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CONTINUATION OF THE POLICY SPEECH BY
THE HONOURABLE CHIEF MINISTER

Mr Speaker, Honourable Members, our walk out from active participation at the World Trade Centre did not stop our attempts to redirect the World Trade Centre procedures toward the correct route to the establishment of federalism in Southern Africa. We continued to make submissions to the relevant technical committees of the MPNP. Our submissions were systematically ignored by the Technical Committees which was acting under the direction of the infamous June 30, 1994 resolution of the Negotiating Council.

We stopped making submissions once we realised that before our voice could be heard we had to negotiate with our counterparts for a restructuring of the negotiation process. I wish to read into the record one of the submissions which we made after we walked out of the Multi Party Negotiating Process. This documentation reflected our original vision related to the establishment of federalism on the basis of a one stage process, and is relevant to show conclusively how much we moved away from our positions in order to seek reconciliation and an all- inclusive constitutional settlement with our opponents. :

This documentation was based on the so called "bottom up" approach, also known as "Model C". At a later stage of my Policy Speech I will describing the contents of the intense negotiations which took place between the end of July and the beginning of October and the Honourable Members of this House will notice how such negotiations were totally outside the parameters of our original "bottom up" approach. In order to seek reconciliation and settlement with our counterparts, by the middle of November 1993 we abandoned any demand related to a "bottom up approach and accepted to work within the parameters of the process designed by our counterparts, who in turn made no significant concessions to improve such a process to accommodate our needs and aspirations. I will read the Submission of the IFP to the Technical Committee on Constitutional Matters dated July 12, 1993 with related relevant attachments.

SUBMISSION OF THE INKATHA FREEDOM PARTY
TO THE TECHNICAL COMMITTEE ON CONSTITUTIONAL MATTERS

JULY 12, 1993

The Inkatha Freedom Party has previously submitted to this Technical Committee a draft for a constitution for a Federal Republic of South Africa. The IFP submits and maintains that this Technical Committee, in compliance with instructions received from the Negotiating Forum on July 1, 1993 and by the Negotiating Council on June 30, 1993, shall draft a constitution which resembles in all respects the draft submitted by the IFP to this Technical Committee on June 18, 1993.

Herewith attached is a position paper drafted on the basis of, and in reply to, the Sixth Report of the Technical Committee which details the process which should lead to the adoption of a federal constitution for South Africa prior to elections. This document is submitted for consideration in the light of its relevance to the substantive provisions to be drafted in the constitution.

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The IFP maintains that the language contained in the instructions given to this Technical Committee is such that it identifies a federal state in which member states retain all residual powers and to the national government are allocated only those powers which can not be properly or adequately exercised at state level on the basis of the notion of residuality.

As is clearly shown in the attached Resolutions of the IFP Central Committee adopted on July 4, 1993, the IFP has entirely rejected the instructions given by the Council to this Technical Committee by the Negotiating Council by means of the June 30, 1993 resolution as ratified in its relevant parts by the Forum of July 1, 1993. However, the IFP submits and maintains that the draft constitution submitted by the IFP to this Technical Committee on June 18, 1993 should be adopted by this Technical Committee in compliance with the mandate it received from the Council and the Forum.

As far as the IFP is concerned, the next constitution will be the only constitution South Africa has and it should be a complete constitution. Whether or not it will be rendered a constitution for an interim period will be dependent upon the constitutional development of the country brought about through mechanisms of constitutional change laid down in the constitution itself. The IFP believes that this mechanism should be modelled after the standard mechanisms used in other countries to bring about constitutional change.

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POSITION PAPER OF THE INKATHA FREEDOM PARTY
ON A PROCESS OF TRANSFORMATION
CAPABLE OF ESTABLISHING FEDERALISM

PREPARED IN RELATION TO THE WORK OF THE TECHNICAL COMMITTEE
ON CONSTITUTIONAL MATTERS

This submission has been prepared in response to the Sixth Report of the Technical Committee on Constitutional Matters [the Technical Committee]. We believe that the Sixth Report of the Technical Committee does not satisfy the instructions received from the Negotiating Council on June 17, 1993. In fact it was our understanding that the Technical Committee was instructed by the Negotiating Council to satisfy our request for additional technical information, namely for the development of a so-called "Model C" of transition to democracy [see infra]. It is beyond doubt that since the Sixth Report should have addressed our request for additional information, our interpretation of the instructions given to the Technical Committee should be preferred over other possible interpretations.

Moreover, the Minutes of the meeting of the Negotiating Council held on June 17, 1993 make it clear that the Technical Committee had been instructed to develop a "constitutional model", rather then merely criticizing and misconstruing our submissions. This conclusion is also corroborated by the fact that the instructions given to the Technical Committee were the expression from a compromise position worked out on the basis of the draft Resolution submitted by the IFP on June 15, 1993. That Resolution would have required the Council to stop its consideration of constitutional principles until a "Model C" process had been fully developed by the Technical Committee. Our understanding of the compromise is that the Technical

Committee was instructed to develop a "Model C" transition process while the Council would have continued to consider the other Reports of the Technical Committee, even if no final agreement could have been reached until a fully-fledged "Model C" process has been tabled.

It is clear that the Sixth Report does not contain a recommendation by the Technical Committee on how a "Model C" transition process could be feasible and viable in the South African context. In fact, the Technical Committee has successfully developed and submitted to the Council a "Model B" transition process which is contained in the second part of the Third Report, in the Fourth and the Fifth Report.

The "Model A" transition process can be described as a straight run to a Constituent Assembly on the basis of the ANCâ\200\231s Harare Declaration.

The "Model B" is a two-stage transition process which will empower a Constituent Assembly within some pre-agreed constitutional parameters which ostensibly would circumscribe and limit its discretion. The two-stage transition process could accommodate a power-sharing agreement or a government of national unity, and would not necessarily call for the establishment of SPRs prior to the adoption of the final constitution, which could take place after as much as five years from elections. This conclusion is not negated by the possibility that the interim constitutional parameters, [i.e. transitional constitution] would contain a constitutional mandate to the new government to establish such regions, for no mechanism has been provided to compel the new government to comply with such a mandate. Consequently under "Model B" the TBVC states and self-governing territories are likely to be

reincorporated into the existing four provinces, which could be provided with more extensive powers.

Due to the fact that the constitutional parameters which provide the framework to the operation of the Constituent Assembly are transitional in nature, they would necessarily provide for a very limited number of powers in the SPRs, and would necessarily establish relations between the SPRs and national government which contain overriding powers at legislative level within which the concurrent exercise of functions would be framed. For the same reason the transitional constitution would be deficient in terms of human rights protection and guarantees such as a jurisdictional Constitutional Court and jurisdictional resolution of conflicts between SPRs and the national government.

"Model C" is a straight-run to a final constitution which establishes federalism in South Africa prior to, or at the same time as, the holding of new elections. Therefore, under "Model C" the new federal government would be empowered in a federal system along with state governments.

The next constitution of South Africa could be amended by virtue of reinforced but standard procedures for amendment of rigid constitutions. Such procedures would be modelled after established constitutional models and would contain no deadlock-breaking mechanisms capable of allowing a 51% majority to change the constitution or other techniques which would compel the amendment of the constitution.

The federal constitution should contain a fully-fledged Bill of Rights which meets the high international standards of human rights protection. Federalism would be defined as a system which leaves to the member states all residual powers and allocates to the national government only those powers which must be exercised at national level on the basis of the notion of residuality. "Model C" is the model which details the stages of constitutional development, the structures and the procedures required to achieve this predetermined outcome.

The Technical Committee felt it relevant to discuss our motivations in endorsing and requesting a "Model C" transition process. We are now therefore forced to rectify the misperception of the Technical Committee about the real compelling need to opt for a "Model C" transition process.

We believe that the first imperative of constitutional negotiations is to reach a comprehensive political settlement, and that this can not be postponed until after elections. It is clear that the powers, functions and autonomy of the SPRs are a fundamental element in the process of such a political settlement. Therefore, we believe that it is essential that a full agreement on the form of state be reached prior to the holding of elections and that such agreement be reflected and entrenched in a final but amendable constitution.

We believe the holding of elections and the empowerment of a new government outside the parameters of a final political settlement would, in the South African context, be a sure recipe for civil war and disaster.

We believe that a federation is the only way to ensure peace and prosperity in our country and the sooner it is established, the better it will be. The harsh historical reality of our country is that many social and cultural formations have developed antagonism and mistrust against the idea that they could governed by only one government. The notion of empowering only one government to rule over the entire country can not please all social and cultural formations, while several governments within a federal structure can do so. There are many who would rather be governed by their own governments or by a government of their own choice at regional level, and because of this they would accept what they perceive as a potentially hostile and insensitive government at the national level.

Moreover, we believe that only a federation would establish a system of checks and balances capable of defeating the totalitarian and centralistic forces operating in South Africa so as to ensure true political pluralism. In fact, a federation will allow the political survival of political formations which are not a force of government at national level but which could be a force of government at regional level. As we indicated in our submissions, federalism is also the best framework to ensure cultural, social and economic pluralism in South Africa and to protect the protection of autonomy of civil society from undue interferences of government.

We also believe that the country will not withstand and survive five years of prolonged constitutional negotiations and we see no reason whatsoever to delay the finalisation of the process of constitutional development of our country. To us, the only explanation, but not justification, for a two-stage transition process is to accommodate a power-sharing agreement or a government of national unity. We

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believe that this political objective of those who want to survive as a force of government after the next elections, irrespective of whatever suffrage they achieve at elections, does not justify the enormous cost to the country which will follow a lengthy two-stage transition process.

Finally the one-stage transitional process will ensure that SPRs are established with residual and autonomous powers, while in the two-stage transition process the establishment of SPRs is not guaranteed.

We believe that the final constitution of South Africa should be produced in a process which recognises the autonomy of the SPRs to determine their own constitutions. We also believe that there is an objective need for SPR constitutions [see: Annexure A].

Our approach is a synthesis of top-down constitutional development with ground-up democracy building. In fact, we do not wish to deny the essential role and need for the unifying process of negotiation at the national level [top-down approach]. However, we maintain that regions should be entitled to participate in the process of constitutional development with an autonomous role which should lead them to identify in autonomy their powers, functions and boundaries within the parameters and the limits set forth by the negotiation process at central level.

We do not believe that the boundaries, powers and functions of the SPRs should be determined in a unified process at national level, even if such process receives inputs from the regional level.

The process of constitutional development leading to the establishment of SPRs needs to be consistent with its predetermined outcome. We contend that the SPRs should be established as sovereign members of a Federal Republic of South Africa in a federal system of split and shared sovereignty established on the basis of the provisions set forth in the federal constitution.

In this respect, the Technical Committee misconstrued our approach, confusing the process with its result. It is a conceptual rather than a historical consideration that once the process is concluded the powers of the Federal Republic of South Africa will be seen as deriving from the powers of the member states and from the sovereignty of the people. This does not mean that the sovereignty of the Federal Republic of South Africa is "devolved upward" from the SPRs to the national government. Rather, with the adoption of the constitution for the Federal Republic of South Africa provision will be made for the recognition of the residual sovereignty of the member states so that a federal system resembling the United States federation can be established. In this respect, the SPRs constitutions could be entrenched at the time of adoption of the constitution for the Federal Republic of South Africa and could be maintained until such time with a the meta-juridical status of a highly authoritative political document [see infra]. The agreement on the process will ensure that SPRs constitutions will be entrenched and will acquire full legal recognition, before the holding of elections.

We have agreed to advocate a common process proposal as originally indicated in the Resolution tabled by the IFP on July 15, 1993 and supported by all of us. According

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to this process proposal, SPRs constitutions should be negotiated and endorsed solely at the SPR level. However, their drafting should be contained and guided by parameters established at national level and their ratification could take place only once it has been verified that they comply with such parameters, with the exception of the Constitution of the State of KwaZulu/Natal.

At this point we have not indicated how SPRs constitutions should be adopted and we have made no representation supporting the idea of elected SPR constitution-making bodies. We have indicated that a specific statutory commission should ensure that SPRs constitutions are drafted and adopted through processes which are broadly representative of the affected interests, providing that the essential element of democracy will be guaranteed through the ratification of the SPRs constitutions by popular referenda, organised under the direction and the auspices of the statutory commission.

