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DELEGATION OF CANADA
TO THE NORTH ATLANTIC COUNCIL

DÉLÉGATION DU CANADA
AU CONSEIL DE L'ATLANTIQUE-NORD

~~TOP~~ SECRET

Paris, November 27, 1962.

Dear Mr. Colonna:

With your PO/62/637 of October 4, you sent me a note by the Legal Adviser on some of the problems involved in the implementation of certain maritime contingency plans for Berlin. You asked me to obtain official comments on the Legal Adviser's note and to pass them on to you.

I now enclose a note containing Canadian legal comments on the Legal Adviser's note.

I am sending copies of this letter and its enclosure to my colleagues on the Council.

Yours sincerely,

G. Ignatieff

Mr. G. Colonna di Paliano,
Acting Secretary General,
OTAN/NATO.

Copy No. 1 of 45 copies

TOP SECRET

November 27, 1962

BERLIN CONTINGENCY PLANNING:
CANADIAN LEGAL COMMENTS ON PO/62/637

The six steps envisaged in the MARCON plans seem to be graduated according to a logistic order, each step requiring for its implementation a greater mobilization of manpower and naval resources than the immediately preceding one. This sequence, however, does not necessarily correspond to a legal one where each step would be more severe than the immediately preceding one and more remote from the standards of international maritime law. Thus, where the plans read: boarding and searching, seizure of ships, and blockade in that order, the legal sequence would normally be the reverse, since boarding and searching ships or seizing them are measures which, if they are to be carried out on any extensive scale, presuppose on the part of the states applying them a policy of blockade. The U.S. quarantine on shipping to Cuba is the latest example and it might be that the plans should be revised on the basis of the experience gained in that operation. In any event, the three steps under consideration offer the same character of seriousness and require about the same legal justification en bloc. The NATO Legal Adviser seems to have reached this conclusion in the table which summarizes his study.

2. Moreover, we concur in his remark at paragraph 9, that it is difficult to assess the legal implications of step number three (hindering and directly annoying ships) which is rather loosely worded. The last step (blockade or enforced diversion) is for its part, inevitably perhaps, described in very general terms and possibly covers a wide variety of situations. It seems difficult to attempt to go further than the Legal Adviser has done, particularly in his paragraph 13, in spelling out those situations; and we are not even sure whether we follow him when he sees a difference between preventing the entry of ships into territorial waters or ports and preventing their exit therefrom. We are not clear as to which situation his use of the word "embargo" in his conclusion at paragraph 16 is meant to cover. (See para 8 below).

3. At paragraphs 19 and 20, the Legal Adviser gives an opinion on the legality of closing to adverse shipping artificial canals controlled by NATO powers. He noted that this is not a part but an assumption of the plans. Looking at other items listed as assumptions of the plans, that is as measures already taken by several or all NATO countries before even the first step of the plans are implemented on a collective basis, we find that one cannot say precisely where the cart ends and the horse begins. We refer especially to the previous denial of port and harbour facilities and to the general and very wide assumption that a NATO embargo of the Soviet bloc is in effect. We meet here the same difficulty, from the point of view of giving a proper legal opinion, as we ran across one year ago when we were asked to comment on economic countermeasures: our view of the matter as calling for a legal justification rather than a legal opinion remains valid.

4. The Legal Adviser has neatly graded his opinion on the plans according to the three categories of: retorsion under the rules of international maritime law (paragraphs 3 to 20), reprisals (paragraphs 21 to 28) and finally measures of self-defence (paragraphs 29 to 32). This pattern follows in the reverse order (thus making for a more logical presentation), the pattern that was previously agreed on by the Sub-Group of Legal Experts on the legal aspects of possible economic countermeasures (C-M(61)99 of October 28, 1961). Any novel aspect arises from the fact that the legal experts had in the end concentrated their studies in the field of civil aviation, where the doctrine revolves around the concept of national sovereignty over air space. We are now addressing ourselves to the field of maritime law where the point of departure is the freedom of the seas. Already in the field of civil aviation, we had occasion to note the very narrow margin left to NATO countries other than the three Powers directly concerned in Berlin, under the heading of reprisals as distinct both from retorsion and the type of measures justified by the right of self-defence. In the field of law of the sea, in view of the different legal starting point, the scope of action left to those countries and

perhaps even to the three Powers themselves under the heading of reprisals is even more restricted. As a result, the arguments adduced by the Sub-Group, which the Legal Adviser reproduces in his Section II (para. 26) in favour of collective reprisals seem somewhat out of context and would be better taken as arguments justifying the recourse to collective measures of self-defence under Section III. The wide assumptions on which the plans are to operate, as we have noted, would also seem to militate against a smooth transition from retorsion to self-defence through reprisals and we wonder if an examination of this second stage is at all necessary in a law of the sea context. In the final analysis, there is an element of paradox in attempting to justify a decision to adopt measures of reprisal where it is the eventual decision of the victim of those measures to resist or not to resist them which will determine their character as either reprisals or measures of self-defence.

