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# NATO CONSULTATIONS AS A COMPONENT OF NATIONAL DECISIONMAKING

By Frederic L. Kirgis, Jr.\*

## I. NATURE AND SCOPE OF THE STUDY

In domestic legal systems procedures exist for taking account of the interests of others when unilateral decisions affecting them are made. These procedures take such forms as the granting of injunctive relief and the requirement for impact statements. International law lacks comparable mechanisms. If governments consider the effects of their proposed decisions on other countries, they generally do so as a result of relatively unstructured intergovernmental consultations. The utility of such consultations has been recognized by decisionmakers of high rank,<sup>1</sup> and a few studies of consultative practices in specialized fields have recently appeared.<sup>2</sup> The present study examines the practice of prior consultation in a setting in which one might expect it to thrive, if it ever does: that of a political-military alliance among states with widely shared values and with a common (though not necessarily uniform) apprehension about a possible external threat to those values.

The North Atlantic Alliance's stated purposes include safeguarding the freedom and democratic heritage of the members through collective self-defense and promoting stability and well-being in the North Atlantic area.<sup>3</sup> The concept of political consultation is important enough to the achievement of these purposes to be woven into the North Atlantic Treaty and stressed in all major NATO pronouncements on cooperation within the

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<sup>1</sup> See, e.g., *International Economic Report Transmitted to the Congress: Message from President Ford*, 76 DEP'T STATE BULL. 129, 130 (1977); Rogers, *U.S. Foreign Policy in a Technological Age*, 64 *id.*, at 198, 200-01 (1971); *Maritime Briefings: Hearings Before the House Comm. on Merchant Marine & Fisheries*, 93d Cong., 1st Sess. 158 (1973) (statement of Ronald A. Webb, Director of the Office of Maritime Affairs, U.S. Dept. of State); *United States-Canadian Relations: Hearing Before the Subcomm. on International Political and Military Affairs of the House Comm. on Int'l Relations*, 94th Cong., 2d Sess. 2, 5 (1976) (statement of Richard D. Vine, Deputy Assistant Secretary of State for European Affairs).

<sup>2</sup> See Bouine, *Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate*, 10 CANADIAN Y.B. INT'L L. 212 (1972); Sztucki, *International Consultations and Space Treaties*, in PROCEEDINGS OF THE 17TH COLLOQUIUM ON THE LAW OF OUTER SPACE 147 (M. Schwartz ed., 1975).

<sup>3</sup> North Atlantic Treaty, Apr. 4, 1949, preamble, 63 Stat. 2241, TIAS No. 1964, 34 UNTS 243; 43 AJIL Supp. 159. NATO members are Belgium, Canada, Denmark, France, the Federal Republic of Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Turkey, the United Kingdom, and the United States.

alliance. Every NATO Secretary General has called upon the member states to conduct timely consultations when they formulate decisions affecting the alliance.<sup>4</sup> Implicit in these assertions are the notions that a political alliance must reflect and generate mutual trust, and that the degree of trust is gauged by the extent to which national decisionmakers take the interests of other members into account when they act on matters within the alliance's ambit.

For consultations to be more than courtesy calls, they must be held before governments make final decisions and must not be mere statements of unalterable intention. As put by NATO's "three wise men" in 1956,

Consultation within an alliance means more than exchange of information, though that is necessary. It means more than letting the NATO Council know about national decisions that have already been taken; or trying to enlist support for those decisions. It means the discussion of problems collectively, in the early stages of policy formation, and before national positions become fixed.<sup>5</sup>

This study will identify the extent to which the North Atlantic allies have followed this practice and have made it the law of the alliance.

Insofar as the consultative practice within NATO has engendered expectations among its decisionmakers that member governments will consult the others before they make decisions in definable circumstances, the practice has created legal norms within the alliance.<sup>6</sup> This is so even when the expectations are not embodied in the North Atlantic Treaty or some other formal document. In the terms of traditional international law, a special custom within the alliance is established if the expectations are firm and are widely shared by the alliance's decisionmakers.

Some decisions by members must be made collectively if they are to be effective. This was true, for example, of decisions relating to the Conference on Security and Cooperation in Europe, where no individual

<sup>4</sup> Paul-Henri Spaak and Joseph Luns have been particularly emphatic. See, e.g., Spaak, *The Political Future of NATO*, 7 NATO LETTER, No. 12, at 1, 4-5 (1959); Luns, *Introduction*, in *TRANSATLANTIC CRISIS: EUROPE AND AMERICA IN THE '70's* 9, 12 (J. Godson ed., 1974). The efforts of the first four Secretaries General are outlined in F. BEER, *INTEGRATION AND DISINTEGRATION IN NATO* 30-37 (1969). For the relevant treaty provisions and collective pronouncements, see section II, *infra*.

<sup>5</sup> Text of the Report of the Committee of Three on Non-Military Co-operation in NATO (Dec. 13, 1956), in NATO INFORMATION SERVICE, *NATO FACTS AND FIGURES*, App. 5, at 308, 316 (1976). The three were Dr. Gaetano Martino (Italy), Mr. Halvard Lange (Norway), and Mr. Lester M. Pearson (Canada), all Foreign Ministers of their countries.

For the various possible meanings of "consultation" in the alliance, see H. CLEVELAND, *NATO: THE TRANSATLANTIC BARGAIN* 19 (1970).

<sup>6</sup> "Decisionmakers" in NATO would include high-level national and international officials with important NATO responsibilities. In general, these would be the heads of state, foreign ministers, and NATO permanent representatives of member states, plus the NATO Secretary General and perhaps a few other top NATO officials. On the role of national and international decisionmakers in the shaping of international law, see McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AJIL 356, 357-58 (1955).

state or small group of NATO states could hope to gain much by taking independent positions. Because there is little incentive to eschew allied consultation in such cases, the consultations do not normally reflect any perceived unwritten obligation and are of marginal significance to a normative study. This discussion will therefore be focused on situations in which individual allies, or a small coterie of allies, might stand to gain—at least in the short run—by acting alone. Such cases test the extent of allied cooperation and make it possible to gauge a political alliance's capability to influence member governments' conduct through the growth of procedural legal norms.

In particular, I will examine the role of the alliance as a means for bringing the interests of the membership into the decisionmaking process of each member. For example, if the U.S. Government were considering a decision that could affect the capacity of the alliance to serve its essential purposes, the question would be whether the United States is expected to (and does) consult the North Atlantic Council or in some other manner reaches all the NATO allies, not whether it consults one or a few allies with which it may have a special relationship.

It is difficult to identify every occasion when there has been give-and-take discussion before a member government has made a decision. Not all NATO consultations appear in published or unclassified records. The North Atlantic Council, the plenary body composed of representatives of the 15 member states, holds meetings of the permanent representatives (ambassadors) at least weekly and of the foreign ministers twice a year, but the proceedings are not public and the communiqués issued after each ministerial meeting are so general as to reveal little more than the broad subjects discussed. In addition to the Council meetings, there are weekly luncheons at NATO headquarters attended by the member states' permanent representatives, but those discussions are strictly off the record. Informal, unrecorded NATO consultations also take place outside the Brussels headquarters, particularly in Washington where diplomats at the subambassadorial level stay in contact with their counterparts in the member countries' embassies. To avoid inaccuracies stemming from the lack of complete records, the discussion to follow deals only with those instances for which prior consultation or the lack thereof has been documented or may reasonably be inferred through published materials, unclassified NATO documents, or personal interviews.

## II. THE FRAMEWORK FOR NATO CONSULTATION

### *North Atlantic Treaty Provisions*

Article 4 of the North Atlantic Treaty provides, "The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened."<sup>7</sup> The article not only requires the allies to consult when one of them perceives such a threat, but also implies that no party should respond uni-

<sup>7</sup> North Atlantic Treaty, *supra* note 3, Art. 4.

laterally without first calling for consultation with the others. This implication can reasonably be inferred on a number of grounds: the consultative provision immediately precedes the article contemplating individual, as well as collective, self-defense in case of an armed attack against any party; since a unilateral response could endanger all the allies, the consultative provision should be construed broadly in order to enable them to air their interests before the response is taken; and provisions in the constituent instrument of a political alliance should be construed, if it is reasonable in light of their language and context, in a manner most likely to promote cooperative efforts.

The treaty's only other consultative provision requires the parties to consult together, if any one of them so requests, for the purpose of reviewing the treaty after it has been in force for 10 years or more. This implies that no party may denounce the treaty or radically alter its commitments under it—moves that would have obvious effects on the security interests of every party—without consulting the other allies. In other words, this provision qualifies the implied right of withdrawal that is generally thought to emanate from a political alliance.<sup>8</sup>

In practice, the consultation issue has arisen in a variety of situations that do not involve immediate threats to the territorial integrity of member states or full-scale denunciations of the treaty. One question, to which I shall return later, is whether the practice establishes broader norms of which those treaty provisions are specific applications.

#### *Recommendations and Declarations*

When NATO's three wise men considered the role of consultations in fostering political cooperation within the alliance in 1956, they recommended (*inter alia*):

a member government should not, without adequate advance consultation, adopt firm policies or make major political pronouncements on matters which significantly affect the Alliance or any of its members, unless circumstances make such prior consultation obviously and demonstrably impossible;

in developing their national policies, members should take into consideration the interest and views of other governments, particularly those most directly concerned, as expressed in NATO consultation, even where no community of views or consensus has been reached in the Council;

where a consensus has been reached, it should be reflected in the formation of national policies.<sup>9</sup>

<sup>8</sup> The provision appears in *id.*, Art. 12. A right of withdrawal, implied by the nature of a treaty, is recognized in the Vienna Convention on the Law of Treaties, Art. 56(1) (b), UN Doc. A/CONF.39/27, 63 AJIL 875 (1969), 8 ILM 679 (1969). On its applicability to political alliances, see Fitzmaurice, *Law of Treaties: Second Report*, [1957] 2 Y.B. INT'L L. COMM'N. 16, 38-39; T. ELLAS, *THE MODERN LAW OF TREATIES* 106 (1974); compare *Report of the Int'l L. Comm'n. on the work of its 18th session*, [1966] 2 Y.B. INT'L L. COMM'N. 172, 251, 61 AJIL 417 (1967).

<sup>9</sup> Report of the Committee of Three, *supra* note 5, at 318-19. The report drew in part on a 1951 report of another three-person NATO committee.

In addition, the wise men called for "NATO consultation whenever economic issues of special interest to the Alliance are involved, particularly those which have political or defence implications or affect the economic health of the Atlantic Community as a whole."<sup>10</sup> The North Atlantic Council formally approved these recommendations.<sup>11</sup>

In 1967, after reviewing a series of studies on the future of the alliance, the Council stated that

[a]s sovereign states the Allies are not obligated to subordinate their policies to collective decision. The Alliance affords an effective forum and clearing house for the exchange of information and views; thus, each Ally can decide its policy in the light of close knowledge of the problems and objectives of the others. To this end the practice of frank and timely consultations needs to be deepened and improved.<sup>12</sup>

The Council also made the following highly equivocal statement: "In accordance with established usage the Allies, or such of them as wish to do so, will also continue to consult on [problems arising outside the North Atlantic Treaty area] without commitment and as the case may demand."<sup>13</sup>

In 1974 the NATO heads of government agreed to the Declaration on Atlantic Relations. During the previous year, Secretary of State Kissinger's tumultuous "Year of Europe," attempts to define the principles of transatlantic cooperation had created more discord than harmony. The consultation issue was particularly troublesome. In the end, the declaration had this to say:

The Allies are convinced that the fulfilment of their common aims requires the maintenance of close consultation, co-operation and mutual trust, thus fostering the conditions necessary for defence and favourable for détente, which are complementary. In the spirit of the friendship, equality and solidarity which characterize their relationship, they are firmly resolved to keep each other fully informed and to strengthen the practice of frank and timely consultations by all means which may be appropriate on matters relating to their common interests as members of the Alliance, bearing in mind that these interests can be affected by events in other areas of the world. They wish also to ensure that their essential security relationship is supported by harmonious political and economic relations. In particular they will work to remove sources of conflict between their economic policies and to encourage economic co-operation with one another.<sup>14</sup>

The clear purport of the 1956, 1967, and 1974 pronouncements is that allied consultation should be informative and should precede important decisions, though it is not clear which decisions would be of the requisite magnitude. The assertion that consultation should *precede* decision was

<sup>10</sup> *Id.* at 323.

