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FROM: BRYONY LODGE  
SIL/TPU  
9 NOVEMBER 1993

F: PD: Position papers

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Mr Thomas - B  
Mr Bell - B  
Mr Watkins - B  
Mr Williams - B  
Mr Brooker - B  
Mr Cooke - B  
Mr Maccabe - B  
Mr Quinn - B  
Mr Beeton - B  
Mr Kyle - B  
Mr Archer, RID - B  
HMA Dublin - B  
Mr Hallett - B  
Mr Caine - B

PS/SECRETARY OF STATE (L&B) - B

#### AMENDMENT OF ARTICLES 2 & 3 OF THE IRISH CONSTITUTION

I attach a paper on Articles 2 and 3 of the Irish Constitution which examines the scope for agreement on how they might be amended to the satisfaction of both unionists and nationalists.

2. The paper is for information only, although it may inform future decisions on constitutional balance. It is not intended to replace earlier papers submitted to Ministers on Articles 2 and 3, but to update the analysis in the light of the positions taken by the participants in last year's Talks and recent statements by the Irish Government.

(SIGNED)

BRYONY LODGE  
SIL/TPU  
5 NOVEMBER 1993  
OAB EXT 6506

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AMENDMENT TO ARTICLES 2 AND 3 OF THE IRISH CONSTITUTION

Introduction

1. The Irish Government has agreed, in principle, to amend Articles 2 and 3 of their Constitution subject to a satisfactory outcome to the political process and the consent of the Irish people in a referendum. Indeed it has been increasingly forthcoming on the point, saying that it 'would' as well as 'could' do so, and referring specifically to Articles 2 and 3 rather than the vaguer 'constitutional issues'. It is natural to assume that provided the developments offered by the Talks process appeared to the Irish an improvement on the status quo - and in principle an increased role for nationalists in Northern Ireland and established North/South institutions would appear to offer such an improvement - then the Constitution would be amended and a settlement reached. In reality things may be more complicated.

Replacing or qualifying the territorial claim

2. It was initially surprising that the Irish seem more comfortable about amending their Constitution to incorporate an aspiration to a united Ireland than about the 'unambiguous consensus' HMG has sought - in an equivalent Article 1(a) of a new Agreement - that Northern Ireland is part of the UK. On the face of it they seem to amount to the same thing. But it has become increasingly clear that when the Irish talk about introducing an element of aspiration into the Constitution it is intended as an addition to rather than a replacement of the territorial claim. In other words they may be prepared to clarify the situation already set out in Article 29 of the Constitution - the principle of the 'pacific settlement' of international disputes apparently guaranteeing that there would be no attempt to bring about unification by force - but not to accept that Northern Ireland is not 'theirs.'

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3. Martin Mansergh advanced such a notion in conversation with John Dew over the summer (Annex A) but this is not a new position. Examination of all recently proposed amendments to the Constitution, from all parties in the Republic including Mary Robinson for Labour (Annex B), reveals that while the aspirational element is proposed as an addition, the territorial claim remains. Garret Fitzgerald could be counted as an exception in that he proposed, during the negotiations leading to the Agreement, an amendment along the lines of substituting an aspiration for the territorial claim. But the price he expected in return of 'movement in the direction of joint authority' was too high then - as it would be now. John Bruton was another exception for a while, proposing in 1990 that the territorial claim should be removed altogether and that amendment should not be used as a bargaining counter. But he was soon brought back into line by the mainstream of his party.

4. Apparently liberal statements from other parties in the Republic can be misleading. Last month for example Proinsias de Rossa, leader of the Democratic Left, produced an Agenda for Peace opposing the retention of Articles 2 and 3 in their current form:

"We believe that they are an affront to democracy, by holding out the threat of a day when all-Ireland rule will spread out from Leinster House to the deepest recesses of the Antrim glens and the front parlours of the Waterside. This fantasy, this dishonest fantasy, can now hardly be mentioned by hardened government Ministers without a grimace of shame, and yet it persists in our Constitution."

Despite this indignation Mr Rossa's own recently proposed amendment to the Constitution, while replacing Article 3 which claims the right to exercise jurisdiction over the whole territory, would have left intact the reference in Article 2 to the 'national territory' which the Irish Supreme Court has interpreted as a claim of legal right.

