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TO: 1) AMBASSADOR CHARLES RUTTEN
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DATE: 16 AUGUST 1994

NR:

EUROPEAN ENERGY CHARTER CONFERENCE SECRETARIAT
DATE/Nº: 16/08/94-3423
ATTR: EDT
FOR INFO: LKE/VW/LW/Dup/ks

SUBJECT: ARTICLE 21(2) (SOVEREIGNTY OVER ENERGY
RESOURCES).

Reference is made to Message No: 257 L addressed to the European Union, Norway, Russia and the United States.

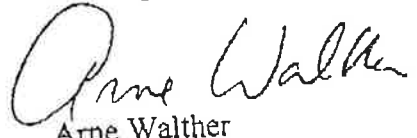
In accepting your invitation to attend the informal meeting on 23 August 1994, I would like to stress that Norway does not agree with the premise in your invitation that there is a need for discussion on the interpretation of Article 21(2). As we have previously pointed out, the draft Memorandum of the Chairman of the Legal Sub-Group contains serious flaws both in its legal analysis and otherwise. It is also our opinion that the original initiative of Mr. Bamberger, which we understand he took in his personal capacity, has received undeserved attention. The actions taken with regard to this politically sensitive matter have the potential of jeopardizing the procedure laid down in the Common Declaration adopted by the Charter Conference at its last plenary. I enclose a PM containing Norwegian views on some of the issues dealt with in the draft Memorandum.

As you are aware Article 21 is the outcome of extensive negotiations between the European Union and Norway. You will recall that the compromise proposal that you presented to the Plenary in Room Document 37 was clearly supported by the European Union, Russia and Kazakhstan, and under the circumstances acceptable also to Norway. Your proposal was adopted by concensus, with only a US scrutiny reserve. The Article is of an utmost importance to Norway and reflects in its present drafting the bottom line of what Norway can accept if we are to sign and ratify the ECT. The further handling of this issue is therefore being followed carefully by the political authorities in Norway.

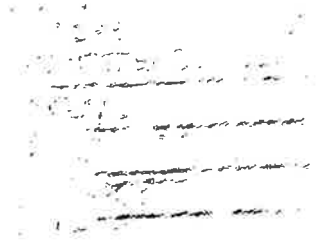
I request that the present telefax and the attached PM be forwarded as soon as possible to the participants at the informal meeting on 23 August 1994.

Norway will be represented at the meeting by Mr. Hans Wilhelm Longva, Deputy Director General of the Legal Departement in the Royal Norwegian Ministry of Foreign Affairs.

Best regards



Arne Walther
Ambassador



P.M.

Subject: Energy Charter Treaty (ECT). Article 21.

Together Article 21 and Part III of the ECT are intended to represent a balanced approach to the legal relationship between the resource state and the investments of investors in the exploration and development of energy resources. The rights of the state as resource owner constitute an important element in this legal relationship, as do the protection granted to investors and their investments under Part III. Article 21(2) preserves the right of Contracting Parties to maintain rules governing the system of property ownership based on the principle of the resource state's ownership rights to its energy resources. Article 21 is intended to affect the interpretation and application of the rest of the ECT, including provisions of Part III. It is not intended to undermine or to gut the application of any provision of the ECT.

It is submitted that in its present drafting, Article 21 spells out these intentions in an adequate legal language. Its rules will have to be interpreted in accordance with generally recognized rules of interpretation of international treaties. In this respect attention is drawn to Article 31(1) of the Vienna Convention on the Law of Treaties which reads: "A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose". It is thus clear that the objective and purpose of the ECT will have to be taken into account in the interpretation of Article 21. The same goes for the context of Article 21, which in accordance with Article 31(2) of the Vienna Convention shall comprise the text of the ECT as a whole including its preamble and annexes. It is submitted that if interpreted in good faith in accordance with these general and broadly recognized rules of interpretation of international treaties, Article 21 does itself contain all the necessary limits on a Contracting Party's use of its rules and leaves no room for abusive interpretations or for unintended effects on the application of the ECT as a whole.

