

EUROPEAN ENERGY CHARTER**CONFERENCE SECRETARIAT**

Brussels, 25 August 1994

NoteFile25

Note for the file

Subject: Informal meeting concerning Article 21(2) (Sovereignty over Energy Resources) held in Brussels on 23 August 1994.

Participation: List attached.

1. The Conference Chairman had invited Legal experts from EC, Norway, Russia and the United States to an informal meeting to discuss the interpretation of Article 21(2) (Mess. 257L).
2. The Chairman opened the meeting recalling the negotiation - history on this Article up to the tabelling of RD-37 during the June Plenary. Following the Plenary, the Legal Sub-Group Chairman Mr. Bamberger, drew attention to the possible influence this Article might have on other Articles of the Treaty, in particular related to assurance for investors. The Chairman had found that this signal of doubt was not possible to ignore. He alerted the EC of the possible consequences of Article 21(2), who expressed a wish to have the opinion of the Legal Sub-Group on this issue. The revised draft memorandum on this point and comments received were circulated to the participants of this meeting (Mess 257L). A letter from AUS expressing their view on Article 21 was distributed at the meeting.
3. One of the questions raised was whether, for the sake of clarity, it would be appropriate to switch the order of paragraphs (2) and (3). USA would be in favour of this but N stated that it would not be acceptable to them as paragraph (3) should refer to both paragraphs (1) and (2). The last sentence of paragraph (1) was only acceptable to N in presence of paragraph (2). Should the sequence be changed N would not be able to sign or ratify the Treaty.

4. Another question was the possible consequence of using different language in Article 21(2) compared to almost similar wording in Article 222 of the Treaty of Rome. It was argued that it might give rise to different interpretations given the otherwise similar use of wording. It was also argued that in translation into other languages there was no difference between "prejudice" and "affect". The Chairman concluded that there was no difference between the two, but that he would not conclude at this point on whether to use one or the other.

5. In continuation hereof it was discussed whether the use of slightly different wording in Article 21(2) could be interpreted to be of an overriding nature. USA thought there was a substantial risk that it might be interpreted that way. N on the other hand was of the opinion that this would not be the case (with reference to the Vienna Convention articles on treaty interpretation). RUF was in favour of the N interpretation and thought it might be useful to examine which Articles of the ECT would/might be affected by the present wording of Article 21. The EC presidency argued that most of the problems raised in Mr. Bamberger's draft memorandum seemed to arise from the different use of wording. It was argued that the need for clarification in part was due to the limited negotiation history on this Article.
It was furthermore pointed out by N that in most of the world resources are owned by the State except in USA, Canada and maybe Australia.
The question of how much room it would have for interpretation was left.
6. The Chairman asked the participants whether there was a need to define "Energy Resources" since it had been pointed out that the term was undefined and unclear in its coverage. Short discussion - inconclusive.
7. A suggestion for an explanatory decision was briefly discussed.

8. Following a break the EC presidency put forward this personal proposal on which the other participants had been consulted:
- a) to substitute "prejudice" with "affecting" and "does not affect" with "shall in no way prejudice";
 - b) to add "natural" before "energy resources"; and
 - c) an interpretative understanding: "Article 21(2) is not intended to undermine the other provisions of this Treaty".

The initial reactions were:

USA a) acceptable
b) not sure whether necessary
c) would prefer "decision" to "understanding" - and not sure what "undermine" would mean.

RUF a) acceptable
b) if change - then throughout the Article
c) idea acceptable - doubts about meaning of "undermine".

N a) acceptable
b) not necessary since there is no doubt that energy resources are "in the ground".
c) If the suggestion is helpful to the US then N would be ready to look more closely at the drafting of such an understanding.

Alternatives mentioned to "undermine" were: negate, circumvent, impair.

And the following alternative formulation of the understanding emerged:

"Article 21(2) shall not be construed to allow the circumvention of the application of the other provisions of this Treaty."

N expressed a preference for the initial EC proposal and added that the acceptability of other understandings might be difficult in the light of other issues more important to N. USA stated that it would anticipate difficulties in accepting the suggestion in whole since the text of Article 21 remains basically as it is.

The Chairman concluded that the best which could be achieved under the circumstances was:

- a) to change the terms used in paragraph (2) as suggested;
 - b) that "energy resources" in itself is clear and the record will show that it concerns resources in the ground; and
 - c) concerning an interpretative understanding the two alternatives would be circulated to the participants (Mess. 259L).
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The Chairman added that the meaning of Article 21 is that no CP is obliged to change the system of property ownership (which is why it was considered superfluous to have such an Article in the first place). The Treaty has no impact on existing regimes/systems.

USA said they would agree with this principle but that the problem was how to put this in writing. The EC presidency explained that they would need the reactions from the other participants on the understandings (preferably by Friday) before the suggestion could be presented to the EC member states.

The Chairman expressed hope that the EC request was heard and thanked the participants for constructive efforts to reach a solution to this issue.

List of participants in Legal Experts meeting on Article 21(2)

Tuesday, 23 August

Ambassador Rutten (Chairman)

~~Dr Böge (EU Presidency)~~

Mrs Borak (EU Presidency)

Mr Borek (USA)

Mr Merton (USA)

Mr Longva (Norway)

Mr Martynov (Russia)

Mr Houttuin (Council Lawyer)

Mr Hetsch (Commission Lawyer)

Mr Schlegelmilch (DGI)

Mr Ervik

Ms Weis

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Tuesday, 23 August - 11.00 - Room 0/11

Ambassador Rutten (Chairman)

Dr Böge (EU Presidency)

Mrs Borak (EU Presidency)

Mr Borek (USA)

Mr Longva (Norway)

Mr Martynov (Russia)

Mr Houttuin (Council Lawyer)

Mr Hetsch (Commission Lawyer) (to be confirmed on 22/8)

Ms Weis (Charter Secretariat)



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19.8.94

Copies: Ambassador Rutten

Mr Jones

Mr Ervik

Mr Sorokin

Ms Weis

Mr Westerhof

Reception - Tervuren Plaza building

Notes: Lise - Ambassador Rutten would like you to take notes at the meeting.
Denis - Please arrange for sandwiches (usual 'tartine' type), coffee and cold drinks.