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SECRET AND PERSONAL

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10 DOWNING STREET

From the Private Secretary

8 November 1985

Dear Henry.

PROPOSED ANGLO-IRISH AGREEMENT

The Prime Minister has considered the Solicitor-General's minute of 7 November in which he dealt with the risk that the proposed Anglo-Irish Agreement could be subject to judicial review and with the further question whether the provisions of the Agreement might be enforceable in our own Courts.

The Prime Minister was very grateful for the Solicitor-General's advice which she found reassuring.

I am copying this letter to the Private Secretaries to the Northern Ireland Secretary and the Foreign Secretary and to Sir Robert Armstrong.

yours ever

(Charles Powell)

Henry Steel, Esq., C.M.G., O.B.E.,
Law Officers' Department.

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Prime Minister 17

Re Solicitor-General advises that the point raised by Mr. Molyneaux at Dr. Paisley has no substance.

CDP 7/xi

PRIME MINISTER

Thank you very much for

PROPOSED ANGLO/IRISH AGREEMENT

1. At the meeting of Cabinet on 31 October I was invited "to consider the risk that the Agreement could be subject to judicial review" and to inform you, the Foreign and Commonwealth Secretary and the Northern Ireland Secretary of my conclusions. The question had been raised with particular reference to the suggestion made by Mr. Molyneaux and Mr. Paisley, when they called on you the previous day, that, if the Agreement was binding in international law (and they apparently saw registration with the United Nations as crucial to this), the fact that it related wholly to matters within our domestic jurisdiction somehow made it enforceable in our own courts. However, I have not confined my consideration of the matter to that limited argument: I have also considered whether, on any basis, the provisions of the Agreement will be enforceable in our own courts. My conclusion is set out at paragraph 12, below.

2. I shall deal first with the particular argument apparently advanced by Mr. Molyneaux and Mr. Paisley. That argument seems to be based on a number of misconceptions. First, the proposed Agreement will, as I interpret it, be binding on the two Governments in international law in any event and irrespective of whether it is registered under Article 102 of the United Nations Charter. It seems to me to be the clear intention of the parties, as I deduce them from the terms of the Agreement, that what they are concluding is a binding treaty within the meaning of the Vienna Convention on the Law of Treaties, i.e. "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". Registration under Article 102 of the Charter does not materially affect the position. It does not in itself turn an instrument into a binding treaty (though

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it is evidence that the parties themselves so regard it) and non-registration does not prevent an instrument from being a binding treaty. What Article 102 does is, first, to impose an obligation on the parties to a treaty to register it and, second, to preclude the parties to a treaty from invoking it before any of the organs of the United Nations if it is not registered: the important organ in this context is the International Court of Justice. As I understand it, it is the intention that the proposed Agreement should be registered, partly because of the obligation imposed by Article 102 to which I have just referred and partly (on our side) because of the value of thus formally placing on public record the express acceptance by the Irish Government of the propositions contained in Article 1.

3. I was not asked to advise on whether the Agreement, once registered, could be enforced against us in the International Court of Justice, but it may be helpful if I briefly touch on that matter. Registration of a treaty under Article 102 of the Charter does not of itself make disputes arising under that treaty justiciable before the Court: it merely clears one possible obstacle out of the way. For such disputes to be justiciable before the Court, both the parties to the treaty must also have accepted the jurisdiction of the Court in a way which embraces those disputes. The United Kingdom has in fact made an acceptance of the compulsory jurisdiction of the Court under Article 36(2) of the Charter in terms which would be wide enough to cover disputes relating to the interpretation or observance of this Agreement; but, so far as I can see, the Republic of Ireland has not done so. Unless, therefore, the Republic of Ireland has made an appropriate acceptance of the jurisdiction of the Court under some provision other than Article 36 of the Charter - I have no reason to think that this is so but I have no information on this matter and, since it does not strictly arise on the question referred to me, I have not pursued it - the International Court of Justice would have no jurisdiction to entertain suits in disputes arising out of the Agreement.

4. In any event, even if the Court were in theory competent to exercise jurisdiction in respect of disputes arising under the Agreement, that jurisdiction would have no practical significance unless the Agreement imposed obligations

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on us which were sufficiently concrete and specific to be invoked before the Court. I do not think that it does, but I deal with that aspect of the matter below, in the more practically important context of possible proceedings in our own courts.

5. I turn then to the argument, put forward by Mr. Molyneaux and Mr. Paisley, that enforceability in international law entails enforceability in domestic law. This, too, seems to me to be founded on a misconception. The fact that an agreement is binding in international law has no necessary implication for its status in municipal law. Whether it is enforceable in municipal law depends solely on whether the domestic courts will themselves construe it as an instrument which was intended to create, and does create, rights and obligations in municipal law which can be asserted either by the parties themselves inter se or by other persons against one of the parties.