<sup>11</sup> Resolution on the Report of the Committee of Three on Non-military Co-operation in NATO (Dec. 13, 1956), in *id.*, Ann. II, at 335.

<sup>12</sup> The Future Tasks of the Alliance: Report of the Council (Harmel Report, Dec. 14, 1967), in NATO FACTS AND FIGURES, *supra* note 5, App. 6, at 336, 337.

<sup>13</sup> *Id.* at 339.

<sup>14</sup> Declaration on Atlantic Relations, June 26, 1974, para. 11, in *id.*, App. 7, at 340, 342, and in 71 DEP'T STATE BULL. 42, 44 (1974).

made explicit in the wise men's report and was retained in shorthand form in the references to "frank and timely consultations" of the later statements. The 1956 and 1967 pronouncements, however, left unclear whether the allies expected to be consulted about problems outside, as well as within, the North Atlantic Treaty area. The 1974 declaration is less equivocal on that point: it notes that the allies' common interests can be affected by events in other areas of the world. Thus, even though the circumstances in which common interests would be affected are not defined, the 1974 declaration shows that expectations of prior consultation may arise even as to events outside Europe and North America.

Do these pronouncements create a legal obligation to consult when "common interests" would be affected? The leading study on the legal effect of North Atlantic Council decisions observed: "To the extent that a resolution *purported* to impose an obligation, member states in principle have acted as if they were bound by reason of their concurrence." The study concluded that

even if one takes the view that the NATO Council . . . is nothing more than a conference of member states and has no power to make authoritative decisions, there can be no question . . . that certain resolutions agreed upon unanimously by the national representatives in the Council would constitute *international agreements* creating international obligations for the member states.<sup>15</sup>

That would be so, a fortiori, when the heads of government issue a declaration. But none of the three major pronouncements on consultations was couched in clearly obligatory terms, and all are rather vague as to just what types of decision call for consultation.<sup>16</sup> Even the 1974 declaration said only that the parties "are firmly resolved" to strengthen the "practice" of prior consultation. That language suggests that the existing practice had not been extensive or consistent enough to establish a norm for prior consultation on all matters of common interest to the alliance; certainly, the words "firm resolve" do not convey an intent to create a binding norm then and there.

In fact, the declaration deliberately fell short of a normative assertion, but only because the French Government would not have joined in it if it had stated the principle of prior consultation in clearly obligatory terms. After the declaration was signed, Secretary of State Kissinger told the press that the problem was whether the consultative principle "was intended to be a legal obligation or a practice reflecting the spirit of the

<sup>15</sup> Stein & Carreau, *Law and Peaceful Change in a Subsystem: "Withdrawal" of France from the North Atlantic Treaty Organization*, 62 AJIL 577, 608, 613 (1968) (emphasis in the original).

<sup>16</sup> In addition to the 1956, 1967, and 1974 pronouncements, the North Atlantic Council has endorsed the principle of intensified consultations on several occasions. See, e.g., the Council's communiqués of May 10, 1961, para. 10, in NATO, *TEXTS OF FINAL COMMUNIQUÉS 1949-1974*, at 136, 137-38 (1975); Dec. 15, 1962, para. 7, in *id.* at 147, 148; May 24, 1963, para. 7, in *id.* at 150, 151. Nonmandatory language was used.



alliance.”<sup>17</sup> He also said that it had always been the American view that a declaration does not represent a set of legal obligations, but this appears to have been partly another bow to French antipathy and partly an expression of the Austinian notion that there can be no truly “legal” obligation without the means to compel compliance.<sup>18</sup> At the same news conference, Secretary Kissinger described U.S. intentions in terms that very nearly promised consultation: “As the country which has the most interests outside of the treaty area of any of our allies, we will meticulously implement the principle of consultation. . . .” He added that although emergencies might arise in which the United States would have to act without consulting the allies, “in all situations which are not emergency situations, the United States feels an obligation to concert its general policies with those of its allies.”<sup>19</sup> NATO officials viewed the declaration as a commitment,<sup>20</sup> though it is not clear whether they considered it a legal commitment in the sense that a failure to consult would violate an obligatory norm of the Organization. Nor is it clear whether they thought it applied to all matters of common interest to the alliance. Perhaps the declaration might best be put in the “twilight zone” between formally binding instruments and those of no legal significance.<sup>21</sup>

Several Presidents of the United States have affirmed their intention to consult the NATO allies on decisions of particular interest to them. For example, when General de Gaulle proposed that France, the United Kingdom, and the United States form a tripartite “directorate” for closer political coordination, President Eisenhower replied, “We cannot afford to adopt any system which would give to our other allies, or other free world countries, the impression that basic decisions affecting their own vital interests are being made without their participation.”<sup>22</sup> This statement is significant because of its context. The President declined a tempting opportunity to limit consultations on important matters to those allies having the most to contribute, in favor of a continuing commitment to the more cumbersome process of NATO consultations. Although the President did not use the language of legal obligation, the necessary inference from what he said—that basic decisions affecting the allies’ vital interests would not be made without their participation—must have created

<sup>17</sup> Kissinger news conference, 71 DEP’T STATE BULL. 37, 39 (1974).

<sup>18</sup> Kissinger’s disclaimer regarding the legal effect of a declaration is in *id.* at 37. The French position is reported in *Atlantic News*, June 19, 1974, at 1, and June 20, 1974, at 2. See also the remarks of U.S. Press Secretary Ronald Ziegler, in 71 DEP’T STATE BULL. 171, 172 (1974) (“consultation should not be viewed as a legally binding obligation”), and of Kissinger in *id.* at 629, 632 (“you can’t wave a paper at somebody and tell him he’s obliged to consult if he doesn’t want to consult”).

<sup>19</sup> *Id.* at 37, 38.

<sup>20</sup> See Neff, *NATO Political Consultation: Fact or Myth?*, 23 NATO REV., No. 1, at 7 (1975).

<sup>21</sup> Compare Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AJIL 296 (1977).

<sup>22</sup> *The Atlantic Alliance: Hearings Before the Subcomm. on National Security and International Operations of the Senate Comm. on Government Operations*, 89th Cong., 2d Sess., pt. 7, at 230 (1966).

expectations that the United States, at least, would act accordingly. That kind of expectation, if reinforced in practice and through affirmation over time by the appropriate decisionmakers, can create a norm having the force of law, even though—as in most situations involving international law—unwilling governments cannot be coerced into compliance.

Presidents Nixon, Ford, and Carter all reaffirmed the American intention to consult. President Nixon, on his 36th day in office, pledged to the North Atlantic Council that there would be full and genuine consultations before and during U.S. arms control negotiations with the Soviet Union, and added:

Beyond consulting on those negotiations, and beyond consulting on other policies that directly affect the NATO nations themselves, I intend to consult on a broad range of other matters. I shall not only welcome but actively seek the counsel of America's NATO partners on the questions that may affect the peace and stability of the world, whatever the part of the world in which they arise.<sup>23</sup>

President Ford, in an address to the Council, called for improving the process of political consultation and concluded, "We should further cultivate the habit of discussing our approaches to those matters which touch the interests of all so that we can develop common policies to deal with common problems."<sup>24</sup> President Carter, in the same forum, said, "We have set an excellent record of consulting with one another on a wide range of issues. That can and should continue, and the United States will increasingly draw the NATO allies into its counsels."<sup>25</sup>

These declarations and statements all assert or imply that consultations will precede decisionmaking, and will not be limited to decisions regarding events within the North Atlantic geographic area. They would raise expectations that the allies would be consulted before decisions affecting their vital interests are made, at least to the extent that actual practice defines both the decisions and allied interests sufficiently to guide those responsible either for conducting consultations or for evaluating the adequacy of others' consultations. To this the discussion now turns.

### III. ACTION WITHIN THE ALLIANCE AFFECTING NATO DEFENSES IN EUROPE

#### *Decisions to Limit Military Commitments*

If there are obligatory norms for consultation not stemming directly from provisions in the North Atlantic Treaty, one would expect them to be most evident when significant changes in military commitments to the alliance are at stake. That is in fact the case.

The NATO allies annually make and revise rolling 5-year defense plans under a system that involves detailed consultations by each member government in the preparation of its annual defense budget. In its current form, the rather elaborate process essentially consists of an annual comparison between the proposed 5-year defense plans of those allies partici-

<sup>23</sup> 60 DEP'T STATE BULL. 250, 252 (1969).

<sup>24</sup> 72 *id.*, at 886, 888 (1975).

<sup>25</sup> *Id.*, No. 2011, Feb. 1978, at 16.

pating in the integrated NATO defense system (all member states except France, Greece, and Iceland) and the force goals approved by the NATO Defence Planning Committee, which is comprised of representatives of the same member states. When the proposed defense plan of a member state falls short of the goals set for it by the Defence Planning Committee, the NATO staff and representatives of other allied governments attempt to persuade the member to come closer to the goals. Nevertheless, each member government retains the final authority to determine the size of its military budget,<sup>26</sup> and the combined NATO 5-year Force Plan emerges each year as the sum of those national decisions. Each government is committed to supplying the forces designated in the plan for the first year only.<sup>27</sup>

Although this process has evolved over time, each year since 1952 some form of review has been held before national defense budgets have been adopted.<sup>28</sup> The allies participating in the integrated defense system do not consider themselves free to bypass the consultative process. Thus, at least for the member states that have not opted out of fully integrated NATO defense, this procedure amounts to a legal duty supported by consistent practice under the conviction that the practice is required—the essence of custom in international law.

There have been several occasions when individual member states have wished to withdraw substantial force commitments from NATO, apart from the normal fluctuations reflecting annual budget revisions. In 1955 the North Atlantic Council adopted a resolution setting forth the procedure for such cases. Paragraphs 3, 7, and 8 of the resolution said that the Council,

RECOGNISING that important quantitative or qualitative changes in member countries' contributions to NATO defence are of concern to the Alliance as a whole and that any such change is therefore properly the subject of multilateral consideration within NATO;

RECOGNISING also that, while the procedures of the Annual Review are the normal method adopted in the Alliance for multilateral consideration of national contributions to NATO defence, provision should be made for circumstances in which a member government feels compelled to make important qualitative or quantitative changes in its current or prospective force contributions to NATO, at a time of year, or with a degree of urgency, which render impracticable their consideration under the normal procedure;

AGREES therefore that in the circumstances described above:

(a) The government concerned shall inform the Council and the appropriate NATO military authorities of the changes contemplated. This shall be done, whenever possible, in time for the Council's views

<sup>26</sup> See L. SLOSS, *NATO REFORM: PROSPECTS AND PRIORITIES* 6 (3 The Washington Papers, 1975).

<sup>27</sup> This simplified outline of the military budget consultation procedure is based on *NATO FACTS AND FIGURES*, *supra* note 5, at 113–15, and on an interview with David Kyd, head of the NATO Press Service, July 5, 1978.

<sup>28</sup> *NATO FACTS AND FIGURES*, *supra* note 5, at 112.

to be fully considered by the government concerned before the execution of decisions on the matters in question.

(b) If a government feels compelled to withdraw units from the area of NATO command to which they are assigned or earmarked in order to meet an emergency elsewhere, it shall at once inform the appropriate NATO military authorities, and the Council, at the first possible opportunity.<sup>29</sup>

This resolution uses legislative language that calls upon member states to consult "before the execution" of pertinent decisions in the absence of an emergency. It would create a legal obligation, unless the parties' practice demonstrated that they do not so view it.<sup>30</sup>

At various times the United States, France, Canada, Greece, the United Kingdom, the Netherlands, and Italy have reduced their NATO military commitments in ways that would arguably fall within the compass of the Council resolution. Because the French and Greek reductions were special cases, they will be examined after the others.

In the spring of 1966, the United States withdrew 30,000 trained troops from Europe for use in Vietnam and replaced them with 15,000 inexperienced troops. It promised to supply the remaining 15,000 replacements by the end of the year. There appears to have been no prior consultation.<sup>31</sup> One could argue, however, that the temporary nature of the reduction in strength removed the incident from the resolution's purview, or that the situation in Vietnam amounted to an emergency and thus merely entailed prompt notification. Consequently, this was not a clear case of failure to comply with the consultative procedure.

