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Approach of Irish side to joint study
of possible new institutional structures

1. It is necessary to decide what proposals will be put forward by the Irish side when the joint study group on possible new institutional structures holds its first meeting on 6 March. The Taoiseach has indicated that he would not set limits to what the study of institutional structures might or might not involve. Our approach, he indicated, was flexible and open and our wish and intention is that no possibility should be ruled out and that different concepts should be considered solely on the basis of whether or not they contribute to political development directed towards the objectives set out in the Communique of 8 December, 1980 i.e. peace, reconciliation and stability (in Northern Ireland) and improved relations between the peoples of this island and of the two countries. Also relevant is the Taoiseach's final comment in the Dail on 11 December in response to a purported clarification by Deputy FitzGerald.

2. At the meeting in London on 30th January, the Irish side referred to the possibility of a range of options being given in the papers coming forward from the study groups. Reference was also made to the need for an open and ambitious North-South element in the work of the study groups and mention was made by way of example of the possible establishment of an Anglo-Irish Council. The British side, in responding, acknowledged that we would be raising such concepts in the context of the joint studies.

3. Guidelines set down following a meeting with the Taoiseach on 28 January and subsequently given his general approval indicated that under the institutional heading, we would:

- (1) seek to have different forms of relationships between the two countries examined, including an Anglo-Irish Council with stated functions;

- (2) in the context of new institutional structures, seek to have raised the question of a federal, confederal or unitary solution to the Northern Ireland problem, within the context of Anglo-Irish relations generally.

4. At a meeting in the British Embassy on 19 February attended by British and Irish members of the Joint Steering Group, the following expressions of view or responses to soundings emerged on the British side:

- (1) they regard the moves already taken as very significant and there is a feeling of unease, on the part of the Prime Minister, who may take the view that we are moving too far too fast
- (2) unionists generally, including moderates, are increasingly feeling themselves to be under threat. It was necessary, to allay suspicions, to reiterate the principle of consent
- (3) the wording of the statement by Mr. Atkins on 10 February, viz:

"the studies take place within, and do not question, the constitutional framework in which the position of Northern Ireland within the United Kingdom cannot be changed without the consent of the people of the province and of Parliament at Westminster"

was carefully drafted. One could conceive of a wide range of institutional structures that could be established with respect for that principle, including structures relevant to future timescales in which consent for changing that position might be obtained. They conceived of a wide-ranging study covering a broad span of options

- (4) we would have to do a lot of work to bring the Prime Minister around to our way of looking at the process and would be well advised to commence with bread and butter matters.

5. The above is background. The concept of an Anglo-Irish Council appears to be generally accepted on the Irish side and the inclusion of Ministerial and Parliamentary structures would scarcely cause any difficulty, if other features were acceptable. The area for decision relates to the range of options as regards the powers or functions of the Council which

might be put forward for study by the Irish side. A second basic question for decision is whether we should already at the stage of joint studies propose study of future, ambitious models of North/South or All-Ireland structures or whether we should hold over such proposals on the basis that they would be put forward for study within or under the aegis of the Anglo-Irish Council, when established.

6. The second of these questions is taken first. The preamble to the terms of reference of the joint study groups, taken with the indications reported in paragraph 4 suggest that it should be possible to secure British acceptance that possible future all-Ireland structures should be studied, on the basis that they would respect the position that Northern Ireland would not cease to be a part of the U.K. without majority agreement. The reference in the preamble to the Joint Communique of 21 May, 1980 is helpful in that the following was contained in that document:

"While agreeing with the Prime Minister that any change in the constitutional status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland, the Taoiseach reaffirmed that it is the wish of the Irish Government to secure the unity of Ireland by agreement and in peace".

7. Considerable attention was paid to the distinction drawn by Mrs. Thatcher after the Dublin summit between institutional and constitutional structures. Since then, the emphasis in statements on replies by Mrs. Thatcher and Mr. Atkins has been on the constitutional position i.e. on consent. Thus it is possible to make a good case for study of future structures brought about through change on a basis of consent. This is not to deny that the British emphasis is likely to be on a pragmatic approach, related to structures that can be established in the political circumstances of 1981.

