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cc PS/Michael Ancram (B&L)
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 PS/Sir David Fell
 Mr Thomas (B&L)
 Mr Bell
 Mr Leach (B&L)
 Mr Watkins
 Mr Wood (B&L)
 Mr Hill (B&L)
 Mr Lavery
 Mr Maccabe
 Mr Stephens
 Mrs McNally

PS/SECRETARY OF STATE (BE&L)

**TALKS: DISCUSSION ON CONFIDENTIALITY:
 PAPER OF 29 SEPTEMBER**

1. This is to provide briefing for the further discussion of confidentiality in the negotiations, following earlier debates on 23 and 24 September. After the first discussion, the chairmen produced a paper; that has been slightly revised in the light of submissions requested on 24 September, and will be the focus of debate tomorrow.

Objectives

2. We might seek an early conclusion of debate. There is no purpose now in prolonging it, and nothing in the paper we need object to or otherwise comment on (though we may be asked to speak to one amendment we have proposed).
3. On the substance, so far as there is discussion, we can to a large extent follow the views of participants; our general aim should be to secure a set of principles that are likely to command some degree of adhesion; that will avoid discussion in talks being inhibited by the possibility of publicity; but that recognise the desirability (and inevitability) of public debate on matters covered by the talks, and so far as possible facilitate it.

Background

4. The principles embodied in the paper are essentially in elaboration of rule 16:

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All participants in the negotiations will ... maintain confidentiality on all aspects of the negotiations except where they may from time to time agree to publicity.

(with some reference also to rule 43, relating to the keeping of records). They do not amount to a full restatement of rule 16: the points of agreement relate essentially to confidentiality of *documents*; but any sort of briefing about discussions potentially falls within the rule.

5. *Previous discussion:* (minutes, 23 September, paragraph 19ff, and 24 September, pages 4 and 5: attached). There was no great enthusiasm for discussion before. Unionists denounced the Government for favouring secrecy; though also for revealing minutes of previous discussions to Sinn Féin. Mr McCartney raised several times the Secretary of State's allegedly partial questioning of the loyalist parties during the hearing of representations, hinting heavily at legal action during which confidentiality could not be asserted (this was the origin of the provisos set out in the paper for court orders).

The paper

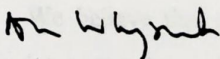
6. The Government proposed one amendment, now reflected in the paper, to principle 4. There was a measure of agreement in previous discussion that the earlier formulation was too restrictive, preventing participants from referring to their own talks papers, except those 'that state or reaffirm positions in the public domain'. The new principle would allow a participant generally to make use of statements of their own policy prepared for the talks, whilst making clear (the old principle was slightly vague) that it may not do the same with respect to others'.

Other talks documents

7. A discussion had been scheduled by the Chairmen of release of the rules of procedure. This has been withdrawn. There would in principle be good arguments for having the rules in the public domain; their release would have no detrimental effect on the talks; some appear to believe they are public already; public curiosity would be legitimate; the draft rules were released (6 June). There is no need to raise the matter, but if it is raised, the Government might endorse the principle of release. So too with other major documents, such as the agenda.

Conclusion

8. I enclose speaking notes on the main points.



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CONFIDENTIALITY DEBATE: SPEAKING NOTE

Speaking notes

General

1. It has been most helpful to have these debates. I believe there is a large measure of agreement that we should have rules in place that so far as possible ensure that free discussion in the talks is not inhibited by the possibility of disclosure, particular hostile disclosure of someone else's documents or contributions; at the same time, recognise the desirability, and indeed inevitability of public debate on matters covered by the talks, and so far as possible facilitate it. The principles that have been developed, in amplification and elaboration of rule 16, assist us toward those ends. We could refine the principles endlessly; but I believe that, having had a generous allocation of time for discussion, we might for the present seek to reach conclusions and move on fairly rapidly.

Point of agreement 4 (proposed by HMG)

2. There was a fair measure of agreement in previous discussion that the earlier formulation of point 4 was too restrictive, preventing participants from referring to their own talks papers, except those 'that state or reaffirm positions in the public domain'. We offered this new draft in the hope that it might be found generally helpful: the new principle would allow participants generally to make use of statements of their own policy prepared for the talks, whilst making clear that it may not do the same with respect to others'.

Questions for discussion

1. Regular briefings of the media

We believe that such briefings would be valuable, satisfying legitimate public interest and ensuring that a balanced view of proceedings was advanced.

The amendment by the DUP [*permitting the Chairmen to propose 'Press Updates' to the Business Committee: Michael Ancram expressed some support for this on 24 September*] is one way of achieving this: if it commanded support, and the Chairmen were willing operate in this way, we should happily endorse it.

