

Legal Advisor

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From: Patrick Davies
Date: 16 March 2003

cc: PS/Mr O'Brien
PS/PUS
Mr Erhman
Mr Chaplin
Mr Oakden
Heads: UND; Press Office; MED;
NPD
Special Advisers
Sir Jeremy Greenstock, UKMIS NY
Tony Brenton, Washington

Mr Ricketts
PS

SUBJECT: KEY POINTS IN THE NEGOTIATION OF SCR 1441

1. I attach an analysis of the negotiation of UNSCR 1441 as requested by the Foreign Secretary and the Attorney General. Given the limited time available and Attorney General's specific requirements, I have not attempted to put together a full blow by blow account of the negotiations. Instead, I have focussed on key areas, including the issues of automaticity, material breach, serious consequences and a "firebreak". The analysis draws on some highly classified material, including records of the Foreign Secretary's discussions with his counterparts.
2. There is very little in all the reporting telegrams and other papers on Security Council members' understanding of the definitions of "material breach" and "serious consequences". It is our judgement, however, that all members of the Security Council understand the meaning of these terms in the UN system.
3. I also attach relevant extracts from the Foreign Secretary's statement to the House on 7 November 2002, his debate in the Commons on 25 November 2002 and his evidence to the FAC on 4 March 2003.
4. Michael Wood has already sent papers on SCR 1205 to the Attorney General's office.

Patrick Davies

Patrick Davies
Emergency Unit
Tel:

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NEGOTIATING UNSCR 1441: KEY POINTS

12 September

President Bush's speech to UNGA:

"My nation will work with the UN Security Council to meet our common challenge. If Iraq's regime defies us again, the world must move deliberately, decisively to hold Iraq to account. We will work with the UN Security Council for the necessary resolutions. But the purposes of the United States should not be doubted. The Security Council resolutions will be enforced -- the just demands of peace and security will be met -- or action will be unavoidable. And a regime that has lost its legitimacy will also lose its power.

14 September

Foreign Secretary writes to the Prime Minister outlining a proposed strategy on Iraq, which includes that "we should: .. get all we need into a first resolution, without either committing ourselves or ruling out a second."

25 September

UK/US agreement on a draft resolution. Key points:

- Iraq is still, and has been for a number of years in material breach of its obligations under relevant resolutions;
- 30 days from the date of the resolution Iraq "shall provide ...an accurate, full and complete declaration of all aspects" of its WMD programmes;
- Iraq "shall provide UNMOVIC and IAEA immediate, unconditional and unrestricted access to any and all areas, facilities, buildings equipment, records and means of transport ...as well as immediate, unimpeded, unrestricted, and private access to all officials and other persons whom UNMOVIC or IAEA might wish to interview";
- failure by Iraq to comply with the Resolution "shall constitute a further material breach ... and that such breach authorises member states to use all necessary means to restore international peace and security in the area";

26-28 September

Ricketts goes to Paris and Moscow (with Grossman), and Ehrman travels to Beijing to present the UK/US draft. There are hostile initial reactions in both capitals, particularly to the authorisation in the draft of "all necessary means" and the intrusiveness of the proposed inspection regime.

27 September

Levitte, French Permanent Representative to the UN tells Sir J Greenstock that France is "aghast" at the UK/US draft resolution. France is focussed on a two-stage approach - ie the

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need to avoid automaticity of military action and the need for clear but manageable obligations on Iraq.