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Significance of the territorial claim

5. The territorial claim remains of primary significance to the Irish. Arguments that amendment would deny citizenship to Northern nationalists are red herrings; new legislation could easily restore such rights. But it is still a conviction in the Republic, and not just among the greener elements of Fianna Fail, that partition was a dirty trick on the part of the British and that Northern Ireland is rightfully theirs.

6. During last year's talks Mr Flynn said that 'Articles 2 and 3 expressed the fundamental conviction of the Irish people that partition was wrong.' The sentiment is not entirely anti-British. There is also perhaps some residual guilt that nationalists were left behind on partition. We may regard as absurd the Irish Government's attempt to rewrite history in its 1937 Constitution. But the idea that partition was and is a mistake came across very forcefully in the Irish delegation's analysis of the problem during last year's talks (Annex C), and in a series of speeches made by the Taoiseach and Tanaiste since the Fianna Fail/Labour coalition was formed (Annex D). Such analysis makes clear that were the Irish to remove the territorial claim altogether they would damage one of the nationalists' most treasured planks to unity: the right, as many see it, of the Irish people to self-determination.

7. The apparent attachment of even the liberal elements of the Irish political culture (Mary Robinson, the Workers' Party) to the "one nation" theory, which underlies the territorial claim, is significant. It indicates a fundamental failure to grasp or come to terms with the essence of Unionism and with the democratic right of Unionists, where they constitute a majority, to decline to join the Irish nation state; and a failure to recognise that they themselves applied and benefited from the same right in seceding from the UK in 1921. Unionists believe that the Irish

territorial claim is simply undemocratic and coercive; just as nationalists would have regarded the refusal of a British Isles majority to allow secession.

8. These attitudes also fail to recognise the fact that the 1921 partition was an attempt to meet the national aspirations of as great a number as possible - in today's parlance, an attempt to provide parity of esteem in the most direct sense.

Is compromise possible?

9. It is unclear whether it would be possible to devise a formulation which would take account of both nationalist and Unionist sensitivities. One possibility might be for the Constitution to retain the territorial claim in some form but to make Northern Ireland consent a requirement (such an amendment was proposed in TPU's paper last year on Articles 2 and 3 (Annex E) and a more recent elaboration has been devised by Mr Watkins (Annex F). A variant on this might be some kind of mutual recognition formula whereby the Irish Government would recognise the British Government's position that Northern Ireland is part of the UK and the British Government might recognise that the Irish Government takes a different view, but both sides would acknowledge that a united Ireland could only be achieved by consent. Such amendments do however raise major questions:

(i) Consent principle

Would any Irish declaration of its adherence to the principle of consent be meaningful while the status of Northern Ireland remains undefined? The revelation under the McGimpsey judgement that the status of Northern Ireland had been 'carefully undefined' under Article 1(a) of the

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Agreement resulted in considerable Unionist scepticism about the 'constitutional guarantee' it supposedly contained. If, the argument ran, in the view of the Irish Government Northern Ireland was already part of their territory then as far as they were concerned there was no need for Unionist consent since its status was already what they would wish. Were the territorial claim to remain, the same ambiguity could persist under the fifth of Mr Spring's new principles: 'If we believe in consent as an integral part of any democratic approach to peace, we must be prepared at the right time and in the right circumstances to express our commitment to that consent in our fundamental law.' Consent by whom, it might be asked, and to what?

(ii) Unionist parameters

Would the Unionists be prepared to accept any formulation which left the territorial claim intact? In general their position appears to be this. There should be no close relationship or joint institutions with a country which lays claim to Northern Ireland as its own territory. Assertions that it will only be 'reunited' by consent are irrelevant. In their eyes the claim is an affront and a denial of what was agreed by the two Governments in 1925. It also, they claim, gives oxygen to republican terrorism and allows them to justify their atrocities. A more moderate approach was displayed by the McGimpsey brothers, who in a discussion with John Dew on 25 August this year suggested that Article 2 should remain as it was, since they had no difficulty in being regarded as part of the Irish 'nation'. They suggested that instead Article 3 be changed to say that the nation consisted of two parts, one of which had voluntarily chosen union with the UK, but allowing both parts to be united by consent at some stage

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if each so desired. It is not clear however how far the McGimpseys would have the support of the rest of their own party for such an approach, let alone the DUP.