Another indeterminate case occurred in 1967, when a coordinated effort by the United States and the United Kingdom to reduce the foreign exchange costs of stationing forces in West Germany resulted in the removal of 33,000 troops and four air squadrons to the United States and of 5,000 troops to the United Kingdom. All of the troops and equipment remained committed to NATO. Consultations were held with the West German Government and apparently with some other allies before the decisions were made, but the discussions within NATO itself—which were held before the removals—seem essentially to have consisted of efforts by the United States and the United Kingdom to convince the allies to acquiesce.<sup>32</sup> Since technically there was no change in the American and British force contributions to NATO, the consultative procedure arguably did not apply. One could also argue that even if it had applied, the United States and the United Kingdom had complied with it by discussing the matter within NATO before removing the troops and equipment. But it is conceivable

<sup>29</sup> North Atlantic Council Resolution on Important Changes in National Defence Efforts, Oct. 5, 1955, paras. 3, 7, 8, NATO Doc. C-M(55)82(Final)(unclassified). The consultations are actually conducted by NATO's Defence Planning Committee.

<sup>30</sup> On the legal effect of "legislative" Council resolutions, see text at note 15, *supra*.

<sup>31</sup> See *Senate Hearings, supra* note 22, pt. 1, at 26; pt. 4, at 146, 147; pt. 6, at 194 (1966).

<sup>32</sup> See H. CLEVELAND, *supra* note 5, at 113-16; 16 KEESING'S CONTEMPORARY ARCHIVES 22176-77 (1967).

that the decisions involved "important qualitative changes" in force contributions, which would have brought the consultative procedure into play; if so, the presentations to the allies would not have satisfied its requirements unless there was also some realistic chance that the final decisions—or at least the manner in which they were to be executed—could have been affected by the allies' responses.

When the United States later contemplated a troop reduction that clearly would have entailed the consultative procedure, it did discuss the matter with its NATO allies. In 1970–1971, the Nixon administration considered reducing U.S. troop strength in Europe, conducted a study, consulted within NATO, and finally decided against any troop cuts.<sup>33</sup>

The Canadian Government carried out a comprehensive defense review in the spring of 1969. By early April it had decided to remain within the integrated military command but to conduct a phased reduction of Canadian forces in Europe. In announcing its intentions, the Government expressly recognized an obligation to follow the NATO consultative procedure in determining the magnitude of the reduction and details concerning it, but rejected any duty to consult regarding the basic decision to reduce the forces.<sup>34</sup> When some of the allies suspected that Canada might not follow the procedure exactly, they objected; the Canadian Government reiterated its intention to comply, though it insisted that the initial decision to reduce forces was not subject to the procedure.<sup>35</sup> Clearly, Canada acquiesced in a legal duty to consult the allies regarding execution of the basic decision.

A similar defense review was conducted by the British Government in 1974. A decision was reached in December to reduce the portion of gross national product committed to defense by a total of 1 percent over the next 10 years, and a tentative blueprint was drawn up showing how this would be carried out. It included, among other things, withdrawal of U.K. regular forces in the Mediterranean from the NATO command. The British Government stated its intention to consult the NATO allies before making its final decisions.<sup>36</sup> In the end, some changes were made in response to the consultations, though they were not of major significance. The British Defence White Paper on the cutbacks reveals the scope and effect of the consultations:

During our consultations with our NATO Allies they have asked us to reconsider those features of the reductions which they consider most damaging and to study the possibility of undertaking certain compensatory measures. We have undertaken to study such mea-

<sup>33</sup> See Yochelson, *The American Military Presence in Europe: Current Debate in the United States*, 15 *ORBIS* 784, 788 (1971); Kohl, *The Nixon-Kissinger Foreign Policy System and U.S.-European Relations: Patterns of Policy-Making*, 28 *WORLD POLITICS* 1, 27–30 (1975).

<sup>34</sup> See 7 *CANADIAN PARL. DEB.*, H. C., 28th Parl., 1st Sess. 7724, 7905–06 (1969); 9 *id.* at 9306.

<sup>35</sup> *Id.* at 9327, 9382.

<sup>36</sup> See 22 *NAATO REV.*, No. 4, at 13, 14 (1974); 882 *BRITISH PARL. DEB.*, H. C. (5th ser.) 1352–53 (1974).

tures on the clear understanding that all of Britain's defence commitments and capabilities must be met from within the total of resources which the Government decided last December it could in future allocate to defence.<sup>37</sup>

In December 1976 the United Kingdom announced another substantial reduction in planned defense expenditures, amounting to about £230 million. Again, consultations were held before the final decision, but without any prospect of inducing a reconsideration of the size of the net reduction.<sup>38</sup>

In May 1974 the Netherlands proposed a large reduction in its military manpower assigned to NATO. The Government then submitted its proposal for consultation in accordance with the established procedure and modified some aspects in response to allied criticisms. Nevertheless, the final reduction was quite substantial.<sup>39</sup> When the Dutch Government in August 1975 proposed another reduction, this time affecting only its naval forces and equipment, further NATO consultations were held. The allies asked the Dutch Government to reconsider, but its final decision remained unchanged.<sup>40</sup>

Italy devised a plan to reduce its armed forces by 20 percent in early 1976, and initiated NATO consultations. Because the reduction would actually increase the efficiency of the Italian armed services, the NATO allies contented themselves with a token statement of concern. No change was made in the Italian plan.<sup>41</sup>

The French measures of March 1966 were of a magnitude quite different from those discussed above. Without prior consultation, General de Gaulle announced that France was going to withdraw all its army and air forces then under NATO command<sup>42</sup> and demand that NATO military headquarters and individual allied military installations be removed from French territory.<sup>43</sup> The French notes to the allied governments expressly rejected negotiations over anything other than problems caused by the decision.<sup>44</sup>

<sup>37</sup> Statement on the Defence Estimates 1975, Cmnd. No. 5976, at 13 (1975).

<sup>38</sup> See Atlantic News, Sept. 21, 1977, at 1-2.

<sup>39</sup> See *id.*, July 10, 1974, at 1-2. The Dutch NATO commitment was reduced by 20,000 men.

<sup>40</sup> NATO Press Release (75) 16, Sept. 26, 1975; interview with David Kyd, head of the NATO Press Service, July 7, 1978.

<sup>41</sup> Interview with David Kyd, *supra* note 27; see also 26 NATO Rev., No. 1, at 17 (1978).

<sup>42</sup> French naval forces had already been withdrawn.

<sup>43</sup> Individual allies could have kept their military facilities in France if they had agreed to place them under French operational control.

<sup>44</sup> See, e.g., the French aide-mémoire to Canada, in 3 CANADIAN PARL. DEB., H. C., 27th Parl., 1st Sess. 2917-18 (1966); French aide-mémoire to the United States, 54 DEP'T STATE BULL. 617-18 (1966), and the U.S. response, *id.* at 617. See also the statement by Secretary of State Dean Rusk, *id.* at 695.

The French did not ask NATO to remove its political headquarters, though the allies ultimately decided that the civilian headquarters should follow the military to Belgium. France did continue to participate not only in NATO political activities, but in some defense matters. See H. CLEVELAND, *supra* note 5, at 102-03.

Not only did France fail to comply with the Council's consultative procedure, but it arguably breached the implied North Atlantic Treaty obligation to consult by means of a review conference if it wished radically to alter its treaty commitment.<sup>45</sup>

Greece followed the French lead in 1974, though on a much smaller scale. It withdrew from the NATO integrated military command, but this action involved little more than the removal of Greek officers from NATO facilities in Turkey. It also withdrew from the NATO Defence Planning Committee but kept its representatives in the Supreme Headquarters Allied Powers Europe (SHAPE) and in some other military coordinating bodies. There was no consultation before the Greek decision.<sup>46</sup>

Despite the French and Greek failures to consult, the overall NATO practice of compliance with the Council's consultative procedure adequately supports it as the law of the Organization. Canada, the United Kingdom, the Netherlands, and Italy demonstrated that they felt obliged to consult, but by their practice established that the consultations need not precede a firm decision to reduce forces. They need only precede decisions regarding such matters as the magnitude and timing of the reduction—"the execution of decisions on the matters in question," to use the terms of the Council resolution. The one case in which the United States consulted even as to the basic decision cannot by itself establish a precedent.

The other cases either were borderline as to whether they fit within the resolution (the 1966 and 1967 cases involving the United States) or involved aberrational conduct (de Gaulle's highly nationalistic decision, of which only three members of his own cabinet were informed in advance,<sup>47</sup> and Greece's decision, which was made virtually overnight in reaction to the Turkish invasion of Cyprus). The allied responses to the manner in which France and Greece acted, though diplomatic in tone, clearly did not acquiesce in the failures to consult.<sup>48</sup> The resolution's normative character thus seems to have been preserved.

### *Use or Production of Tactical Nuclear Weapons*

Another formal NATO consultative procedure can be found in the guidelines on the use of tactical nuclear weapons in Europe. Originally devised at the 1962 NATO ministerial meeting in Athens and since revised, they require (subject to a caveat mentioned below) that a member considering the use of nuclear weapons in Europe consult all member governments.

<sup>45</sup> See text at note 8 *supra*. Stein & Carreau, *supra* note 15, at 620, 639, conclude that even if France was entitled to withdraw its military cooperation under the doctrine of changed circumstances, it had a good faith duty to submit a reorganization proposal to the Council.

<sup>46</sup> Interview with David Kyd, *supra* note 27; see also R. HILL, *POLITICAL CONSULTATION IN NATO: PARLIAMENTARY AND POLICY ASPECTS* 79 (Canadian Dep't of Nat'l Defence ORAE Mem. No. M72, 1975).

<sup>47</sup> Rousseau, *Chronique des Faits Internationaux*, 70 *REVUE GÉNÉRALE DE DROIT INT'L PUBLIC* 736, 760-61 (1966).

<sup>48</sup> See the declaration by the 14 NATO allies other than France, stressing the need to consult and act together, 3 *CANADIAN PARL. DEB., H. C., 27th Parl., 1st Sess.* 2875 (1966). See also the statement by U.S. Under Secretary of State George Ball regarding French unilateralism, 54 *DEPT STATE BULL.* 613, 616 (1966).

The latter are to transmit their views through the North Atlantic Council or the NATO Defence Planning Committee to the government of the nuclear power, which retains the final decisionmaking authority. The caveat is that the full procedure need not be used if time and circumstances do not permit. It is apparently understood that time and circumstances would not permit during either a nuclear or full-scale conventional attack on Western Europe. But even in those cases, consultation apparently would be required with those NATO states on whose territory the weapons are based or would fall, and with those providing the nuclear warheads and/or delivery systems.<sup>49</sup> Consultation with these states has been called an "obligation" in a report issued by a committee of the Western European Union.<sup>50</sup> The implication is not that full-scale NATO consultation is never an obligation; rather, in extreme circumstances the obligation is qualified by the need to act quickly—but the governments primarily involved must still be consulted.

The Athens guidelines concern the use of nuclear weapons once they have been deployed in Europe. In the late 1970's the United States consulted its European allies intensively about another nuclear weapons issue: whether to produce an enhanced radiation warhead, or "neutron weapon."<sup>51</sup> The case, however, was not one in which the United States had a substantial incentive for making its decision unilaterally, since the warhead was to be produced primarily for use in Europe. There would have been little point in producing it without some assurances from the European states that they would ultimately allow it to be deployed on their territories.