5. Our detailed comments are accordingly restricted to Section I of the Legal Adviser's Note, which studies the applicability of the plans on the high seas, in territorial waters and in internal waters, when the purpose is to annoy and obstruct Soviet bloc shipping without violating international law (and we would add, any multilateral or bilateral treaty). The analysis made by the Legal Adviser is generally based on the rules enunciated in the Law of the Sea Conventions, adopted in Geneva in 1958, and is basically sound.

High Seas

6. We agree entirely with the conclusions which he reaches at paragraph 9 in respect of the implementation of the plans on the high seas. We are wondering, however, why he left out the right of hot pursuit, set forth in Article 23 of the Geneva Convention on the High Seas, from the exceptions to the rule of freedom of the high seas listed in his paragraph 5. (He mentions it in his paragraph 11 under the heading of territorial waters.) We have some doubt, on the other hand, about his inclusion in this section of the exercise of the right of self-defence which he examines at paragraph 7. This was left out of the Geneva Conventions both by the International Law Commission and the Conference itself, although it is recognized by a number of leading authors. We agree with his conclusion that the exercise of this right of supervision over a fairly broad contiguous zone would not justify the measures envisaged under steps 4-6 of the plans and perhaps also step number 3 except under the circumstances of an armed attack on Berlin discussed in Section III. His reference in paragraph 8 to the exceptional case of a state with (merchant) ships sailing under its flag agreeing to the exercise of authority over those ships by the patrol ships of other states is substantiated by the text of the North Pacific Ocean Fur Seals Convention of 1957 between Canada, Japan, the U.S.S.R. and the U.S.A. Article 6 of that Convention makes it permissible for an official of any of the parties to board and search and seize or arrest vessels of another party when he "has reasonable cause to believe that any vessel outfitted for the harvesting of living marine resources is offending against the prohibition of pelagic sealing". We do not find the same provision, however, in the Convention of 1949 for the North West Atlantic Fisheries to which the U.S.S.R. has acceded nor in the Convention of 1946 for the Regulation of Whaling to which it is a party. In practice, it would be difficult to find occasion to invoke Article 6 against Soviet ships, as Russian seal hunters operate on land and never on the ocean. The Russians, it is understood, resisted the inclusion of a similar provision in the whaling convention because their own ships would in fact have been liable to search along with the vessels of all other parties.

Territorial Waters

7. We agree with the first conclusion of this part that, in territorial waters, the plans can be implemented one step further than on the high seas i.e. include the exercise of the right of boarding and searching. This step concerns exclusively ships other than warships and also, it is assumed, other than fishing vessels since the latter have no right of innocent passage in territorial waters. It is quite clear that the Canadian authorities are at liberty to enter foreign merchant vessels in territorial waters for purposes

of investigation or law enforcement. Para 12, which states that the plans could not, however, be carried to the further point of seizure except for due cause, is in accordance with the principles of the Geneva Convention on the Territorial Sea and Contiguous Zone. In ratifying this convention, the countries of the Soviet bloc entered a reservation concerning the assimilation which it makes of state-owned ships used for commercial purposes to private ships for the purpose of their liability to the jurisdiction of the coastal state. While Canadian courts e.g. in the recent case concerning the Cuban ships (Supreme Court judgment of June 11, 1962) appear to be moving toward the assimilation agreed in Geneva, they have been traditionally reluctant to consider that the exercise of jurisdiction should extend to seizure of any state-owned ships.

8. As to paras 13-16, concerning the applicability of the last step of the plans, see our observation in para 2 above. Perhaps the useful distinction to be drawn here is not between blocking ships from access to territorial waters and preventing their exit therefrom but between preventing their passage in territorial waters and preventing their access to ports. The right of innocent passage of both merchant ships and warships (we have referred above to the distinct case of fishing vessels) in territorial waters is clearly stated in the Geneva Conventions. It might be useful to note, however, that Soviet bloc countries have entered a reservation to this part of the conventions and thus reaffirmed their support for the principle of controlling the access of foreign warships to territorial waters. We take it that the conclusion at para 16 acquires its full meaning as a ruling on the right of access to ports. In the case of merchant ships, we must take into account not only international usage (short of a positive right of access) but also Canada's treaty obligations. An analysis of these (i.e. our commercial treaties with the Soviet Union and Poland) have shown in the past that Canada is under an obligation to permit the commercial shipping of those countries to navigate as freely within Canadian waters, including using our ports, as would be the case for Canadian shipping. This point was raised in 1961 as item (g) of the proposed economic countermeasures and the Deputy Minister of Transport, in a letter of October 27, 1961, indicated that he "was unaware of any laws or administrative regulations currently in force in Canada which would provide for the implementation of this countermeasure as it affects /merchant/ shipping". We would, however, be inclined to support the denial of access to ports to warships.

Internal Waters

9. The question resolves itself mainly into that already discussed, of access to ports. Given our treaty obligations, we could not in practice endorse the views expressed at para 18.

10. The conclusion at para 20, is generally sound. Perhaps sub-para (d) would summarize the findings more accurately if it said that this part of the plans could not be applied in territorial and internal waters "except in fairly exceptional and isolated cases". We would like a restriction to be added to sub-para (e) as follows: "the plans could be applied partially to merchant ships"...add: "where there are no bilateral agreements to the contrary". The full applicability of the plans to fishing vessels in territorial waters should also be spelt out.