11. Would the Unionists ever accept that the British Government simply has a 'claim' to Northern Ireland in the same way as the Irish Government or that they only 'aspire' to be part of the UK in the same way that nationalists aspire to be part of a united Ireland? This seems to be the burden of recent statements by Irish Ministers (Annexes C and D). An alternative approach might be that if HMG would give up its own 'claim', leaving Northern Ireland in a carefully undefined limbo, then the Irish territorial claim might go too. But while the position of Northern Ireland as part of the UK has the force of international law behind it this solution seems unlikely to appeal to the Unionists, or indeed HMG.

#### The way forward

12. It is difficult to imagine what solid foundation there would be for Northern Ireland's future were current ambiguities to remain in any settlement. Indeed HMG has already given its support to the principle of 'unambiguous consensus', both at last year's talks (Annex C) and in the House of Commons on 3 July 1992:

'The Government will seek, as a product of the talks process as a whole, an unambiguously expressed consensus on the constitutional issues and a framework for relationships which be genuinely acceptable to all. We believe that such an outcome should thereby enable all participants to acknowledge Northern Ireland's present status as a part of the United Kingdom ...'

13. There has in the past been an argument that the Unionists rather than HMG should make the running on Articles 2 and 3 since they are the demandeurs. But in an attempt to move the process

along and to remove what would otherwise be a sticking point we ourselves have undertaken to discuss constitutional issues with the Irish. To an extent we are all demandeurs. The Unionists want to see the territorial claim removed, and have made its removal (or at least its substantial amendment) a condition precedent to their participation in North/South institutions. But in that sense the Irish and SDLP, who are the ones who particularly want such institutions, are the demandeurs and must consider what they are prepared to do to get them. The role of HMG is not perhaps to suggest what amendments might work but to ensure that the Irish fully understand how much might be required before the Unionists will sign up to any settlement.

14. The Irish have, so far, been extremely cautious about producing their own ideas on constitutional change, citing the risk of legal or constitutional challenge should they become public. Such caution is understandable. We have long understood the Irish wish to consider the whole package before making any significant moves on Articles 2 and 3, and their need to be sure that any referendum they might sponsor on the Constitution would be successful. The corollary is however that HMG will wish to show a similar caution in negotiation and to avoid making concessions, whether in terms of constitutional balance or powers for North/South institutions, in the absence of corresponding movement on the part of the Irish. The Irish Government is not after all without influence over the electorate: it is up to them to create the climate in which a referendum could succeed.



Recent assessments by Irish officials political advisers

Irish officials and political advisers have sent out a number of signals as to the difficulties they would face in acknowledging Northern Ireland's status as part of the UK.

2. Speaking to John Dew on 9 June Martin Mansergh suggested that the Irish Government had two options to deal with amendment as part of any settlement: to pass legislation on the pattern used for the Single European Act, stating that it expressly overrode the Constitution, but without changing the wording of the Constitution itself; or to add language to Articles 2 and 3 to the effect that while their 'judicial content' remained unchanged, they were only to be pursued on the basis of the consent of the people of Northern Ireland. The suggestion put to him by the British side of the Secretariat that the Republic redefine itself in terms of the 26 counties was 'quite simply a non-starter.'
3. Declan O'Donovan's recent comments on the framework document were also revealing:

Before engaging in such an exercise both Governments should be confident that such an agreement could actually be reached between them. He was not sure that this would be possible, referring to the Prime Minister's recent letter to Mr McNamara and its reference to an 'unambiguous acknowledgement' of Northern Ireland's constitutional position. Until then the formula used by the British side had been an "unambiguous understanding ..." which, he claimed, had a constructive ambiguity which this latest formula did not offer.

[Mr McKervill's note of the Liaison Group meeting of 6 August]

4. On 31 August Mr O'Donovan told Mr Thomas at lunch that he began to see real doubts in securing the passage of a referendum to reform Articles 2 and 3. And subsequently he said to Mr Williams over dinner on 1 October that the Taoiseach was personally very sensitive about the Government's position on Articles 2 and 3, and would not be responsive to suggestions that the Irish side should give a clearer statement that it intended to modify them into an aspiration.