As to the specific questions raised in the legal advice received by the Conference Chairman and attached to his note of 28 July 1994, Norway has the following comments:

Article 6 of the ECT states that the Contracting Parties shall not apply any trade related investment measure that is inconsistent with the provisions of GATT's Article III or GATT's Article XI. The said GATT Articles pertain to non-discriminatory (national) treatment with respect to products of another Contracting Party, and to a general obligation to eliminate quantitative restrictions on products, respectively. ECT's Article 6 could hardly be interpreted as having a wider application than the GATT TRIMs Agreement adopted at Marrakesh. The GATT TRIMs Agreement explicitly states in its Article 1 that its coverage applies to investment measures related to trade in goods only. On this background, it cannot be seen that the ECT's Article 21(2) could be interpreted as being inconsistent with Article 6 of the ECT. The national treatment obligation in Article 13(7) requires a Contracting Party to accord to investments of investors of another Contracting Party treatment no less favourable than that which it accords to investments of its own investors or of the investors of any other

Contracting Party or any third State. Regardless of Article 21(2) it cannot be seen that this provision affects the exercise of ownership rights over energy resources. Neither can it be seen how Article 21(2) could be construed to deny national treatment, contrary to Article 13(7).

The "best efforts" commitments under Article 13(2) and (5) relate to the "Making of Investments". The issue of "access to energy resources" is exhaustively regulated in Article 21. Article 21(4) is at the core of the regulation of this issue. This provision is based on the EC Council Directive on the Conditions for Granting and Using Authorizations for the Prospection, Exploration and Production of Hydrocarbons. In the context of "access to resources" the "best efforts" commitments under Article 13(2) and (5) would apply once authorizations, licences, concessions and contracts have been allocated in accordance with Article 21(4) and only to entities who have received such authorizations, licences, concessions and contracts. It cannot be seen that Article 21(2) will affect the granting of national treatment to the "Making of Investment" by such entities in accordance with such authorizations, licences, concessions and contracts. Neither can it be seen that Article 21(2) will affect the application of national treatment to the "Making of Investment" in other contexts.

Article 21(2) cannot be seen as allowing a breach of obligation in contravention of the last sentence of Article 13(1), which states that a Contracting Party shall observe any obligations it has entered into with an investor of another Contracting Party. The last sentence of Article 13(1) is merely a statement of the proviso "pacta sunt servanda". A system of property ownership to energy resources cannot plausibly be seen a pretext not to observe contractual obligations undertaken towards investors.

Article 21 gives the State a right as resource owner to decide the optimization of the recovery of its energy resources. The intention of this provision is to reconfirm, in accordance with a commonly accepted standard of good oilfield practice, the right of the State as resource owner to decide the necessary measures in order to ensure that the recovery of petroleum shall take place in accordance with prudent technical and sound economic principles and in such a manner that waste of petroleum or reservoir energy is avoided. Thus, if needed for reasons of good reservoir management, the investors may be required to, e.g., inject gas or water into a reservoir, or to drill a well, in order to enhance oil recovery, and to bear the costs of such measures. Another example may be unitization of field developments and production.

The right of the resource owner under Article 21 to decide on the optimization of the recovery of its energy resources is not unlimited. The decision should primarily be based on what is considered economical, both from the point of view of the investor and the resource owner. In case of conflict of interest between the investor and the resource owner, the State may choose to let its interests as resource owner prevail.

It is clear that measures taken by the State in accordance with Article 21 could not be considered as nationalization or expropriation within the meaning of Article 15. This also goes both for measures adopted with a view to the optimization of the recovery of energy resources and for measures to regulate the environmental and safety aspects of the exploration and development of energy resources. On the other hand it must also be clear that Article 21 does not give the State a right, as resource owner or in the exercise of its administrative powers, to impose any decision on an investor without regard to the consequences of such decisions, economically or otherwise. Part III of the ECT, including Article 15, provides the investor with an adequate protection against abusive interpretations of Article 21.

Article 25(1) relates to the activities of state enterprises in relation to the sale or provision of goods and services. It cannot be seen that this provision is affected by Article

21(2). The remaining provisions of Article 25 all require that state entities or entities to which a Contracting Party grants exclusive or special privileges shall conduct its activities and exercise its authority in a manner consistent with the Contracting Party's obligations under the ECT. Article 21(2) is an integral part of the ECT. Consequently, there is no possibility of inconsistencies between Article 21(2) and Article 25.

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