The SPR constitution-making process would contribute to the process of national constitution-making to the extent that the constitutions for those SPRs which can complete their constitution-making within the pre-agreed time-frames, would be registered and accommodated by the constitution-drafting process at national level. An analysis of the details of our process proposal will clarify how, from a technical point of view, this process operates at a political level without limiting the legal discretion of the national constitution-making process.

There is no reason to believe that this approach would take more time than the process described in "Model B". On the contrary, this entire process is conditioned

by the existing constitutional deadline of September 1994 [which under the terms of the present constitution could be extended for an additional five months.] Therefore, "Model C" would ensure the completion of the process by the end of 1994 on the basis of a one-stage transition. This is in sharp contrast with a two-stage transition which opens a process of constitutional development with no built-in deadline.

Moreover, a "Model C" approach has the additional advantage of forcing the achievement of consensus without producing deadlocks. The "Model B" provides for deadlock-breaking mechanisms which could lead to the adoption of the final constitution for South Africa by a 51% majority, thereby creating the possibility that the final constitutional dispensation for South Africa does not reflect a comprehensive political settlement among the major participants and opens the doors for disaster. The "Model C" will rely on the autonomy and independent constitution-making of the SPRs. To this aspect of autonomy and independence at local level would correspond the need to achieve consensus in the drafting of the federal constitution. This two aspect process reduces the risk of deadlocks allowing for concessions to be made at regional level which might not be carried at national level.

The issue of the form of state must be resolved and disposed preliminarily to any determination affecting both the modalities of the process of transformation as well as the constitutional principles to be embodied in any future constitution. A predetermined type of state, that is a federal, confederal, regional or unitary state would condition the process of transformation. Put otherwise, the process of transformation needs to be shaped in order to produce a predetermined type of state. A unified centralised process of transformation, centred around the notion of a constituent assembly is not likely to produce the breakdown of the present unitary state into member states organised on the basis of the federal principle. The MPNP should not focus on a constitution making body and transitional constitution until the form of state has been considered. To do otherwise "would be to put the process before substance, to permit the fundamental determination on the substance to be conditioned by the procedural decisions." There are compelling reasons to justify the preliminary determination of form of state in the negotiating process. Such reasons relate, amongst other things, to political expediency, constitutional dogmatics, the determinative relationship between the form of state and the constitution making process and the component structures of the constitution. These reasons are fully explained under in our original submissions to the Technical Committee.

The form of state is described in the following broad terms: A federal system in which "all powers should be reserved to the region/state while only those powers which cannot be adequately exercised at region/state level should be devolved upwards to the federal government."

Such a form of state should be informed by the principles of subsidiarity, residuality and possible asymmetry. The notion of subsidiarity requires the taking of decisions at the lowest possible level. So to speak, all services and governmental functions and powers should be handled or exercised by the lowest level of government capable of handling such function, powers or services. On the other hand, residuality is a qualification of the notion of subsidiarity. According to the concept of residuality only those powers which cannot be exercised adequately and properly at local level should be devolved upwards to the federal level. These notions are more fully explained in our original submissions.

On this proposal of form of state, autonomous member states would come into being as part of the "Federal Republic of South Africa". Such a federal system is "intended as a system of splits of sovereignty between the member states and the federal government".

The federal system could be established on an asymmetric basis. This would allow the adjustment of the system to social and economic differences amongst the various regions of our country and could be achieved through provisions in the state constitutions which empower the member states to delegate upwards to the federal government the exercise of some of their functions. As an extreme possibility, it is

Section 7 is taken almost verbatim from pages 8-9 of the Schedule of the Sixth Report

conceivable that a portion of South Africa could be organised as a unitary state and that such a portion would entertain a federal relation with one or more regions of the territory organised as a federal system.

Our proposal envisions a constitution-making process which does not require a transitional process. The present constitutional order would last up to the adoption of the final and federal constitution of South Africa with elections to be held under such constitution no later than the end of 1994.

The MPNP should determine preliminarily the form of state. Decisions on constitutional principles should be consistent with the agreed form of state. The new South Africa shall be established as a federal system with residual powers recognised to the member states on the basis of the principle of residuality.

The MPNP should promote the establishment of a statutory commission charged with the task of co-ordinating top-down negotiations and ground-up democracy building.

The MPNP would determine a set of constitutional principles which would guide and circumscribe the drafting and adoption of SPR constitutions. The Commission will verify the correct implementation of these principles. Within the parameters set by the MPNP the ground-up democracy-building processes would determine in autonomy regional borders and SPRs powers and functions. Our proposal provides for mechanisms to deal with possible inconsistencies between different proposals as far as boundaries are concerned.

The ground-up democracy building processes would set the premises and the mechanisms for the reincorporation of the self-governing territories and the TBVC states in the new SPRs, for instance as is provided for by the Constitution of the State of KwaZulu/Natal.

While the commission co-ordinates and supervises ground-up democracy-building processes, negotiations would continue at central level to produce a final federal constitution for South Africa. The actual drafting would be completed by a panel of experts on the basis of principles and guidelines approved by the MPNP. Alternative constitution-making processes could be considered at this stage and would still be consistent with our approach to integrate ground-up democracy-building with top-down negotiations.

Once the commission verifies that the constitutional proposals for the SPRs are consistent with the parameters set forth at central level, it will prompt the ratification of such constitutions through popular referendum. The SPRs constitutions so approved and ratified would be forwarded to the constitution-making process at central level. Such constitutions would have no legally binding value on the constitution-making process at central level and would be nothing more than very powerful popular petitions to the constitution-drafting process at central level.

The commission which we propose could be established by the end of June. By the end of July the MPNP should finalise the principles guiding ground-up democracy

building. By the end of September the commission, working in close co-operation with regional representatives, should finalise constitutional proposals for SPRs.

This of course will be possible only for those SPRs which are ready, willing and able to finalise such proposals with a degree of credibility determined by the commission within the established time-frame. The other regions will need to be provided for through negotiations at central level.

SPRs constitutions should be submitted for approval by referendum to be held on December 1, 1993. By January, 1994 such constitutions could be delivered to the constitution-drafting process at central level.

The commission would be assisting the constitution-drafting process at central level so as to ensure that the SPRs constitutions are acknowledged, registered and capitalised on in the drafting process for a federal constitution. Depending on the technique used for the drafting of the federal constitution, the drafting process at central level could be concluded within a period of two to seven months.

As soon as the drafting of the federal constitution is concluded, the federal constitution would be submitted for approval by referendum, and general elections can be held by September 1994 under the terms of the federal constitution and under the terms of the SPRs constitutions to fulfil national and regional political positions.

The constitution-drafting process at central level which we propose would reflect the technique adopted to reach consensus on the treaty establishing the international monetary system [Bretton Woods technique].

In its original submission to this Technical Committee, the IFP has already tabled a set of constitutional principles which should be handed down by the MPNP to the commission and which should guide and circumscribe the constitution-drafting process. The IFP has also tabled a proposed Bill for the establishment of the commission and for the determination of its role and function. Both documents are hereby incorporated by reference.

According our proposal a special and expedited process for approval of the Constitution of the State of KwaZulu/Natal should be established in recognition of the fact that KwaZulu/Natal has gone further ahead than any other region in the process of erecting its territory into statehood within the parameters of a federal system.

The MPNP would approve or reject in its entirety the draft constitution prepared by the experts in accordance with the principles previously set forth by the MPNP. The SPRs constitution would have been previously approved through referendum. The national constitution will be submitted to referendum. Soon thereinafter national and regional elections would take place on the same day.

Our proposal would establish federalism and entrench SPRs before the empowerment of a new government and would ensure that the existing territorial local autonomy [TBVC states and self-governing territories] are transformed into SPRs without having to be previously reincorporated into the four existing provinces. The TBVC states

and the self-governing territories would be promoting ground-up democracy building processes. However, such processes would remain in a meta juridical level [not contra legem but praeter legem] and the entire process would be legitimated with the ratification of the final constitution of South Africa which would set forth, as all constitutions do, the principle of its own self-legitimation. The South African Parliament would need to adopt the necessary legislation to establish the commission and to prepare for elections, including institutions such as the Independent Media Commission, the Electoral Commission and possibly TECs.

In accordance with the draft constitution for a Federal Republic of South Africa tabled by the IFP with the Technical Committee on Constitutional Matters, a Federal Senate would represent the regions on the principle of equal suffrage.

Reference is made to the Schedule to the Sixth Report of the Technical Committee.

Our proposal does not describe entirely a bottom-up process of transition. It describes a process which integrates ground-up [bottom up] democracy building processes with the process of negotiation at central level creating mechanisms for co-ordination and harmonisation. This will ensure that South Africa comes together on the basis of the true, needs, wants and aspirations of the South African people. This process avoids delays and deadlocks and will ensure the completion of the transition by 1994.

We urge the members of the Negotiating Council and the concerned public to make direct reference to the IFP original submission to the Technical Committee on Constitutional Matters. We have demanded that our proposal should be considered by the Negotiating Council before it seeks to agree on the alternative proposal for a two-stage model which is fully described in the Third, Fourth and Fifth Reports of the Technical Committee on

Constitutional Matters.
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ACTION AGENDA TO IMPLEMENT
THE ONE-STAGE "MODEL C" TRANSITION

Agreement of a federal form of state with residual powers in the member states and powers to the central government allocated on the basis of the notion of residuality.

Submission to Parliament convened in special session of the Bill establishing the statutory Commission with powers and functions as per the IFP proposal and draft Bill.

Multiparty agreement of the broad constitutional principles which must guide and circumscribe constitution-drafting at member state level.

Establishment of institutions necessary to ensure free and fair elections, including IEC, IMC, TECs, et cetera. Multiparty actions to curtail violence and intimidation and jump-start economic recovery and social reconstruction.

Multiparty agreement on specific constitutional principles for the Constitution of the Federal Republic of South Africa.

Verification by the Commission that draft constitutions of member states are in compliance with the broad constitutional principles approved by the MPNP and resolution of possible boundaries conflicts.

Ratification by popular referenda of the member states constitutions and of the Constitution of the State of KwaZulu/Natal.

Appointment of a group of South African and international experts to draft the Constitution for the Federal Republic of South Africa on the basis of the specific principles adopted by the MPNP. The Federal Constitution shall recognise the State Constitutions.

Submission of the ratified member state constitutions to the experts.

The MPNP approves or rejects the draft Federal Constitution in its entirety. In the case of rejection the experts will need to draft a new one or a new panel can be appointed.

Ratification of the Federal Constitution by popular referendum.

Elections at state and federal levels.
July 9, 1993

ANNEXURE A

THE NEED FOR SPR CONSTITUTIONS

Constitutional autonomy.

A constitution, or a charter is a document which organises and regulates autonomous powers. Every time an entity comes into existence by virtue of the organisation of autonomous powers, it will do so with a document which sets forth its organisation and operation. Autonomous powers are the powers of self-regulation. Autonomous entities are corporations, charitable organisations, sporting clubs and any other entity organised by individuals to self-regulate their interests. All these entities are organised and operate under the terms of a constitution, however denominated.

Regions are political autonomous entities. If SPRs are to be autonomous entities they must have a constitution which organises their structures and regulates the exercise of their powers. The IFP maintains that the SPRs must exercise autonomous powers, which means that the powers of the SPRs must be vested in them and exercised in their own name without substantial interference from the central government. Both in a regional and in a federal system, SPRs are considered autonomous entities.

Provinces are considered legal entities and in many cases might be vested with their own powers. However, they are often not considered to be autonomous because they

do not have the power to regulate their own structures and to exercise their own powers without substantial interference from the central government. Provinces are not autonomous to the extent that they do not have the powers to give themselves rules (autonomous). The law of the central government can determine their structures and the modalities under which they exercise their powers. Autonomy requires that the entity has the power to determine by itself its rules of organisation and operation and this can be done only through a constitution or a charter or articles of incorporation.

A constitution is the articles of incorporation of an SPR. Modern constitutionalism has provided an enormous amount of consideration to support the need for constitutional autonomy. These considerations range from increased democratic participation to improved government efficiency and the perfection of the system of checks and balances. Since 1933, when Professor Ambrosini first identified the parameters of a regional state, constitutional autonomy has also been related to minority protection and the need of expressing in an institutional form the cultural and social diversity of a given territory.

The concept of constitutional autonomy can exist either in a system of unified sovereignty or in a system of divided sovereignty.