2. Length of period of confidentiality

It seems to us that there would be a risk of discussion being inhibited if all participants were free to publish everything the moment the talks wound up. We should welcome the views of participants on whether a fixed period needs to be specified, and in that case what it ought to be. [A simple rule of thumb might be the life of the next full Parliament following the final winding-up of the talks].

3. Breach of confidentiality: 'first strike'

We judge that it would be dangerous to leave to any participant believing itself offended against full rights to cast aside the rules and respond in kind. It would be healthier for the talks if some mechanism for resolving such questions could be found. For example, such questions might be brought to the Business Committee, which could have arrangements for meeting to investigate on them, and reach a conclusion, quickly.

4. Breach of confidentiality: consequences

We believe the Business Committee might have a role here. We do not want to over-bureaucratise the structure, and the committee might have a first objective of seeking friendly settlement rather than deciding whether there has been a breach, and if so what consequences should follow – though we believe that right should be there as a last resort.

5. Third party response to accusations of breach of confidentiality

It is right that participants should consult the Chairmen, and perhaps through them the Business Committee, if in doubt about the requirements of the confidentiality rule.

6. (DUP suggestion): Definitions

The rules of procedure must, we believe, apply to formal talks, and to bilateral meetings between participants in the talks relating to matters they concern. As to meetings with third parties, it must be for those taking part to agree to what extent they are confidential.

[DUP question: what documents are in the public domain?]: if this is a reference to the rules of procedure, we take them not to be in the public domain, since they have never been expressly released. But subject to the views of participants, we believe it right that they – and, when it is agreed, the agenda – should be released.

Allegations that the Secretary of State was one-sided in questioning of loyalists

Both governments have made it clear that we do not intend to reopen the questions involved in the representations we had to consider. Suffice to say that given the grave sanction of expulsion from the talks that would arise if a complaint of demonstrable dishonouring of the Mitchell principles had been made out, we thought it right to see that all aspects of the response of the parties were properly explored.

[If pressed]: if any question arises of talks documents being sought for legal proceedings, that will obviously have to be considered at the time. The principles circulated rightly acknowledge the possibility of them being so sought.

Memory,

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23 September

16. At this point Cedric Wilson of the UKUP asked for clarification on whether the Alliance Party's claim would be ruled on first as had been the case with the UDP and PUP. Senator Mitchell said it was a matter for the two Governments. The Secretary of State and Mr Gleeson both said that the determination would be available shortly and circulated later today. There followed 50 minutes nugatory discussion about whether confidentiality should be discussed at the plenary or whether it should wait until after the two Governments' determination was available.

17. In that discussion, Messrs Robinson and McCartney expressed concern that it had taken longer to reach a decision on this claim than on that for the UDP and PUP. Mr Close said the Alliance Party did not wish to exclude parties as a result of their indictment and therefore wished business to continue. At various points, the DUP, UUP and UKUP stressed that the Alliance Party had made an indictment whose punishment was exclusion from the talks, and that any blame for delay lay at their door.

⇒ 18. The SDLP and Women's Coalition both pressed for a discussion on confidentiality to proceed. Mr Durkan suggested that as the party making the allegation were willing to sit in plenary with others at this time and they had not last time, a distinction could be made and discussion could continue. Mr Robinson and Mr Weir (for the UUP) said they wished to have their names cleared before debate continued. The Secretary of State said the parties should think carefully before allowing a complaint to stop business because of the potential for deliberate disruption in future. Mr Farren said a precedent regarding delay would not be set in discussing confidentiality because it was itself essentially a procedural matter. Mr Robinson eventually said that as the debate on confidentiality was not a matter of substance he believed it could proceed.

Protracted slanging matches particularly between McCartney and the SDLP over the latter's alleged lecturing of Unionists on the cause of delay ultimately became circular when Mr Durkan said in

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response to a further charge from McCartney that for the record he needed to refute McCartney's allegation for the written record in case of publicity so that SDLP supporters could see that the SDLP had not allowed charges to go unanswered. Ultimately, Senator Mitchell called a 20-minute adjournment to allow the two Governments to consider when the determination might be available. The minutes from previous meetings had already been circulated. (Comment: In the course of the plenary, the Irish side had confirmed to the British Government that they now had the political clearance necessary for the determination to be promulgated).

19. The plenary resumed at 15.50 with the announcement that the two Governments had agreed the determination which was now being copied. It would be made available in due course. Initially, when Senator Mitchell asked for comments on confidentiality none of the participants offered to speak. Ultimately, Mr Durkan suggested that a regular neutral briefing on what was going on was needed. He suggested it should come from the Chair. That would provide information to the Press and remove any excuse to engage in leaks or counter-leaks.

