

CONSEIL DE L'ATLANTIQUE NORD
NORTH ATLANTIC COUNCIL

Reg EF

PC-13-4-81

EXEMPLAIRE N° 368
COPY

ENGLISH ONLY
22nd September, 1961.

REGISTRY

4TH FLOOR
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NATO SECRET
WORKING PAPER
AC/202-WP/8

WORKING GROUP ON ECONOMIC COUNTERMEASURES

LEGAL BASIS FOR NATO COUNTRIES PARTICIPATION IN ECONOMIC
COUNTERMEASURES AGAINST SOVIET BLOC IN EVENT OF
ACTIONS VIOLATING ALLIED RIGHTS IN GERMANY

Note by the United States Delegation

Problem

In the context of the current threats to West Berlin, the Foreign Ministers of France, the Federal Republic of Germany, the United Kingdom and the Secretary of State of the United States agreed, at a meeting held on 6th August, that "economic counter-measures represent an integral part of the overall allied policy for meeting the threat to West Berlin". They decided that economic countermeasures amount to a total economic embargo against the Soviet Bloc would be an appropriate response to the blockage of Allied military and civilian access, air or ground. Their recommendations envisage lesser economic countermeasures to meet other contingencies which could arise in the Berlin situation. The Ministers agreed that economic "countermeasures cannot substitute for military, political and psychological actions, but can serve as an effective auxiliary to such actions".

2. Having adopted this policy for themselves, the Four Governments agreed to undertake to secure the early agreement of all NATO countries to the policy. The Ministers expressed their hope that the NATO countries would proceed to plan their participation in the event a total economic embargo was called for.

3. On 8th August, 1961, Secretary of State Rusk made a report to the North Atlantic Council and laid before it the Recommendations of the Foreign Ministers. The matter was then placed on the agenda of the Council. In the ensuing discussions, some of the NATO countries have indicated their concern that economic countermeasures against the Soviet bloc, and particularly the total economic embargo recommended by the Four Governments, would violate certain multi-lateral and bilateral international agreements to which they are party with bloc countries.

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4. As a separate legal point some NATO countries which are not parties to agreements with the USSR establishing the right of access to West Berlin have questioned the legality of their taking economic countermeasures against the Soviet bloc in response to violation of these agreements by the USSR. It is understood that this point is raised independently of the question of treaty commitments with the bloc countries although it has relevance in that respect as well.

5. Finally, the question has been raised as to the legality of economic countermeasures applied to the satellite bloc countries which are not parties to the Berlin agreements.

Background

6. The North Atlantic Treaty establishes a system of collective self-defence among the signatory nations which, as expressed in the preamble to the treaty, are resolved "to unite their efforts for collective defense and for the preservation of peace and security". In Article 5 of the Treaty the parties agree: that "an armed attack against one or more of them in Europe or North America shall be considered as an attack against them all". The terms of Article 5 apply to an armed attack on the occupation forces of any Party in Europe (Article 6).

7. The Berlin situation has been examined by the North Atlantic Council on several occasions. The North Atlantic Council Declaration on Berlin of 16th December, 1958 in part stated:

- (i) The North Atlantic Council examined the question of Berlin.
- (ii) The Council declares that no state has the right to withdraw unilaterally from its international engagements. It considers that the denunciation by the Soviet Union of the interallied agreements on Berlin can in no way deprive the other parties of their rights or relieve the Soviet Union of its obligations. Such methods destroy the mutual confidence between nations which is one of the foundations of peace.
- (iii) The Council fully associates itself with the views expressed on the subject by the Governments of the United States, the United Kingdom, France and the Federal Republic of Germany in their statement of 14th December.
- (iv) The demands expressed by the Soviet Government have created a serious situation which must be faced with determination.