### *Appointment of SACEUR*

There is greater normative significance in the U.S. practice of consulting the NATO allies before appointing a new Supreme Allied Commander, Europe (SACEUR). Although it would be shortsighted not to consult fully, the importance of the position to the United States and its practical ability to place its preferred designee in the job could induce it to hold only pro forma consultations. It appears, however, that the U.S. Government has taken the consultations seriously.<sup>52</sup>

<sup>49</sup> See STAFF OF SEN. COMM. ON FOREIGN RELATIONS, 93D CONG., 1ST SESS., U.S. SECURITY ISSUES IN EUROPE: BURDEN SHARING AND OFFSET, MBFR AND NUCLEAR WEAPONS 19-20 (Comm. Print 1973); *Nuclear Weapons and Foreign Policy: Hearings Before the Subcomm. on U.S. Security Agreements and Commitments Abroad and the Subcomm. on Arms Control, Internat'l Law and Organization of the Sen. Comm. on Foreign Relations*, 93d Cong., 2d Sess. 156-57 (1974) (statement of Secretary of Defense James R. Schlesinger); COMM. ON DEFENCE QUESTIONS AND ARMAMENTS OF THE WESTERN EUROPEAN UNION ASSEMBLY, COMMUNICATIONS AND CRISIS MANAGEMENT IN THE ALLIANCE 20 (1977).

<sup>50</sup> Report of the COMM. ON DEFENCE QUESTIONS AND ARMAMENTS, *supra* note 49.

<sup>51</sup> The enhanced radiation warhead would kill enemy troops without causing extensive damage to inanimate objects. On the NATO consultations, see *Atlantic News*, Sept. 28, 1977, at 4; *id.*, Oct. 14, 1977, at 1; *id.*, Dec. 10, 1977, at 2; *id.*, Mar. 22, 1978, at 4; *id.*, Mar. 24, 1978, at 1.

<sup>52</sup> U.S. consultations appear in H. CLEVELAND, *supra* note 5, at 128; *N.Y. Times*, Sept. 6, 1974, at 1, col. 5; *id.*, Mar. 1, 1979, at A13, col. 6.



*Disputes Among Member States*

On a few well-known occasions, a NATO member state has attempted to resolve a dispute with another member by using force or taking other actions that would adversely affect the other member's military capability in the European area. The issue is not whether there are prior consultations between the disputants in such cases, but whether there are prior consultations within NATO in order to bring the interests of the alliance as a whole into the decisionmaking process.

The most notorious nonamicable attempts to resolve disputes were the Anglo-Icelandic "cod wars" and the Cyprus hostilities between Greece and Turkey. The first cod war took place in 1958, when Iceland extended its exclusive fisheries jurisdiction to 12 miles. The extension cut heavily into long-established British fishing interests off the coasts of Iceland. Just before the decree's effective date of September 1, fishery experts of the NATO states (including Iceland and the United Kingdom) met to try to find a solution. When no solution was reached, Iceland put the new zone into effect and the British Government promptly sent in destroyers to protect the British trawlers. Although there is no public record of what was said at the NATO meeting, it is reasonable to assume not only that Iceland discussed its plans to go ahead as scheduled, but also that the United Kingdom revealed its proposed response.<sup>53</sup>

Iceland again extended its exclusive fishery zone (to 50 miles) on September 1, 1972, but the United Kingdom refrained from sending in destroyers until May 1973, after incidents had occurred between the Icelandic Coast Guard and British trawlers. The British Government did not consult its NATO allies before acting. It simply told the North Atlantic Council what it was doing.<sup>54</sup>

In July 1974 a faction of the Greek Cypriot National Guard, supported by the military junta in Greece, ousted Archbishop Makarios as President of Cyprus and installed a firm advocate of union with Greece. Five days later Turkey invaded Cyprus and set up a Turkish Cypriot administration in northern Cyprus. Turkey later widened its area of control. Although high-level representatives of the United States and the United Kingdom were in urgent telephone and personal contact with their Turkish and Greek counterparts during the 5 days before the original Turkish invasion, there is no indication that the Turks and Greeks felt obliged to consult anyone.<sup>55</sup>

<sup>53</sup> See 11 KEESING'S CONTEMPORARY ARCHIVES 16479 (1958). The British Government had already warned that it would send in destroyers if necessary.

<sup>54</sup> See 19 *id.* at 26028, 26030 (1973); *Atlantic News*, May 23, 1973, at 1.

<sup>55</sup> See *Stern*, *Bitter Lessons: How We Failed in Cyprus*, FOREIGN POLICY, No. 19, at 34, 62-64 (1975); Rudnick, *NATO and the Cyprus Crisis*, THE ROUND TABLE, No. 266, at 182, 187 (1977). For a report of postinvasion NATO consultations, see R. HILL, *POLITICAL CONSULTATIONS IN NATO 27* (6 Wellesley Papers 1978).

When Turkey sent the *Sismick I* into the Aegean Sea for geologic soundings in July 1976, serious tension with Greece again resulted. There were no North Atlantic Council consultations because the matter was considered essentially a bilateral affair. *Atlantic News*, July 20, 1976, at 3.

Rather, the contacts amounted to last-minute peacekeeping efforts by two vitally concerned allies, and in any event they did not encompass the alliance as a whole.

When measures adversely affecting an ally's military capabilities have fallen short of open hostilities, there have sometimes been consultations within the alliance. For example, after the Icelandic elections in 1971, the new Government announced that it would invoke the consultative procedure in the 1951 agreement with the United States with a view to possible termination of their mutual defense arrangement. Under the procedure Iceland could have closed the U.S. air base at Keflavik—which it threatened to do—after allowing 6 months for consultations within the North Atlantic Council; failing agreement, either government may give 12 months notice of termination, which would allow an opportunity for readjustment.<sup>56</sup> Council consultations were held, and a settlement permitting continued U.S. operation of the base was reached in 1974 (following a change of government in Iceland).<sup>57</sup>

A similar situation occurred in Portugal, which at one time considered closing U.S. air bases in the Azores. The Portuguese Government discussed the matter with the United States, and apparently in the North Atlantic Council.<sup>58</sup>

After the Turkish invasion of Cyprus in 1974, the U.S. Congress legislated an embargo on arms transfers to Turkey. The legislation was discussed in the North Atlantic Council before it went into force, but not with much hope of influencing the outcome.<sup>59</sup> Later, when the House of Representatives rejected a proposal for a partial lifting of the embargo, Turkey retaliated by closing American bases. The NATO allies were advised beforehand of the Turkish threat to close the bases, but the decision to do so apparently was not discussed in the Council until after it had been made.<sup>60</sup> Nevertheless, the element of retaliation sets this case apart.

<sup>56</sup> See Defense Agreement with Iceland Pursuant to the North Atlantic Treaty, May 5, 1951, Art. 7, 2 UST 1195, TIAS No. 2266, 205 UNTS 173.

<sup>57</sup> See Bjarnason, *Iceland's Position in NATO*, 15 ATLANTIC COMMUNITY Q. 393, 400-01 (1977).

<sup>58</sup> 35 Facts on File 387 (1975) refers to Portuguese willingness to resume talks with the United States on this issue. R. HILL, *supra* note 55, at 95, poses the North Atlantic Council discussion hypothetically. The author, however, was in a position to know whether the discussion occurred, and presumably stated it hypothetically to avoid public confirmation of matters not officially on the public record.

<sup>59</sup> André de Staercke, who was the Belgian permanent representative to NATO at that time and dean of the NATO ambassadorial corps, characterized the discussion as notification rather than consultation. Interview with Ambassador de Staercke, July 6, 1978. To the same effect: interview with Peter Collins, political officer in the U.S. delegation to NATO, July 14, 1978.

<sup>60</sup> Interview with Peter Collins, *supra* note 59; Atlantic News, July 11, 1975, at 3; *id.*, July 30, 1975, at 1-2.

It will be recalled that the French measures of March 1966 included the closing of allied military installations. There were no prior consultations. See text at note 43, *supra*. That case, however, involved a violation of an explicit procedural norm.

Not all policy decisions directly affecting an ally's military capability have involved arms embargoes or the closing of bases. For example, in the fall of 1962 the United States decided not to proceed with the development of Skybolt, a missile the United Kingdom had relied upon to give new life to its strategic bomber force. Before President Kennedy and Prime Minister Macmillan formally announced the demise of Skybolt in December 1962 at their summit meeting in the Bahamas, Secretary of Defense McNamara had flown to London to discuss the decision and then attended a North Atlantic Council ministerial meeting at which the allies undoubtedly explored the matter.<sup>61</sup> Despite assertions to the contrary by Secretary McNamara and Prime Minister Macmillan, the U.S. decision seems to have been made before the London and NATO discussions. The only questions left open had to do with the alternative to Skybolt to be offered the United Kingdom.<sup>62</sup>

Another decision affecting an ally's military capability, though less directly than in the case of Skybolt, was that of the United States and the United Kingdom to supply arms to Tunisia during Algeria's war of independence from France. There was no prior NATO consultation. Since the arms could well have found their way to Algeria or have freed other weapons for that purpose, the Anglo-American decision precipitated a minor NATO crisis. France charged that the two allies had violated the consultative principles set forth by the three wise men in 1956.<sup>63</sup>

The occasional instances of Council consultation are not sufficient to establish a duty to consult the allies before taking an action that weakens the ability of another ally to participate in the common defense. Measures of this sort are to be distinguished from those that directly weaken the alliance as a body. In such cases, which usually involve troop reductions or military budget cuts, consultations before final decisions are the norm.

#### IV. DÉTENTE WITH EASTERN EUROPE AND THE GERMAN QUESTION

##### *Arms Control Negotiations*

Post-World War II arms control negotiations began in earnest in the early 1960's and have continued in various forms ever since. With a few exceptions, such as the Conference on Security and Cooperation in Europe and the Mutual and Balanced Force Reductions talks, these negotiations have not involved formally coordinated NATO positions. Instead, one or a few member states have carried on negotiations with the Eastern bloc,

<sup>61</sup> See *The Times* (London), Dec. 8, 1962, at 8, col. 3; *id.*, Dec. 14, 1962, at 8, col. 4 and 12, col. 1. The Final Communiqué of the North Atlantic Council ministerial session, Dec. 15, 1962, note 16 *supra*, at 147, 148 (1975), refers to a discussion of adequate and balanced forces, nuclear and conventional, and to a need for closer alignment between NATO military requirements and national force plans.

<sup>62</sup> See H. TREWHITT, *McNAMARA* 175 (1971).

<sup>63</sup> See F. BEER, *supra* note 4, at 16; M. BALL, *NATO AND THE EUROPEAN MOVEMENT* 140 (1959); G. LISKA, *NATIONS IN ALLIANCE: THE LIMITS OF INTERDEPENDENCE* 79 (1962). For the wise men's recommendations on consultation, see text at note 9, *supra*.

or in a few cases, such as the seabed arms control negotiations, all NATO states have been free to participate without any commitment to present a united front. Whenever there is no commitment to coordinate among all NATO members, the issue of prior consultation tends to arise between the negotiating and the nonparticipating members.<sup>64</sup>

In most cases the United States has been either the leading or the sole negotiator from the alliance. A number of instances can be found in which high-ranking U.S. officials have said that their Government consults within NATO before presenting a new position in arms control negotiations, or have pledged that it will do so.<sup>65</sup> But the record suggests that the U.S. "consultations" are sometimes mere notifications or briefings.

One of the first examples involved the partial Test Ban Treaty of 1963.<sup>66</sup> At most, the United States informed several of its major European allies of the treaty's details just before the Moscow signing.<sup>67</sup> The Assembly of the Western European Union adopted a resolution regretting "the absence of sufficient and previous consultations, and [requesting] that in the future the conclusion of treaties affecting the vital interests of member States of NATO and WEU be preceded by consultations in the spirit of the treaties."<sup>68</sup> This very nearly amounted to an assertion of the duty to consult, and the United States within a few years began acknowledging its intention to do so.

The European allies were not vitally interested in some of the other arms control negotiations of about the same vintage. These included the negotiations leading to the Antarctic Treaty and the Outer Space Treaty, both of which contain arms control provisions. In these instances, allied consultations were desultory.<sup>69</sup>

On the other hand, the European allies were quite interested in the Nuclear Nonproliferation Treaty. After the negotiations had dragged on for some time, the United States-Soviet talks suddenly became serious in late 1966. Without consulting its NATO allies, the United States worked out with the Soviet Union the arrangement that eventually became the core

<sup>64</sup> As I noted at the beginning of this article, efforts such as CSCE and MBFR that require detailed coordination to be effective are not particularly significant to a normative study of prior consultations. Consequently, they are mentioned only briefly in this section.