5. At the Liaison Group on 14 October Mr O hUiginn said that if Articles 2 and 3 were changed, the British perception of Northern Ireland as part of the UK would stride the field uncontested. The Irish view of Irish unity would become a remote and distant contingency. The door on Irish unity would be closed or the route to it complicated. He referred warmly to Mr Hurd's references to Britain and Ireland being in 'partnership' and not 'rivals for sovereignty'.

7. In January 1980, the Progressive Democrats put forward a proposed new constitution, Article 1, sub-paragraph 2, of which would have replaced the present Articles 2 and 3 with the following formulation:

"The people of Ireland hereby proclaim their firm will that the national territory, which consists of the whole island of Ireland, be united in harmony and brotherly affection between all Irishmen".

## EXTRACT A FROM TPU PAPER OF 18 JUNE 1993

## PREPARATION FOR STRANDS 2 &amp; 3 OF THE TALKS: ARTICLES 2 &amp; 3 OF THE IRISH CONSTITUTION

Previous proposals for the amendment of Articles 2 and 3

6. Many in the Irish Republic have come to see Articles 2 and 3 as anachronistic and obstructive to the development of good relations between the two parts of Ireland. As a result, there have been several proposals to amend them in recent years. The first was contained in the report of the all party Dail Committee on constitutional reform which reported in December 1967. The report proposed no amendment of Article 2, but the replacement of the reference in Article 3 to the "right of jurisdiction" over the whole of the national territory by an aspiration that that territory be "reunited in harmony and brotherly affection between all Irishmen". This proposal would thus have retained the reference to the "national territory" and would not have enshrined the principle that the consent of a majority of the people of Northern Ireland was necessary before unity could be achieved. (No Irish Government had up to that time formally accepted that Northern Ireland was an appropriate unit for self determination).

7. In January 1988, the Progressive Democrats put forward a proposed new constitution, Article 1, sub-paragraph 2, of which would have replaced the present Articles 2 and 3 with the following formulation:

"The people of Ireland hereby proclaim their firm will that the national territory, which consists of the whole island of Ireland, its islands and territorial seas, be united in

harmony and by consent. The laws enacted by the Parliament established by this constitution, until the achievement of the nation's unity may otherwise require, shall have the like area and extent of application as the laws of the Parliament which existed prior to the adoption of this constitution. Provision may be made by law to give extraterritorial effect to such laws."

8. The PD's new constitution would thus have retained the existing definition of the national territory while removing the reference to the "right of jurisdiction" over the whole of that territory. It included a reference to reunification by "consent", but did not specify whose consent was needed.

9. Following the McGimpsey judgement, Mrs Mary Robinson (then an independent Senator) put forward a proposal in the Irish Times on 21 April 1990 for grafting on to Articles 2 and 3 the substance of Article 1(a) of the Anglo-Irish Agreement. This would have enshrined in the Constitution the principle that unity required the consent of the people of Northern Ireland, but would have left Articles 2 and 3 otherwise unaltered.

10. On 5/6 December 1990 the Dail debated a Private Member's Bill tabled by the Workers' Party to amend Articles 2 and 3. The Bill proposed adding the following sentence to Article 2:

"This shall not be taken to mean that there will be any change in the status of Northern Ireland other than with the consent of a majority of the people of Northern Ireland".

11. The Workers' Party also proposed the replacement of Article 3 by a provision proclaiming the firm will of the people of the state that the people of Ireland "be reunited in peace, harmony and by consent." While retaining the definition of the national

territory, therefore, these amendments expressly provided that the consent of the people of Northern Ireland would be needed before reunification could be achieved and removed the "right of jurisdiction" from Article 3. (The positions adopted by the other parties in the debate are analysed in the paper on the "Constitutional Issue").

This conflict is the legacy of the difficult and often tragic relationship between these two islands, centred predominantly on the question of whether and to what extent Ireland should enjoy the right of self-determination, vis-a-vis Great Britain. In certain areas the necessary search for accommodation is particularly challenging, since there is a direct and outright conflict between the two aspirations, for example in relation to issues of sovereignty.

