

agreed, with Libya to submit by 20 December 1993 and the United Kingdom and United States by 20 June 1995.⁵⁴

In the meantime, it remains to be seen whether the Security Council seeks any extension of sanctions. The vote on Resolution 748 would seem to indicate that this is unlikely.

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II. BRITISH IMPLEMENTATION OF UN SANCTIONS AGAINST IRAQ

A. Introduction

Prior to the invasion of Kuwait in 1990 the Security Council had imposed mandatory collective economic sanctions on only two occasions: in 1966 after the 1965 unilateral declaration of independence by Southern Rhodesia and in 1977 with the arms embargo against South Africa.¹ Since that date, the Security Council has imposed sanctions against a number of countries: Iraq, Yugoslavia, Somalia and Libya.² This note is confined to UN sanctions taken against Iraq as a result of the invasion and occupation of Kuwait. In August 1990, due to the co-operation among the five permanent members, the Security Council was able to impose economic sanctions promptly and to provide, in a manner which had not been done before, for their systematic implementation in a series of resolutions.

Increasing refinement in the drafting and method of implementation of UN sanctions is taking place.³ Member States are obliged by Article 25 of the Charter to carry out Security Council decisions in resolutions made under Chapter VII. The resolutions are not themselves directly binding on individuals and private companies and the terms and scope of the national measures implementing the UN sanctions are, therefore, essential to their effectiveness. The Security Council resolutions gave fairly detailed guidance to States on the intended scope and application of the sanctions but inevitably, in the course of their national implementation, many more detailed issues arose. The British measures taken to implement the UN sanctions relating to Iraq provide a valuable illustration of the complexity of the task of implementation and of the constant need to fine-tune the legislation to meet the demands of the changing international situation and to

54. I.C.J. Communiqué 92/15, 24 June 1992.

1. SC Res.232(1966), 253(1968), 277(1970), 388(1976) and 409(1977) in respect of Southern Rhodesia; 418(1977) in respect of South Africa.

2. SC Res.713(1991) in respect of Yugoslavia; 757(1992) in respect of Serbia and Montenegro; 733(1992) in respect of Somalia; 748(1992) in respect of Libya.

3. On UN sanctions generally see: J. Combacau, *Le pouvoir de sanction de l'ONU* (1974), M. Doxey, *Economic Sanctions and International Enforcement* (1971), Kapungu, *The United Nations and Economic Sanctions against Rhodesia, a Study in International Law* (1974), P. J. Kuypers, *The Implementation of International Sanctions* (1978), C. Brown-John, *Multilateral Sanctions in International Law* (1975). Of articles in periodicals, H. Kelsen, "Sanctions in International Law under the Charter of the United Nations" (1946) 31 *Iowa L. Rev.* 499 and P. J. Kuypers, "International Legal Aspects of Economic Sanctions", in P. Sarcevic and H. van Houtte (Eds), *Legal Issues in International Trade* (1990), p.145, are particularly noteworthy.

clarify the legal uncertainties for commercial and financial enterprises affected by the sanctions.

Both Security Council resolutions and national legislation were concerned with the scope of the sanctions, that is, the definition of the prohibited activities and their subject matter—the persons and territories and time to which they applied, any exceptions to the prohibited activities, the manner and supervision of their enforcement, the penalty and consequences of breach of sanctions. In this connection the effect of the sanctions on existing legal obligations and the attribution of loss to Iraq also arose as relevant issues.

The following provides a brief summary of how the sanctions imposed by the Security Council were implemented by the British government and supplements the account of British practice given in earlier issues of the Quarterly.⁴ A general outline of the legislation will first be given followed by discussion of specific issues relating to the scope and method of implementation by reference to the Security Council resolutions and UK legislative measures.