20. Mr Robinson said there were three separate categories to be considered. Firstly, on documents, he noted that other people's documents ought not to be reproduced but asked whether the documents produced by the party in question could be circulated more widely, as this may cast a light on the way in which negotiations were proceeding or on the negotiating positions taken by others. Similar considerations applied in reporting on what was said and there was the third issue of general comments on talks. (At this point Ministers on both the British and Irish sides left for a bilateral). Mr McCartney said that confidentiality considerations should not prevent parties from stating their own position and objectives with regard to the talks process. He identified three key considerations which he believed should be taken into account. First, the acceptance of confidentiality as an aid to negotiation. Second, the need to let the public know the position adopted by

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individual parties at the talks process; and third, what he described as the gagging effect of positions taken publicly by the Governments as architects of the process. He claimed that the British Government were very poor at disseminating information, preferring to throw a veil of secrecy over their policies and actions. Mr McCartney felt that if the public were not kept informed about progress in the talks, they were unlikely to endorse any eventual outcome. One purpose of the Forum was, in his view, to keep the public informed of the broad issues being discussed at negotiations. The use of the Forum for this purpose would go some way to addressing the democratic deficit in Northern Ireland and allay any suspicions which the public may have about what is being agreed. In short, confidentiality regarding the finer points of negotiation was desirable, but at the same time access to the media was essential.

21. Mr Trimble endorsed Mr McCartney's views on the "secrecy" with which the British Government went about its business, and on the desirability of using the Forum to debate the broad issues under negotiation at the talks. In these circumstances, he could not envisage how Rule 16 could reasonably apply, believing instead that it should be left to the individual parties to make up their own mind as to what information should be published.

22. Mr Close agreed that there was a need to keep the public informed, and suggested that this might be done in the form of a briefing, the contents of which would be agreed by the participants. This might be conducted by the Chairman, possibly accompanied by participants.

23. The Chairman attempted to move discussion forward by seeking the agreement of the participants to the following concepts:

- (1) That Rule 16 prevents the leaking of minutes to the press. This was agreed unanimously by plenary.

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- (2) That minutes of meetings should be kept confidential in all circumstances. This was agreed, but qualified to exclude circumstances where all participants agreed otherwise, or where discovery of minutes was sought by court order, or where a party sought leave of the Chair to make available minutes of meetings for the purpose of court proceedings. The Chairman conceded that it was impossible to foresee all circumstances where exceptions might need to be made, and that a degree of discretion would have to be available to cover particular circumstances.
- (3) That information contained in minutes will not be further disseminated. Plenary discussion on this point was inconclusive.
- (4) That documents prepared by the Chair at the request of participants will not be circulated by participants. This was agreed unanimously.

24. On the question of documents prepared by participants, Mr Farran suggested that publication would be acceptable provided that such documents represented the views of that party only. It was generally agreed that a document which stated a party's publicly held position or which referred to the publicly held position of another party was not covered by Rule 16, but that all other documents in respect of the negotiations were covered.

25. Discussion then moved on to how oral statements might be handled. It was generally agreed that the same principles should apply to oral statements as to documents. Mr McCartney observed that in the final analysis it all came down to a matter of trust and confidence!

26. At this point, the Chairman suggested that he might produce (overnight) a document which would summarise the discussion to date and put some alternatives to the participants for agreement. In

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response to a question from Mr Robinson, the Chairman indicated that the document would consider what sanctions might be available in the event of Rule 16 being broken. Mr Robinson said that whatever sanctions are made available should not be put in the hands of the two Governments, but rather should be administered by the chair. This view was endorsed by Mr McCartney and Mr Durkan, the latter suggesting that this might best be done in consultation with the Business Committee.

27. Representatives of the UUP, DUP and SDLP sought an assurance that whatever confidentiality rules were ultimately decided upon should apply equally to the two Governments. The British Government side agreed that the Government would be bound by the agreed guidelines, subject to the requirements of accountability to Parliament. The Irish Government also agreed to be bound by whatever guidelines were adopted. Dr Paisley and Cedric Wilson asked whether this would include the possibility of the British Government, the Irish Government and/or the SDLP passing information on the negotiations to Sinn Fein/IRA. Mr Durkan provided an assurance that his party would not engage in the transmission of information (written or oral) to any party. Mr Cooney responded on behalf of the Irish Government by referring to a recent article in the Newsletter by Mr McCartney and a statement made by Dr Paisley following a meeting with the Secretary of State in Parliament, and suggesting that as a result the DUP and UKUP were not without sin in publicly referring to the position of other parties. (Comment: This "courageous" defence by Mr Cooney of the Irish Government's position effectively deflected attention away from the British Government's position, thereby obviating the need to respond.)