In a regional state, regions are not provided with the attributes of sovranitas but only with a potestas, which is a devolved and not original autonomous power. Therefore, within the parameters of a regional state, the national constitution will be organising the sovranitas and only the central state will be recognised as a sovereign entity. In this context the regional constitutions will have the purpose of organising the potestas of the region.

In all regional states regions have constitutions which serve this purpose. The parameters of the latitude which such constitutions can take, depends on the parameters of the grant of potestas performed by the national constitution. In other words, the regional constitutions will be limited to the organisation of the area of autonomy reserved to them by the national constitution. Within this area of autonomy each regional constitution can organise and structure the exercise of the regional powers in different fashions so as to accommodate local needs and aspirations.

This is the case in both the Italian and Spanish regions. It needs to be noted that both in Italy and Spain the respective national constitutions grant two types of potestas to the regions so that regions in those countries come into classes, ordinary and special-autonomy regions.

The purpose of regional constitutions in Italy and Spain is to determine forms of organisation and operation of the regions which reflect the specific characteristics, needs, wants and aspirations of the region and of the people living therein. A noticeable example in this regard is the constitution of the region Trentino-Alto Adige which is entirely structured so as to preserve the cultural diversity and peaceful co-existence amongst the German, Italian and Ladini communities living in the region.

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The only alternative to regional constitutions would be the organisation of the operations and functions of the regions through an Act of Parliament which would establish the regional offices and determine how they should operate. This approach would serve the cause of administrative uniformity but would deny the intrinsic value of constitutional autonomy, and for this reason it is rejected by the IFP. This approach would turn regions into provinces.

Constitutional autonomy in a federal system

In a federal system as advocated by the IFP the member states would hold the residual sovereignty. This is the case in the United States where both the Federal Government and the member states share in the attributes of sovereignty in a system of split sovereignty. In the United States, because of historical reasons, the member states not only have residual sovereignty, but also original sovereignty, while to the federal system is recognised a form of devolved sovereignty on the basis of an irretrievable transfer. However, there is no equation between original sovereignty and residual sovereignty, for residual sovereignty could be a devolved one by virtue of a provision in the federal constitution.

Therefore in a federal system the state constitutions have the fundamental purpose of organising the exercise of sovereign powers. Modern constitutionalism recognises that sovereign powers can not be exercised outside the parameters of a constitution, whether such a constitution be written or unwritten. Modern constitutionalism equates the notion of sovereignty to the need for a constitution and recognises that all countries have a constitution, even if in some cases it is an unwritten constitution.

The IFP maintains that South Africa should be a federation in which to the member states are reserved all residual powers and sovereignty. In the IFPâ\200\231s vision, South Africa should closely resemble the United States system.

Relation between SPR constitutions and national constitutions

The issue could be raised of when and how should SPR constitutions be drafted and adopted? In other words should the national constitution precede the SPR constitution, or should it be done the other way around? The answer to this question cannot be found in constitutional theory but in the actual process of constitutional development of any given country. Historically there are examples of constitutional developments where the adoption of SPR constitutions preceded the adoption of the national constitution, and there are cases where the SPR constitution has been drafted and adopted on the basis of constitutional parameters set forth in the national constitution.

An interesting case in this regard is the adoption of the constitution of Sicily, an Italian region provided with a special and greater autonomy than any other region in Italy. This constitution was adopted before the adoption of the Italian Constitution and forced the Constituent Assembly of Italy not only to adopt a regional state, but also to recognise exceptional autonomy to the Sicilian region. In fact the constitution of Sicily provided for a Constitutional Court for the region charged, infer alia, with the task of assessing the constitutionality of national legislation as applied in the

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region. This specific jurisdiction of the constitutional court of Sicily faded out once the Italian Constitutional Court came into existence.

Therefore the path of constitutional development leading to the establishment of SPRs and of a federal system are innumerable and unpredictable. They rely completely on the strength of political events taking place on the ground, and no technical reason could be advanced to support the proposition that one type of constitutional development is more adequate to the needs of a country than another.

Constitutional continuity can be guaranteed in any type of constitutional development through well-known constitutional techniques such as ratification. It is clear that there are many aspects of constitutional development which take place at a meta-juridical level and they are then recaptured into the realm of legality and legal phenomena by subsequent enactments. This is the case of the present negotiating process, for neither CODESA nor the Multiparty Negotiation Process has any constitutional standing in law. However, it is foreseeable that future stages of the constitutional development of South Africa will ratify the product of our negotiations, thereby ensuring constitutional continuity. Similarly, the adoption and possible ratification of the Constitution of the State of KwaZulu/Natal still operates within an area which is meta-juridical, which is to say that it is not contra legem but is praeter legem.

The IFPâ\200\231s proposed constitution for a Federal Republic of South Africa indicates how, once the national constitution has been adopted, the constitution of the State of KwaZulu/Natal will receive ratification and legitimation within a process which ensures constitutional continuity and prevents any constitutional break (provided that the national constitution is approved in constitutional continuity.)

In this scenario proposed by the IFP, the Constitution of the State of KwaZulu/Natal would be adopted and ratified prior to the adoption of the Federal Constitution for South Africa, and this fact by itself has no bearing on any concern related to constitutional continuity. Constitutional continuity could also be ensured by the work of the statutory Commission on Regionalisation proposed by the IFP in its original submission to the Technical Committee on constitutional matters.

There are compelling reasons to believe that the drafting, adoption and possible ratification of state constitutions should precede the drafting of a federal constitution. In South Africa there are geo-political realities which share sufficient commonality of interests to justify their erection into statehood within the parameters of a unifying federal system. After decades of forced ethnic and geo-political integration brought about first by colonialism and by the regime of apartheid afterwards, it is essential that South Africa rediscovers its roots in a process of constitutional development which emanates from the true, needs, wants and aspirations of the people.

We believe that the people of regions such as KwaZulu/Natal have achieved a great deal along the path of racial harmonisation which is now expressed in a true commonality of interests. This commonality of interests justifies the recognition to such a community of the right to self-determination which is the right to ordain for themselves a government of their choice and to choose their constitutional future in autonomy.

Theoretically they would have the right to a UDI. However, the right of self-determination could be exercised to a lesser degree than the full claim of independence, and could be limited to the erection of the region into statehood within the parameters of a federation. In other corners of the country there are similar claims for self-determination and ground-up democracy building.

If we want the process of constitutional development of South Africa to be really democratic and really responsive to the needs of the people, we must ensure that the process of constitutional development receives its momentum from initiatives such as the adoption of the Constitution of the State of KwaZulu/Natal, SATSWA, the Kei State initially, and possibly a Volkstaat. Otherwise the process of constitutional development will move from preconceived ideas of what should happen; ideas which have been formulated in smoke-filled rooms in the often removed-from-reality environment of negotiations.

Our country needs to re-discover itself and regain the power to determine its own destiny at all levels of government.

Because of all these reasons the constitutions of the states need to precede the federal constitution as a matter of better constitutional development for our country. Once these state constitutions have been approved, either as legal documents or as documents existing only at the political level, there will be established parameters to guide the federal constitutional development of our country.

We submit and maintain that if federalism needs to be established, this is the best way

to go about it. It is also the only way which will entrench federalism by ensuring the certainty of the outcome of the process. Any other process will be very uncertain as it would rely on the full discretion of the Constitution-Making Body to establish federalism, and to choose the form of federalism which it thinks would meet the needs of the people of the country. Ground-up democracy building allows the people of the country to choose the form of state they prefer and to give a precise mandate to the Constitution-Making Body.

There is surely no formula to establish federalism but we maintain and submit that if the process has to be designed to ensure the establishment of federalism along the lines proposed by the IFP, ground-up democracy building is the most solid and reliable way to do it. The alternative would ignore processes such as the Constitution of the State of KwaZulu/Natal and the SATSWA initiative, and this would be an act of constitutional arrogance which would carry a very negative omen on the success of the constitutional development of this country.

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Mr Speaker, Honourable Members, the Record of Understanding entered into between the ANC and the South African Government/National Party entrenched in the process the notion of a two stage transition centred around the empowerment of a Constituent Assembly charged with the task of drafting the final constitution. That document also carried an agreement o
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the idea that a Constituent Assembly would adopt a constitution by virtue of deadlock-

breaking mechanisms, which were commonly understood to imply that in the final analysis a 50% + 1 majority of the Constituent Assembly could rewrite the Constitution. Since the opening of CODESA, we made it very clear that we believed that the constitution had to be final and amendable only by virtue of standard and reinforced amendment procedures.

The team-play between the ANC/SACP Alliance and the South African Government/National Party was so well orchestrated that it allowed the ANC never to submit any specific proposal on deadlock-breaking mechanisms, even if its submissions clearly called for such mechanisms. The fact of the matter is that the proposal for deadlock-breaking mechanisms submitted to the Technical Committee at the World Trade Centre were contained not in the ANC'â\200\231s submissions but in the detailed language of the draft constitution, proposed by the National Party/South African Government. In actual fact the language adopted by the Technical Committee and the very structure of the deadlock-breaking mechanism follows almost verbatim the proposal of the South African Government-National Party. The final result is clearly spelt out in section 73 of the 1993 Constitution and as it is now generally recognised, will allow a Constituent Assembly to adopt a new constitution by 50% + 1 majority in less than three months after elections. What is not generally known is the resemblance of section 73 with the SAG/NP own proposals.

During the month of July 1993 our negotiating team tried to find a possible mechanism to bridge the gap between a two-stage process based on the preservation of the South African unitary state and a one-stage process based on the idea of establishing a Federation of States prior to elections. Negotiations took place on a bilateral basis both with the ANC/SACP Alliance and the South African Government/National Party. In both cases negotiations were primarily driven by the work of technical committees which reported to the full delegations on the ways and means available to bridge the gap in approaches and perspectives.

Some of these efforts at the technical level were unmandated and yet they developed a pool of ideas and options which we made available to our counterparts in order to bridge the gap. As the record clearly shows on all occasions our counterparts rejected our bridging proposals, whether mandated or unmandated, without offering us any other option than accepting the framework of the constitution as it was being drafted by the Technical Committee.

We had major contentions with the constitution as it was shaped by the Technical Committee with reference to the nature and extent of the powers given to the States/Provinces/Regions [SPRs] and the degree of their independence in the exercise of such powers. We also had major contentions with respect to the notion of concurrent or exclusive powers, for we believed that all, or substantially all, powers of the SPRs had to be exclusive rather than concurrent. In this respect, I want to stress the fact that when we are talking about concurrent powers, it means that in any given province there can be, for instance, both national and provincial schools, hospitals and housing programmes.

National and provincial powers can therefore coexist side by side and they can be exercised to the fullest extent possible as far as the exercise of such respective powers does not create a conflict between central and provincial governments. If the conflict arises the matter is regulated by what are known as over-rides of the central government which, for instance, would allow the central government to impose legislation and regulation not only to the national schools, hospital and housing programmes in the province, but also to the provincial ones.

The thinking of the Technical Committee was that the central government should be entitled to extend its own powers on matters left to the competence of the provinces in almost any case it felt there was a good reason to do so. This type of thinking was translated into the drafting of very broadly worded over-rides which it was soon recognised could cover almost any conceivable situation. This process ended with the drafting of Section 126 (3) of the 1993 Constitution which contains at least 21 separately identifiable over-rides which allow the central government to resolve in its favour any conflict between concurrent legislative and executive powers of the national and provincial government.

Therefore, the effort of our delegation and of the joint technical committee which was established in the bilateral negotiations was aimed at bridging the issue of the constitutional autonomy of SPRs. Moreover, they looked into available techniques to bridge the gap between the idea of a final constitution and a two-stage process. Outside a specific mandate our constitutional adviser developed the notion of a one-and-a-half stage process in which provinces would have the entrenched right to establish federalism as we envisioned it after elections through the adoption of provincial constitutions which could claim additional powers and autonomy within predetermined parameters.

This approach would have entrenched the so-called "hard core" of the constitution before elections, while allowing for the empowerment of a Constituent Assembly which could by virtue of deadlock-breaking mechanisms change and rewrite the constitution with the exception of its hard core which could not be modified unless special broad majorities were achieved.