B. The UN Resolutions

Resolution 661 of the Security Council, which came into effect on 6 August 1990, imposed a ban on imports and exports to Iraq and Kuwait and on provision of funds or finance to the two countries. Resolution 665 authorised maritime forces to enforce the trade blockade by force if necessary and Resolution 666 established a mechanism for authorising export of foodstuffs in humanitarian circumstances. Resolution 669 charged the Sanctions Committee, set up under Resolution 661 pursuant to Article 50 of the UN Charter, to examine and report on requests for assistance of member States with special economic problems arising from carrying out the sanctions. Resolution 670 specifically addressed questions of enforcement of the trade embargo in respect of carriage by aircraft. Resolutions 674 and 687 (1991) declared Iraq "liable under international law for any direct loss . . . as a result of Iraq's unlawful invasion and occupation of Kuwait". The second resolution was stated to be "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990".⁵ Paragraph 20 of Resolution 687 extended the exceptions to the trade embargo.

C. UK Implementation

The United Kingdom had two possible routes for the implementation of sanctions: by national legislation and, as an EC member State, by EC law. The

4. (1991) 40 I.C.L.Q. 482–492 and 965–976. This note states the position as at 30 June 1992.

5. The texts of SC resolutions, national measures implementing the resolutions and reports and communications of member States in response to applications under Art. 50 of the UN Charter are collected together in D. J. Bethlehem (Ed.), *The Kuwait Crisis Sanctions and their Economic Consequences Part I* (Cambridge International Documents Series, Vol.2, 1991). The preparation of this note has been greatly assisted by Daniel Bethlehem's collection of relevant materials. Vol.1, published in Jan. 1991, contains background documents relating to the international status and boundaries of Iraq and Kuwait, statements by each of the two States and their respective legal positions and documents demonstrating the role of the UN and other international organisations.

existence of primary enabling legislation enabled the United Kingdom to act quickly, as also did the direct application in English law of an EC regulation. Both routes were used prior to the actual adoption on 6 August of Security Council Resolution 661.

1. *Under EC law*

At a meeting on 4 August 1990 the EC Council of Ministers condemned "the brutal Iraqi invasion of Kuwait" and decided to safeguard the interests of the legitimate government of Kuwait by adopting certain measures including an embargo on oil imports from Iraq and Kuwait, an embargo on the sale of arms to Iraq and the freezing of Iraqi assets in the territory of member States.⁶ The United Kingdom, as a member State, pursuant to this decision and by Notice of the Department of Trade, amended the Open General Supply Licence of 4 December 1987 relating to oil imports from Iraq and Kuwait, thereby prohibiting their import into the United Kingdom from midnight on 6 August 1990, except by special individual licence.⁷ An EC regulation preventing trade by the Community with Kuwait and Iraq was adopted on 8 August.⁸ It was made plain in the regulation that the Community was following the UN's lead in the matter of collective sanctions against Iraq and that:

The Community and its member States have agreed to have recourse to a Community instrument in order to ensure uniform implementation throughout the Community of the measures concerning trade with Iraq and Kuwait decided upon by the United Nations Security Council.

In accordance with this policy, EC Regulation 2340/90 was extended and amended on 29 October 1990 to give effect to enforcement of the trade embargo in relation to air transport adopted by the UN Security Council in Resolution 670.⁹ Regulation 3155/90 prohibited the provision by air of non-financial services with the object of promoting the economy of Iraq or Kuwait. Take-off from and overflight of member State territory by aircraft for the purpose of carrying cargo to Iraq or Kuwait were prohibited.

Prohibited activities were defined in Regulation 2340/90 of 8 August as the sale, supply or promotion of all commodities or products exported from or imported to Iraq and Kuwait.¹⁰ Import and export of the prohibited goods were banned into or out of the territory of the Community, or by means of aircraft or vessels flying the flag of a member State or by any Community national.¹¹ The activities were not to be carried out in or from Iraq and Kuwait or with any person, natural or legal, in Iraq or Kuwait. This prohibition was refined in the later regulation so as to apply

6. Statement by 12 EC member States on Iraq's invasion of Kuwait 4 Aug. 1990, reprinted in Bethlehem, *idem*, p.111.

7. Notice to Importers 2274 and explanatory note, amending Open General Supply Licence of 4 Dec. 1987 in respect of oil and oil products, issued by DTI 5 Aug. 1990, in *idem*, p.326.

8. Council Reg. (EEC) No.2340/90 (1990) O.J. L213/1 (9 Aug.), corrigendum notified (1990) O.J. L216/28 (11 Aug.) 1990, in *idem*, p.114.