- (v) The Council recalls the responsibilities which each member state has assumed in regard to the security and welfare of Berlin and the maintenance of the position of the three powers in that city. The member states of NATO could not approve a solution of the Berlin question which jeopardized the right of the three Western powers to remain in Berlin as long as their responsibilities require it, and did not assure freedom of communication between that city and the free world. The Soviet Union would be responsible for any action which had the effect of hampering this free communication or endangering this freedom. The two million inhabitants of West Berlin have just reaffirmed in a free vote their overwhelming approval and support for that position. (Background of Heads of Government Conference, 1960, Principal Documents, 1955-1959, Department of State Publication 6972, p. 314)

This Declaration was reaffirmed in December, 1960 and May, 1961.

8. The position of the three NATO countries (United States, United Kingdom and France) which have direct responsibility for the security of West Berlin is well known. In a note delivered to the Soviet Government on 17th July, 1961 the United States Government said:

With regard to Berlin, the United States is not insisting upon the maintenance of its legal rights because of any desire merely to perpetuate its presence there. It is insisting on, and will defend, its legal rights against attempts at unilateral abrogation because the freedom of the people of West Berlin depends upon the maintenance of those rights

The Soviet Government thus threatens to violate its solemn international obligations, to determine unilaterally the fate of millions of Germans without their consent, and to use force against its World War II Allies if they do not voluntarily surrender their rights and vital positions. The Soviet Government must understand that such a course of action is not only unacceptable, but is a more serious menace to world peace, for which it bears full responsibility before all mankind.

The immediate cause of this threat to peace arises from the announced intention of the Soviet Government to present the three Western Powers with a de facto situation based on the false assertion that they would no longer be entitled to remain in Berlin, or to have free access thereto. Such a move could lead to highly dangerous developments, and would be totally devoid of legal effect. The United States considers

the exercise of its rights together with its British and French Allies, in order to maintain the freedom of over two million people in West Berlin, a fundamental political and moral obligation. (Department of State Publication 7257 - Background - Berlin - 1961).

Similar notes were delivered on the same day by French and British Governments.

Legal Bases

I. War

9. The economic countermeasures contemplated by the Foreign Ministers of the Four Governments could be invoked either in conjunction with military, political or psychological countermeasures or as the sole response to violations by the USSR to Allied rights in West Berlin without resort to non-economic measures. Thus, one of the situations envisaged by the Ministers for which it requested the NATO powers to be prepared was the use of an economic embargo in connection with military operations. Since it is the policy of the Allied powers only to engage in military measures against the USSR in the case of the use of force by the USSR, it can be assumed that NATO commitments would involve all the NATO countries in the military operations. Upon this set of facts, the legal basis for the NATO countries to institute an economic embargo without violating their international agreements rests on the generally accepted rule of international law that treaties providing for friendly intercourse between or among the parties, which generally includes treaties on economic matters, are abrogated or at least suspended between belligerents during time of war. (Hackworth, V, pp. 382, 385.) Further Article 51 of the United Nations Charter recognizes the inherent right of collective self-defense in case of an armed attack. The measures of collective self-defense can be both military and economic.

10. Since the USSR is allied in the Warsaw Pact with the European bloc members, in case of hostilities the whole bloc would be involved and so an economic embargo against the bloc would be justified.

11. There should be no hesitancy on the part of the NATO countries to ready themselves for this contingency.

II. "Armed" Attack by the USSR - but no War

12. A situation may arise in which the USSR takes action by force of arms to stop access to Berlin (e.g. shooting down airplane, stopping truck convoy by gunfire). It is arguable that this is an "armed attack" within the meaning of Article 51 of the United Nations Charter giving rise to the right to take measures of collective self-defense. In this situation the NATO countries, although having

the power to take collective military and economic measures of self defense, may choose, as an a fortiori procedure, to take only economic measures. The NATO countries would be legally justified in taking such measures despite the existence of multi-lateral and bilateral treaties which would otherwise be violated.