<sup>65</sup> See Secretary of State Dean Rusk's statement in *Senate Hearings*, *supra* note 22, pt. 5, at 161 (1966); H. CLEVELAND, *supra* note 5, at 70 (reporting President Nixon's pledge to consult) and at 177; statement by President Carter, *DEF'T STATE BULL.*, No. 2014, May 1978, at 31.

<sup>66</sup> Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 UST 1313, TIAS No. 5433, 480 UNTS 43.

<sup>67</sup> See Report of the Comm. on Defence Questions and Armaments, *The Moscow Test Ban Treaty and Its Effects on the Western Alliance*, Assembly of the Western European Union Doc. 288, in *PROCEEDINGS OF THE 9TH ORDINARY SESSION*, pt. 2, vol. 3, at 79, 88 (1963).

<sup>68</sup> *ASSEMBLY OF THE WESTERN EUROPEAN UNION, COLLECTED TEXTS ADOPTED AND REPLIES OF THE COUNCIL*, 9th Ordinary Sess., at 15 (1963).

<sup>69</sup> See H. CLEVELAND, *supra* note 5, at 67.

of the treaty.<sup>70</sup> It involved a promise by nuclear weapons states not to transfer nuclear weapons to nonnuclear states or assist them in their manufacture, and a promise by the latter not to receive or manufacture nuclear weapons. This meant, of course, that the North Atlantic Alliance would be limited to three nuclear powers, at least if those three all became parties to the Nonproliferation Treaty. The allies let the United States know of their disenchantment with the failure to consult. The result was close consultation in the North Atlantic Council from April 1967 until the drafting was completed and the treaty signed on July 1, 1968.<sup>71</sup>

A similar scenario unfolded in the fall of 1967, when the U.S. Government was considering its options regarding development and deployment of antiballistic missile (ABM) systems. Without consulting the NATO allies, Secretary of Defense Robert McNamara announced that the United States had decided to go ahead with a "thin" ABM system to defend against a possible Chinese attack, rather than a more ambitious system capable of defending against an all-out Soviet attack. Although selection of the "Chinese option" arguably put the decision outside the area of NATO concern, the NATO allies did not see it that way. At a meeting of the NATO Nuclear Planning Group a week after Secretary McNamara's announcement, he was openly challenged for having failed to consult. It was noted that even a "thin" system could be used against a Soviet attack, and the question was raised whether the United States planned to protect itself at least partly from Soviet attack while leaving Europe vulnerable. Secretary McNamara responded that the ABM issue had not really been decided yet, and that European views would be taken into account before the decision was made.<sup>72</sup> As it turned out, the U.S. decision was not final, and the ABM's fate became tied to the U.S.-Soviet strategic arms limitation talks (SALT).

The SALT negotiations are bilateral between the two superpowers. They began in 1968, near the end of the Johnson administration, and have resulted in an interim (SALT I) agreement in May 1972, acceptance of limits on strategic delivery vehicles in 1974, and, since then, a SALT II agreement in 1979 and SALT III negotiations. Throughout, the United States has been in frequent contact with its NATO allies regarding the negotiations. These contacts have been cited by a former NATO Secretary General as examples of trustful and complete consultations, an assessment shared by the former dean of the NATO corps of permanent representa-

<sup>70</sup> *Id.* at 68, noting that the allies were only brought up to date several weeks later.

<sup>71</sup> Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 UST 483, TIAS No. 6839, 729 UNTS 161. On the consultations, see H. CLEVELAND, *supra* note 5, at 68-69; F. BEER, *supra* note 4, at 24-25; Lyon, *Beyond NATO?*, 24 INT'L J. (Canada) 268, 271 (1974).

E. GOODMAN, *THE FATE OF THE ATLANTIC COMMUNITY* 383 (1975), says that the "allied consultation was in the nature of a tardy effort to make amends for oversights in a deal originally struck by the superpowers." But, given the forceful objections by the allies after they had been bypassed in 1966, this is tantamount to saying that the United States was acquiescing in an assertion by the allies of a right to be consulted. Customary international law is created by just such a process.

<sup>72</sup> See H. CLEVELAND, *supra* note 5, at 59; J. NEWHOUSE, *COLD DAWN: THE STORY OF SALT* 96-99 (1973).

tives.<sup>73</sup> As will be seen, however, not all the European Governments joined in that assessment—at least as it applies to SALT I.

In January 1969 the U.S. permanent representative briefed the North Atlantic Council on the outgoing Johnson administration's SALT objectives and negotiating principles. The briefing took place after the initial American proposal had been prepared, and would have been after it had been presented to the Soviet Union if the 1968 invasion of Czechoslovakia had not led the United States to postpone the first SALT meeting.<sup>74</sup>

When the Nixon administration took office, it began to prepare its own proposals. President Nixon told the Soviet Ambassador that negotiations could not begin until the review could be completed and consultations could be held with the allies.<sup>75</sup> During the ensuing 3 years of negotiations leading to the SALT I agreement, U.S. officials routinely briefed the allies in Brussels before and after each of the seven negotiating rounds. It appears, however, that the actual proposals were developed almost entirely within the administration, sometimes without even the participation of the U.S. arms control bureaucracy. The most crucial negotiations in the spring of 1972 were prepared in total secrecy and then conducted equally secretly by Secretary of State Kissinger in Moscow while the seventh round was following its own course in Helsinki.<sup>76</sup> In the eyes of at least some European allies, the "consultations" were little more than notifications of what the United States had already decided to do or had done.<sup>77</sup> Nevertheless, the allies raised no strong objections to the procedure, probably because the substance of the SALT I agreement did not seriously affect Western European security and because the regular briefings did provide some assurance of that.<sup>78</sup>

Some other bilateral U.S.-Soviet negotiations at about the same time were conducted with little or no prior NATO consultation. In 1972 the two superpowers signed their nonbinding "Basic Principles of Relations," the forerunner of the Helsinki accords eventually reached in the Conference on Security and Cooperation in Europe. The "Basic Principles" did not include some points, important to the West, that were later incorporated in

<sup>73</sup> Brosio, *Consultation and the Atlantic Alliance*, 16 SURVIVAL 115, 117 (1974) (referring also to the multilateral CSCE and MBFR negotiations); interview with André de Staercke, *supra* note 59.

<sup>74</sup> J. NEWHOUSE, *supra* note 72, at 120-30, 137-38. The Newhouse book is an insider's account of the SALT I negotiations.

<sup>75</sup> *Id.* at 141.

<sup>76</sup> *Id.* at 176-86, 203, 214-18, 223-24, 234-56.

<sup>77</sup> See Smart, *Perspectives from Europe*, in SALT: THE MOSCOW AGREEMENTS AND BEYOND 185, 190 (M. Willrich & J. Rhinelanders eds., 1974). Compare J. SCHAEZEL, THE UNHINGED ALLIANCE: AMERICA AND THE EUROPEAN COMMUNITY 52 (1975).

<sup>78</sup> See Smart, *supra* note 77; Buchan, *The United States and the Security of Europe*, in 8 CRITICAL CHOICES FOR AMERICANS, WESTERN EUROPE: THE TRIALS OF PARTNERSHIP 297, 305 (D. Landes ed., 1977). The SALT I agreement was the Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, with Protocol, May 26, 1972, 23 UST 3462, TIAS No. 7504 (no longer in force).

The initial ABM agreement, negotiated in tandem with SALT I, is the Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 UST 3435, TIAS No. 7503.

the Helsinki accords, and did include references to "peaceful coexistence" that were open to Soviet interpretation as legitimating ideological warfare. The United States did not consult its NATO allies in advance.<sup>79</sup> Similarly, the U.S.-Soviet Agreement on the Prevention of Nuclear War<sup>80</sup> was signed in 1973 without any meaningful prior NATO consultation. In general, the agreement commits each party to avoid the threat or use of force against the other except in self-defense, and provides that if a risk of nuclear conflict arises the parties will consult each other and make every effort to avert the risk. Several commentators have noted that the agreement was almost certain to raise fears among the NATO allies of the United States about the credibility of its nuclear deterrent to an attack on Western Europe.<sup>81</sup>

The record is less clear as to meaningful NATO consultation before President Nixon's visit to Moscow in early July 1974, when two bilateral agreements were signed: a protocol reducing the number of ABM deployment areas permitted under the 1972 ABM treaty from two to one,<sup>82</sup> and an agreement (which has never entered into force) limiting the strength of underground nuclear weapons tests. On June 18 and 19, Secretary of State Kissinger briefed the North Atlantic Council on the President's impending trip. He assured the Council that no allied interests would be compromised. President Nixon then stopped in Brussels on his way to Moscow, explaining in general terms the objectives of his trip. Nowhere does it appear, however, that the allies were given the opportunity at either the Kissinger or the Nixon briefing to contribute to the positions to be adopted by the United States.<sup>83</sup>

In July 1977 the United States, the United Kingdom, and the Soviet Union entered into negotiations pointing toward a comprehensive nuclear test ban treaty, to include a ban on underground tests. Although the negotiations have been discussed in the North Atlantic Council, the discussions—like most relating to U.S.-Soviet bilateral negotiations—appear to have been more in the nature of briefings than real consultations.<sup>84</sup>

<sup>79</sup> See E. GOODMAN, *supra* note 71, at 389.

<sup>80</sup> June 22, 1973, 24 UST 1478, TIAS No. 7654.

<sup>81</sup> See E. GOODMAN, *supra* note 71, at 390; R. HILL, *supra* note 55, at 23; Hassner, *How Troubled a Partnership*, 24 INT'L J. (Canada) 166, 178 (1974). Shortly before the agreement was signed, Henry Kissinger said that when the interests of the European allies were directly affected by U.S. bilateral negotiations with other superpowers, the United States had been scrupulously consulting them. Kissinger, *The Year of Europe*, 68 DEP'T STATE BULL. 593, 597 (1973). His definition of consultation, however, did not always coincide with that of the European allies.

<sup>82</sup> Protocol to the Treaty of May 26, 1972, on the Limitation of Anti-Ballistic Missile Systems, July 3, 1974, 27 UST 1645, TIAS No. 8276.

<sup>83</sup> The Kissinger-Nixon briefings are reported in *Atlantic News*, June 18, 1974, at 3; *id.*, June 20, 1974, at 1; *id.*, June 21, 1974, at 1; *id.*, June 26, 1974, at 1; *id.*, June 27, 1974, at 2. The Moscow visit involved broad strategic arms limitation discussions as well as the signing of the two agreements.

<sup>84</sup> Interview with Stephen J. Ledogar, director, Office of NATO and Atlantic Political-Military Affairs, U.S. Dept. of State, Aug. 2, 1978.

All the U.S.-Soviet negotiations mentioned to this point have had potential, but indirect effects on Western Europe. The SALT II and III negotiations pose issues of much more direct concern to the European allies. These encompass limitations on forward-based systems (aircraft and missiles based in Western Europe) and on the deployment of cruise missiles. As the issues have moved closer to home for the European NATO members, they have increasingly expected to participate in the U.S. decisionmaking process.<sup>85</sup> The Carter administration has therefore undertaken much closer consultations than had occurred during the SALT I and early SALT II negotiations, thus making it possible for the European allies to air their views while negotiating positions are being formed.<sup>86</sup>

The allies have systematically consulted with one another before taking positions in a number of multilateral arms control negotiations. In the Mutual and Balanced Force Reductions (MBFR) negotiations the NATO allies have presented coordinated positions. The United States has been tempted to try to settle the MBFR issues bilaterally with the Soviet Union, but it has consistently referred Soviet proposals to its NATO allies before taking any position.<sup>87</sup> Similarly, during the negotiations from 1967 until 1971 on seabed arms control, when a NATO member wanted to make a new proposal it would normally consult the others before putting the proposal in final form.<sup>88</sup> The same held true during the contemporaneous Geneva negotiations on banning biological weapons.<sup>89</sup> Before each session of the

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The bilateral U.S.-Soviet talks on a proposed agreement prohibiting chemical weapons have involved some coordination between the United States and those allies represented at the Geneva disarmament conference, but no political consultations at NATO headquarters in Brussels. *Ibid.*

<sup>85</sup> See, e.g., Vance, *Comment*, in *THE NEW ATLANTIC CHALLENGE* 366, 367 (R. Mayne ed., 1975). Cf. R. HILL, *supra* note 55, at 73, reflecting the expectation of a knowledgeable Canadian official.