8. The following questions then arise:

- (1) is it desirable for the Irish side to propose studies of federal etc. structures now?
- (2) what would be the purpose of such a proposal?

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9. The British are likely to take the line that no purpose would be served, that if it were to become known that such matters were being studied, far from contributing to peace, reconciliation and stability, the result would be greatly increased division and disorder. They will argue for a slower, step-by-step approach. One has to recognise the force of their argument about the possible violent consequences of any revelation of such studies. This is an argument, however, not for refraining from conducting such studies but rather for keeping them confidential. It also suggests that when completed they should not be published, except in favourable conditions. Whether they would be tabled at any future inter-governmental conference with provision for attendance by Northern Ireland political leaders would be for judgement by reference to the evolution of British Government and unionist attitudes.

10. But among the arguments for and purpose of conducting studies on these structures in the present round are that association of the British with such studies, when eventually revealed, will give a clear signpost as to the direction in which they wish to see structures evolving. It should be easier now to get reluctant British agreement to the conduct of such studies as part of a balanced process including other studies pointing along roads they would wish us to travel than in any Anglo-Irish Council with representation of unionists or recalcitrant Tory MPs. The point is that one can expect to present such people, at an appropriate time, with a fait accompli, in the completed study.

11. Other arguments for proposing such studies now are that (1) they will provide evidence for the British establishment of the seriousness of the Irish Government in respect to our aspiration for unity - something sometimes doubted on the British side and (2) they will provide a profile of a possible settlement through stages that may be useful in its effects on those in the British Government who, like Mrs. Thatcher, do not wish to let down the unionists and on those who may wish to

have a firmer basis for openly advancing their private view that the path to an ultimate settlement involves gradual British disengagement. In the domestic sphere, there are arguments relating to the picture of the studies given by the Taoiseach and his need, in due course and at an appropriate time, to demonstrate that the political process is leading inexorably to an ultimate settlement that will satisfy Irish nationalist aspirations and can only be delayed by violence. There is also the related factor that some of the matters that have been mooted for study but which could raise difficulties for the Government here (e.g. defence co-operation above a very low level, IDA industrial promotion on behalf of Northern Ireland, possibility of all - Ireland Court) could only be contemplated in circumstances where there was considerable advance in respect of the Government's primary political objective. It seems clear that this balance should be observed even at the study stage. The position would then be that it would be evident to the British Government that if they were prepared to contemplate significant political advance we might be able to contemplate steps of significant interest to them: such a prospect would also be evident to unionists if a set of circumstances arose in which it would be appropriate that they be made aware of some or all of the results of the studies.

12. In summary then, I recommend that we should propose study of federal, confederal and unitary models of structures for a future agreed Ireland on the basis that

- (1) the studies in question would be tabled for discussion or be the subject of a progress report at the Heads of Government meeting to be devoted to special consideration of the totality of relationships,
- (2) they would otherwise be kept confidential, on the understanding that they might be revealed, (subject to advance confidential notice?) at a favourable appropriate time.

13. The second question raised above was that of the powers and functions of an Anglo-Irish Council. This is now considered from a number of different angles. In an overriding sense the function of such a Council would be to bring forward and consider (and possibly carry out) policies for better relations

between Britain and Ireland, for peace, reconciliation and stability in Northern Ireland (and for peace and reconciliation within Ireland). These objectives are perhaps better expressed as defining the purpose of the Council.

14. One framework for consideration of powers and functions is in terms of the broad areas of study set out in the December Communique. A minimalist approach that might well be advocated on the British side would be the raising of the existing Anglo-Irish Economic Steering Groups (AIESG) to ministerial level with the accompaniment of more regular and systematic inter-parliamentary exchanges, possibly with - but also possibly without - the creation of some new more formalised structure for such intensified exchanges. They would almost certainly be prepared to take into the ambit of the Ministerial level AIESG whatever new areas of economic co-operation might be identified as a result of the joint study of that sphere. Such an extension, of course, might well have happened had there never been any Dublin Summit. This option is clearly too conservative from an Irish stand point but it is suggested that if the British agree to study - even if largely unilaterally on our part in practice - our maximalist proposals, we should agree to study of this minimalist approach, on a corresponding basis - joint or effectively unilateral, as appropriate.