III. Serious Threat of Armed Attack

13. It has been argued that the United Nations Charter not only did not take away the right of individual or collective self-defense against an actual armed attack, but also against the serious threat of such armed attack.⁽¹⁾ In accordance with this view it would be proper for a group of nations to take anticipatory action of a military or economic nature in anticipation of the materialization of the threat of armed attack. The insistence of the USSR in imposing a blockade, in the face of the firm statements of the Western Powers to take all measures to protect their rights would betoken an intention on the part of the USSR to use force. Even if it be conceded, arguendo, that there may not in this situation exist the inherent power to use force in an anticipatory way, it would appear reasonable and justifiable for the threatened group to be able to adopt economic countermeasures short of war for protective and deterrent purposes.

IV. Treaty Breach and Reprisal

14. If the USSR action of blocking access does not fall under categories I, II and III above, at the minimum it constitutes a breach of a treaty obligation to the Three Powers and thus an international delinquency. The Three Powers are entitled to take action of reprisal. The definition of reprisal (Briggs, The Law of Nations 958 (2nd Edition 1952)) is:

such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency.

Hackworth defines reprisals as:

coercive measures taken by one state against another, without belligerent intent, in order to secure for, or to prevent recurrence of, acts or omissions which under international law constitute international delinquency. (Hackworth, VI, 156)

(1) Article 2(4) of the United Nations Charter requires members to refrain from the threat or use of force.

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It is clear from the discussion in Hackworth that reprisals may take a form of action which would otherwise be a violation of international law.

15. Assuming that the use of reprisals by one State against another State is warranted, the violation of treaties as a part of the reprisals would not constitute a violation of international law since the legitimate use of reprisals necessarily presupposes a suspension of the application of international law with respect to the action taken. As stated in section 37, II Oppenheim, International Law (Lauterpacht 7th edition 1955) 139:

An act of reprisal may be performed against anything and everything that belongs to or is due to the delinquent State or its citizens. Ships sailing under its flag may be seized, treaties concluded with it may be suspended,

There is no problem in this respect for the three NATO countries (United States, United Kingdom and France) which are signatories to the agreements with the USSR which underline their rights with respect to West Berlin and as occupying powers in Germany. But there still remains the problem of the resort to reprisals by other NATO powers not only against the USSR but the rest of the bloc, since the other NATO countries have no direct rights under the Allied agreements concerning Berlin.

16. However, it is believed that the NATO countries which are not occupying powers in Germany have an interest in and are beneficiaries of the Berlin agreements deriving generally from their status as members of the alliance which defeated Germany in World War II. If such beneficial interest can be found, then these countries could justify their acts of reprisal against the Soviet bloc for actions taken by the USSR in violation of the Berlin agreements on the basis that the actions of the USSR affect their beneficial interests as well as those of the signatory powers.

17. Thus in the Act of Military Surrender of 8th May, 1945, it is stated the act of surrender is "without prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations". Then in the fourth paragraph of the Declaration Regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers of 5th June, 1945, it is stated that the Declaration is made by the Allied Representatives "acting by authority of their respective Governments and in the interests of the United Nations". Further, on 5th June, 1945, the Governments of the United Kingdom, United States and the USSR issued the following statement with respect to the occupation of Berlin:

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By the Declaration regarding the defeat of Germany issued at Berlin on 5th June, 1945, the Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics and the Provisional Government of the French Republic have assumed supreme authority with respect to Germany. The Governments of the Four Powers hereby announce that it is their intention to consult with the Governments of other United Nations in connection with the exercise of this authority.

18. All in all, without laboring the point, it appears clear that the Powers who took over the supreme authority in Germany and in Berlin were acting in a kind of trustee capacity for the other countries who were in the alliance against Germany or who might have been victims of Nazi aggression. Thus it is stated in Berlin - 1961 (Department of State Publication, 18th August, 1961) at page 3:

Thus the major allies become trustees for a reformed Germany - trustees for all the peoples who had fought against or suffered from the aggression and atrocities of the Nazi regime.

And at page 27:

The record shows that the Western Allies have been faithful to the trusteeship they assumed in 1945.

19. It thus is arguable that the NATO members can legitimately claim to have beneficial interests in the arrangements made with respect to Berlin and corresponding rights of reprisal.

