

ulca

20J(a-b)



THE DEPARTMENT
OF TRANSPORT

13

FROM THE SECRETARY OF STATE

2 MARSHAM STREET LONDON SW1P 3EB
TELEPHONE 01-276 3000

Ms J R Binstead
Private Office
Secretary of State for Defence
Ministry of Defence
Main Building
Whitehall
LONDON
SW1A 2HB

My Ref: P/PSO/9685/90

Your Ref:

17 AUG 1990

Serial No: 1997

Copy No 2 of 5.

Dear Jane,

IRAQ/KUWAIT: OIL EMBARGO

Elizabeth Wilmshurst's letter of 13 August conveyed the Attorney General's advice in response to your letter of 11 August. There is little that my Secretary of State could add to that in relation to the action against foreign ships.

In the case of British ships we have power to search British flag ships, including dependent territory ships, under the Iraq and Kuwait (United Nations Sanctions) Orders and the Iraq and Kuwait (United Nations Sanctions) (Dependent Territories) Order. However, the power to search is restricted to Authorised Officers as referred to in Section 692(1) of the Merchant Shipping Act 1894, ie a commissioned officer on full pay in HM naval or military service, any officer of the Secretary of State for Transport, any officer of Customs or any British Consular officer. This would pose no problems for the Royal Navy. However, the power would not permit foreign states to stop and search British ships. If they did so they might be at risk of legal action from the ship owners/operators, though one would expect that if sued in their own Courts, they would be able to plead the equivalent to our defence of "Act of State", and if sued in UK Courts they would refuse to submit to UK jurisdiction, pleading sovereign immunity.

If that was not thought satisfactory, the UK could seek effectively to take upon itself the liability of the searching state by asking it to search the ship on our behalf ie as our agent. This would effectively transfer liability to the UK Government which would then itself be open to legal action, as the search would not have been carried out within the powers conferred by the Sanctions Order and the defence of "Act of State" is not available under UK law against UK citizens. This risk could be mitigated if the Sanctions Orders were to permit

the UK Government to authorise other states to stop British ships in support of the embargo. However it is doubtful whether this would be worth a special amendment and perhaps need only be borne in mind if further Orders had to be made for some other reason.

Although, therefore, there appear to be no insuperable legal problems to permitting other nations to stop and search British ships, there are probably presentational advantages in not doing so at the present time and certainly not until we have good evidence of specific vessels being involved in sanctions breaking. Even in those cases it would be preferable to seek to use Royal Navy ships to stop and search if it is possible to do so. Good US/UK liaison could help.

British owned but foreign flagged ships are, of course, in the same position as foreign owned and flagged ships.

/ I am sending copies of this letter to Charles Powell (No. 10), Stephen Wall (FCO), Elizabeth Wilmshurst (Law Officers' Department) and to Sonia Phippard.

Yours sincerely

Sonia Whiteley

S C WHITELEY
Private Secretary