- B 7 October Foreign Secretary tells French Foreign Minister Villepin that the US (and UK) are concerned that France will sign up to a first resolution and then veto a second, even if Iraq is in clear breach and force is the only available response. Villepin replies that there is no question of France vetoing a second SCR if it had signed up to the first.
- C 10 October Powell tells Villepin that the US knows France needs a pause after a report of Iraqi violations to decide whether a second resolution is needed. He has no difficulty with this..... But the US also needs a resolution that does not prevent it from taking action if necessary.
- D 12 October Villepin tells the Foreign Secretary that he doubts anyone would veto a second SCR if action against Iraq were justified. In such circumstances, a coalition could decide to take action and France might participate.
- E 16 October Negroponte, US Permanent Representative to the UN shares compromise language on OP10 with Sir J Greenstock:
- “Decides to convene immediately, upon receipt of a report in accordance with paragraph 9 above, in order to consider the situation and the need for full compliance with all the relevant SCRs in order to restore international peace and security.”
- He says the language is an attempt to move towards France. But the US would not agree to the Council explicitly taking the decision to approve force. Sir J Greenstock later warns Levitte off from recommending an amendment saying the Council would convene immediately to “consider any measures”. The Foreign Secretary does the same with Villepin on 17 October. He also warns Villepin against making an issue of “material breach” in OP1, which is a matter of historical fact.
- F 17 October Levitte reverts to the US with French views. They want Blix only to report to the Council when there is a “serious” failure by Iraq fully to cooperate (OP9). And they want the Council to consider the “steps needed” for full compliance (OP10). Negroponte rejects the changes on Powell’s instructions.
- G 17 October Security Council Debate on Iraq. In his intervention, Sir J Greenstock says “That Resolution must give the regime in

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Baghdad an unequivocal choice: complete disarmament ... or refusal and the inevitable consequences ... It represents a single, final chance for Iraq ... Let me make totally clear that the UK government would expect there to be a detailed Security Council discussion if Blix or El Baradei ... reports that Iraq is not fully cooperating.... We would want ... to hear the views of all our Security Council colleagues”.

Negroponte says “The US believes that the best way to ensure Iraqi compliance is through one resolution that is firm and unambiguous in its message”.

H 22 October

P5 Perm Reps meet to discuss US/UK draft. France, Russia (Lavrov) and China argue that Ops 1-3 amount to a trigger for immediate force. All dislike the preamble (PPs 2, 3, 4 and 8) which by referring to 678, the ceasefire struck under 687, and threats to international peace and security, they believe contains hidden triggers for the use of force.

Negroponte says that Bush would not have taken the text to the UN, and Powell would not have made efforts to win round colleagues, if the whole purpose was to get a piece of paper that the US did not need to authorise force.

I 23 October

US/UK draft circulated to Security Council. Levitte and Lavrov welcome OPs 11 and 12, which according to Levitte set out two well-defined stages. But both are concerned that the draft contains too many other hidden triggers for military action.

J 24 October

Negroponte and Sir J Greenstock discuss Sir Jeremy's proposed compromises (moving OP2 on serious consequences to after OP12 and linking the second material breach para (OP4) to Ops 11 and 12). State Department lawyers are not convinced by the proposed changes. But Negroponte sees them as a useful fix. Sir Jeremy says that “as he saw the UK's position, we had no fear of a second stage Council discussion. We would not be bound if, at that stage, the Council flunked its responsibilities”.

K 25 October

US/UK draft put into Blue. Security Council Discussion. Cunningham (USUN) says Levitte had been right when he said “material breach” had a special meaning.... Iraq had gone into material breach after 687 and this had never been rectified. Including the language was a crucial sign of determination and warning. The US would not go to war because this piece of paper said material breach - material breach existed with or without it”.

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27 October

France puts amendments to the US

L
OP1: "Decides that Iraq's failure to cooperate for a number of years ... in particular under para 8-13 of SCR 687, constituted a material breach of its obligations ..."

OP4: "...implementation of this resolution, when established in accordance with paras 11 and 12 below, may constitute another material breach..."

Both are rejected. Powell told the Foreign Secretary that "may" in OP4 was a real problem as it amounted to asking not just for a second vote, but a third as well (eg one to determine material breach and another on all necessary means).

France also proposed moving OP2 to the end of the resolution and adding "in that context". This was later accepted.