9. Council Reg. (EEC) No.3155/90 (1990) O.J. L304/1 (1 Nov.), in *idem*, p.116.

10. Arts.1 and 2.

11. *Ibid.*

to natural persons in Iraq or Kuwait, any legal person incorporated under Iraq or Kuwait law, any non-Iraqi or Kuwaiti organisation exercising an economic activity controlled by persons resident in Iraq or Kuwait or an organisation incorporated in either country.¹² Activities of the prohibited character carried on outside Iraq or Kuwait with Kuwaiti bodies controlled and recognised by the legitimate government of Kuwait were exempted.¹³ Article 1 of EC Regulation 3155/90 also clarified the question whether the prohibited activities included the provision of services (for discussion of some problems arising, see Section D3).

The regulations exempted from the embargo the supply of products intended strictly for medical use and foodstuffs for humanitarian purposes. In the amended regulation of 29 October the excepted medical products were more strictly defined and foodstuffs excepted only if supplied free of charge for humanitarian purposes. Both required prior authorisation and member States were to inform the Commission of their emergency food and operations within two days of this authorisation.¹⁴ Regulation 3155/90 also specified that the prohibition should not apply to postal or telecommunications services or to medical services needed to run existing hospitals.¹⁵ After the cease-fire on 27 March the categories of food and medical supplies to Iraq were widened.¹⁶

The DTI Notice effective on 6 August indicated that licences for goods in transit and firm contracts would normally be issued. The first EC regulation did not cover goods exported from Kuwait and Iraq before 7 August; but included transactions already concluded or partly carried out. The EC regulations excluded from the air embargo non-financial services resulting from contracts concluded before 8 August where their execution began before that date.¹⁷ The European Council encountered considerable difficulties in drafting a regulation to implement paragraph 29 of Security Council Resolution 687 concerning claims of Iraq in relation to contracts affected by UN sanctions. This matter is dealt with below.

Following the allies' military action in February and the cease-fire and Resolution 686 regarding assistance to the government of Kuwait, on 4 March 1991 the Council of Members meeting in the framework of political co-operation decided there was no reason to maintain the Community embargo with regard to Kuwait, and accordingly lifted the prohibitions contained in the previous regulations.¹⁸ Sanctions have not at the time of writing been lifted in respect of Iraq. Iraq's acceptance of Resolution 706 (1991), which would require limited Iraqi oil export sales to be paid into a UN fund to pay compensation for war damage, certain UN expenses arising from the war and for humanitarian goods has not yet been obtained. A general lifting of sanctions requires a further resolution of the Security Council. It is unlikely in the foreseeable future.

12. Reg.3155/90, *supra* n.9, Art.1.

13. *Idem*, Art.2.

14. Annexes to Regs.2340/90 and 3155/90.

15. Reg.3155/90, Art.1.2.

16. Council Reg. (EEC) No.542/91 of 4 Mar. (1991) O.J. L60/5 (7 Mar.) and Council Reg. (EEC) 811/91 of 27 Mar. (1991) O.J. L82/50 (28 Mar.).

17. Regs.2340/90, Art.3(1), and 3155/90, Art.3.

18. *Supra* n.16.

2. Under UK national laws

On a national basis UK implementation of the UN sanctions took the form of delegated legislation. Existing primary legislation (though not in all respects suited to the task) was utilised. In addition to the Foreign and Commonwealth Office, which was responsible for the UN and international aspects of sanctions, the Treasury, Bank of England and Department of Trade and Industry (DTI) were also involved in the implementation, with enforcement involving HM Customs and Excise and the Ministry of Defence (MoD).¹⁹ The Home Office with the MoD took measures restricting the movement of Iraqis in the United Kingdom.