This type of thinking underlines the work of the technical committee established both by our delegation negotiating with the ANC, and by our delegation negotiating with the National Party/South African Government. I want to stress once again that this type of exploratory thinking because it was very reconciliatory and aimed at seeking a compromise, was very far removed from our positions as expressed in the documentation which I read earlier, and yet it was rejected outright by our counterparts on many separate occasions. In this respect I wish to read into the record the Memorandum drafted by the technical sub-committee consisting of Mr Valli Moosa of the ANC and our constitutional adviser which ANC Secretary-General, Mr Cyril Ramaphosa, rejected, indicating that such a document could not form the basis for further negotiations. His rejection of this document reached us even before we had had an opportunity to fully analyse and react to the contribution provided by Mr Moosa and our constitutional adviser.

AGENDA / MEMORANDUM OF A STEERING COMMITTEE OF THE TECHNICAL COMMITTEE
BETWEEN THE IFP-KZG AND THE ANC
[M.V. Moosa and M.G. Oriani-Ambrosini
August 8, 1993

The next constitution will provide for regional elections to establish SPR governments and legislatures.

The SPRs shall have powers which immediately vest under the next constitution and are capable of being implemented through SPR legislation. The distinction between exclusive and concurrent powers is dropped. The powers of the SPRs shall be exercised autonomously. The central government shall have the power to co-ordinate

the exercise of SPR powers and to assist the SPRs in their functions as it best deems fit. [This includes contingent and qualified financial assistance and earmarked block grants.]

The list of powers shall be consistent with all the powers listed in the latest draft of the Technical Committee with the inclusion of the power of taxation to ensure fiscal autonomy. In addition, the powers currently exercised by the self-governing territories would be added to where applicable. The list of powers will not be limited to matters of local interest, even if the powers of the SPR could only be exercised within its territory and with effect and consequences not to transcend its territory.

The provisions of the latest report of the Technical Committee shall be adjusted accordingly.

The next constitution would be amendable by a two-thirds majority. It would not contain a constitutional mandate to finalise a new constitution within a predetermined period of time. However, it will contain language indicating that the CMB could draw up a new constitution. The CMB could adopt an entire new constitutional text by means of deadlock-breaking mechanisms to be negotiated at a later time. This mechanism would not allow under any circumstances the adoption of a new constitution by a 51 per cent majority and could not be used to amend the agreed principles attached as a Schedule of the next constitution. Moreover, the deadlock-breaking mechanisms could not be used to amend the Chapter which empowers the SPRs, protects their autonomy and identifies their powers. Additional matters such as the Constitutional Court and possibly some fundamental human rights will also be entrenched in this fashion. /

SPR legislatures will be entitled to adopt their own constitutions autonomously. Their constitutions should be consistent with the set of principles attached as a Schedule to the next constitution as amended with reference to point no. 8 below. The Constitutional Court will verify compliance with such principles. Consistently with the set of principles as amended, the SPR constitutions could claim for the SPRs a range of powers broader than those set forth in the next constitution.

His Majesty the King of the Zulus shall be accommodated within the parameters of the SPR constitution for KwaZulu/Natal with solutions and mechanisms which could be modelled after the provisions of the Constitution of the State of KwaZulu/Natal, this to be decided within the discretion of the SPR legislature.

The set of constitutional principles attached to the next constitution will be amended to indicate that SPRs could exercise all powers which they can adequately or properly exercise. This test will be fleshed out in the adjudication of the Constitutional Court.

The SPR constitutions will be adopted by 75 per cent - or 60 per cent majority. This power could be exercised only once within pre-agreed time limits.

A Constitutional Court will be provided for in the next constitution. The

Constitutional Court will be independent and fully jurisdictional and easily accessible along the lines of the Constitutional Court proposed in the IFP draft constitution

tabled with the Technical Committee. However, the justices will be selected en bloc by Parliament in joint session on the basis of an 80 per cent majority. Consistently with the draft of the Technical Committee the Constitutional Court will need to be empowered before any constitutional amendment can take place.

TECs will be established to ensure free and fair elections. All decisions of the TECs need to be reached with the unanimous consensus of a special permanent standing committee in which the ANC, the NP and the IFP would be permanent members.

The KwaZulu Government will remain in existence under its present legislation and with its present structure and operational and financial autonomy until the new SPR is empowered. The new SPR will rationalise the KwaZulu Government in co-ordination with the central government.

The IFP will return to negotiations. The Standing Rules of Procedures would be amended to provide for a Standing Committee of Consensus and Reconciliation in which the ANC, the NP and the IFP would be permanent members. This Committee shall decide by unanimity on all challenges to consensus on fundamental constitutional matters to the exclusion of procedural matters.

[[A Peace-Keeping Force shall be established on the basis of a quota system reflecting the major political components. The IFP-KZG could fill its quota on the grounds through the KZP police or by borrowing cadres from other entities, such as the Bophuthatswana Government.]]

[[The Peace-Keeping Force will be controlled by a multi-party structure in which fundamental decisions must be taken with the consensus of the ANC, NP and IFP. Deadlock-breaking mechanisms could include the participation of international independent organisations to the exclusion of the OAU, the US Government and the UN.]]

The IFP and ANC commit to resolve on a bilateral basis any further problem in negotiations and will go ahead expeditiously with the process of transformation. The IFP and the ANC will make a joint submission to the technical committee to implement this memorandum.

Mr Speaker, Honourable Members, I indicated earlier that before we could even assess the full implications and acceptability of the approach outlined in the foregoing document, the ANC conveyed to us that negotiations could not proceed on the basis of such a document. The rejection by the ANC of the documentation provided by Mr Moosa and our constitutional adviser, clearly revealed to us that the ANC was not even willing to conside
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an option which was so far away from our bottom lines and our demands that it most likely would have been highly acceptable with respect to the policies of the Inkatha Freedom Party and the KwaZulu Government. This gave a clear indication that the ANC was not willing to make any substantial move to meet us half way. This document had also not been accepted by the KwaZulu Government or the Inkatha Freedom Party.

Therefore, we pursued with greater intensity negotiations with the South African Government/National Party in the hope that having reached an agreement with them, it would then become easier to convince the ANC/SACP Alliance to seek a possible reconciliation on the issue of federalism and entrenched constitutional guarantees. We had received indicatio
ns
from the SAG/NP that they would canvass with the ANC any agreement reached with us, and that such route could have been more productive of results. Therefore we put negotiations with the ANC on the back burner until negotiations with the SAG/NP exhausted their course by the end of the second week of October 1993. Future events proved that our reliance on the SAG/NP was not justified, for when by the end of December 1993 we did reach an agreement with the SAG/NP on most of the contents of the Freedom Allianceâ\200\231
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December 19, 1993 document, known as the Yellow Paper, the SAG/NP failed to defend that agreement with the ANC/SACP Alliance and argued against and opposed the amendments contained in the Yellow Paper during the trilateral negotiations of January and February 1994.

During the months of August and September 1993, bilateral negotiations with the South African Government/National Party were extremely intense and produced a variety of options, proposals and discussion documents, most of which were rejected by the South African Government/National Party which could not detach itself from the terms and conditions of the Record of Understanding and from the main frame of the constitution being drafted by the Technical Committee at the World Trade Centre. In fact, the effort of the South African Government/National Party during negotiations was primarily directed at convincing us to accept the draft constitution produced at the World Trade Centre.

Mr Speaker, Honourable Members, I wish to read into the record a significant document which was submitted by our delegation to the National Party and the South African Government as a basis for a possible agreement between the IFP and the KwaZulu Government and the South African Government and the National Party on which further progress could be made on a multilateral basis.

UNMANDATED DISCUSSION PAPER

Following intense bilateral negotiations between the KwaZulu Government and the South African Government, it has emerged that the KwaZulu Government and the South African Government share broad commonality of vision in relevant constitutional matters. The South African Government and the KwaZulu Government have determined that the constitutional documentation produced through the negotiation process at the World Trade Centre has numerous and substantial flaws and is otherwise defective to ensure long-lasting freedom, democracy and peace in South Africa.

For this reason, the KZG and the SAG have agreed to commit themselves to a common undertaking to propose and support fundamental notions of constitutionalism so as to ensure that they are going to be entrenched in the next constitution of South Africa being drafted
at
the Multi-Party Negotiation Process. The KZG and the SAG agree to take any available step at the negotiation and political levels to ensure that the constitutional objectives listed
herein
are successfully achieved in the interests of the country.

The KZG and the SAG commit themselves to ensure that the next constitution establishes in South Africa a federal system which will be entrenched in future stages of constitutional development. This federal system should be based on the following four characteristics:

> divided sovereignty and dual citizenship

* the right of the SPRS to exist under SPR constitutions autonomously adopted [indestructible states in an indestructible union]
the right of the SPRS to have final decision-making powers in the areas of their constitutional autonomy
the right of the SPR to participate in the legislative decision-making at national level by virtue of a Senate which represents the SPR with powers equal to those of the National Assembly.

It is agreed that the achievement of a federal system should be entrenched in the process of constitutional development, even if this result might not be obtained at the first stage of constitutional development and may need to be perfected in a second stage following the next elections.

The next constitution adopted by the MPNP should contain a hard core which reflects the terms of the political settlement amongst all the major participants. This hard core shall not be modifiable by virtue of deadlock-breaking mechanisms, and could only be amended through ordinary reinforced procedures of constitutional amendment requiring a two-thirds majority of the Constitutional Assembly. The hard core of the constitution shall include the provision regulating the boundaries, powers, duties and functions of the SPR, the procedures for amendment of the constitution, the provisions on the Constitutional Court and the core of internationally recognised human rights to include private property and the right to free-market enterprise.

Article 68.1 of the Third Draft Constitution submitted by the Technical Committee on Constitutional Matters on August 20, 1993 [hereinafter "the draft"] shall be amended to read as follows:

"A new constitutional text may be adopted by the Constituent Assembly." Section 65 (2), 66 (1) and (3) and 39 (1) shall be amended accordingly.

Article 68 (3) should indicate that the deadlock-breaking mechanism cannot be utilised for the approval of constitutional provisions amending or affecting the constitutional provisions related to the subject matters referred to in paragraph 3. above.

Article 68.5 should indicate that the process of verification of any constitutional amendment with the constitutional principles by the Constitutional Court shall be of a jurisdictional nature. Therefore in its relevant part the section shall read: "...It has been certified through adjudication by the Constitutional Court..." Article 66.3 shall be amended accordingly.

The majority required for approval of a constitutional amendment at a referendum should be raised from 60% to 70%. Article 69 (9) shall be amended to require that in the case a draft constitution submitted to referendum is not ratified the same procedure set forth in Article 68 (1) through (8) shall apply.

The principle of the constitutional state must be entrenched in this as well as in any other stage of constitutional development. This will be achieved by removing Article 68 from the section of the constitution which can be amended by virtue of deadlock-breaking mechanisms. Moreover, principle XIV of Schedule 7 must spell out that the constitution adopted by the Constitutional Assembly can only be amended by a two-thirds majority, while Constitutional Principle IV shall indicate that the constitution must be justiciable through the offices of an independent jurisdictional and easily accessible Constitutional Court.

SPR constitutions shall not be subject to the discretion of the Constitutional Assembly. The MPNP shall draft and adopt a basic and standard SPR constitution as an attachment to the next constitution. Such standard SPR constitutions shall contain all the provisions on SPR government and legislature presently set forth in the draft. The standard SPR constitution will be amendable autonomously by the SPR legislatures after elections. Approval by the Constitutional Assembly would not be required. It could be envisioned that the new SPR constitutions, autonomously adopted by the SPR legislatures in substitution of the standard SPR constitution, could be submitted to the Constitutional Court for verification of compliance with the principles of Schedule 7 at the same time when the constitution adopted by the Constitutional Assembly is submitted to the Constitutional Court.

The principles set forth in Schedule 7 shall be changed so as to allow the SPR legislatures to claim powers in addition to those set forth in Article 118 and in their initial SPR constitution. The interim constitution would recognise the power of the SPR legislature to adopt after elections a new constitution to broaden the area of their powers, duties and functions within the limits set forth in the principles of Schedule 7. It is essential for us that Schedule 7 contains a principle which reads as follows:

by __ per cent majority any SPR legislatures may adopt a new SPR constitutions to define and organise their powers, duties and functions. Such constitutions shall identify the powers, duties and functions of the SPR, provided that the central government shall have the power to exercise exclusive legislative, administrative and judicial functions and powers in the following subject matters:

enforcement and implementation of the Bill of Rights and assistance to the SPR for the implementation of human rights requiring implementing legislation and of social provisions contained in the Bill of Rights and other provisions of the constitution.

monetary system, foreign credits, exchange and convertibility

general principles of legislation to coordinate the regulation of banking, credit and insurance

general principles of legislation to coordinate the regulation of environmental protection of national interest

11.