20. The basis for the NATO countries taking economic countermeasures against the entire Soviet Bloc by way of reprisal (also under II and III above) is provided by the Warsaw Security Pact to which Albania, Bulgaria, Hungary, the so-called German Democratic Republic, Poland, Rumania, the USSR and Czechoslovakia are parties. Article 4 of the Warsaw Pact, in part, provides:

"In the event of armed attack in Europe on one or more of the Parties to the Treaty by any state or group of states, each of the Parties to the Treaty, in the exercise of its right to individual or collective self-defense in accordance with Article 51 of the Charter of the United Nations Organization, shall immediately, either individually or in agreement with other Parties to the Treaty, come to the assistance of the state or states attacked with all such means as it deems necessary, including armed force"

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Under Article 5 of the Pact, the Contracting Parties have agreed:

"....to establish a Joint Command of the armed forces that by agreement among the Parties shall be assigned to the Command, which shall function on the basis of jointly established principles. They shall likewise adopt other agreed measures necessary to strengthen their defensive power, in order to protect the peaceful labours of their peoples, guarantee the inviolability of their frontiers and territories, and provide defence against possible aggression."

21. It seems obvious that if military operations occurred in Germany the Warsaw Pact countries would claim an "armed attack" by the Western countries and invoke Article 4 of the Pact. Similarly, if the situation over Berlin deteriorates, the Soviet Bloc countries would place the blame on the NATO countries and take measures to strengthen their defensive power under Article 5. There is evidence that this is already taking place in the case of Poland.

22. The unified position with the Soviet Union which the Warsaw Pact countries are taking in the Berlin situation is evidenced by the communiqué which was issued when the border between West and East Berlin was closed. On the general situation in Germany the communiqué states:

"It is well known that the Government of the USSR, with the full agreement and support of all member states of the Warsaw Pact organization, has proposed to the governments of the countries which participated in the war against Hitler Germany that a peace treaty be concluded with the two German states, and, on this basis, the question of West Berlin be settled by granting it the status of a demilitarized, free city. This proposal takes into account the situation practically obtaining in Germany and Europe in the postwar period. This proposal is not directed against anyone's interests and its only aim is to do away with the remnants of World War II and to consolidate world peace."

23. With respect to the border closing the communiqué charges the Western Powers with using their position in West Berlin as a center of subversive activities against the GDR and all other countries of the socialist commonwealth. It also charges that the German Federal Republic and the intelligence agencies of NATO countries were using the traffic situation on the borders of West Berlin to undermine the economy of the GDR. It then states:

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"In the face of the aggressive aspirations of the reactionary forces of the German Federal Republic and its NATO allies, the Warsaw Pact member states cannot but take necessary measures to guarantee their security, and primarily, the security of the GDR in the interests of the German peoples themselves." (Underscoring added)

24. Thus, it seems to be clear that the position of the USSR and its proposals for solution of the Berlin situation have been fully endorsed and will be acted upon by the satellite countries. These countries can be considered from a legal standpoint as jointly involved and co-responsible with the USSR.

V. Express of Implied Provisions in Multilateral or Bilateral Treaties to which NATO countries and Members of the Soviet Bloc are Parties.

25. Having considered the aspects of international law which may be used as the justification for violating valid treaty obligations, it is left to consider whether the treaties themselves provide by explicit provision for an escape from the obligations involved which would be available to the NATO countries as a legal basis for taking economic countermeasures against the Soviet Bloc or whether there is an implied right in the law of treaties which would be so available.

A - Express Provisions

26. With respect to the bilateral treaties between the NATO countries and bloc countries, we have not been able in the time available to ascertain what these agreements are and what express provisions they contain. These agreements seem to be prevalent in the field of trade and aviation. The bilateral air agreements which have been inspected generally do not provide a right to take action inconsistent with the treaty obligations in emergency situations, but provide for unilateral termination upon the lapse of a fixed period of time (6 months to a year) after giving notice. The termination provisions in the trade agreements are not known at this time.