(a) *Freeze of financial assets.* The Emergency Laws (Re-enactment and Repeals) Act 1964 empowers the Treasury to freeze a country's financial assets and dealings in gold in the United Kingdom where it is satisfied that action to the detriment of the United Kingdom is being or is likely to be taken by the government or persons resident in that country. Acting under this legislation the Treasury issued directions with effect from 3 p.m. BST on 2 August freezing Kuwaiti financial assets and on 4 August freezing Iraqi financial assets.²⁰

These directions prohibited the carrying out of any order of the government of or any person resident in Kuwait or Iraq for payment of gold or securities or for any change in the persons to whose credit gold or securities stood. The directions were made prior to the UN sanctions Resolution 661 of 6 August, although by the evening of 2 August Resolution 660, determining a breach of international peace and security, had been adopted by the Security Council.

The Treasury Directions and subsequent Bank Notices²¹ elaborating the directions' effect gave advance effect to paragraph 4 of Resolution 661, imposing sanctions which required States not to make available to the government of Kuwait or Iraq or their nationals funds or other financial or economic resources.

The mechanism of issuing Notices by the Bank of England enabled a swift response to be made to the changing situation. Thus, in the case of UK nationals returning from Kuwait or Iraq after 2 or 4 August²² or of former residents of Kuwait when later living outside Kuwait or Iraq,²³ supplements to the Notices enabled the Bank to lift the restrictions on the operation of their UK accounts. In

19. See UK Responses to Questionnaire of the UN Sanctions Committee on implementation of SC Res. 661. S/AC 25/1990/1, 12 Oct. 1990, in Bethlehem, *op. cit. supra* n.5, at p.629. Where sanctions extend to services such as students' grants, radio and TV transmissions, other departments (Education, Home Office) may also become involved. Unlike the UN sanctions against Yugoslavia there was no ban on sporting links in relation to Iraq; sport is the responsibility of the Department of the Environment.

20. The Kuwait directions were not in fact signed until 3 Aug. 1990. The Control of Gold, Securities, Payments and Credits (Kuwait) Directions 1990 (2 Aug. 1990, S.I. No.1591). The Control of Gold, Securities, Payments and Credits (Iraq) Directions 1990 (4 Aug. 1990, S.I. No.1616), in *idem.* pp.324–325.

21. Bank of England notices relating to Kuwait (7 Aug. 1990) and Iraq (7 Aug. 1990), in *idem.* pp.327, 332.

22. Supp. No.2 to each of the Bank of England notices, *ibid.* 2 Sept. 1990, in *idem.* pp.360–361.

23. Supp. No.1 to each of the Bank of England notices, *ibid.* 25 Aug. 1990, in *idem.* pp.355, 356.

the same way, on 20 September 1990 UK branches of the National Bank of Kuwait were declared to be regarded as UK residents, a status which UK branches of the United Bank of Kuwait had enjoyed from the first.²⁴

(b) *Embargo on goods—under 1939 legislation.* The embargo on export of goods, including arms, to Iraq and Kuwait and import of goods from those countries imposed by paragraph 3 of Resolution 661 of 8 August was implemented in the United Kingdom by delegated legislation conferred under two enabling statutes. The first of these, the Import Export and Customs Powers (Defence) Act 1939, empowers the Secretary of State for Trade and Industry by order to prohibit and regulate, as he considers expedient, the import or export of all or any goods. Orders made under these powers may suspend wholly or in part the operation of any enactment, proclamation, Order in Council or order regulating the import and export of goods.

Exports were consequently prohibited under the Export of Goods (Control) (Iraq and Kuwait Sanctions) Order 1990, made under the 1939 Act, which came into force on 8 August.²⁵ This Order prohibited the export from the United Kingdom or the Isle of Man, without a licence, of all goods to Iraq or Kuwait or to any destination in any other country for delivery to a person for the purposes of any business carried on in or operated from Iraq or Kuwait. The ban on import of goods from Iraq or Kuwait was effected by the Secretary of State exercising his power to amend all individual import licences and the Open General Licence of 4 December 1987 (as had been done in respect of the EC oil embargo) to prevent the import into the United Kingdom of any products originating in Iraq or Kuwait.²⁶ These powers are derived from the Import of Goods (Control) Order 1954,²⁷ which in turn was made under the 1939 Act and which provides that the import of all goods from any State to the United Kingdom is prohibited save where the Secretary has issued a licence (either in general or individual form) allowing that import, such licences being subject to modification or revocation at any time by the Secretary of State.

