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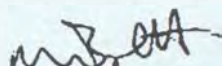
From: David Brett, RID
Date: 19 October 1998

cc: Mr Jeffrey
Mr Stephens
Mr Brooker
Mr Gray
Ms McClelland
Mr Keown
Mr Berman
Mr Fergusson o/r

To: Mr Bell

SUBJECT: UK PAPER ON IMPLEMENTATION BODIES

1. Please refer to Mr Fergusson's minute of 16 October, circulated earlier today. I now attach a final version of the Note on Implementation bodies for you to hand over to the Irish side. It has been seen again by the NIO, HOLAB and the FCO's legal advisers, and takes account of their further comments.



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Tel: 0171 270 2356
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NO. OF ATTACHMENTS: 1

**NO. BY UNITED KINGDOM GOVERNMENT ON ESTABLISHMENT OF
IMPLEMENTATION BODIES**

1. We are grateful for the helpful points raised at the meeting on 8 September 1998, in the Irish paper handed over on 14 October, and in discussion in the Liaison Group meeting on 14 October. We have given careful consideration to the points raised and have taken account of these in revisiting arrangements for establishing the implementation bodies.

2. It is understood that both Governments share the same fundamental concerns:

(i) To ensure that the bodies are so established as to be able to carry out their functions fully and properly in accordance with the Belfast Agreement with the requisite legal powers and status;

(ii) To ensure that neither side will unilaterally abrogate its participation in the bodies or renege on financial arrangements;

(iii) To ensure, in accordance with the scheme of the Belfast Agreement, that the Northern Ireland authorities can deal directly with the Irish authorities in relation to the establishment and operation of the bodies.

3. In order to ensure that the bodies can fully carry out their functions within the island of Ireland it is essential to ensure that they are vested with the requisite legal personality and capacities in the law of both Ireland and Northern Ireland. Regardless of the nature of the international instrument establishing the bodies, their ability to carry out their functions will depend on the adequacy of domestic legislation.

4. Under current legislative arrangements, the Northern Ireland administration has, and under the NI Bill will continue to have, the power to conclude "agreements and arrangements" with the Irish Government - this covers both memoranda and other instruments which are not intended to be binding in public international law as well as contracts governed by domestic law. This power is intended to take account of the unique relationship under the Belfast Agreement between the authorities of Northern Ireland and those of Ireland and in particular in relation to the implementation bodies. It enables the Northern Ireland administration to deal directly with the Irish Government on devolved matters relating to the island of Ireland without the need for the United Kingdom Government to play an intermediary role.

5. We note the particular concern expressed in the Irish paper and in the discussions on 14 October that legally binding instruments should be used for the establishment of the initial six implementation bodies pursuant to paragraph 9(ii) of the Strand Two section of the Belfast Agreement.

6. Careful consideration has been given to whether the bodies provided for in the Belfast Agreement should be established by treaty. Given that treaties are binding on States, it would not be possible to pursue such an approach following devolution without the interposition of the United Kingdom Government in the process of

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establishing and operating the implementation bodies. This would be contrary to the principles underlying devolution and point 2(iii) above. The UK Government had therefore envisaged that the implementation bodies should be established by memoranda of understanding using precisely those powers which have been created to enable the Northern Ireland authorities to deal directly with the Irish Government.

7. The Irish team has raised a number of pertinent concerns both in relation to the technical feasibility of establishing the bodies other than by treaty and to the possibility of one side or another unilaterally abrogating its commitment to such bodies. With regard to the former the United Kingdom has already given very careful consideration to technical feasibility of this approach and has reviewed these points in detail having regard to the issues raised by the Irish team:

(a) Establishment. It is fully accepted that it is important to avoid the "Foyle Fisheries" precedent of seeking to establish the bodies by parallel legislation in two jurisdictions. This is not, however, envisaged here. Each body will be established, not by parallel legislation, but by a single instrument concluded jointly by the Irish and Northern Irish authorities. There are a number of precedents in international practice of bodies which have been established by instruments which are not intended to be binding in international law.

