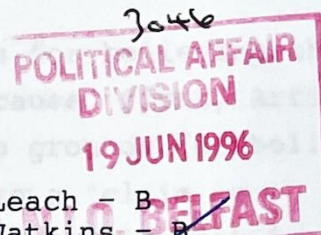


FROM: P N BELL
JOINT SECRETARY
18 JUNE 1996



cc Mr Leach - B
Mr Watkins - B
Mr Beeton - B
Mrs Brown - B
Mr Hill - B
Mr Maccabe - B
Mr Stephens - B
Mr Whysall - B
Mr Lamont, RID - B
HMA, Dublin - B

C2876

MR THOMAS - B

CONSTITUTIONAL ISSUES PAPER: DRAFT

Your minute to me of 3 June raised a number of issues which, while not the most immediately pressing, are nonetheless of the first importance and will certainly be revisited, at length, should the Talks last that long. Unless, as some of our more observant colleagues have noted, the Irish forego their territorial claim by default (hope on!), I therefore believe it may be useful to explain why I believe that while our current Negotiating Brief on Constitutional Issues is more than serviceable in short run, it remains, in part for the reasons I adduced in my minute to Mr Whysall of 30 May, inadequate as a full statement of our position.

2. That is because the distinction between a "territorial claim of right to Northern Ireland" and a "territorial claim of right to jurisdiction over Northern Ireland" may not, I suggest, be either as vacuous as you imply either as a matter of substance or, even less, as a matter of presentation. (If so, we should not of course reinforce Ministers in what are arguably erroneous and politically damaging judgements.) I am wholly innocent of public international law. I lack the legal expertise of Messrs Trimble, McCartney - and of Ancram and Mayhew. I do not have easy access to whatever papers led Ministers to their apparent conclusion. Nevertheless, there

seem to me persuasive common sense grounds for believing that an important distinction does exist here: because, first, Articles 2 and 3 of the Irish Constitution give us no grounds for believing that the "territorial claim" is confined to a "claim to jurisdiction" over Northern Ireland. Article 2 is cast in very broad terms, while Article 3 only singles out the right to exercise jurisdiction (as a right to be preserved) over the whole of the national territory because that Article is temporarily restricting the jurisdiction of the Dublin authorities to the territory of the Republic pending the reintegration of that national territory. To suggest that the sum total of the Irish claim over Northern Ireland is restricted to jurisdiction is, therefore, to be insensitive to the context of those two Articles and the specific mischief which Article 3 seeks to avoid. There is, moreover, nothing whatsoever to suggest that the claim is exhausted by a claim to jurisdiction.

3. Second, whatever the wording of the actual Constitution, it strikes me as a matter of natural construction that to withdraw a claim 'to jurisdiction' is weaker than to withdraw quite simply a territorial claim simpliciter. But whether you take these two arguments singly or together, the conclusion I would invite you and others to draw is that in renouncing the particular claim to jurisdiction, the Irish would not necessarily be renouncing any other claims they may entertain.

4. What these other claims may be, and which may have led Ministers to conclude the distinction was unimportant, is less obviously clear. But they would comprise, in my book, claims of a political, moral or even - this is Ireland - metaphysical variety. They could amount to saying, for instance, "this is our (i.e. not your) territory even if for any number of good reasons we choose not to do much, or indeed anything practical about it for the foreseeable future... - and we shall have even gone so far as to give up a claim to jurisdiction if we get as far as a settlement." Viewed from where I sit, that constitutes a residual if not necessarily or to all a threat, at least a residual uncertainty and

worry. (It would justify some, I believe, in continuing to argue that - whatever position had been reached about consent say - Northern Ireland was essentially occupied territory.....). And that uncertainty would be all the greater because it would seem that the Irish still apparently felt obliged (or able?) to withdraw their "territorial claim" in language which was, to borrow a phrase, less than unequivocal. What people (or you) will ask is their ulterior motive in this sophisticated choice of words?

5. Current preferred Irish language is also unsettling, not just given the interpretation of Articles 2 & 3 in the McGimpsey case cited in Mr Whysall's brief, but also because a key Irish objective could be dealt with - even if there were an unequivocal abandonment of the territorial claim. Namely, retaining the ability of anyone born within Northern Ireland to claim - as is already protected in 'Frameworks'. Namely, retaining the ability of anyone born within Northern Ireland to claim, if they so wish, Irish as well as UK citizenship. Provided that is assured to the Irish, anything less than dropping - and being seen to drop the territorial claim to tout court is likely to strike a lot of people around here as simply mischievous or worse. And that brings me to the final, very important presentational point: whatever the force of the learned arguments, weasel Irish words will be seen as precisely that - and, in addition, a potential break issue in the Talks.

6. Partly for that reason; partly because we are already on the back foot through not spelling out in our negotiating objectives any desire to preserve the unity of the United Kingdom; and, of course, partly because I believe the Irish territorial claim (on any interpretation) to be at best 'unhelpful', I see both strategic and tactical advantage in our seeking to press the Irish as hard as possible to renounce it unambiguously. For it is a matter on which, if there is a break, it will be widely seen, at least here, in terms of their refusal to give up an unjustified irredentist claim. And, second, even if we do eventually concede the 'Frameworks' position, we may then be more likely to secure a significant price elsewhere, by way of a trade off. But I would still be extremely cautious

about falling back too readily on 'Frameworks' and risking losing the Unionists in the process. For, in the kind of end game I envisage - should we get that far - Republicans/Nationalists are likely to justify a "partitionist settlement" in terms of this being the best deal we can get in this generation. My fear is that any Unionists signing up to such a settlement against this background would be extremely vulnerable to the charge that all they had achieved by agreeing to such unpalatable measures as North/South bodies with executive powers etc (a significant slide down the 'slippery slope' in itself) would merely be to have bought a temporary respite.

7. The more we can do, I suggest, to make it possible for us and above all Unionists to say that, subject to the limits of human fallibility and foresight, the settlement we reach is indeed a definitive political accommodation, the more likely it is we shall achieve it. The more also we can do - an idea, this, of Mr Whysall's - to remove the 'aspirational' elements of the Bunreacht to some separate Covenant etc the better too. But this amounts once again to saying more thought is still needed on these complex and sensitive issues.

[Signed]

P N BELL