28 October

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Sir J Greenstock discusses the possible addition of an OP1bis with Negroponte: "Decides, notwithstanding paragraph 1 above, to offer Iraq ... a final opportunity to comply with its obligations"

Levitte tells Sir J Greenstock he cannot understand why we are resisting the French OP1, which combined with OP4 made clear the possibility for a material breach in the future. He believes the US wants continued ambiguity which France would resist.

30 October

Negroponte gives Levitte (slightly revised) OP1bis language which he thought France might see as a better "firebreak" than their own OP4. Powell passes the language to Villepin.

2 November

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Villepin proposes revised OP4 language to Powell: "...shall constitute a further material breach of Iraq's obligations when assessed by the Security Council." Powell makes clear that "assessed" will not work and offers another formulation: "shall constitute a further material breach ... and will be reported to the Security Council for assessment in accordance with OP12." Villepin thinks France can accept this. Levitte says France will have difficulties - it looks like it would establish material breach before the Council met.

3 November

O
Foreign Secretary tells the Mexican Foreign Minister that the revised OP4 language is an attempt to bridge the US and French positions, but without saying the Council would "decide"

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whether Iraq was in material breach. In practice, the Council would deal with any further breach. But we had to maintain the right to act if the Council failed satisfactorily to address the issue. Castenada said we have the right to act in any case.

5 November

Revised draft SCR given to France and Russia

Key points:

- References to SCR 678 (the original authorisation of force) remain in the preamble;
- OP1bis "while acknowledging" the material breach in OP1 offers Iraq a final opportunity to comply with its disarmament obligations (the "firebreak");
- The further material breach in OP4 will be reported to the Council for "assessment" in accordance with OPs 11 and 12. (Changed back by the US to "OPs 11 or 12" before the draft is circulated to the Council on 6 November).

6 November

P5 discussion of revised draft: Levitte and Lavrov argue for reverting to the previous French language for OP4 ("when established by the Council"). This is rejected. Lavrov says the existing language creates a casus belli before the report reaches the Council. Levitte underlines the importance of OP4 linking to both Ops 11 and 12.

7 November

Security Council Discussion after further minor amendments ("and" instead of "or" in OP4, and "secure" instead of "restore" in OP12). Lavrov still expressed concern about automaticity in OP4.

8 November

Unanimous Adoption of SCR 1441

UK Explanation of Vote: "We heard loud and clear during the negotiations the concerns about "automaticity" and "hidden triggers".... Let me be equally clear in response There is no "automaticity" in this Resolution. If there is a further Iraqi breach of its disarmament obligations, the matter will return to the Security Council for discussion as required in OP12. We would expect the Security Council then to meet its obligations..... But if Iraq chooses defiance and concealment, rejecting the final opportunity it has been given by the Council in OP2, the UK - together, we trust, with other members of the

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Security Council - will ensure that the task of disarmament required by the Resolution is completed."

US EOY: "... this resolution contains no "hidden triggers" and no "automaticity" with respect to the use of force. It there is a further Iraqi breach, reported to the Council by UNMOVIC, the IAEA, or a member state, the matter will return to the Council for discussion as required in paragraph 12. The Resolution makes clear that any Iraqi failure to comply is unacceptable and that Iraq must be disarmed. And one way or another, Mr President, Iraq will be disarmed. If the Security Council fails to act decisively in the event of a further Iraqi violation, this resolution does not constrain any member state from acting to defend itself against the threat posed by Iraq, or to enforce relevant UN resolutions and protect world peace and security."

Chinese/French/Russian Statement: "Resolution 1441 ... excludes any automaticity in the use of force. In case of failure by Iraq to comply with its obligations, the paragraphs 4, 11 and 12 will apply. Such failure will be reported by ...UNMOVIC or by the ...IAEA. It will then be for the Council to take position on the basis of that report."

Foreign and Commonwealth Office

16 March 2003

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