15. Other steps up the ladder of a framework related to the five broad areas of study might involve the Council being concerned with the following matters, on a cumulatively ascending scale:-

- I "Problem-Free" matters in economic co-operation plus matters from the measures to improve mutual understanding plus routine matters concerned with citizenship rights.
- II Matters under I plus more difficult economic co-operation matters not yet going to heart of Government.
- III Matters under II plus cross-border security matters plus monor matters in field of co-operation on external security.
- IV Matters under III plus political matters i.e. matters relating to the internal government and administration

of Northern Ireland plus economic matters going to the heart of such government plus major matters in field of co-operation on external security.

16. Problem-free economic co-operation matters would embrace such matters as co-ordinated separate implementation of the Derry/ Donegal and Erne development programmes, issue of cross-border tourism brochures, administration of bilateral transport agreement and in general the type of matters covered by the A.I.E.S.G. to date. More difficult economic co-operation matters would involve matters in the energy field where substantial expenditure and delicate negotiation is involved e.g. re the East-West inter-connector or extension of natural gas to Northern Ireland or joint administration of Lough Foyle and other offshore areas of un-defined jurisdiction for hydrocarbon purposes. In all these matters one is dealing with a spectrum and a higher-grade matter that would not yet go to the heart of government is joint tourism promotion in Europe, the U.S. and further afield. The economic matters going to the heart of government would be taxation and currency. Again on the spectrum, the range of options in respect of external security cannot be caught in a simplified minor/ major categorisation.

17. The Irish objective would presumably be to get as much of IV as possible. If one could not get as much of IV, it would be a matter of carefully judging the balance before one decided how far to go along the scale above I but below the full content of IV.

18. One could also attempt to specify more clearly, not necessarily in an exclusive or exhaustive manner, the range of matters with which the Council could be concerned. This could extend in, say, the economic area, beyond areas tentatively identified at this stage as possible areas for joint study, in that the range could include routine co-operation. The following sets out a range of areas, some of which are at this juncture much more easily conceivable than others. Most relate to North-South matters but some would have an East-West aspect:-

- development generally of the various cross-border sub-regions
- energy
- transport

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- tourism
- fisheries
- harbours adjacent to border
- drainage
- application of C.A.P.
- industrial promotion
- trade promotion
- telecommunications development
- roads
- pollution control
- vehicle-related services and regulation
- maritime services
- all forms of manpower training
- currency
- animal and plant health
- wildlife conservation
- co-operation re external security
- cross-border security
- arts and cultural exchanges
- youth exchanges
- aspects of education
- scientific and technical co-operation
- citizenship rights
- co-ordination of all aspects of foreign policy.

This list can be reviewed as the views of Departments and of the British side become clearer.

19. Another but parallel frame of reference might focus on the type of power to be exercised, in the sense of the degree of influence to be exerted. The following is a simplified scale:

- (1) consultation, deliberation, exchanges of views and information
- (2) adoption of common general policy positions
- (3) decision in areas of purely executive competence with implementation separately by both sides
- (4) decision in areas of legislative competence, with agreed arrangements for separate processing as subordinate legislation as for some E.E.C. regulations (Government Order, Order in Council); this could include power to establish new subordinate corporate bodies

- (5) action in areas of executive competence i.e. implementation of decision jointly, either through central organs or through subordinate bodies.

20. Other types of power that do not fit readily into the above scheme are concurrent powers (as in some federations), power of decision on appeals, power to refer back or to higher bodies, power to delay. Another dimension is compulsory consultation before any decision is taken in a certain field e.g. as specified for decisions on all important questions of foreign policy, in Article II A I of the Franco-German Friendship Treaty of 1963, or as imposed on the Chichester-Clarke Stormont Administration in the Downing Street Declaration of August, 1969.