- general principles of legislation to coordinate economic development and foster inter-SPR commerce among the SPRs

- general principles of legislation to coordinate the technical regulation of equipment of communication

- legislation to provide negotiation and procedural coordination of the SPRs policies with national policies and the policies of other SPRs in the field of transportation, energy, inter-SPR and foreign commerce, economic development, consumer protection, banking and social welfare in so far as they relate to the interests of the Federal Republic of South Africa. Parliament may enact legislation to empower the Government to enter into agreements with the Government of the member states to ensure policy coordination in other fields.

- nationality, immigration, emigration, alienage and the right of asylum

- international relations

- defence against foreign enemies

- organisation and administration of the federal system of justice in the subject matters of federal prerogative

- admiralty and maritime law and regulations

- air transportation law and regulations

- protection of intellectual property rights

- external customs, tariffs and foreign trade

- legislation on weights and measures

- use of the area of exclusive economic influence

- other matters as authorised by a constitutional law of the Federal Republic of South Africa

- summoning the SPR militia to defend the territory, freedom and liberty of the Federal Republic of South Africa from an external enemy. When entering or stationing in the territory of an SPR, the armed forces of the Federal Republic of South Africa or the armed forces of another SPR shall seek the approval of the concerned SPR.

All powers not reserved by the constitution to the Federal Republic of South Africa shall belong to the SPR and to the people respectively. When required by the constitution to assist SPRs in the exercise of their functions, the Federal Republic of South Africa shall do so in a fashion which preserves the integrity of the jurisdiction of the concerned SPR. However, it may condition its assistance to the compliance with reasonable criteria and directives.

To the extent that the new SPR constitution identifies powers, duties and functions which exceed those set forth in this [the interim] constitution the power of the SPR to adopt such constitution can be exercised only once and within two years from the day of the first session of the SPR legislature. The SPR constitution so adopted will be amendable pursuant to its provisions.

Article 118 shall be revived to ensure that all the powers currently listed as concurrent powers become exclusive. Article 118 (3) shall be changed to provide as follows: Should the legislation or administrative action of an SPR exceed its constitutional limitation, it can be challenged before the Constitutional Court. If another SPR or the national government holds that legislation of the SPR is in conflict

with the national interest on any account, the SPR legislation can be voided by a resolution adopted by qualified majority of Parliament in joint session. Concurrent powers shall only be contemplated for subject matters which can be transferred to the SPR in addition to those listed in 118 (1) and (4), and Article 118 (5) shall only apply to such powers. However, Article 118 (5) shall be rephrased to indicate that Parliament can only adopt general principles of legislation in matters in which SPR governments have concurrent power, leaving the legislative implementation of such principles to the SPR autonomy. Article 122 shall be deleted.

The list of powers set forth in Article 118 shall include the power of self-organisation and many other powers which can be exercised at SPR level, to be identified at a later time through further negotiations between the KZG and the SAG/NP.

Article 124 shall be incorporated in the SPR constitution but Article 124 (4) and (7) shall be deleted. Article 126 shall be deleted.

Articles 125 through to 137 shall be reviewed in accordance with agreement reached on the foregoing matters. The Independent Commission of SPR government shall only help the SPR governments with technical expertise and coordinate the process of rationalization between the SPR and national governments. The members of the commission should be appointed through the participation of SPR governments.

The self-governing territories shall be preserved in their financial, operational and institutional autonomy as they presently stand until the time when they are reincorporated and rationalised by the SPRs. Article 119 shall be revised accordingly. Provision should be made for the continuation of the present legislatures and cabinets of the self-governing territories.

The power of the Senate shall be re-examined to ensure that the Senate has control on all relevant SPR matters and enjoys legislative powers on the same footing as the National Assembly.

The Bill of Rights should be re-examined to ensure the entrenchment of private property and free-market enterprise and to insert mechanisms which can protect the integrity and pre-eminence of civil society. These provisions, along with the core of other fundamental human rights, will not be amended by virtue of deadlock-breaking mechanisms. For this purpose, social and cultural formations shall be recognised an area of protected constitutional autonomy.

The provisions on the Constitutional Court shall be amended so as to increase its accessibility and jurisdiction.

Article 39 (1) shall be amended to ensure that Parliament could survive for five years after elections.

The terms of office of MPs should not be terminated in the membership in their parties is terminated

Mr Speaker, Honourable Members, I want to stress that the foregoing document was an attempt to reach compromise and reconciliation with our counterparts, and as such it moved very far away from the policies and the constitutional demands of the IFP and the KwaZulu Government. In fact, the approach contained in the document I have just presented to you moved within the parameters of the one-and-a-half stage process which would have created a constitutionally protected option to establish federalism after elections, rather than before elections, making allowance for the empowerment of a Constituent Assembly which could not undermine the so-called "hard core" of the constitution consisting of specific chapters of the constitution not amendable through deadlock-breaking mechanisms.

Once again, before the KwaZulu Government and the controlling body of the Inkatha Freedom Party could fully evaluate the implications of this approach, negotiations were terminated by the unwillingness of the South African Government and the National Party to compromise, for they rejected the entire approach. In fact the document which I presented to you earlier became the basis for a Joint Discussion Paper between the South African Government and the KwaZulu Government. This Joint Discussion Paper was developed by the delegations through the work of the technical sub-committee. This second document shows the degree of consensus reached between the South African Government and the KwaZulu Government on the basis of the enormous concessions that we were willing to make to seek reconciliation and an all-inclusive settlement. However, this document also clearly shows the two crucial issues on which negotiations reached an insurmountable deadlock and eventually broke down.

The first crucial issue was related to the extent of powers to be recognised to provinces. We were willing to consider the structure of provincial powers as provided for in the constitution

being drafted at the World Trade Centre only in the event that provinces could claim additional powers and autonomy within predetermined parameters after elections. This was a major concession for us, for the entire structure of provincial powers in the draft constitution was then, as it is now, totally and unconditionally unacceptable to us. However, the South African Government refused to agree to this crucial point which was recorded in Section 4.5 of the Joint Discussion Paper. Failure to reach agreement on point 4.5 undermined the entire structure of the negotiations with the South African Government and the National Party and determined a situation in which our delegation saw no way forward.

The second crucial point on which no agreement could be reach was on the nature and value of the Joint Discussion Paper. The South African Government and the National Party delegations did not accept to embody in the Joint Discussion Paper the contents of the first two paragraph of the document produced by our delegation, which I read earlier, and which would have made the Joint Discussion Paper a binding agreement rather then a mere reference document which the South African Government and the National Party delegations could renege on at any time. The fact of the matter is that during the trilateral negotiations of January and February 1994 the South African Government and the National Party opposed many of the contents of the Joint Discussion Paper which it had previously agreed upon.

Mr Speaker, Honourable Members, I wish to read the joint discussion paper between the KwaZulu Government and South African Government as it was amended on the basis of the final meeting of the technical sub-committee. Attached to this document is a separate position paper related to the fiscal and financial powers of the provinces.

JOINT DISCUSSION PAPER
BETWEEN
THE SOUTH AFRICAN GOVERNMENT
AND THE KWAZULU GOVERNMENT

CONSTITUTIONAL STATE

(v)

It is imperative that a Constitutional State ("regstaat") be firmly entrenched in the Constitution and the Constitutional Principles ("CP"). In order to attain that objective, the following should be added as CPâ\200\231s:

The establishment of a Constitutional Court as a jurisdictional, independent, impartial and non-political institution to adjudicate the constitutional validity of legislation and all actions at all levels of government;

The establishment of a Human Rights Commission to promote human rights and democratic values;

The fundamental rights set forth in Chapter 3 may be added to but not detracted from.

Amendments to the Constitution shall require a two- thirds majority of Parliament and, where applicable, the consent of two-thirds of the legislature of an SPR affected, and if there is a chamber of Parliament composed of SPR representatives, two-thirds of the members of such chamber.

Amendments to Chapter 3 shall require a three-fourths (75%) majority.

AD SECTION 68

2.1

Section 68(1) shall be substituted as follows: The revision or confirmation of this Constitution in terms of this section shall be completed within two years from the commencement of the first session of Parliament.

The parties agree that the word "new" before the word constitution shall be deleted from sections 68(1), 65(2), 66(1), 66(3), 39(1), 68(2), 68(3), and the Preamble. The Preamble should read "... confirms this or draws up a final Constitution."

In the context of section 68, the next constitution adopted by the MPNP should contain a hard core which reflects the terms of the political settlement amongst all the major participants. This hard core shall not be modifiable by virtue of deadlock-breaking mechanisms, and could only be amended through ordinary reinforced procedures of constitutional amendment requiring a two-thirds majority of the Constitutional Assembly. The hard core of the constitution shall include the provisions regulating the boundaries, powers, duties and functions of the SPR, the procedures for amendment of the constitution, the provisions on the Constitutional Court and the Bill of Fundamental Rights enshrined in Chapter 3. Section 68(3) should read as follows: "The deadlock-breaking mechanism set forth in this section may not be used to amend or repeal the following chapters of this constitution:..."

2.4

2.5

2.6

The panel of experts referred to in section 68(3) should be nominated by the leaders of the five largest parties represented in Parliament.

Article 68.5 should indicate that the process of verification of any constitutional amendment with the constitutional principles by the Constitutional Court shall be of a jurisdictional nature. Therefore in its relevant part the section shall read: "...It has been certified through adjudication by the Constitutional Court..." Article 66.3 shall be amended accordingly.

If the said majority is not achieved, then

@ Section 68(9) shall be amended to require that the same procedure set forth in Article 68(1) through (8) shall apply.

or

(i1) the constitution for the transitional period shall become the permanent constitution that can be amended or replaced at any time by two-thirds or more of the members of the National Assembly and the Senate sitting together.

CONSTITUTIONAL COURT

3:1

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3.4

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The Constitutional Court shall have the powers to adopt its own rules, procedures and organisation. The law may not regulate any matter related to the CC.

The Constitutional Court shall draft and propose to Parliament its own budget. The salaries and pensions of the judges of the CC shall be set forth by law and shall not be inferior to those of the judges of the Appellate Division.

The term of appointment of judges of the Constitutional Court should be for a fixed period of 10 years, not renewable. Upon termination of office a judge may not hold public office for 5 years.

The Constitutional Court in developing its own procedure, shall develop forms of direct access with special regard to the indigent.

All decisions of the Constitutional Court shall have retroactive effect of general application and may provide rules to recognise rights meriting protection and which

vested in good faith under norms declared null and void or ineffective.

Section 87(2)(a) should read: "the violation or anticipated violation of any fundamental right enshrined in Chapter 3 or any other provision of this constitution. "

The following aspects should be brought to the attention of the Technical Committee on Constitutional Issues:

(i) Jurisdiction in matters arising out of the impeachment of the State

President and Cabinet Ministers;

(ii) Jurisdiction over certain other sources of law eg. common law, collective bargaining agreements and statutes of political parties.

(iii) The impeachment and disqualification of judges.

(iv) Jurisdiction to protect the constitutional autonomy of institutions of civil society.

SPR CONSTITUTIONS

The following common objectives have been identified:

4.1

4.2

4.3

The MPNP shall draft and adopt a basic and standard SPR constitution.

Such standard constitution shall contain all the provisions on SPR legislatures and executives as may be decided on by the MPNP.

Such standard constitution shall autonomously be amendable by SPR legislatures after the elections.

NOTE: Prof Kruger indicated that the term "autonomous" in this context may require re-visiting.

SPR constitutions so amended shall comply with Schedule 7, and will in that regard be certifiable by the CC.