28. Rounding off this part of the discussion, Mr Robinson indicated that his party was happy to proceed on the basis that no-one was without sin, adding pointedly that HMG had been communicating with the IRA during the last talks when a similar confidentiality rule had been in place. He went on to indicate that his party would reserve the right to respond in the event that another participant

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breached the confidentiality guidelines ultimately agreed. Mr Durkan disagreed, suggesting instead that if a party felt compromised by the statement of another, a "levelling" statement might be made by the Chairman. Mr Robinson also asked that the Chairman, in considering his draft paper, consider the duration of the embargo on information, ie would it stay in place for so long as the talks lasted or for all time?

29. The Chairman adjourned the plenary at this point at the call of the Chair - probably sometime during the course of Tuesday morning. The confidentiality document would be produced by his office overnight and be distributed early tomorrow morning. A plenary would be convened after participants had had an opportunity to consider this document. The Chairman also indicated that the judgement on the indictments brought by the Alliance Party against the DUP and UUP would be distributed to the party delegation rooms immediately following the plenary session. In response to a question from Dr Paisley, the Chairman indicated that, if required, a discussion on the judgement could take place during the next plenary session. Plenary was adjourned at 17.30 hours.

Irish Government

30. At 16.05 the bilateral between the two Governments began. The Irish Government were led by Mrs Owen and Mr Gleeson, and the British Government by the Secretary of State and Michael Ancram. Clearly speaking to a prepared brief, Mrs Owen said that the time had come for the UUP to provide answers; they had said that they needed sight of the legislation in order to engage, now they seemed to want more. She said the key question was under what circumstances the UUP would engage in substantive discussions. She was not prepared to go on offering concession after concession. The Secretary of State said he recognised the Irish concerns and reported on his bilateral that morning with the UUP in which he had stressed that both Governments needed assurances regarding a

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ate. Michael Ancram said it would be useful to know how many parties thought opening statements were still necessary, as it would save time to be able to dispense with them.

→ At 2.00pm the plenary commenced. The Chairmen began by asking about making public the governments' conclusions on the Alliance party allegations. Dr Paisley said they had already been made public by Dr Alderdice (absent at the Liberal Democratic party conference) who had attacked them in that day's press. He had sought guidance on whether these were confidential documents and had not been given an answer by the office of the Chairman. Mr McCartney argued that confidentiality only applied to discussions about a settlement and the Mitchell allegations were not directed at securing a settlement. This brought the discussion into the confidentiality issue and the Chairman, concluding that the documents related to the Alliance allegation could be published, opened the discussion of the paper on confidentiality. He reminded participants that the second sentence of Rule 16 of the Rules of Procedure was the only one which touched on confidentiality. If the office of the Chairmen was to give guidance on such questions as that raised by Dr Paisley, it would be necessary for the participants to determine a standard against which a ruling could be made.

Part 4 of the paper on the confidentiality of documents caused some discussion. Mr Trimble said that some documents for example statements of parties' positions, would need to be made public. This was endorsed by Michael Ancram who said it was in the public interest for participants to be able to declare their public policy position, and confidentiality regulations should recognise this point.

Mr McCartney returned to a previous theme not strictly related to the issue under discussion. He again asked for a verbatim transcript of the plenary debate of 10 September, in particular of the Secretary of State's questions to the Loyalist parties following the DUP allegation of a breach of the Mitchell principles. He

referred again to the possibility that he may seek to have the exact text brought into the public domain, and criticised the official transcripts available from the Chairmen's note-takers for their narrative style, which did not provide sufficient detail. Dr Paisley commented that the transcripts are censored documents, and a full record should be available of the allegation debates. The Chairman repeated that the model followed by the official note-takers was that from the 91/92 talks. If a different style was required, the participants must decide what they wanted. It was too late to request a verbatim record after the event.

In discussing how to provide information on the talks to the press a number of suggestions were made. Mr Empey suggested that in order to assist informed debate, a system of unattributable briefings on lobby terms for selected journalists. These could be conducted by representatives of each party. A number of parties - NIWC, SDLP, Alliance - favoured the Chairmen's office giving briefings, but others - UKUP, DUP - thought it could damage their impartiality. Peter Robinson suggested it should be a responsibility of the Business Committee to prepare reports for the press, and Michael Ancram supported this suggestion. Views were expressed however that there should not be too many rules, or there would be problems of dealing with allegations of breaches of confidentiality; the system had to be based on trust.

At 3.30pm the session was adjourned at the call of the chair.

At 4.25 the second bilateral of the day was held with the Irish, again led by Mr Coveney. Michael Ancram led the Government side. This time the focus of Irish discontent was clearly their assumption that General de Chastlain was intended for the Chair of the Verification Commission. That he should also chair Strand 2 was unacceptable, and they requested an undertaking written in to the paper that whatever scenario was agreed to would not result in the same person chairing Strand 2 and the Commission. It may mean someone else being found to chair Strand 2.