[23 August 1992: Allegiance and Underlying Realities]

There is no suggestion anywhere in the agreed basis for Talks that such constitutional issues must be confined to developments in one direction only, or to changes regarding only one of the two rival constitutional perspectives on the status of Northern Ireland.

The Constitution reflects the nationalist assumption that the traditional historic and political entity encompassing the island of Ireland should remain the valid frame of reference for the collective exercise of the right of the Irish people to self-determination.

The electorate will wish above all to be reassured that any proposed amendment reflects the Irish wish to reconcile and acknowledge the rights and aspirations of both communities on a basis of their equal legitimacy, and is not an attempt to resolve

Positions during 1992 TalksIrish Government

'This conflict is the legacy of the difficult and often tragic relationship between these two islands, centred predominantly on the question of whether and to what extent Ireland should enjoy the right of self-determination, vis-a-vis Great Britain. In certain areas the necessary search for accommodation is particularly challenging, since there is a direct and outright conflict between the two aspirations, for example in relation to issues of sovereignty.'

[28 August 1992: Allegiance and Underlying Realities]

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'The Constitution reflects the nationalist assumption that the traditional historic and political entity encompassing the island of Ireland should remain the valid frame of reference for the collective exercise of the right of the Irish people to self-determination.'

'The electorate will wish above all to be reassured that any proposed amendment reflects the Irish wish to reconcile and acknowledge the rights and aspirations of both communities on a basis of their equal legitimacy, and is not an attempt to resolve

the conflict in favour of one side and at the expense of the other. They will be particularly sensitive to the impact of any proposed amendment on the position of the nationalist community within Northern Ireland who, unquestionably, were the victims of the Government of Ireland Act. The Government would feel justified in proposing constitutional change only in a context where they considered the electorate could be offered reassurance on these and related aspects, and persuaded that the change being submitted to them was in the interests of both communities in Northern Ireland and would help achieve the truly historic conclusion of peace and stability in Ireland.'

[Constitutional Issues, 28 August 1992]

'Articles 2 and 3 expressed the fundamental conviction of the Irish people that partition was wrong. It would be difficult to confront and overcome that conviction.'

(Mr Flynn, Strand II Committee 21 September 1992)  
 unambiguous statement of the status of Northern Ireland as a part of the United Kingdom.'

HMG

The British Government, for its part, will seek as a product of the Talks process as a whole an unambiguously expressed consensus on the constitutional issues and a framework for relationships which will be genuinely acceptable to all. We believe that such an outcome should thereby enable all participants to acknowledge Northern Ireland's present status as a part of the UK.'

[Strand 2: opening statement by Secretary of State]

DUP

'If our two countries were to sit side by side, in continuing hostility, then Unionists would condemn the territorial claim but would not require it to be removed. If, on the other hand, we are

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to establish a proper neighbourly relationship between Northern Ireland and the Irish Republic, as we earnestly wish, then the removal of that claim is not just a matter for consideration but an imperative.'

[Mr Molyneux, Strand II Committee: 18 September 1992]

[A New Start: 28 August 1992]

EDLR

The territorial claim continued to inspire violence and legitimise the IRA. There could be no proper co-operation until there was mutual respect between both parts of Ireland, which necessarily included the recognition of NI as part of the UK de facto, but de jure also. Articles 2 and 3 might, if necessary, be replaced with an aspirational clause rather than repealed.

[Dr Paisley: Strand II Committee: 18 September 1992]

The relations with the Republic of Ireland will consist of more than UUP good neighbourliness.

'With regard to Northern Ireland there must be a clear and unambiguous statement of the status of Northern Ireland as a part of the United Kingdom.'

It has been said repeatedly by those who support the Anglo-Irish Agreement

[UUP principles for a new agreement: 22 September 1992]

'The setting up of proposed (North/South) structures would be triggered by a positive response from the Irish Republic's electorate in a referendum to deal with the "territorial claim" contained in Articles 2 and 3 of the Irish Republic's Constitution.'

which is consistent with your Government's solemn declaration of recognition.' This is no less relevant today. We are far from the point of Ireland which would replace the

[Structures for Communication and Co-operation: 28 September 1992]

Articles 2 and 3 typified the UUP dislike of the Constitution although they were not uniquely objectionable: other portions eg

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the Preamble were aggressive and offensive in tone and set the scene for the two Articles. Constitutional claim resented but not taken seriously until the McGimpsey judgement.