An SPR legislature may broaden its area of powers to the extent allowed for by the parameters set forth in the

NOTE: The words to be inserted are either "national constitution" (Prof Kruger) or "Constitutional Principles" (Dr Ambrosini). The latter will imply that an SPR may claim powers extending beyond those allocated by (the present) Section 118. In the same context Dr Ambrosini asks for a re-phrasing of the relevant Constitutional Principle (XXIV) to list the powers which must be reserved to the national government, carrying the implication that all the powers which are not listed could be claimed by the SPRâ\200\231s. At the request of Dr Ambrosini the following statement, taken from the KZG unmandated discussion paper, is inserted to clarify the KZG position:

The principles set forth in Schedule 7 shall be changed so as to allow the SPR legislatures to claim powers in addition to those set forth in Article 118 and in their initial SPR constitution. The interim constitution would recognise the power of the SPR legislature to adopt after elections a new constitution to broaden the area of their powers, duties and functions within the limits set forth in the principles of Schedule 7. It is essential for us that Schedule 7 contains a principle which reads as follows:

by __ per cent majority any SPR legislatures may adopt a new SPR constitutions to

define and organise their powers, duties and functions. Such constitutions shall identify the powers, duties and functions of the SPR, provided that the central

government shall have the power to exercise exclusive legislative, administrative and judicial functions and powers in the following subject matters:

enforcement and implementation of the Bill of Rights and assistance to the SPR for the implementation of human rights requiring implementing legislation and of social provisions contained in the Bill of Rights and other provisions of the constitution.

monetary system, foreign credits, exchange and convertibility

general principles of legislation to coordinate the regulation of banking, credit and insurance

general principles of legislation to coordinate the regulation of environmental protection of national interest

general principles of legislation to coordinate economic development and foster inter-SPR commerce among the SPRs

general principles of legislation to coordinate the technical regulation of equipment of communication

legislation to provide negotiation and procedural coordination of the SPRs policies with national policies and the policies of other SPRs in the field of transportation, energy, inter-SPR and foreign commerce, economic development, consumer protection, banking and social welfare in so far as they relate to the interests of the Federal Republic of South Africa. Parliament may enact legislation to empower the Government to enter into agreements with the Government of the member states to ensure policy coordination in other fields.

nationality, immigration, emigration, alienage and the right of asylum international relations

defence against foreign enemies

organisation and administration of the federal system of justice in the subject matters of federal prerogative

admiralty and maritime law and regulations

air transportation law and regulations

protection of intellectual property rights

external customs, tariffs and foreign trade

legislation on weights and measures

use of the area of exclusive economic influence

other matters as authorised by a constitutional law of the Federal Republic of South Africa

summoning the SPR militia to defend the territory, freedom and liberty of the Federal Republic of South Africa from an external enemy. When entering or stationing in the territory of an SPR, the armed forces of the Federal Republic of South Africa or the armed forces of another SPR shall seek the approval of the concerned SPR.

All powers not reserved by the constitution to the Federal Republic of South Africa shall belong to the SPR and to the people respectively. When required by the constitution to assist SPRs in the exercise of their functions, the Federal Republic of South Africa shall do so in a fashion which preserves the integrity of the jurisdiction of the concerned SPR. However, it may condition its assistance to the compliance with reasonable criteria and directives.

To the extent that the new SPR constitution identifies powers, duties and functions which exceed those set forth in this [the interim] constitution the power of the SPR to adopt such constitution can be exercised only once and within two years from the day of the first session of the SPR legislature. The SPR constitution so adopted will be amendable pursuant to its provisions.

At the request of Dr. Ambrosini the following statement was also noted: "The option of claiming additional powers after elections could apply to KwaZulu/Natal only, on an asymmetric basis.

SPR POWERS

Consideration was given to the need of re-examining SPR powers as set forth in Section 118. However, pending the finalisation of the SAG proposal in this regard, discussion was deferred until a later time. The position of the KZG was stated in the document tabled at the meeting of 27 September. Dr Ambrosini stressed that such position was contingent on finalisation of an agreement on the foregoing point.

THE COMMISSION ON SPR GOVERNMENT

Sections 125-137 will need to be revisited depending on the nature of agreement on the foregoing points.

THE SENATE
7.1 The parties in principle agree that a Senate representing SPRâ\200\231s should be esta blished.
7.2 The legislative role of the Senate should be substantial.

NOTE: Dr Ambrosini indicates that he favours a deletion of the whole of s.59, and

the deletion of the words "... to finance ..." in s.58(1).

Dr Ambrosini raised a concern on the advisability of terminating the office of an MP on the termination of the MPâ\200\231s membership of a political party (Section 43(1)(b)).

The parties agree that the means to protect the autonomy of civil society should be broadened, particularly in the Bill of Fundamental Rights.

In order to broaden the spectrum for the protection of civil society, the following is suggested:

The constitutional establishment of an Independent Commission to empower civil society to check and balance the unjustified encroachment by Government on the autonomy of the institutions of civil society.

Dr Ambrosini places on record that he, in addition to the above, favours a constitutionally mandated privatisation effort.

SECTION 119

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The position of the KwaZulu Government after elections

10.1

10.2

The parties have analyzed the contents of sections 119 and 120 and have come to the conclusion that those provisions will:

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(i)

(iii)

guarantee the present institutional autonomy of KwaZulu Government until rationalisation;

guarantee the operational autonomy of KwaZulu Government until rationalisation;

guarantee the status and position of KwaZulu Government until rationalisation provided that the SPR recognises the civil servantâ\200\231s seniority/service.

In order to address the KwaZulu Government concern that the institutional and operational autonomy of KwaZulu Government could be changed prior to the coming

into operation
are suggested:

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(i)

Dr Ambrosini
administrative

SECTION 121

of the (transitional) constitution, the following clarifying amendments

By inserting the words "... as determined by the respective enabling legislation which established them ..." for the words "... which immediately before the coming into force of this Constitution were established ..." in 5.119(3)(a)).

By inserting the words "... including the enabling legislation which established the self-governing territories ..." after the comma in the

third line of s.120(1).

places on record that he would like to add the words "and the related practices" to paragraphs 10.2(i) and (ii).

Documents will be exchanged on Section 121 of the draft constitution. At the request of Dr. Ambrosini the following statements are also noted: "Any agreement on 121 also depends entirely on 4.5 above, for only in that context we could bridge the otherwise unreconcilabl
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issue of residual taxing powers."

GENERAL REMARKS

Dr Ambrosini places on record the concern of the KwaZulu Government regarding:

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a single ballot paper to be utilised in elections;

The possibility of voting outside the SPR of ordinary residence.

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DISCUSSION PAPER FROM THE REPRESENTATIVE OF THE KWAZULU GOVERNMENT ON THE TECHNICAL COMMITTEE BETWEEN THE KWAZULU GOVERNMENT AND THE SOUTH AFRICAN GOVERNMENT ON THE REFORMULATION OF SECTION 121 OF THE DRAFT

INTERIM CONSTITUTION.

This paper has been mandated by Section 9 of the Joint Discussion Paper between the SAG and the KZG.

This contribution aims at comparing the proposed reformulation of Section 121 submitted by the Department of Finance of the SAG with the constitutional position of the KZG as expressed in the Constitution of the State of KwaZulu/Natal and the Policy Speech delivered to the KwaZulu Legislative Assembly by His Excellency Prince Mangosuthu Buthelezi this year, and in other constitutional documentation of the KZG as they are understood by the author of this paper.

The draft reformulation submitted by the SAG deals with three subject matters:

1. The taxing powers of the SPRs

2 The entitlement of SPRs of the share of the revenues collected by the national government

3 The powers of the SPR to raise money in the market and assume financial obligations.

Section 121 of the latest draft prepared by the Technical Committee deals with the same thr ee
items.

The position of the KZG could be summarised as follows:
1 SPRs should have residual taxing powers.

2. There shall be equalisation grants between national government and the SPRs – – which could be earmarked -- on the basis of a) equal treatment and b) objective criteria

The financial autonomy of an SPR requires the power to raise money. Such power directly affects the exercise of other powers. For instance, if an SPR has the power to decide on the construction of an incinerator, the exercise of such power should not be impaired by the fact that financing for such an incinerator could be obtained only with the political approval of the national government for the required issuance of bonds in other tools of finance. Moreover, the federal constitution could impose a balance budget provision to be incorporated as a necessary requirement in SPR constitutions, with the qualifying proviso that such requirement could be derogated by virtue of a special parliamentary majority approving the budget on the basis of documentation which specifies the sources of payment and the economic impact of the specific economic manoeuvre. [see Article 80 of the Constitution of the State of KwaZulu/Natal.]

However, the exercise by the SPR of these powers could not adversely affect interstate commerce or the constitutional position of other SPRs. It is the KZG position that any type of conflict arising out of this as well as any other subject matter between national and SPR level of government, or between SPRs should be resolved in a jurisdictional fashion by the Constitutional Court.

It needs to be stressed that the full-faith and credit of the national government would not need to be extended to the obligations of an SPR government unless a specific agreement is reached in this sense on a case by case basis.

The SAG proposal identifies a limited tax basis on which SPRs can exercise their taxing powers, including surcharge taxation. The exercise of such powers is suggested to be on the basis of a recommendation from the Financial and Fiscal Commission [FFC]. In addition the SPR could be given additional tax bases through legislation. :

In the draft of the Technical Committee in addition to the approval of the FFC the political approval of the legislature is required. This latter requirement would make the financing of projects totally unviable, producing unworkable delays and political uncertainty in SPR operations.

As far as the power to raise loans is concerned, the reformulation suggested by the SAG is closer to the KZGâ\200\231s position than the draft of the Technical Committee. The SAG position calls for the technical oversight of the FFC and for technical inputs from the Auditor-General. This technique addresses some of the concerns that the KZG addressed by means of pertinent provisions in the SPR constitutions. The KZG position, however, more heavily relies on the autonomy of the SPRs to ensure that the SPR power on the subject matter is regulated by the same economic concerns and awareness for the fundamentals which seem to motivate the SAG proposals in this respect. The advantage of the KZG position relies on greater involvement of the political representatives at SPR level, thereby interiorising economic awareness and management skill within the SPR government. The proposal of the Technical Committee is in total conflict with the KZG position to the extent that it would give a blank cheque to the national executive to regulate the subject matter on the basis of political concerns.

The SAG proposal on the distribution of revenues collected nationally amongst the SPR seems to go a long way to meet KZG thinking. However, greater attention ought to be given to the relation between the recommendation of the FFC and the final power of the national parliament on this matter. The KZG believes that the role of the FFC, as well as the powers of parliament, in this subject matter should be exercised under the parameters of a water-tight constitutional provision which entrenches the power of the SPRs to receive transfers from the national government on an equalisation basis characterised by equal treatment and objective criteria to be determined at a technical rather than a political level through the action of the FFC.

All the foregoing considerations heavily hinge on the powers, composition and institutional position of the FFC. It is essential that the FFC is established as an independent and technical body, the composition of which does not derive from the political power. The FFC must be provided with institutional independence in the constitutional order and shall emanate

to a considerable extent from institutions of civil society, such as chambers of commerce a
nd
trade and industry associations.

These comments are provided on the basis of the first draft for the reformulation proposed
by the SAG and will be updated on the basis of the second draft which at the time is not
available to the author.

The author wishes to stress the fact that this matter is a crucial element in the definitio
n of
the relation between national and SPR governments. The subject matter is complex and a
preliminary determination must be made on what degree of constitutionalisation this matter
should receive. This means to determine what portion of the complex legal regulation of
interest between national and SPR governments should become part of, and be entrenched
in the constitution. It is obviously not advisable to entrench such regulation of interest
to the
degree of details. What ought to be entrenched are the general parameters of this relation
which define the respective checks and balances and areas of constitutional autonomy. The
fluid process of future constitutional development through implementing legislation and
constitutional adjudication will define details so as to better reflect the needs of the pr
esent.
It seems to the author that the SAG draft proposal constitutionalises as much as is advisab
le
of this matter.

In conclusion it seems that the KZG and SAG proposals related to equalisation grants and
powers of the SPRs to raise money could be reconciled. A possible way of reconciliation
could rely on the structure of the powers of the FFC which could be coordinated with SPR
legislatures.

It also seems that the KZG and SAG positions are still at fundamental variance as far as th
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extent of SPR taxing power is concerned, such difference hinging on the notion of residual

taxing powers.
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Mr Speaker, Honourable Members, there is no doubt that our negotiating action enormously
improved the constitution while it was drafted at the World Trade Centre. The documents
that I read into the record earlier clearly show the many points on which our demands were
finally accepted and were translated in constitutional amendments. Amongst them, the most
significant is surely related to the power of provinces to adopt their own constitutions. W
e
had to struggle vehemently for the recognition of the need for constitutions for provinces.
Then we had to fight to ensure that provincial constitutions would not be drafted by the
Constituent Assembly and that their adoption would be primarily under the control of the
provinces.