21. In relation to each of the broad frames of reference outlined above the basic difficulty is that the advancement of the ultimate objective of the Irish Government would suggest the widest extent of functions or the highest grade of powers, including powers in matters going beyond what is normally understood by co-operation and extending into the "internal" administration of Northern Ireland but it is evident that the unionists will be opposed to even the most harmless functions and powers and may be violently opposed to the more extensive powers and functions. Their actual and anticipated reactions will condition the British approach which is likely to be cautious and gradual.

22. The Irish side should probably press for study of the full range of possible powers and functions. If we hold back from doing so, it could be expected that the British would be encouraged in taking a very restrictive attitude as regards the institutional structures to be studied and might doubt the seriousness of our approach to the studies.

23. However, given the likely British position and the real risks of pressing matters too far, we may need to determine a tentative preferred outcome, in the sense of what powers and functions we might prefer to see assigned to the Council. One could minimise adverse reaction among ordinary people of unionist conviction in the North by assigning functions in bread and butter areas, especially where a good case can be made that they will benefit from the new or intensified

co-operation instituted e.g. in respect of more secure employment at Kilroot or in the gas companies or in respect of cheaper energy. The better the case that can be made, the greater the powers that could be contemplated. In all areas but especially where the benefits to the North and to unionists are less clear, matters should be so arranged that the ability of unionists to damage or frustrate them is minimised. This has implications for structures but in relation to powers, it might suggest dispersion and decentralisation of functions and powers, without any undue concentration of executive powers in the hands of Ministers in the central Anglo-Irish Council. It might also suggest that our preferred outcome would be such as would not unduly impel unionists to resist the institutional structures, or the discharge of their functions and powers. No progress will be made - rather the reverse - if we obtain reluctant British agreement to structures or to a range of powers and functions that give rise to such a widely-based and violent reaction, among Northern unionists that the British Government will repudiate the agreement reached with us. This may imply that in the more sensitive areas involving the internal government of the North and not involving clear potential benefits, executive powers or even possibly consultative functions should not be explicitly and specifically conferred in the initial stages, with Irish Government input rather taking place under a general understanding for consultation between the two Governments on all matters related to promoting peace, reconciliation, stability and economic reconstruction in Northern Ireland.

24. The above considerations underline once again the importance of striking the right balance - in this case between going sufficiently far to give at least a minimum critical impetus to the process in the direction in which we would wish it to go and, on the other hand, not to go so far as will make the process stillborn, as a result of the British reaction to unionist resistance. One implication is that one might aim for different degrees or profiles of power in relation to different functions of the Council. Further detailed consideration will be needed before firm suggestions can be made as to precisely how the matching of powers to functions might best be arranged from the

standpoint of the Irish Government. Decisions in respect of subjects for study in the other broad areas will also be relevant. A possible preliminary conclusion is that powers of substantive action might best be dispersed to subject-related bodies in respect of which a Council would have general supervisory functions. The areas of Council decision or where consultation with the Council might be required could be largely in the area of appointing or dismissing Boards, exercise of certain financial functions and exercise of general powers of direction.

25. A further implication is that it will be necessary, in the context of developing ideas, on structural forms to consider, especially in relation to a Council whose explicit and specific powers were relatively low-grade, from what source would the impetus come for subsequent accessions of powers. For without some feature, preferably built-in, directed to this purpose, the process could serve to bolster direct rule in the North. If one considers the European Communities, the initial impetus came from a shared desire to create common structures and policies that would make impossible a recurrence of a conflict such as the Second World War. Similarly, the initiative in respect of EMS has been attributed to a common concern at the apparent lack of world leadership from the U.S. One cannot have the same confidence that external stimuli will have potent effects in encouraging the development of an integrative process in Ireland. A desire for peace and concern about the economic situation are present among both major traditions in Ireland but while they may exercise some influence in the desired direction, this is unlikely to offset the continuing strong influences against integration. Further elements may have to be thrown into the scales e.g. a modification of the British guarantee and more explicit explanation of the guarantees for unionists that would be available in the context of an agreed Ireland.