Interestingly, when Belgium planned to enter into disarmament talks with Poland, it consulted its NATO allies first. See H. CLEVELAND, *supra* note 5, at 22.

<sup>86</sup> See *Atlantic News*, Mar. 23, 1977, at 1; statement of President Carter, *DEP'T STATE BULL.*, No. 2011, Feb. 1978, at 16, 17, 26 *NATO REV.*, No. 1, at 29 (1978); statement of George S. Vest, Ass't Secretary of State for European Affairs, in *DEP'T STATE BULL.*, No. 2012, Mar. 1978, at 27, 29. The European insistence on closer consultations, and U.S. compliance, were brought out also in an interview with Stephen J. Ledogar, *supra* note 84.

The Guadeloupe four-power summit in January 1979 was a confirmation of, and a possible deviation from, the principle of close NATO consultations. It stemmed from President Carter's inclination to draw into his counsels at an early stage those NATO allies that would be most acutely affected by the impending SALT III negotiations, but it excluded all other NATO allies. The departure from pan-NATO consultation was temporary, as the NATO Nuclear Planning Group was to discuss the SALT III issues in April.

<sup>87</sup> See E. GOODMAN, *supra* note 71, at 376; R. HILL, *supra* note 55, at 95.

<sup>88</sup> See R. HILL, *supra* note 55, at 73 (giving Canadian practice as an example).

The negotiations produced the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 UST 701, TIAS No. 7337.

<sup>89</sup> See Fabiani, *Biological Weapons Ban Near After Years of East-West Effort*, 20 *NATO REV.*, Nos. 1 & 2, at 20-23 (1972). The negotiations produced the Convention



Third UN Law of the Sea Conference, the North Atlantic Council has met to discuss the outstanding issues and the responses of individual allies.<sup>90</sup>

In all of these multilateral negotiations, the European NATO allies have had particular interests to protect. The MBFR negotiations are the most obvious example, since they deal with East-West force reductions in Central Europe. The negotiations on seabed arms control and the Law of the Sea Conference involved defense-related issues of considerable interest to the NATO maritime states, which includes all except Luxembourg. The negotiations on biological weapons were significant not only because they led to a ban on the production and use of a specific type of weapon, but also because they were closely related to the 1925 Geneva Protocol prohibiting gas warfare, to which all NATO states except the United States were already parties.<sup>91</sup>

### *Other Policies Toward Eastern Europe*

Some significant policy decisions on relations with potential adversaries in Eastern Europe have been made outside the context of arms control. These have included decisions on Berlin and German reunification, steps toward rapprochement with the Soviet Union by individual NATO members, and the development of strategic defense plans by the nuclear powers in the alliance.

On matters concerning Berlin and the "German question," the United States, the United Kingdom, France, and the Federal Republic of Germany have borne special responsibilities. The former three have consistently consulted each other before taking positions and have included Bonn in the consultations since the West German accession to NATO. The practice of prior consultations with the other members of the alliance, however, has not been as consistently observed. They have generally occurred before relatively formal contacts with the Eastern bloc on specific issues, such as the sending of a diplomatic note in response to a Soviet initiative or the signing of an agreement—except when the contacts have been in response to an immediate crisis. Individual members have generally not held consultations with the entire alliance at each step in the development of their policies toward Eastern Europe.

To illustrate: During the period of heightening tension over Berlin, before the serious problems of 1958–1961, the three allied powers responsible for the city developed the practice of discussing proposed political communications to the Soviet Union with the North Atlantic Council. These

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on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 UST 583, TIAS No. 8062.

<sup>90</sup> See Fabiani, *The Caracas Conference on the Law of the Sea, June-August 1974*, 22 NATO REV., No. 3, at 22, 23; Atlantic News, Mar. 8, 1978, at 1.

<sup>91</sup> See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 UST 571, TIAS No. 8061, 94 LNTS 65. The United States became a party at the same time it ratified the Biological Weapons Treaty.

appear to have been genuine consultations rather than mere briefings.<sup>92</sup> Similarly, there were NATO consultations before the 1955 summit and foreign ministers conferences at which the United States, the United Kingdom, and France met with the Soviet Union to try to resolve the question of German reunification.<sup>93</sup>

The Berlin "crises"—an overstatement for the most part—began on November 27, 1958, when the Soviet Government sent notes to the United States, the United Kingdom, France, and the Federal Republic of Germany asserting that the 1944 and 1945 four-power agreements relating to Germany were void, and that the Soviet Union would give the German Democratic Republic control over access to Berlin. The foreign ministers of the four Western allies met just before a North Atlantic Council meeting and agreed on the issues to be covered in their replies. They issued a statement to that effect, adding that "[t]hey will consult their allies in the Atlantic Council, following which the four Governments will formulate their replies."<sup>94</sup> They did so. Another Soviet note was delivered on January 10, 1959. The four allies cleared their responses with the Council before delivering them to the Soviet Government.<sup>95</sup> They proposed a conference among the United States, the United Kingdom, France, and the Soviet Union, to which the latter eventually agreed. A month before the conference, the allied negotiating position was discussed extensively in a North Atlantic Council ministerial meeting.<sup>96</sup> Nevertheless, specific negotiating proposals apparently were adopted just before and during the conference's two sessions by the three Western participants and the Federal Republic of Germany; the North Atlantic Council was simply kept apprised of the proceedings.<sup>97</sup> The conference proved inconclusive.

On June 15, 1961, Soviet Premier Khrushchev announced that if all states formerly at war with Germany did not sign a peace treaty by the end of the year, the Soviet Union would sign a separate peace treaty with East Germany. The United States, the United Kingdom, and France rejected this position in notes delivered to the Soviet Union on July 17, after they had obtained the approval of the North Atlantic Council.<sup>98</sup> On August 13, the true crisis materialized when the East German authorities sealed the border between East and West Berlin. The Berlin wall soon followed. At the height of the crisis the three Western allies apparently acted without consulting the others (except, eventually, West Germany), although they did keep them informed. Their actions included the delivery of protest notes to the Soviet Union, the call-up of more than 75,000 U.S. reservists, and the dispatch of 1,500 U.S. troops in armored trucks to the autobahn to West Berlin.<sup>99</sup> These measures required a series of prompt decisions that

<sup>92</sup> See LUNS, *Progress Report on NATO*, 6 NATO LETTER, No. 12, at 3, 8 (1958); P.-H. SPAAK, *WHY NATO?* 35 (1959).

<sup>93</sup> See R. HILL, *supra* note 55, at 17.

<sup>94</sup> 7 NATO LETTER, No. 1, at 11 (1959).

<sup>95</sup> *Id.*, No. 3, at 6-7 (1959).

<sup>96</sup> *Id.*, No. 4, at 13 (1959).

<sup>97</sup> *Id.*, No. 6, at 15 (1959); *id.*, No. 8, at 9 (1959).

<sup>98</sup> See 13 KEESING'S CONTEMPORARY ARCHIVES 18163, 18223 (1961).

<sup>99</sup> These events are recounted, without mention of prior NATO consultations, in *id.*, at 18274-75, 18277-78, 18307-10; A. SCHLESINGER, *A THOUSAND DAYS* 393-400

probably could not have been effectively coordinated beyond the inner circle of allies. Eventually, when the discussions among the four allies disintegrated, the others were brought in.<sup>100</sup> The crisis cooled in October.

Allied handling of relations with Eastern Europe since 1961 has followed much the same pattern: Council consultations before formal contacts and foreseeable events important to West European security, but not before steps in the gradual development of policy or before responses to genuine crises. For example, before the Federal Republic of Germany concluded its normalization treaty with the German Democratic Republic in 1972, it consulted its NATO allies.<sup>101</sup> When the latter Government restricted foreign access to East Berlin in 1977, the three allies responsible for Berlin consulted within NATO before sending a written protest to the Soviet Union.<sup>102</sup> When the Prime Minister of Turkey planned to go to the Soviet Union in 1978 to sign a "political document" of good will, he discussed the matter—though apparently without much give-and-take—in the NATO summit meeting of May 1978 before any specific language had been drafted.<sup>103</sup> Consultations also have been held on policies to be adopted when President Tito of Yugoslavia leaves office.<sup>104</sup> On the other hand, there were only minimal consultations in the North Atlantic Council while the West German *Ostpolitik* was evolving toward normalization with East Germany and while some other members were pursuing détente with Eastern Europe in the 1960's.<sup>105</sup> And in the crisis situation sparked by the Soviet invasion of Czechoslovakia in 1968, the United States did not consult its allies before sending two destroyers into the Black Sea. Some of the allies questioned the lack of consultation.<sup>106</sup>

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(1965); T. SORENSEN, KENNEDY 593-96 (1965). See also A. BUCHAN, CRISIS MANAGEMENT 36-39 (The Atlantic Papers, NATO Series, No. 2, 1966).

<sup>100</sup> See F. BEER, *supra* note 4, at 18-19.

<sup>101</sup> See the Final Communiqués of North Atlantic Council Ministerial sessions, Dec. 10, 1971, and May 31, 1972, in NATO, TEXTS OF FINAL COMMUNIQUÉS 1949-1974, at 266 and 276 (1975).

<sup>102</sup> See Atlantic News, Jan. 12, 1977, at 3.

<sup>103</sup> Interviews with Orme Wilson, political affairs counselor, U.S. delegation to NATO, July 10, 1978, and with Francis J. Seidner, public affairs adviser, Bureau of European Affairs, U.S. Dept. of State, Aug. 1, 1978. See also N.Y. Times, May 30, 1978, at A1, col. 5 (city ed.).

<sup>104</sup> See R. HILL, *supra* note 55, at 127.

<sup>105</sup> See H. CLEVELAND, *supra* note 5, at 133, 136, 140; R. HILL, *supra* note 55, at 92-93. Hill notes that the allies did not expect extensive consultations from West Germany during its *Ostpolitik* phase.

See also Secretary of State Dean Rusk's statement in *Senate Hearings*, *supra* note 22, pt. 5, at 161 (1966), mentioning discussions among the four major allies during the post-Berlin crisis period, but indicating that the other allies were merely briefed on them.

The West German Government failed to consult all the allies before deciding to hold a presidential election in Berlin. See H. CLEVELAND, *supra* note 5, at 22.

<sup>106</sup> See H. CLEVELAND, *supra* note 5, at 20-21. It had been routine for the United States to send warships through the Dardanelles occasionally, in order to show that the Black Sea is an international body of water. The State Department wished to say that this was just another routine visit, and thought NATO consultations would belie that. *Ibid.*

A final class of cases involving policies toward potential adversaries is represented by changes in U.S. strategic defense plans. Since NATO defenses rely heavily on the retaliatory capability of the United States on a global scale, as well as within Europe, significant changes in U.S. strategic defense policy are of vital interest to the alliance. Nevertheless, when Secretary of State Dulles announced the massive retaliation policy in January 1954, the NATO allies had simply been notified—not consulted—beforehand.<sup>107</sup> In 1962 the Kennedy administration abruptly switched to a strategy of flexible response. There was little or no consultation with the NATO allies, who were left confused about the countermeasures the United States was planning in the event of a Soviet attack on Western Europe.<sup>108</sup> The United States apparently decided in 1965 to produce MIRV's (multiple independently targeted reentry vehicles) but did not inform its NATO allies until just before it made a proposal to the Soviet Union in March 1967 that the impending arms control talks include offensive systems in addition to antiballistic missiles.<sup>109</sup>

In sum, NATO consultative practice regarding Eastern Europe has assumed the following pattern. The European NATO allies have strenuously asserted that the United States has a duty to consult them before making decisions on arms control negotiations only when the decisions could directly and significantly weaken the defense of Western Europe. The United States has acquiesced in that relatively narrow assertion. Otherwise, the European allies themselves engage in prior consultations only in the case of a significant, foreseeable event involving Eastern Europe or when a specific, rather formal contact with Eastern Europe is contemplated, and then only if the situation is not a true emergency.<sup>110</sup>

## V. DEVELOPMENTS OUTSIDE THE NORTH ATLANTIC TREATY AREA

### *Confrontations*

The North Atlantic Alliance was established to defend a relatively well-defined area encompassing North America and Western Europe. The de-

<sup>107</sup> Interview with André de Staercke, *supra* note 59. The United States had already announced a massive retaliation policy relating to a Soviet attack on Western Europe. The 1954 announcement applied to a Communist attack anywhere, if the attack could start a general war.