(b) Capacity and Powers. It is fully accepted that the bodies must have the requisite capacities to carry out their functions. As noted above, this depends not on the nature of the instrument establishing the bodies, but on the bodies being clothed with the necessary capacities and personality in Irish and Northern Irish domestic legislation. It is accepted that a treaty would be required to establish an intergovernmental body with international legal capacity. It is however submitted that the implementation bodies are not intended to function as intergovernmental organizations - with for example the power to conclude treaties with other States - but as public bodies operating throughout the island of Ireland.

8. The need to ensure that neither side can unilaterally abrogate its commitment to the bodies is absolutely crucial. The United Kingdom side fully recognises concerns raised by the Irish side on this point. It would reiterate that instruments which are not intended to be binding in international law are not ephemeral statements that either side can abrogate at will. They represent solemn, express political commitments on the part of both signatories. A substantial amount of international business is of course conducted by both the British Government and other international actors on the basis of such instruments. It is understood that the Irish Government is fully familiar with such instruments and is aware of their status and value in international practice. The British Government would of course expect all signatories to such instruments to comply with them rigourously and fully.

9. The United Kingdom's proposal is based solely on the concern to ensure that the Northern Ireland administration is able to deal directly with the Irish Government. It is not intended in any way to diminish the commitment to the establishment and operation of the implementation bodies. It should be stressed that the operation of the implementation bodies, and indeed the entire institutional framework, depends on the political commitment on both sides. Such

mechanisms as might be available in relation to treaty obligations are likely to be of little practical reassurance in the circumstance in which they are likely to be invoked and within the overall framework of the political settlement.

10. In relation to the important points raised at last week's meeting, the following points should be underlined:

(a) Financial Commitments. It is fully recognised that neither side should be in a position whereby it invests substantial funds in a body which ceases to operate. Where funding is to be given, for example to a specific project, it is recommended that provision is for a contractual regime, governed by the relevant domestic law, to ensure that all participants meet their financial commitments. More generally as noted at the meeting on 7 July, the international legal principle of estoppel may also, in certain circumstances, be relevant.

(b) Statutory Powers. Under the Northern Ireland Constitution Act 1973 the Northern Ireland Assembly has the power to legislate so far as is required to give effect to any "agreement or arrangement" entered into with the Irish Government. The Assembly will continue to have such power under the Northern Ireland Bill in relation to "agreements or arrangements" reached within the framework of the North South Ministerial Council and the British Irish Council. Nothing in either the Act or the Bill gives the Assembly the authority to unilaterally abrogate such instruments.

11. Having regard to the discussions held on 14 October and the need to make progress on this issue, we are prepared to consider the establishment of the first six implementation bodies by treaties between the Irish and British Governments. It should, however, be stressed that we remain entirely satisfied that the bodies can be fully and properly established on the basis of memoranda as outlined above. It is noted that the bodies must be established before the Northern Ireland administration assumes its powers and the central need to avoid the interposition of the UK Government between the Northern Ireland and the Irish Government will clearly only arise after devolution.

12. If this approach is adopted, it should also be stressed that the provisions of any treaty must be restricted to that which is necessary to formally establish the bodies:

(a) Detailed arrangements relating to the operation of the bodies must be the subject of memoranda between the Northern Ireland administration and the Irish Government. Given that the bodies are intended to be working, evolving bodies it is essential to maintain flexibility and to ensure that the Northern Ireland administration and the Irish Government can amend such arrangements without the interposition of the UK Government.

(b) A treaty setting out arrangements which require implementation in domestic law would raise significant legal difficulties. Arrangements conferring the necessary functions and capacities on the first six bodies are to be implemented in Northern Irish law by an Order made under existing legislation. This can only be used in implementation of "agreement or arrangements" concluded pursuant to section 12 of the 1973 Northern Ireland Act. Its use to implement provisions set out in a treaty (even where duplicated in arrangements made under section 12) would be ultra vires.

Tim O'Connell

N13

Headquarters

As discussed, grateful if any reference to location could be omitted from Consultation Papers.

In briefing, could use following:

“The general issue of locations and headquarters for bodies to be decided centrally, taking account of the locations of existing offices and of any particular requirements of the activities involved.”

Boards

EU Programmes

- As discussed, grateful if following square bracket could be added in para 4.2, third line, after “overseen by”:

[a Board and]