[Mr Molyneaux, Strand II Committee: 18 September 1992]

Constitutional August 1992]

SDLP

Constitutional reform that did not meet the requirements of the Did not address Articles 2 and 3 except to acknowledge that the new political arrangements they proposed were likely to contain 'constitutional implications.'

Strand II Committee 18 September 1992]

Alliance

The existence of the Irish Nationalist tradition requires that relations with the Republic of Ireland will consist of more than mere good neighbourliness.

Such institutional relations will require the promotion of a mutual respect and recognition which has not existed before.

It has been said repeatedly by those who support the Anglo-Irish Agreement, that such respect and recognition is contained already in Article 1 of the Agreement. This was also said of the Sunningdale Agreement. At that time, in 1973, my predecessor Oliver Napier said, "...that recognition now makes a nonsense of those terms in your Constitution which claim jurisdiction over our territory. We now expect you to take urgent steps to bring in a new Constitution which is consistent with your Government's solemn declaration of recognition." This is no less relevant today. We are familiar with proposals, and indeed proposed wordings, from politicians in the Republic of Ireland which would replace the offending claim, with an aspiration. We ourselves have a proposed working which would be acceptable to us and which we wish to explore with others at the appropriate juncture. We look forward

to seeing from the Government of the Republic of Ireland, their proposals for a solution to this problem, which may form part of the overall package which emerges from these Talks'.

[Underlying Realities, Identity, Allegiance and Constitutions: August 1992]

'In the event of an overall agreement that took account of the Constitutional reform that did not meet the requirements of the situation would be the worst of all possible worlds.

[Dr Alderdice  
Strand II Committee 18 September 1992]

[Mr Reynolds speaking on RTE Radio 1 on 15 September 1993]

'Our common need now is to dismantle the perception thus bequeathed to Irish nationalists of Britain as the sponsor and exploiter of division in Ireland. We must in a sense revisit the arrangements of the twenties, not to deny the realities of partition or unionism, which the statesmen of those days grappled with by their lights, but to seek to reconcile them, with all the insights we have since gained, in a better and more imaginative way ... On both sides we have constitutional doctrines on Northern Ireland which can appear one-dimensional when set against reality ... rivalry in sovereignty is essentially a contest over which of two theoretical over-simplifications may be involved in Northern Ireland.

[Mr Spring speaking at the BIA Conference 10 September 1993]

Recent statements by the Taoiseach and Tanaiste

'In the event of an overall agreement that took account of the constitutional position of both traditions and that both traditions could have their identity in one way or another recognised to their satisfaction in those circumstances that type of agreement would be put to the Irish people both Northern and South for their approval ... The Government of Ireland Act is a constitutional position in the North of Ireland and Articles 2 and 3 is the constitutional position down here. What we are looking for is a balanced constitutional agreement that takes account of both traditions and both identities.'

[Mr Reynolds speaking on RTE Radio 1 on 15 September 1993]

'Our common need now is to dismantle the perception thus bequeathed to Irish nationalists of Britain as the sponsor and exploiter of division in Ireland. We must in a sense revisit the arrangements of the twenties, not to deny the realities of nationalism or unionism, which the statesmen of those days grappled with by their lights, but to seek to reconcile them, with all the insights we have since gained, in a better and more imaginative way ... On both sides we have constitutional doctrines on Northern Ireland which can appear one-dimensional when set against reality ... Rivalry in sovereignty is essentially a contest over which of two theoretical over-simplifications may be involved in Northern Ireland.'

[Mr Spring speaking at the BIA Conference 10 September 1993]

18. As recommended in the "Constitutional Issue" paper, should avoid ourselves putting forward any specific amendments to  
EXTRACT B FROM TPU PAPER OF 18 JUNE 1993

PREPARATION FOR STRANDS 2 & 3 OF THE TALKS: ARTICLES 2 & 3 OF THE  
IRISH CONSTITUTION

...Ideally, we should like to see a revised formulation which:

(a) either removed the definition of the national territory or made clear in some way that it was a statement of political aspiration rather than a legal claim;

(b) removed the reference to a right of jurisdiction over the territory of Northern Ireland;

(c) included the principle that unity could only be achieved with the consent of a majority of the people of Northern Ireland.