Once that was accepted, our struggle was to free the provincial constitutions from the
limiting provisions of the national constitution, which eventually led to the amendment to
Section 160 passed by Parliament in March this year. This amendment finally recognised
that through the adoption of a provincial constitution a province may regulate its own
executive and legislative structures as it best sees fit, rather than in terms of the very
detailed
provisions set out in the national constitution. This gives autonomy to the provinces on th
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organisation and administration of its powers. It is therefore an important concession whic
h
is undermined by the fact that the powers given to the provinces are insignificant.

The amendment of section 160 of the 1993 constitution also ensures that provincial constitutions are not going to be necessarily wiped away by the adoption of a second constitution. Technically speaking, such constitutions could still be cancelled by a constitution adopted by the Constituent Assembly; however, a Constitutional Principle prescribes that even if such constitutions are repealed, provinces would still have the same degree of autonomy to adopt a new constitution as they had under the 1993 Constitution as amended.

The Constitutional Principles also ensure that the Constituent Assembly may not give provinces substantially less powers than those given to them by the 1993 Constitution as amended. Since such powers are very limited, the value of this concession is also undermined. Moreover, the constitution continues to state that as a first priority the Constituent Assembly shall rewrite the chapter on provincial powers and functions.

History has shown that we secured many other constitutional improvements which were covered by the Joint Discussion Paper. Among them are the two ballot paper, the role of the Senate with reference to money bills and provincial finance, improvements in the fiscal and financial autonomy of provinces, the role and powers of the Constitutional Court, and improvements in the Constitutional Principles. Unfortunately many of these constitutional improvements did not go far enough to be truly significant.

These are very substantial achievements which reflect our negotiating effort since July 1993 and which are clearly documented in the record which I presented earlier to this House. However, these achievements fall very short of delivering to us anything of substance in terms of federalism and the entrenchment of constitutional guarantees. Our attempt to find ways to reconcile our position with those of our counterparts are clearly expressed in the documentation which I presented earlier to this House. They are a huge effort on our part which was not met by any appreciable effort by our counterparts. Therefore, we had to realise that we had scratched the bottom of the negotiating barrel.

This negotiating context of unsurmountable deadlocks set the scenario for the formation of the Freedom Alliance as a negotiating alliance. I want to stress the historical importance of the formation of the Freedom Alliance. In fact, in the process of reconciliation of the different positions held by the various members of the Freedom Alliance, the constitutional positions and vision of the IFP became to a great extent the minimum common denominator in all the positions taken by the Freedom Alliance in negotiations.

This was an achievement of historical dimensions which makes us today even sadder when we tell the story of the failure of negotiations by the end of February 1994. In fact, for the first time a window of opportunity was opened to establish a federation of states. For a few months this ideal had the support not only of the Inkatha Freedom Party but also of the Conservative Party, the Afrikanervolksfront, the Ciskei Government and the Bophuthatswana Government. The work of the Freedom Alliance set the basis of an all-inclusive solution which, if timeously accepted by our counterparts, would have created unprecedented conditions for long-lasting peace and democracy in our country. It was a unique opportunity for the concretization of a solution capable of catering for and satisfying different and often conflicting interests.

The negotiating unity of the Freedom Alliance was clearly expressed in the opening document used in negotiations with the ANC/SACP Alliance and the National Party-South African Government. In this respect I wish to read into the record the Freedom Allianceâ\200\231s opening
statement at the bilateral discussion with the ANC/SACP Alliance on October 25, 1993. This document sets out the differences between the unified constitutional approach of all the
members of the Freedom Alliance on the one hand, and the documentation of the World Trade Centre on the other hand. The document also acknowledges that several months of negotiations could not reconcile these differences and called for a new mechanism by virtue of which new ways and means to reconcile differences could be found, namely a summit of leaders.

FREEDOM ALLIANCE

OPENING STATEMENT AT THE BILATERAL DISCUSSION WITH THE ANC/SACP ALLIANCE ON OCTOBER 25, 1993

LIST OF IRRECONCILABLE DIFFERENCES IN CONSTITUTIONAL POSITIONS BETWEEN THE FREEDOM ALLIANCE AND THE WORLD TRADE CENTRE PROCESS AND THE WAY FORWARD TO CONSTRUCTIVE NEGOTIATIONS

During the October 17, 1993 bilateral discussion with the Freedom Alliance, the ANC indicated that by and large it is satisfied with the draft constitution as proposed by the Technical Committee. During the October 20 bilateral with the FA, the SAG offered a document which states the SAG positions. When compared with the type of objections that the FA raises against the documentation emerging from the World Trade Centre, the differences between the latest draft constitution, and therefore the ANC position, and the SAG blur and therefore for the purposes of this document, the ANC/SAG position will be treated on the same level unless otherwise indicated.

| B Form of State

The expression â\200\231form of stateâ\200\231 is used to describe the mystical relation between the three
components of a state; population, territory and sovereignty.

The Freedom Alliance advocates that South Africa be divided into member states.

These member states shall be primarily responsible for the governance of the people. Therefore, they shall exercise all the powers which a compelling reason does not require to be exercised at different levels of government.?

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Member states shall exercise all residual powers. It needs to be stressed that when allocating powers between levels of government attention should not only be given to legislative powers as they relate to the exercise of governmental functions. 1In fact the legislative powers of Parliament far exceed the scope of requlating and directing executive functions, for they provide directly for the direction, organisation and regulation of civil society in so far as, for instance, family law, trade and

commerce law, criminal law, etc. are concerned.

The member states shall have residual sovereignty in a system of divided sovereignty with any other level of government, which sovereignty is to be recognised. Member states shall have recognised constitutional autonomy.?

Member states shall have the power to participate as such in the legislative decision-making of any higher level of government. This type of organisation of the member states shall ensure that the people residing therein will be able to govern themselves to the fullest extent possible, thereby concretising their right of self-determination.

The boundaries of the member states shall be drawn so as to guarantee the right of self-determination of the peoples living therein. Such exercise shall be adjusted to the manner and fashion in which each people has elected to exercise its right of self-determination. For instance, the Zulu Nation has not opted to have its own member state but has rather chosen to erect KwaZulu/Natal into a member state in which the Zulu Nation will live on an equal footing with all the other people living in the territory. Boundaries should be drawn to accommodate the expression of the right of self-determination by Tswana and Afrikaners.*

This involves final decision-making in the area of constitutional jurisdiction of member states, the power to autonomously adopt constitutions through which the member states can organise the exercise of their functions and their own offices and structures, and the right to exist as indestructible constitutional entities.

The recognition of the right of self-determination and the acknowledgement of the necessity to recognise ethnicity as a building block of the constitutional dispensation has an important bearing on the form of state and on the recognition of social and cultural formations. The recognition of the right of self-determination will need to be adjusted to the different fashions in which each people have opted to exercise it. For instance, the Zulu people have opted to exercise their right of self-determination in establishing a member State of a Federation which encompasses other ethnic groups in a constitutional framework which has absolutely no racial connotations whatsoever. This framework also recognises the autonomy of social and cultural formations which would create a space outside the control of government in which the right of self-determination could find a continuing form of institutionalised expression within the parameters of a constitution. Similarly, the Tswana people have indicated that their first option is to preserve the independence of Bophuthatswana with revised negotiated boundaries leading to the consolidation of their territory. The independent state would co-ordinate with the rest of South Africa on the basis of confederal arrangements. The SATSWA proposal exercises the right of self-determination of the Tswana to establish a member State of a Federation in a system which will allow the co-existence of the Tswana with all other ethnic groups living in the territory on an equal footing. The Afrikaners have indicated their intention to exercise their right of self-determination through the establishment of a Volkstaat whose system of government would be ethnically based. In the Volkstaat there could be recognition for the constitutional autonomy of social and cultural formations which could provide a space for self-determination for those ethnic groups which are not represented in the system of government of the Volkstaat. The right of self-determination as an international law notion would apply only to those groups who identify themselves as a different component from the rest of society, the so-called "self."

Within each member state allowance should be made for recognition of the right of social and cultural formations over and above the right of individuals.Â® Social and cultural formations shall be recognised constitutional autonomy to allow for the self-determination of
the peoples within the parameters of civil society. In specific circumstances, the right of self-determination of a given people may demand that legislative and/or executive powers directly reflect or emanate from a particular ethnic group intended as a social and cultura l
formation.Â®

Social and cultural formations include institutions of civil society, such as chambers of commerce, universities, trade unions, professional associations, arts and culture, etc. But they also include and express the manifestation of ethnicity ranging from traditional structures to the tools of self-organisation of a nation. Mention in this regard can be made of the Zulu Monarchy presently organised as a social and cultural formation existing in an area of autonomy which is presently outside government regulation, even if no guarantee has been provided to this extent. Similarly, the Afrikaner nation could express significant portions of its demanded self-determination through limitations on the role of government and corresponding recognition to the constitutional autonomy of social and cultural formations.

The crucial issue is the organisation of power within the Volkstaat with specific reference to racial discrimination, for the CP advocates a system of government which would be ethnically based. However, through the work of the relevant committees of the Freedom Alliance, great progress has been made to determine a system of government in a Volkstaat which would not be discriminatory. This system should be perfected through additional negotiations with the ANC and the SAG.

However, at this stage it could be indicated that The Volkstaat could grant equal and universal suffrage in both houses of its parliament to all the residents, whether Afrikaners or non-Afrikaners. However, non-resident Afrikaners could vote for the upper house wherever they live in the rest of Southern Africa. This will mean that the upper house would be expressing the "Afrikaner nation" and would most likely consist of an Afrikaner majority. The parliament would consist of a pure bilateral system in which both chambers had the same powers. This means that the there would be a mutually blocking veto power on the adoption of any legislation. Self-determination in this case would boil down to a veto power.

Two crucial issues would need to be explored: One issue is related to the acquisition of residency by non-residents. There would be discrimination if all Afrikaners can become residents merely by virtue of their race, while non-Afrikaners would be required to meet various types of qualifications which would limit the influx of non-Afrikaners in the Volkstaat.

The second issue relates to the executive of the Volkstaat which in order to mitigate a perception of racism in the composition of parliament, would need to be expressed through a pure parliamentary system without further racial connotations.

Therefore the right of self-determination requires both limitation of the scope of governme
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to preserve and ensure an area of constitutional autonomy for social and cultural formation
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and in specific circumstances a special structuring of the form of government, both element
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to be entrenched in the constitutional dispensation of Southern Africa.

The South African Government and the ANC have agreed on a model in which SPRs are the secondary rather than the primary government of the people. Even the SAG reformulation of Section 118 does not break this logic.â\200\235 This logic is also reflected in the regu
lation of
the financial powers of the SPR set forth in Section 121.

Even the reformulation by the SAG of Section 118 preserves the unitary state with provincial or regional characteristics rather than establishing a federal or confederal arrangement. Even when compared with established wunitary states with regional characteristics such as Italy and Spain, Section 118 falls very short in terms of list of powers and degree of autonomy granted to the SPRs in exercising those powers, for in Spain and Italy greater autonomy and more extensive powers are provided. During the October 20 1993 bilateral discussion, the SAG clarified that it is satisfied with the 16th Report of the Technical Committee and that therefore it does not wish to recognise to the SPRs the power of self-organisation of offices and structures which is essential to guarantee that the SPR has exclusive control over its own civil service. The SAG also does not wish to recognise to the SPRs the powers over ports and harbours, emergency and civil protection services, public works, water management and control, environment, correctional services and SPR judiciaries in matters of its own jurisdiction. Moreover, we still do not know to what degree the SPR will have jurisdiction over police and local government. All the foregoing are standard functions in a unitary state with regional characterisations, such as is the case in Italy and Spain. The degree of autonomy recognised to the SPRs by both the draft constitution and the SAG reformulation is jeopardised by claw-back provisions. In the draft constitution the notion of concurrency is such that could preclude the exercise of powers by the SPR. In the SAG reformulation the provisions which authorise the central government to exercise concurrent powers are absolutely vague and offer no certain parameters for constitutional adjudication. Moreover in both cases concurrency is established allowing the central government to have exactly the same power as the SPRs, rather than limiting in all cases the intervention of the central government to the adoption of general principles of legislation to be implemented by the SPRs through their own legislative activity, as is the case in Italy. In federal systems this entire type of arrangement is not present and a clear divide in jurisdiction characterises the system.