6. One possible way in which a domestic court might conclude that the proposed Agreement is an instrument of that kind would be if it interprets it as operating as a municipal law agreement (i.e. a contract) as well as an international agreement. Such operation on both the international and municipal planes is not unknown. But I see nothing to support a suggestion that the proposed Anglo/Irish Agreement has that effect. The fact that it deals with matters within our domestic jurisdiction is not material: many purely international agreements (e.g. extradition treaties) do that without in any way operating as agreements in municipal law. Accordingly, if the suggestion is that the proposed Agreement operates as a municipal law agreement, I think that it falls at this first hurdle.

7. A further - and, as I think, equally fatal - hurdle is the requirement that the obligations imposed by the agreement should be sufficiently concrete and specific to be capable of judicial identification and enforcement. In general, I do not think that the relevant provisions of the proposed Agreement meet that test. If we were at some point to refuse, or fail, to co-operate in good faith in working the machinery established by the Agreement (e.g. if we refused to attend meetings of the Conference or to allow the Conference to discuss matters

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that were properly within its remit, or if we refused to take part in a review of the working of the Conference as required under Article 11), I can conceive that a court, if it could be properly seised of the matter, might hold that this constituted a breach of the Agreement. But, short of that, I do not see any ground on which a court could find such a breach even if it had jurisdiction.

8. There is also the question of who (on the assumption that we are dealing with a municipal law contract) could seise a domestic court of a dispute arising under it. The "contractual" obligations imposed on the two Governments by the Agreement, such as they are, are owed by them to each other and I do not see how anybody else could plausibly claim to have a right of action under the Agreement if they were disregarded. The Irish Government would themselves have a right of action against us, but I would think that the prospect of the Irish Government submitting to the jurisdiction of the United Kingdom courts in order to seek enforcement of this Agreement is remote.

9. The other basis on which it might be argued that the proposed Agreement will be enforceable in our domestic courts - and it may well be this that Mr. Molyneaux and Mr. Paisley have in mind - is that, as well as imposing obligations on the United Kingdom Government, vis-à-vis the Irish Government, in international law, the Agreement is somehow also incorporated into our municipal law as a source of (non-contractual) duties owed by the British Government to the public at large, so that any member of the public who claims to be injured or aggrieved by a breach of those duties can apply to our courts for redress.

10. I do not think that any such argument would be accepted by our courts. In the first place, our legal system (unlike some others) has no general doctrine of the incorporation of international agreements into municipal law: the basic rule is that, if a treaty requires a modification of domestic law, either to create rights or to confer obligations, specific legislation must be enacted for that purpose. Nor, as I have said, do I consider that the obligations imposed on the United Kingdom by the proposed Agreement are sufficiently concrete and specific to be capable of enforcement by the domestic courts. Even if they were, I do not see

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anything in the proposed Agreement which would justify the contention that it purports to create, or can properly be construed as creating, rights in or obligations towards anybody other than the parties to it. I therefore do not think that any private litigant (from whichever end of the political spectrum) would have "sufficient interest" to move the Court successfully for relief by way of judicial review.

11. Finally, there is the question whether our courts would regard judicial review as an appropriate remedy in the sort of case that we are contemplating. Given the nature of the obligations in question (and even leaving aside what I have said about their lack of concreteness and specificity), I think it extremely unlikely that an English court would think it right to make a declaration - and I see no other form of relief by way of judicial review which would be appropriate - that the United Kingdom Government was bound, as a matter of law, to discharge its treaty obligations in a particular way when the Government had decided that it was not in the national interest to do so. Judicial review is a discretionary remedy, and I do not see our courts as at all likely to exercise that discretion so as to intervene in what is so clearly the field of international relations.

Conclusion

12. Accordingly, I advise that the point raised by Mr. Molyneaux and Mr. Paisley has no substance, and that there is no risk of the proposed Agreement being enforced against us in our domestic courts, whether by way of an application for judicial review or otherwise. This is not to say that an application for judicial review could not be made. But I see no risk of it succeeding. For the avoidance of doubt, I add that this is a different question from the question whether proceedings could be mounted in our domestic courts, by way of an application for judicial review, to challenge the very conclusion of the Agreement, on the ground that it was in conflict with the 1973 Act or with other legislation or was in some other way unlawful or unconstitutional. The Attorney-General and I have both already advised on this latter question. Our advice was that an application for judicial review on those grounds could be launched - in the sense that the courts would have jurisdiction to entertain it - but that we should have a good defence to it and it should not succeed.

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13. I am sending copies of this minute to the Foreign and Commonwealth Secretary, the Northern Ireland Secretary and the Secretary of the Cabinet.

Patrick Mayhew

7 November, 1985

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