17. It is likely, however, that we shall have to strike a balance between what is ideal and what is negotiable. As stated above, removal of the definition of the national territory would probably be a sticking point for the Irish Government. They may also resist a specific reference to unity requiring the consent of a majority of the people of Northern Ireland. We shall need to take a view, as the negotiations develop, as to how far we should insist on these points, or support the Unionists in doing so. Final decisions are likely to depend on (a) the likely shape of the rest of the Strand 2 package and (b) the risk of deadlock over this issue. Our "bottom line" might be that we could live with a retention of the definition of "the national territory", provided we secure removal of the claim to a right of jurisdiction over the whole of that territory and inclusion of the principle that unity requires the consent of a majority of the people of Northern Ireland.

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18. As recommended in the "Constitutional Issue" paper, we should avoid ourselves putting forward any specific amendments to the Irish constitution. We might, however, wish to have in mind a possible revised formulation to test against proposals which the Irish Government and the Unionists put forward. A possible formulation might be along the following lines:

"The people of Ireland proclaim their firm will that [the national territory] [the island of Ireland] [the territory of Ireland] be reunited in harmony and with the consent of a majority of the people of Northern Ireland. Until such unity shall be achieved, the laws enacted by the Parliament established by this constitutional shall have the like area and extend of application as the laws of the Parliament which existed prior to the adoption of this constitution."

On possible approach, which would build on the Mary Robinson/WP ideas set out in paras 9 and 10 of Annex B, would be:

- (a) the Irish amend their Constitution
  - (i) to retain the assertion that the whole island is "Ireland"; but also
  - (ii) to provide that the 6 counties of NI cannot become part of the Irish state unless and until the NI population so votes in a referendum (tested periodically);
- (b) thus the Irish would not directly give up the claim/assertion that "Ireland" is the whole island, but would make NI consent an Irish constitutional requirement;
- (c) similarly, the British Government (and unionists) would continue to assert, as of right, and give effect to the fact, that NI is part of the UK;
- (d) the NI constitutional referenda to be held under both British and Irish constitutional legislation, ie, a referendum could only take place when the 2 governments agreed to establish the machinery (an independent Commission?) to carry it out.
- (e) the Irish constitutional legislation might also provide for the 26 county electorate to vote simultaneously on the proposition put to the 6 county electorate (national self-determination or the appearance of it).

In effect, both the UK and Ireland would continue to hold their territorial "claims", but they would reflect agreement in constitutional provisions on the only means by which the conflicting claims will be resolved. And the simultaneous referenda would provide the "national self determination" element.

Mr Bell	2
Mr Watkins	2
Mr Williams	2
Mr Bowyer	2
Mr ...	2
Mr ...	2
Mr ...	2
Mr ...	2
Mr ...	2
Mr ...	2
Mr ...	2
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Mr ...	2

PS/Secretary of State

AMENDMENT OF ARTICLES 2 AND 3 OF THE IRISH CONSTITUTION

1. Mr Lodge has kindly copied to me his minute of 9 November and paper on Articles 2 and 3 of the Irish Constitution.
2. The paper usefully sets out many of the uncertain signals which we have received from the Irish side about what they might do about change to the Irish Constitution. I agree that progress towards an acceptable amendment of the Irish Constitution will not be straightforward. But I do not at all agree with paragraph 2. We do not know - despite the hopes voiced by various officials and Mr Hancock - what at the end of the day, the Irish will settle for. I do not see any conclusive evidence to support Mr Lodge's statement that "it is increasingly clear" that the Irish will opt for an addition to the Constitution rather than a replacement. We do not know what they will do now although the issue of an additional article that changes the many elements and the price for settling now will be high, possibly as high as £500 million.
3. We may at some stage have to say to the Irish that what they are proposing is not enough. But I do not think we should push them into a corner now. They have probably all the time of their mind as to how far they will go and will have weighed up the total package of falling back on us and they will not be surprised if we say that if pushed on this point we...