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Draft 1

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**Issues Paper: North/South Institutions**

1. The creation of North/South institutions will be a core issue in Strand 2 of the forthcoming negotiations, as at Sunningdale and in the 1992 talks. A very substantial gap exists between the position of the two Governments as set out in *A New Framework for Agreement*, which is broadly endorsed by the SDLP and seems generally acceptable to Alliance, and even the most advanced proposals of the UUP, as tabled in 1992.
  
2. This paper summarises the principal institutional/structural questions likely to arise in the negotiations. It assumes that our approach in the negotiations will be firmly based on the Framework Document. It does not explore which areas of activity should fall within the remit of new institutions, which is the subject of a separate paper. Nevertheless, the two aspects of the question are intimately connected. The stronger the practical case that can be advanced for treating matters on a cross-border or all-Ireland basis, the more convincing the argument for creating the relatively elaborate complex of institutions envisaged in the Framework Document will be. The question of the specific arrangements which might be made for EU matters is also to be explored separately.

Framework Document

3. The main features of the Framework Document's treatment of North/South institutions are:
  - there is a need for institutions to have a clearly defined purpose.
  
  - that purpose, while encompassing the common pursuit of practical economic and social objectives, is explicitly seen as wider, and as fundamentally political in its motivation (cf para. 38 in particular).
  
  - institutions would also require a clear identity.
  
  - the centrepiece of the new institutions would be a North/South body involving political heads of Departments, for whom participation in the body would be a duty of service.

- the body could exercise its functions directly, through subsidiary bodies, or through existing agencies.
  
- the body would be established and maintained by legislation in both sovereign parliaments.
  
- that legislation would also specify the initial functions to be discharged or overseen by the body.
  
- the determination of functions to be discharged or overseen would take account of four broadly defined criteria of common interest, mutual advantage, mutual benefit, and economy.
  
- additional functions could in time be designated by the administrations/legislatures North and South, possibly on the recommendation of the body.
  
- it would be envisaged that the body's remit would be dynamic
  
- functions would fall into the three broad categories of consultative, harmonising and executive.
  
- matters already designated could be moved on the scale of functional categories.
  
- both Governments anticipate that significant responsibilities, including meaningful functions at executive level, would be designated.
  
- within the limits of the competences of new Northern Ireland institutions, neither Government would place any restriction on the matters which might be designated.

- there would be arrangements for legal, administrative, financial and political accountability. It is envisaged that in their exercise of powers in the body Heads of Department would be accountable to the Oireachtas and new Northern Ireland institutions, respectively.
- the body would meet regularly and frequently.
- it would operate by agreement between the two sides.
- there would be a North/South parliamentary forum.
- there would be administrative support staffed jointly by civil servants , and appropriate finance for the body and its agencies would also be provided.
- in its treatment of East/West matters, the Framework Document states that the British and Irish Governments would have oversight of all new institutions, and that intergovernmental procedures would be put in place to allow for the redress of any failure by institutions to operate properly. In the event that devolved institutions ceased to operate, arrangements to maintain North/South co-operation would be made.

#### Matters requiring further consideration

4. The parameters for North/South institutions set out in the Framework Document are quite detailed. However, and while the scheme is clearly for negotiation, on the assumption that what is agreed will substantially conform to it a number of issues, primarily of a practical/administrative nature, will require examination, in addition to the basic questions of which matters will be designated and the EU dimension.
5. Will the body have a specified and standing membership of a certain number of heads of Department from the two jurisdictions (the Council of Ireland model) or will it, while having a consistent legal and institutional personality, meet in varying functional formats

(the EU model)? If the former, how will the decision-taking requirement of “agreement between the two sides” be met? By unanimity? By qualified majority? Would the Northern side be expected to act as a collectivity? In the EU model, could it be envisaged that while the body would normally meet in specialist form (eg on agricultural matters) there would be periodic meetings of a “super-Body” bringing together the Panel (or other overall head of the Northern side) and the Taoiseach/Minister for Foreign Affairs to impart overall direction to the work of the body and to resolve disputes?