27. However, discussions in the North Atlantic Council indicate that the NATO countries are primarily concerned about violations of multilateral agreements to which members of the bloc are party. Other than intra-European multilateral arrangements, there are six multilateral treaties on which the invocation of the list of economic countermeasures listed by the Foreign Ministers might have an effect. With the exception of the International Sugar Agreement all of these multilaterals provide for the freedom of action of member countries in matters involving their essential security interests.

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- (a) Convention on International Civil Aviation, and
- (b) International Air Transport Services Agreements.
Czechoslovakia and Poland are parties.

28. These two agreements confer the right to overfly and to make traffic and technical stops in the territory of member countries. Article 89 of the International Civil Aviation Convention, which applies to both agreements, provides:

In the case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council.

29. Should this procedure not be considered practical, it may be possible, if a justification can be found after an investigation into the facts, to invoke the provisions of Article 1, Section 5 of the Air Services Transit Agreement to deny the aircraft of Poland and Czechoslovakia the right of overflight and non-traffic stops. That section reads:

Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State, or in case of failure of such air transport enterprise to comply with the laws of the State over which it operates, or to perform its obligations under this Agreement.

30. We are not aware to what extent either Polish or Czech aircraft have been failing to comply with the laws of the countries over which they fly, but the NATO countries involved probably have this information available.

31. We are, however, informed that Czechoslovakia does not permit aircraft of other countries to overfly its territory in accordance with the terms of Article 5 of the Civil Aviation Convention. Thus, Czechoslovakia may be stopped from protesting that the NATO countries are not complying with their obligations under the Convention or Agreement if the facts show that Czechoslovakia is not acting in accordance with its obligations.

- (c) General Agreement on Tariffs and Trade. Czechoslovakia and Poland are parties.

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32. Article XXI, inter alia, provides:

Nothing in this Agreement shall be construed ...

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests.

(d) International Telecommunications Convention. Albania, Bulgaria, Czechoslovakia, Hungary, Poland, Rumania and the USSR are parties.

33. Under the Convention the contracting parties recognize the right of the public to correspond by means of the international service of public correspondence. Article 30 provides:

Each Member or Associate Member reserves the right to suspend the international telecommunications service for an indefinite time, either generally or only for certain relations ..., provided that it immediately notifies such action to each of the other Members and Associate Members through the medium of the General Secretariat.

(e) Convention on Road Traffic. Czechoslovakia, Poland and the USSR are parties.

34. The contracting parties agree to the use of their roads for international traffic. Article 34 reads:

Nothing in this Convention shall be deemed to prevent a Contracting Party from taking action ... which it considers necessary for its external or internal security.

(f) International Sugar Agreement. Czechoslovakia, Poland and the USSR are parties.

35. The basic objective of the Sugar Agreement is to assure supplies of sugar to importing countries and markets for sugar to exporting countries at equitable and stable prices. The agreement does not provide for suspension by a party in emergency situations short of war. However, whether an economic embargo would violate the obligations of the NATO countries imposing the embargo would depend in general on the state of the world sugar market. The three bloc countries which are parties to the agreement are all exporting countries. If the importing countries can satisfy their requirements by purchasing sugar from the other non-communist participating countries, as seems likely in view of the large free world sources, then the embargo would not appear to violate the agreement.

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36. Other than the possible exception of the Sugar Agreement, it is readily apparent that these multilateral agreements would not constitute a legal barrier to the imposition of an economic embargo if the escape procedures provided for in the agreements are followed. In each case the measures of the proposed economic embargo could therefore be taken against the Soviet bloc countries without bringing the NATO countries into breach of their obligations to third countries parties to the agreement.

B - Implied Provisions

37. The Legal Staff and members of the OEEC (OECD) have expressed the view that there is an implied essential security exception in all treaties. Thus, when the United States proposed the inclusion of a clause on "essential security interests" in the Codes on Invisible Transactions and Capital Movements, the OECD Secretariat made the comment that the Article (on public order and essential security interests) was intended to be a restatement of generally accepted principles of international law. Similar statements were made with respect to the draft agreement on the protection of foreign investment.

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