26. Again, if one looks at the European Community, one major source of pressure for new powers and closer integration has been the Commission. Again, however, it is difficult to imagine the British (with an eye on unionist reaction) agreeing to an Anglo-Irish Council having a Secretariat with powers/functions analogous to those of the European Commission. On the analogy

of the European Council, one might look to the periodic meetings of the Heads of Government as one important source of impetus. But again, there is the difficulty that the major recalcitrant party is not directly represented at these meetings. More recently in Europe, a substantial body of opinion within the European Parliament has organised to promote further integration and new initiatives in relation to the Community institutions. Again, in the Irish situation, the obvious difficulty is that unionist members of any parliamentary arm of any Anglo-Irish Council would doubtless, if they participated at all, exert themselves to reduce rather than increase the powers and functions of the Council.

27. Clearly, there are no obvious or easy answers to the questions posed. Careful consideration will be needed as the study proceeds.

28. The possible areas of action of a Council in respect to different types of co-operation - economic and security, internal or external, have been discussed in recent weeks and are suggested by the list of subjects in paragraph 18 above. Less attention has been given to functions and powers in respect of the internal government and administration of Northern Ireland. The following represents an attempt to isolate the more sensitive and significant of these:-

- Law on elections including drawing of electoral boundaries, franchise, system of election
- Assent to legislation of any devolved Assembly
- Method of creation of any devolved Executive
- Assignment of powers and functions between Departments, especially where there was a devolved Executive
- Recruitment of public servants, central and local
- Appointments to Area Boards, Housing Executive and other more significant appointed bodies
- Any powers of taxation
- Allocation of public expenditure

- Determination of priorities within budgets of Departments/Agencies
- Allocation of housing
- Economic/physical planning strategy and powers
- Receipt of reports and accounts of appointed Boards
- Approval of investment (and borrowing?) proposals of such bodies
- General directions to appointed boards
- Appointment of judges and other Law Officers (D.P.P., Attorney General, County Registrars, Sheriffs etc)
- Formulation of criminal law
- Use of emergency powers
- Pardon and commutation of sentences
- Appointments to Police Authority
- Appointment of senior police officers
- Direction of the police
- Appointment of senior prison officers.

29. In considering possible Irish positions as to the propriety and nature of a role for an Anglo-Irish Council, one would need to have regard to:-

- (a) the likely British position
- (b) the reaction of unionists
- (c) the feelings of the minority community in the North
- (d) the extent to which exercise of powers/influence in this area by the Council would represent movement in the direction of Irish authority over the North.

In striking a balance, one might conclude that for most of these functions/powers that have current relevance, we might seek that on the Franco-German model, we be fully consulted in the Council framework, but that for some of them the Council have specific and explicit powers/functions. This matter will require further detailed consideration.

30. Preliminary investigation of the constitutional and legal aspects ^{suggests that} of the exercise of executive functions and powers by an Anglo-Irish Council or by specific subject-related corporate bodies, probably under a Council umbrella could be permissible both in terms of the unlimited and illimitable sovereignty in the U.K. of the Westminster Parliament and without infringing the Irish Constitution. It would, however, be necessary to describe the Council as subordinate to the Oireachtas, in the sense of Article 15.2.2° of the Constitution, if the Council were to exercise any legislative authority in relation to the area of jurisdiction referred to in Article 3 of the Constitution.

31. As regards the assignment of functions to executive boards with a cross-border or all-Ireland remit in particular areas, it appears that this is also feasible under the Irish Constitution. Subject to an exception in respect of unacceptable elements concerned with the handing over of offenders to persons outside the jurisdiction, the Foyle Fisheries Act provided a general model of continuing validity as to how these matters could be regulated constitutionally.

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2nd March, 1981.