Secretary Dulles did acknowledge that the United States would consult its NATO allies if it actually had to retaliate massively. See R. OSGOOD, *LIMITED WAR* 208-13 (1957). This appears to have been a recognition of the U.S. obligation under Article 4 of the North Atlantic Treaty. See text at note 7, *supra*.

A similar pledge to the NATO allies, relating to the use of nuclear weapons anywhere in the world, was made by the United States and the United Kingdom in 1962. See H. CLEVELAND, *supra* note 5, at 15-16.

<sup>108</sup> Staff of Senate Comm. on Government Operations, *Basic Issues*, in *THE ATLANTIC ALLIANCE* 7, 21 (H. Jackson ed., 1967). See also H. CLEVELAND, *supra* note 5, at 47.

<sup>109</sup> See J. NEWHOUSE, *supra* note 72, at 91.

<sup>110</sup> One form of true emergency central to NATO's *raison d'être*—an armed attack on Western Europe—has not occurred. As was discussed in the text at notes 49-50, *supra*, there is a formal NATO consultative procedure for the use of tactical nuclear weapons in such an emergency.

fense is directed against a possible attack from Eastern Europe. A working hypothesis—at least in the early years of NATO—was that events outside these areas were of little concern to the alliance. Under that hypothesis, a member would not be expected to consult the others before acting outside the treaty area, even if a confrontation was involved. In practice, however, several crosscurrents have often influenced the expectation and likelihood of prior consultation. These include such factors as the need to act quickly in a crisis, the likelihood of Soviet military involvement, the prospect of escalation, the geographic proximity of the events to the treaty area, and the desire of individual allies to be associated with or dissociated from the policy of the acting ally.

In the 1950's Secretary of State John Foster Dulles made clear that the United States, as a nation with worldwide responsibilities, might on occasion have to respond to a crisis outside the treaty area without waiting to consult its NATO allies. He gave a specific example: the protection of Taiwan in the event of an attack from the Chinese mainland.<sup>111</sup> This principle, at least as it applied to an area half a globe away, does not seem to have aroused any substantial opposition from the allies.

It was another story, however, when Great Britain and France intervened militarily after President Nasser of Egypt nationalized the Suez Canal Company in 1956. They acted without consulting their NATO allies, who objected sharply not only to the lack of consultation but to what some viewed as attempts to deceive them.<sup>112</sup>

Another Middle Eastern incursion by NATO members occurred in 1958, when the United States and Great Britain landed forces in Lebanon and Jordan, respectively. They acted at the invitation of those Governments and in response to a volatile situation sparked by the overthrow of the Iraqi Government under circumstances that could have led to insurrection in Lebanon and Jordan. It appears that the United States and the United Kingdom did consult in the North Atlantic Council before matters came to a head, warning that they would respond to requests for help in a crisis. A number of the allies preferred not to become involved, and accordingly remained silent. Apparently, there was no consultation immediately preceding the decision to land forces.<sup>113</sup>

Decisions were made on decolonization by the European allies without significant NATO consultation during the most turbulent period of self-determination, which extended from the granting of independence to India and Indonesia shortly after World War II through the hostilities in the

<sup>111</sup> See Dulles, *Developing NATO in Peace*, 34 DEP'T STATE BULL. 706, 709-10 (1956); M. BALL, *supra* note 63, at 137.

<sup>112</sup> Interview with André de Staercke, *supra* note 59. See F. BEER, *supra* note 4, at 13; Brosio, *supra* note 73, at 115, noting President Eisenhower's outburst at the British-French conduct.

<sup>113</sup> See Prime Minister Macmillan's statement of July 17, 1958, in 6 NATO LETTER, No. 8, at 10-11 (1958); Luns, *supra* note 92, at 8-9; F. BEER, *supra* note 4, at 29; Jordan & Newman, *The Secretary-General of NATO and Multinational Political Leadership*, 30 INT'L J. (Canada) 732, 754 n.55 (1975).

former Belgian Congo beginning in 1960. That period saw a number of crises over decolonization for the European states involved, sometimes with important implications for other members of the alliance. This was true not only in the Congo, but in such places as Algeria and Indochina as well. Nevertheless, it took the United Nations involvement in the Congo and the jockeying for position there by the superpowers to generate any real interest among the allies in being consulted collectively before controversial decisions about decolonization were made.<sup>114</sup>

In the 1960's and early 1970's the United States took or threatened military action in several situations arising outside the treaty area. In at least one case the United States attempted to consult but was largely rebuffed; in some cases it neither attempted nor was expected to consult; and in two cases it consulted the other allies so hurriedly that there was insufficient opportunity for input to satisfy them.

The first case grew out of the U.S. involvement in Vietnam. Although the Johnson administration insisted that the war was a NATO concern, the allies preferred not to become involved so long as there was no direct U.S.-Soviet confrontation.<sup>115</sup> Even when there was a dramatic escalation, as when the United States sent ground troops into Cambodia, the allies did not make a serious issue of NATO consultation.<sup>116</sup> Other instances in which the United States neither consulted NATO nor was criticized for the omission included the Bay of Pigs invasion in 1961,<sup>117</sup> the intervention in the Dominican Republic in 1965,<sup>118</sup> and the *Mayaguez* incident in 1975.<sup>119</sup> Despite the possible spillover from all these situations to relations between the alliance and Eastern Europe, the allies simply regarded them as too remote for concern.

In quite another category were the Cuban missile crisis in 1962 and the U.S. worldwide military alert during the 1973 Middle Eastern war. Because of the element of Soviet-U.S. confrontation, the allies were vitally concerned. The problem was time.

It would have taken about 10 days from the U.S. discovery of Cuban launching pads and missile-designed buildings until the missiles could be on the pads ready for firing. President Kennedy had to consult his own experts and senior political-military advisers before deciding what to do, and apparently felt that he could not afford the luxury of seeking another set of opinions from another set of potential advisers, his partners

<sup>114</sup> See A. BUCHAN, *supra* note 99, at 24; F. BEER, *supra* note 4, at 16, 22.

<sup>115</sup> See Neff, *supra* note 20, at 8; R. HILL, *supra* note 55, at 89.

<sup>116</sup> For an account of the U.S. decisionmaking process regarding the Cambodian incursion, see M. & B. KALB, *KISSINGER* 154-64 (1974).

<sup>117</sup> See A. BUCHAN, *NATO IN THE 1960's*, at 119 (rev. ed. 1963).

<sup>118</sup> See A. BUCHAN, *supra* note 99, at 34-35.

<sup>119</sup> See R. HILL, *supra* note 55, at 71, putting the situation hypothetically but in such a manner as to suggest that there was no consultation. See also R. ROWAN, *THE FOUR DAYS OF MAYAGUEZ* 66-70, 88-92, 140-44, 172-80 (1975), discussing the U.S. decision-making without mentioning NATO consultation.

in NATO.<sup>120</sup> Just before announcing his decision, he sent Dean Acheson hurriedly to Europe to notify the allies. Although Acheson is reported to have told General de Gaulle that he was there merely to inform, not to consult, the then dean of the NATO ambassadorial corps, Belgian Permanent Representative André de Staercke, recalls that Acheson actually asked him whether the allies had any objection to the U.S. plan. Ambassador de Staercke called the NATO Secretary General and told him they had only a few minutes to decide whether to raise any objections. They did not, and undoubtedly would not have done so under the circumstances even if they had disagreed with the American plan.<sup>121</sup> At the next ministerial meeting of the North Atlantic Council some questions were raised regarding consultation in such crises, "but no real complaint was made against the United States for the manner in which the allies were consulted or informed."<sup>122</sup>

The 1973 worldwide military alert was called in response to a message from General Secretary Brezhnev to President Nixon complaining about alleged Israeli violations of an agreed cease-fire after Israeli forces had crossed the Suez Canal. Brezhnev's message proposed that the United States and the Soviet Union urgently dispatch peacekeeping contingents to Egypt—a proposal the United States had already firmly rejected—and said that if the United States did not do so, the Soviet Union "should be faced with the necessity urgently to consider the question of taking appropriate steps unilaterally. Israel cannot be allowed to get away with the violations."<sup>123</sup> A hastily assembled group of U.S. governmental experts, led by Secretary of State Kissinger, concluded that there was a high probability of some kind of unilateral Soviet move. Informed of this, the President called the first stage of the worldwide military alert within 2 hours of the receipt of Brezhnev's message. Although Kissinger telephoned the NATO military commander in Europe, he merely sent a middle-of-the-night cable to the U.S. political delegation at NATO headquarters in Brussels, which instructed the delegation to inform the allies. Because of technical problems in the NATO communications system, the allies were not actually informed until a few hours later.<sup>124</sup>

Ambassador de Staercke, then still dean of the NATO ambassadorial corps, protested that if the Secretary of State could call the NATO military commander, he could also have called the NATO Secretary General and the dean of the ambassadors.<sup>125</sup> Other NATO allies made it clear that they expected such prior consultation as was practicable under the cir-

<sup>120</sup> See A. SCHLESINGER, *supra* note 99, at 803; A. BUCHAN, *supra* note 99, at 33-34, 41. Nevertheless, the President did consider the effects on NATO of the decisions he was making. See R. KENNEDY, *THIRTEEN DAYS* 98-99 (1969).

<sup>121</sup> Interview with André de Staercke, *supra* note 59. The exchange between Acheson and de Gaulle is set forth in E. ABEL, *THE MISSILE CRISIS* 112 (1966).

<sup>122</sup> Statement of H. C. Green, Canadian Secretary of State for External Affairs, in 3 *CANADIAN PARL. DEB.*, H. C., 25th Parl., 1st Sess. 2699 (1962).

<sup>123</sup> Quoted in M. & B. KALB, *supra* note 116, at 490.

<sup>124</sup> *Id.* at 490-93; interview with André de Staercke, *supra* note 59.

<sup>125</sup> Interview with André de Staercke, *supra* note 59.

cumstances, though they recognized that full consultations would not have been possible—at least if the Soviet threat was as serious as the U.S. decisionmakers had thought.<sup>126</sup> Publicly and privately, the United States conceded that it had not engaged in adequate consultations at the height of the crisis and that it would be willing to review its consultative procedures, although it reserved the right to proceed without extensive consultations in an emergency.<sup>127</sup> As a result of the procedural review, the United States pledged to consult any NATO ally before U.S. forces on the ally's territory are alerted.<sup>128</sup>

### *Political Developments*

Some decisions relating to events outside the treaty area are significant to the alliance, even though they do not involve immediate crises. To the extent that they do not, any expectation of prior consultation is weakened. For example, the United States, the United Kingdom, France, Belgium, and the Federal Republic of Germany did not consult the smaller NATO states before deciding to meet in Paris in June 1978 to consider playing a larger role in Africa following the abortive Shaba invasion earlier that year.<sup>129</sup> However, once they had decided to meet (and had thus taken the first step toward more active involvement in Zaire and perhaps in all of Africa), they did discuss their plans at the NATO summit meeting of May 1978.<sup>130</sup> Later that summer, the United States failed to consult its NATO allies before President Carter decided to invite Egyptian President Sadat and Israeli Prime Minister Begin to the important Camp David summit meeting at which a framework for resolving their differences was worked out. The allies did not expect to be consulted.<sup>131</sup>

<sup>126</sup> See Neff, *supra* note 20, at 7–8; M & B. KALB, *supra* note 116, at 497. Some responsible U.S. Government officials assessed the Soviet threat somewhat differently than did the Secretary of State, and he assessed it differently than did the President. See M. & B. KALB, *supra* note 116, at 497–98.

<sup>127</sup> Interview with André de Staercke, *supra* note 59; M. & B. KALB, *supra* note 116, at 499; Kissinger, *The United States and a Unifying Europe: The Necessity for Partnership*, 69 DEP'T STATE BULL. 777, 779 (1973); statement of Arthur Hartman, Assistant Secretary of State for European Affairs, in *United States-Europe Relations and the 1973 Middle East War: Hearings Before the Subcomms. on Europe and on the Near East and South Asia of the House Comm. on Foreign Affairs*, 93d Cong., 1st & 2d Sess. 31–32, 48–49, 57 (1974). See also R. HILL, *supra* note 55, at 26–27.