6. The creation of a body, which would impose new duties upon Ministers and probably upon Departments, and would probably involve the creation of distinct new subsidiary bodies with executive powers, would no doubt require constitutional, legal and administrative changes in our jurisdiction. In some ways, the best analogy might be with the consequences of EU membership. Among the issues to be considered would be whether there was a need for an amendment to Articles 6 or 29 of the Constitution to allow ratification of a new Agreement creating such institutions; whether the Ministers and Secretaries Act would require amendment (to enable Departments to act as agents of the Body); the legal personality and accountability of the body in its executive functions - in which jurisdiction would its acts be judiciable, for example?; where there was a transfer of executive authority away from Ministers/Departments, the possible need for the amendment of existing legislation, contracts etc. Consideration of these issues would need to be put in train alongside discussions on the remit of the body.
7. Arrangements for political accountability to the Oireachtas would need to be put in place. The possible additional role of a parliamentary forum in this connection could also be explored.
8. In due course, as the likely extent of the body’s functions became apparent, there would have to be a detailed examination of the staffing and financial consequences.

#### Unionist Criticisms of Framework Document Approach

9. The Unionist parties can be expected to resist strongly the proposals set out in the

Framework Document. It remains to be seen whether they will, tactically and strategically, adopt a policy of rigid and total opposition, or whether, as foreshadowed in the 1992 talks, they will offer positive proposals which may appear constructive but which in reality will be aimed at emasculating the North/South dimension. Equally, this paper does not explore whether there are aspects of the Framework Document on which we might be flexible, and, if so, when and how this should be signalled - this may arise for consideration during the negotiations.

10. The Framework Document's treatment of North/South issues has been extensively attacked both by Unionist politicians (notably Robert McCartney, Peter Robinson and David Trimble) and by a number of academics and commentators. While the angles of assault vary, the following are the main lines:

Substantive

- the degree of economic interaction between North and South is already at normal levels;
- the benefits of further integration have been grossly oversold;
- while further integration and co-operation may be desirable, this should be led by the private sector;
- where government activity is required, this can be effected through co-operation between departments and agencies; the creation of new structures is unnecessary;
- new bureaucracies will be expensive, wasteful and will actually discourage practical co-operation.
- both North and South should be focussing on developing their links with Britain and the wider world;

- the EU is already a vehicle for harmonisation; where further harmonisation may be required, logic points to an East/West axis.
- the creation of new links in the arts, culture and heritage denies Northern Ireland's distinctiveness and Britishness

#### Institutional/Formal

- the basic purpose of new institutions is patently political, and conforms to a nationalist agenda which posits a false equality between the reality of the Union and the aspiration to a United Ireland.
- institutions are intended to lead, in a functionalist way, to a *de facto* United Ireland; this is confirmed by the dynamic remit envisaged for the North/South body.
- the creation of a body with such extensive powers is well beyond normal international practice and may even be questionable under international law.
- there would be a ratchet effect whereby all movement would be in the direction of increasing the body's powers.
- the body would have a distinct and free-standing institutional identity, and would ultimately derive its authority from Westminster and Dublin, and not from institutions within Northern Ireland.
- an embryonic all-Ireland bureaucracy will be created in the secretariat of the new body.
- the valid distinction between cross-border and all-Ireland bodies has been ignored.

- the criteria for determining which areas of activity may come within the remit of the body are so general as to be meaningless; the consultative function is so all-embracing as to require Northern institutions to report all activity to Dublin.
  - the duty of service on the body interferes with the right of elected representatives in Northern Ireland to act as they, and their constituents, see fit: only those willing to collaborate with the body will be permitted to hold office.
  - Northern nationalist representatives on the body will side with the South rather than with their Northern colleagues, thus weakening the safeguard offered by the consensus principle.
  - a new Northern assembly will be so hamstrung with checks and balances as to be unable to exercise proper control over the body .
  - the two Governments will exercise their overall powers of oversight and guarantee in such a way as to force Unionists into agreeing to an expansion of the body's functions over time.
  - they are also prepared to keep North/South links in being even if devolved institutions collapse; this gives nationalists an incentive not to cooperate in such devolved institutions.
11. Unionist proposals for North/South co-operation have been very cautious and, since 1992, sketchy. The moderate and pragmatic element within the UUP may accept the necessity of some form of institutional linkage. However, others within the party regard Empey et al. as having gone too far in 1992. The Unionists' proposal in 1992 for an inter-Irish committee as part of a Council of the British Isles essentially sought to postpone decisions on the substance of North/South relations until after the creation of new institutions in Northern Ireland. It held out the possibility of bodies with limited executive powers (along the lines of the Foyle Fisheries Commission), but lacked

specificity and certainty.

