plenary and hesitate to alter it. Nevertheless, I believe that the following re-draft is clearer without affecting the intended meaning:

> "(2) For the purposes of paragraph (1) "EIA" means an agreement which substantially liberalises *inter alia* trade and investment by providing for an absence or reduction of discrimination among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new measures which are more discriminatory, such liberalisation being operative from the entry into force of the agreement or within a reasonable time thereafter".
>
> (3) This Article shall not affect the application of the GATT in

accordance with Article 35".

13. Article 35 - The anomalous preamble to the article could be standardised by being converted into paragraph (1) of the article with all existing numbered paragraphs and cross-references being re-numbered accordingly. I would substitute the words "While any" for the whimsical "So long as one or more". I would also insert the words "of this Article" after the word "provisions" in the second line. The middle "its" in line three of current paragraph (3) could be replaced by "the". I leave the real substance to those who can fathom it.

14. Article 35ter - This appears to be inconsistent in that it establishes a task for the provisional Charter Conference in the body of the Treaty. Should not this provision be removed to where the rest of the provisions relating to provisional bodies are located? This was to be in the Final Act last I heard.

15. Article 50(2)(b) - This does not appear specific enough to me and I would suggest the following formulation for the consideration of the Group:

> "(b) Neither a signatory which makes a declaration in accordance with paragraph (2)(a) nor those who would otherwise have been considered as provisional Investors of that signatory may claim the benefits of provisional application under paragraph (1) from other signatories."

16. Copies of this letter go to Lise Weis in the Charter Secretariat, Mr Fremantle, Mrs Dawson and Mr Gill in DTI, Mr Scrafton in ESED and Mr Hughes in Oslo.

Yours ever,

Andrew

Andrew J Young
Assistant Legal Adviser
K276

Legal sub-group 17VI94