<sup>128</sup> Interview with Stephen J. Ledogar, *supra* note 84.

<sup>129</sup> The Netherlands and Norway were first informed of the impending Paris meeting at the May NATO summit meeting in Washington. Het Parool, June 16, 1978 (translation by U.S. mission to NATO).

<sup>130</sup> Secretary of State Cyrus Vance, press briefing, May 30, 1978, in DEP'T STATE BULL., No. 2016, July 1978, at 5.

<sup>131</sup> The Carter decision was made immediately after President Sadat announced that he would not resume direct peace talks with Israel, and involved little or no input even from President Carter's own foreign policy advisers. See 38 FACTS ON FILE 581, 601–02 (1978); Washington Post, Aug. 18, 1978, at A6, cols. 3–4. The allies expected only to be informed of developments in Middle East talks. See Atlantic News, July 26, 1978, at 4.



In a significant series of decisions focused outside the treaty area, the NATO allies have made overtures to the People's Republic of China, which have often led to its being recognized as the Government of China. On this matter, the consultative practice within NATO has been inconsistent. Thus, although the Canadian Government at one point thought it was required to (and did) consult its NATO allies before recognizing the People's Republic, France did not consult them before extending recognition.<sup>132</sup> The United States bypassed NATO on Henry Kissinger's first, secret trip to Peking. It was taken to task for forgetting its alleged NATO obligation to consult.<sup>133</sup> Nevertheless, when the United States formally recognized the People's Republic on January 1, 1979, it felt no greater duty to its NATO allies than to give them prior notification of its intent, and the allies expected no more.<sup>134</sup>

These inconsistencies suggest that there is no NATO norm for prior consultation relating to politically sensitive acts outside the treaty area, at least insofar as the acts do not raise the specter of armed confrontation with the Soviet Union.<sup>135</sup> But when that specter does exist, the allies expect prior consultation to the extent that it is feasible under the circumstances. Although the U.S. practice during the Cuban missile crisis was inconclusive on this point, the assertion-acquiescence processes set into motion by the 1956 British-French Suez intervention and the 1973 U.S. worldwide military alert support the norm. In both cases the allies protested what they considered to be inadequate prior consultation, and the states whose actions precipitated the protests acquiesced by joining in the ensuing declarations calling for effective prior consultations: the three wise men's Council-approved report of 1956 and the Declaration on Atlantic Relations of 1974. The 1956 prescription, in turn, lends normative significance to the NATO consultations in 1958 on American and British intentions regarding Lebanon and Jordan.

<sup>132</sup> See statements of Paul Martin, Canadian Secretary of State for Foreign Affairs, in 3 CANADIAN PARL. DEB., H.C., 26th Parl., 2d Sess. 3307, and 4 *id.* at 3479-80 (1964). France recognized the People's Republic in 1964, but Canada did not do so until 1970.

<sup>133</sup> See Brosio, *supra* note 73, at 116.

<sup>134</sup> Interview with Orme Wilson, *supra* note 103; R. HILL, *supra* note 46, at 40. See also Washington Post, Dec. 17, 1978, at A9, col. 1.

<sup>135</sup> This may also be true regarding acts closer to home than those discussed in the text. On a number of occasions the allies let their desire to be disassociated from any contacts with Franco Spain override any desire they may have had to be consulted before an individual ally took a step involving Spain. For example, the United States simply kept its allies informed (that being all they wanted) as it negotiated a friendship and cooperation treaty with Spain. See statement of Robert J. McCloskey, Ambassador at Large, in *Spanish Base Treaty: Hearings Before the Senate Comm. on Foreign Relations*, 94th Cong., 2d Sess. 7, 9 (1976); Final Communiqué of the Defence Planning Comm., May 23, 1975, para. 5, in NATO FINAL COMMUNIQUÉS 1975, at 11, 12. When the Federal Republic of Germany explored the possibility of establishing Spanish bases in 1959, it consulted only the major allies. See G. LISKA, *supra* note 63, at 74-75. The United Kingdom would not normally consult the allies before drafting a note to Spain concerning Gibraltar. R. HILL, *supra* note 55, at 97.

It is perhaps debatable whether this record of state practice is sufficient to establish a binding procedural norm requiring prior consultation when a NATO ally faces a decision on events outside the treaty area that could lead to an armed confrontation with the Soviet Union or its allies. The better view is that the record does establish the duty to consult, insofar as consultation is feasible under the circumstances. That there are only a few instances of state practice in this connection reflects the relative (and happy) paucity of armed confrontations with the Eastern bloc. When the occasions for state practice are few, and the assertion-acquiescence record is both reasonably clear in those few instances and consistent with the shared goals of the only interested states, a special custom can arise. It probably has arisen in this instance.

## VI. ECONOMIC AND ENVIRONMENTAL POLICIES

Article 2 of the North Atlantic Treaty provides in part that the allies "will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them."<sup>136</sup> This does not expressly require prior consultations, but as was noted earlier in this study, in 1956 the Council approved the three wise men's recommendation that NATO consultations be held whenever economic issues arise with political or defense implications or with consequences for the economic health of the Atlantic community as a whole.<sup>137</sup> The latter part of this advice has not always been followed. For example, it was ignored in August 1971 when the United States imposed an import surcharge of 10 percent and closed the "gold window" backing the U.S. dollar—actions with obvious consequences for the economic health of the Atlantic community.<sup>138</sup> From the first, in fact, attempts to coordinate economic policies within the alliance have been largely unsuccessful.<sup>139</sup>

On the other hand, there is a long record of prior consultation regarding decisions to supply militarily useful goods or technology to Communist countries. The consultations do not actually take place in a NATO forum, but in the Coordinating Committee (COCOM), a loosely structured but security-conscious group based in Paris. COCOM consists of Japan and all NATO states except Iceland. Formed in 1949, it maintains periodically changing, unanimously adopted lists of items that member states normally will not send to Communist countries unless an exception has been granted by unanimous consent.

The exception procedure amounts to an arrangement for providing prior consultation rather than formal veto power, because COCOM decisions, given after confidential discussions in Paris, are recommendatory only.

<sup>136</sup> North Atlantic Treaty, *supra* note 3, Art. 2.

<sup>137</sup> See text at notes 10–11, *supra*. The 1974 Declaration on Atlantic Relations, *supra* note 14, says that the allies "will work to remove sources of conflict between their economic policies and to encourage economic co-operation with one another."

<sup>138</sup> See Brosio, *supra* note 73, at 116.

<sup>139</sup> See G. Wright, *NATO in the New International Order*, 36 *BEHIND THE HEADLINES*, No. 4, at 5 (1978).

Each member retains the power of final decision, although it is very unusual for a member not to accept a COCOM recommendation.<sup>140</sup> It is also very unusual for a member to try to circumvent COCOM by selling a listed item to a Communist country without submitting the matter for discussion in Paris.<sup>141</sup> Consequently, although there is no treaty obligation to submit any matter to COCOM or to abide by its recommendations, there appears to be a customary norm among member states to submit proposed sales of listed items and to give significant—perhaps conclusive—weight to COCOM's recommendations.

NATO's concern with the environment is expressed through its Committee on the Challenges of Modern Society (CCMS), created in 1969 at the urging of the United States. The primary focus of CCMS is on pilot environmental studies conducted by individual member states. CCMS meets twice a year, once to consider the pilot studies and once to conduct round-table discussions on matters of mutual interest. Although the round-table discussions have sometimes been occasions for consultation regarding such proposed measures as the U.S. fluorocarbon ban and aircraft noise regulations,<sup>142</sup> the year's hiatus between round tables and the practice of discussing only one issue at each meeting prevent CCMS from becoming a forum where member states would routinely consult the others before taking any environmentally related action that could adversely affect them.<sup>143</sup>

#### SYNTHESIS

NATO practice establishes that there is an obligatory norm for consultation within the alliance before a member government makes a final decision on a course of action that (1) could have a direct, adverse effect on the alliance's collective ability to defend against an attack from outside the treaty area, or (2) could significantly enhance the military capability of those states presumed most likely to attack, *i.e.*, those controlled

<sup>140</sup> See *Export Licensing of Advanced Technology: A Review: Hearing Before the Subcomm. on International Trade and Commerce of the House Comm. on International Relations*, 94th Cong., 2d Sess., pt. 1, at 50-51, 61 (1976); *Extension of the Export Administration Act: Hearings Before the Subcomm. on International Finance of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 174-75 (1976).

<sup>141</sup> One instance in which there may have been circumvention was the license granted in 1975 by Rolls Royce to the People's Republic of China for the manufacture of Spey jet engines. The license may have substantially accelerated the development of Chinese propulsion design and production technology, according to a CIA statement in *House Hearings*, *supra* note 140, pt. 2, at 8 (1976). The proposed deal had been submitted to COCOM in 1973, but had been withdrawn after some members expressed reservations. It was not resubmitted, but the United Kingdom did consult at least some of the allies bilaterally. See *Rolls-Royce Deal: Its Political and Military Meaning*, excerpted from *BUSINESS CHINA*, Feb. 6, 1976, in *id.* at 26-27; *Financial Times*, Dec. 23, 1975, at 4, col. 5.

<sup>142</sup> Interview with James Sampas, CCMS Project Officer, July 5, 1978.

<sup>143</sup> On the limitations of CCMS, see Kyba, *Environmental Co-operation To Meet Political Objectives*, *INTERNATIONAL PERSPECTIVES*, July-Aug. 1977, at 11.

by Communist governments. These two cases, of course, are opposite sides of the same coin.

This norm is supported not only by the implied duty of parties to the North Atlantic Treaty to consult before denouncing the treaty, but by the regular defense budget consultative procedure, the consultative procedure stipulated by the Council in 1955 for extraordinary force reductions, the U.S. practice of consulting before appointing SACEUR, and the evolving practice of consulting before undertaking arms control negotiations that are particularly likely to affect means of defense relied upon by the European allies. As for the other side of the coin, the well-established COCOM procedure supports the norm.

There are some limitations. The norm does not require consultations before an initial decision is made, even if the decision establishes a general course of action that is irreversible for all practical purposes. An example would be the decisions by several allies to reduce their forces assigned to NATO. The duty arises, in other words, only before a final decision is made that establishes the particulars of what is to be done. Even that norm does not extend to decisions to take an action that could weaken the ability of an individual ally to participate in the common defense. Those decisions usually are made in an atmosphere of such tension between the allies directly involved that consultations within the alliance have not occurred and could not reasonably be expected.

A second obligatory norm requires such NATO consultations as are feasible when an ally contemplates action within or outside the treaty area that could lead, in the short run, to armed confrontation with the Soviet Union or could seriously exacerbate an existing confrontation with it. Support for this norm is found in the treaty's implied duty to consult before countering a threat to the territory, independence, or security of any party; it is also found in the NATO procedure on the use of tactical nuclear weapons, as well as in the assertions and acquiescences when individual allies have acted in crises, particularly in the Middle East.

Consultations that could cripple decisionmaking in a crisis are not required. Nevertheless, as the allied response to the 1973 worldwide alert shows, the duty is not excused merely because the acting state perceives a need for a quick decision. Nor is the duty, as it applies to confrontation situations, simply a duty to consult after an initial decision but before a final one. The expectation is that the allies will be taken into the basic decisionmaking process insofar as is practicable under the prevailing circumstances.

There have been a number of nonconfrontation situations outside the treaty area, in which the decisions of individual allies could have affected the interests of others. Sometimes there have been prior consultations in these cases, but not with such consistency as to establish an obligation.

This study has shown that normative expectations have arisen in the alliance beyond the narrow ones found strictly in the North Atlantic Treaty. The expectations have arisen partly from provisions in the treaty

itself and partly from Council declarations and statements by NATO Secretaries General and U.S. Presidents, but also from less formal practice. As a result, prior consultations are required in the two categories discussed above. But this study has also shown that, despite the sweeping language sometimes found in the declarations and statements, there is no all-encompassing duty to consult whenever an individual government's decision might affect the interests of its NATO allies. The political-military alliance has not yet reached that stage of shared decisionmaking.