12. Since 1992, the UUP has entered into little detail about North/South links. Their *Statement of Aims* (November 1995) maintains the proposal for a Council of the British Isles, which might - as envisaged in Dermot Nesbitt's accompanying commentary - operate in flexible formats allowing for some Belfast/Dublin interaction, including the creation of executive bodies where necessary. *The Democratic Imperative* (February 1996) acknowledges the need for "a proper and appropriate relationship with the Irish Republic both for a) the mutual exploitation of any economic benefits and b) the acknowledgement of northern Nationalists' empathy with the Republic of Ireland, consistent with Northern Ireland remaining an integral part of the United Kingdom." However, these moderately encouraging words have not been supported with any detail, and the leader's commitment to them is unclear: the paper was launched by Reg Empey, and Trimble's recent speech to the Institute of Directors, while not explicitly ruling out any institutional links, forcefully made the case against ambitious structures.
13. The Cadogan Group, in their paper *Lost Accord* (June 1995) recognise the importance of the Irish dimension to nationalists, and the need to go beyond increased cross-border co-operation. They suggest a consultative North-South Co-operation Council to promote activities on an all-Ireland basis, on condition that nationalists fully recognise the legitimacy of Northern Ireland as a region of the UK. They suggest that the actual institutions proposed in the Framework Document are not incompatible with such an approach, but register opposition to their political context and to their intended dynamism.
14. In the Forum's debate on the North/South element of the Framework Document, Alliance generally endorsed the proposals, while making much of partitionist attitudes in the South and stressing the importance of democratic accountability.
15. In keeping with their general approach, during the same debate Sinn Féin avoided entering into specifics. However, they did see a possible role for "all-Ireland institutions"

as a step towards the end of partition. They stressed the need for “a democratic rather than a bureaucratic mandate.” This apparent implicit acceptance of a democratic basis for such institutions short of a united Ireland was vigorously probed by the SDLP.

Possible Response to Unionist criticisms

16. It will be necessary to prepare a carefully-focussed response to the Unionist line of attack. This is a matter for substantial further work, but the following broad lines may be suggested:

- we will need to marshal general economic arguments in favour of the value of and scope for integration and for the potential role of institutions in fostering such integration; while worthwhile research material exists and should be forcefully deployed, we should not oversell the case by claiming that it is completely straightforward or can be definitively settled. All economic forecasting, in particular of the relatively long-term sort involved here, is by definition speculative. General ideological attitudes towards the role of the state in fostering economic development also come into play.
- in relation to individual sectors of activity, it goes without saying that our arguments should be as thorough and carefully-prepared as possible
- in response to Unionist views of the political motivation and purpose of a North/South body we should be frank, not defensive: what is envisaged has a clear political purpose, which derives from need to accommodate the nationalist identity within a framework which is not of their choosing. Is Unionism ready to confront this in its own terms or not?
- on specific Unionist fears about the mechanics of the North/South body, we should do all possible to reiterate the many safeguards and guarantees we envisage, and to counter some of their more paranoid anxieties.

Further Work

17. What is proposed here overlaps to some extent with what is being done under the “Economic and Social Co-operation” and “EU dimension” headings.
18. With a view to the eventual preparation of a strong position paper on common economic and social interests North and South, we need a background paper examining the overall case for increased North/South economic and social co-operation, and the Unionist critique of this case. This will be of course be supplemented by the detailed work done inter-Departmentally. This material might then be used in the preparation of rebuttal/Q&A briefing.
19. What is in the Framework Document offers the basis for a paper on Institutional Arrangements. Further down the line, we will need to think in more detail about the precise modus operandi of a body.
20. The constitutional/legal/administrative implications for this jurisdiction of a North/South body with executive powers might be flagged in an inter-Departmental committee and subsequently pursued, generically in the first place, with the Departments of Finance and the Taoiseach and the AG’s office.
21. A detailed study of Unionist political/institutional objections to the North/South element of the Framework Document should be undertaken, and subsequent rebuttal/Q & A material prepared.

Research Unit

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