The SAG has submitted a reformulation of Section 121 which deals with the same three subject matters of the draft constitution which are:

The taxing powers of the SPRs
The entitlement of SPRs of the share of the revenues collected by the national government
The powers of the SPR to raise money in the market and assume financial obligations.

position of the FA could be summarised as follows:

SPRs should have residual taxing powers.

The SAG would want that this type of arrangement would not only govern the interim constitution but would also be carried into the final constitution, thereby preventing that the type of form of state advocated by the FA could be established in the stage of constitutional development following elections.â\200\235 Under the present formulation of Schedule 7, the form of state at the end of the process could vary, for it could allow for possibilities ranging from

There shall be equalisation grants between national government and the SPRs â\200\224â\200\224 which could be earmarked â\200\224â\200\224 on the basis of a) equal treatment and b) objective criteria

The financial autonomy of an SPR requires the power to raise money. Such power directly affects the exercise of other powers. For instance, if an SPR has the power to decide on the construction of an incinerator, the exercise of such power should not be impaired by the fact that financing for such an incinerator could be obtained only with the political approval of the national government for the required issuance of bonds in other tools of finance. Moreover, the federal constitution could impose a balance budget provision to be incorporated as a necessary requirement in SPR constitutions, with the qualifying proviso that such requirement could be derogated by virtue of a special parliamentary majority approving the budget on the basis of documentation which specifies the sources of payment and the economic impact of the specific economic manoeuvre. [see Article 80 of the Constitution of the State of KwaZulu/Natal.]

However, the exercise by the SPR of these powers could not adversely affect interstate commerce or the constitutional position of other SPRs. It is the KZG position that any type of conflict arising out of this as well as any other subject matter between national and SPR level of government, or between SPRs should be resolved in a Jjurisdictional fashion by the Constitutional Court.

It needs to be stressed that the full-faith and credit of the national government would not need to be extended to the obligations of an SPR government unless a specific agreement is reached in this sense on a case by case basis.

Even if the SAG reformulation of Section 121 creates substantial improvements in meeting the vision of the FA, it still moves within the logic of the original draft by the Technical Committee. An irreconcilable difference remains in relation to the issue of residual taxing powers.

See paragraph 2.3 and 5.2 of the Governmentâ\200\231s submission.

the formulation of the first draft constitution to the reformulated 118 proposed by the SAG."

Under the draft constitution the SPRs could only come into existence through actions of the central government and the Constituent Assembly, for a two-thirds majority of the Constituent Assembly is required for the final ratification of the SPR constitutions.

In the Government submission no explicit provision is made for the powers of the SPRs to adopt their constitutions autonomously, i.e. without central government approval.

The draft constitution provides a limited legislative role for the Senate as a representative of the SPRs. The SAG submission does not reach the point of stating that the role of the Senate should be on the same footing as the other legislative chamber. Both the draft constitution and the SAG submission are inadequate for they do not gather any of the above expressed considerations which characterise in essence the form of state advocated by the FA.

2. The process

The Freedom Alliance has advocated the notion that elections and the empowerment of a new government shall only take place under the terms of a final political settlement among all the major parties, such settlement to be entrenched in a final and not easily modifiable constitutional dispensation for Southern Africa.

The FA strongly objects to the following points which are common both to the draft constitution and to the FA submission.

* Constitutional mandates to amend the constitution drafted and adopted before elections. The constitution drafted and adopted before elections shall be amendable in terms of its own provisions but there shall be no legal obligation forcing the amendment, revision or repeal of such a constitution and the adoption of a new constitution.

- The adoption of a new constitution must only take place by means of standard reinforced amendment procedures as they are known throughout the world. Any amendment affecting the powers of the member states would require their consent. The FA rejects outright the notion of a Constituent Assembly charged with the task

= The FA submits that the principles of Schedule 7 are not conducive to the establishment of the form of state advocated by the FA. They were used as a parameter for the drafting of the first proposal submitted by the Technical Committee which proves their consistency with the regional or provincial model. Even within the area of absolute vagueness and contradiction of the relevant principles of Schedule 7, it would be difficult to argue their consistency with a model in which member states are the primary government of the people.

â\202¬ This point was not resolved in the bilateral discussion between

government and the KzZG, even if the SAG conceded that SPRs should have their own constitutions to be drafted by the MPNP prior to the holding of elections, so as to ensure that SPRs could be operational right after elections.

of adopting a new constitution in a period ranging from between five months and two years. The FA rejects the notion that such a Constituent Assembly would in the final analysis adopt a constitution by a 51 plus one per cent majority."

The FA demands that until the member states are established, the present position and autonomy of self-governing territories and TBVC states be preserved, including their institutional and operational autonomy as presently determined by both legislation and administrative practice.â\200\235Â® The process of rationalisation of self-governing territories and TBVC states shall be conducted by member states without interference from other levels of government. Co-ordination between levels of government and technical assistance in the process of rationalisation should be provided by an independent commission which ought not to have any regulatory or prescriptive function.

3. Other matters

During bilateral discussions between the SAG and the KZG, it was agreed that the present draft constitution does not entrench the notion of a constitutional state, and agreement was reached to close any relevant loophole in the draft constitution. The FA feels that the provisions of the draft constitution are totally inadequate to protect the free-market enterprise system and private ownership. The FA also demands a constitutionally mandated privatisation effort and guarantees against nationalisation by any government.

The FA believes that agreement reached between the KZG and the SAG in bilateral discussions on a Constitutional Court shall be preserved.

The term of office of members of Parliament should not be terminable on termination of the MPâ\200\231s membership of a political party.

Means to protect the autonomy of civil society must be broadened to the recognition of the constitutional autonomy of social and cultural formations and the establishment of an independent commission to empower civil society to check and balance the unjustified encroachment by government on the autonomy of the institutions of civil society, as previously agreed upon between the KZG and the SAG.

4. The only way forward

In the SAG submission at point 7.2 provision is made for an amendment of Section 68 of the draft constitution which would give substance and political relevance to the 60% majority required for ratification at a referendum. In the draft constitution the majority required at the referendum has no meaning from a political point of view, for it would be political suicide for any dissenting minority to oppose the ratification of the constitution due to the fact that failure to ratify the constitution, would empower a simple majority to operate without any restraint whatsoever.

In this respect progress was made in bilateral discussions between the KzZG and the SAG in relation to the self-governing territories and 6.1 of the SAG submission is read within the parameters of the agreements reached in that respect. Bilateral discussions have also taken place between Bophuthatswana and the SAG with reference to TBVC states.

a) Meeting of leaders

The fact that five major participants representing a vast segment of Southern African constituencies have abandoned negotiations at the World Trade Centre on account of the irreconcilable differences on the foregoing points, shows that what is emerging from the World Trade Centre does not accommodate their fundamental needs in negotiation.

This consideration supports the statement that negotiations have produced a national crisis.
It must be acknowledged and there must be awareness that this crisis exists and can not be ignored or wished away. Those who will proceed pretending that such crisis does not exist will need to carry the responsibility of having prevented a resolution, which we feel is within
reach, of this crisis.

The constitutional dispensation for Southern Africa must be the product of an all-inclusive solution. Given the fundamental objections of the members of the Freedom Alliance, the World Trade Centre is in the process of finalising a solution, which by definition is not inclusive but rather negates the fundamental request of a large constituency of the region.

During the last eight months bilateral and multi-lateral negotiations have not succeeded in bridging the gap between the ANC/SACP Alliance and the National Party on the one side, and the Freedom Alliance members on the other. The issues which set us apart have not been resolved and are still outstanding as indicated in this document. There is no reason to
believe that we would now have a better opportunity to reconcile our differences than we had in the past eight months.

Therefore, we must acknowledge that we have reached a crisis in which the way forward can not be identified merely by doing more of what we have done in the past eight months. The way forward can only be identified through the collective wisdom of the leaders who should be faced as a collective body with a list of unresolved issues.

The leaders as a collective body will be able to express a political direction capable of allowing bilateral and multi-lateral negotiations at delegation levels to shape a new and all-
inclusive solution. If the leaders are not capable of finding a way forward, no one else will.

A summit of leaders is the only possible option at this juncture. The only alternative would
be for the ANC/SACP Alliance and the SAG/NP to go it alone in finalising a constitution which meets the fundamental objections of the Freedom Alliance. This course of action would be highly divisive in our country and would lead to further political polarisation which
would exacerbate political tensions.

We believe that it would be disastrous for our country to go to elections as a divided society
in a fundamental split on the rules of the game and on the constitution. An all-inclusive solution must be found to ensure that the new Southern Africa is born out of consensus and is supported in its initial stage of formation by all the major political parties.

In this regard a meeting of leaders is also necessary to bring about the cathartic reconciliation
of all major political parties.

b) The process leading to a summit of leaders

A summit of leaders is meant to prevent the problem originating from the finalisation of a constitution in a divided society. It is aimed at finding reconciliation which will allow the finalisation of a constitution on the basis of an all-inclusive solution. Therefore the summit of leaders must take place before the constitution is finalised, otherwise such a summit is going to be locked into the dichotomisation between support and opposition to the final constitutional draft.

We reject the notion that the summit of leaders can only take place before the delegations have analyzed the outstanding issues and made an additional attempt to find reconciliation and agreement. We reject the notion of having much more of the same. We feel that bilateral negotiations up to this point have clearly identified the point of difference between the World Trade Centre and the Freedom Alliance as indicated in this document.

We will not be trapped into additional bilateral negotiations on issue of substance which are not going to be productive of major break-throughs, but will have the only function of legitimising the ANC-SAG bilateralism at the World Trade Centre.

Against the failure of the delegations to find reconciliation and a way forward, the delegations should also not be so assuming as to attempt to circumscribe the role and purposes of the summit of leaders. Aware of the crisis, the leaders will come together and determine what they need to discuss in order to find solutions to such a crisis.

We reject the notion that a meeting of leaders should be preceded by a thorough identification of the issues which set us apart and full discussions on the possible differences through the establishment of workshops. This would be a process calling for endless discussions and

analysis which replicate the efforts of the past eight months.

As shown in this document at this point there is total awareness of the issues which divide us. This was confirmed during the FA/ANC bilateral of Tuesday, October 19, 1993 in which both Mr Slovo and Mr Maharaj confirmed there is no need to put any effort in identifying issues for the list of outstanding issues is well known. Similarly at the October 22 bilateral meeting with the SAG Minister Bartlett clearly indicated that to his mind only two fundamental issues were outstanding - the form of state and process and that no further investigations in this respect was necessary.

The idea of establishing workshops expressed by some has the explicit view of ensuring that the summit of leaders does not antagonise the process of negotiations at the World Trade Centre. We say that the process of negotiation at the World Trade Centre has failed, for it has produced an impasse which can not be solved through its own procedures and political mechanisms. Therefore a summit of leaders can not be accommodated within the World Trade Centre procedures. Such a summit should not be perceived as antagonistic to the World Trade Centre, but rather as supplemental.

The summit of leaders is expected to produce a reconciliation which will result in new instructions to the Technical Committee so that the terms of such a reconciliation or

settlement can be built into the various documentation produced at the World Trade Centre.

Therefore we can not share Mr Slovoâ\200\231s desire to subordinate the notion of a summit of leaders to the time-frame and needs of the process at the World Trade Centre. On the

contrary, it is the process at the World Trade Centre which must acknowledge that from the summit of leaders will emerge political material which will condition the World Trade Centre and further negotiations.

Therefore, it is the World Trade Centre process which must be altered so as to accommodate a summit of leaders. This may require a delay on the present time-frame at the World Trade Centre which aims at a plenary on November 6 and 7 to ratify a constitution to be finalised by November 4. A summit of leaders can not take place under any circumstances in a situation in which the same issues before leaders have been thoroughly discussed at the World Trade Centre, or in a situation in which agreement on such issues have been achieved in any form within WTC parameters. If any agreement is reached at the World Trade Centre on the fundamental issues which are still outstanding, the summit of leaders would be locked into the polarisation between support and opposition to such agreement and we would not be in the position of constructively finding a way forward.

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