In order to have an embargo in place at the earliest possible time, in accordance with paragraph 3 of Resolution 661, the Secretary of State's powers were used to impose this blanket ban on all imports and exports. The orders are notable for their brevity and show signs of having been drafted to meet an emergency situation. The embargo which they sought to impose was in rudimentary form, enforcement powers were not expressly enacted (those of the Export of Goods

24. Letter from Bank of England to Chief General Manager of the National Bank of Kuwait 20 Sept., Supp. No.4 to the Bank of England notice in respect of Kuwait, *ibid.* 6 Nov. 1990, in *idem.* pp.366, 375.

25. S.I. 1990 No.1640, in *idem.* p.337. See also DTI, Explanatory Note for UK Exporters, attachment to DTI Press Notice No.P/90/492, 8 Aug., in *idem.* p.350.

26. Instrument issued by the Secretary of State for Trade and Industry providing for modification of revocation of individual import licences authorising import into UK of goods originating in Iraq or Kuwait, 8 Aug. 1990; Amendment No.46 to the Open General Import Licence of 4 Dec. 1987, 8 Aug. 1990; Notice to Importers issued by Import Licensing Branch, DTI, regarding imports originating in Iraq and Kuwait, in *idem.* p.340. See also DTI, Explanatory note to UK Importers, attachment to DTI Press Notice No.P/90/492, 8 Aug. 1990, in *idem.* p.351.

27. S.I. 1954 No.23.

(Control) Order 1989 being incorporated by a brief clause), nor was there any elaboration of how the licensing system would work. However, the mechanism of a licensing system itself and its power to issue special licences ensured that, as with the Bank of England's notices in respect of financial assets, the trade embargo had the flexibility and sensitivity both to deal with the need to protect the legitimate government of Kuwait, and its subjects, and to adapt to the changes in circumstances in what was a fluid situation.

(c) *Embargo on goods—under the United Nations Act 1946.* The most appropriate primary legislation to give effect to the UN embargo was the United Nations Act 1946. Much more detail as to how the embargo was to be implemented was contained in Orders in Council made under this Act, which enables Her Majesty to make such provisions as are necessary or expedient effectively to apply those measures required to be taken by a decision of the Security Council under Article 41 of the UN Charter ("being that Article which relates to measures not involving the use of armed force"). It was initially thought that the procedure of the Queen making Orders in Council might lead to delays and hence orders were also made and powers exercised under the 1939 Act. There is, as a result, some duplication of measures between the orders made under the 1946 Act and those made by the Secretary of State under the 1939 Act. In the event the first Orders in Council were made on the same date as the regulations under the 1939 Act, albeit they were issued from the royal yacht *Britannia*.²⁸

The Iraq and Kuwait (United Nations) Order 1990 prohibited the following activities (except where the Secretary of State granted a licence under this or any previous order):²⁹

- (1) The making and performance of contracts for the export of goods from Iraq or Kuwait and any other act calculated to promote the export of goods from Iraq or Kuwait.
- (2) Dealing with goods exported from Iraq after 6 August 1990.
- (3) Supplying goods not in Iraq or Kuwait to, or to the order of, persons in Iraq or Kuwait or to, or to the order of, an Iraqi or Kuwaiti company or to or to the order of an Iraqi- or Kuwaiti-controlled company.
- (4) Any act calculated to promote the supply of goods to or to the order of a person in Iraq or Kuwait, or to an Iraqi or Kuwaiti company or an Iraqi- or Kuwaiti-controlled company.

28. The Iraq and Kuwait (United Nations Sanctions) Order 1990 (8 Aug. 1990, S.I. No.1651), in Bethlehem, *op. cit. supra* n.5, at p.341 (hereafter UN Sanctions Order).

29. See Open General Licence (Essential Goods), 10 Aug. 1990, in *idem*, p.352; Open General Supply Licence (Authorised Recipients), 10 Sept. 1990, revoked and replaced by Open General Licence (Authorised Recipients), 1 Oct. 1990, in *idem*, pp.362, 367. Open General Supply and Export Licence (Personal Mail to Iraq and Kuwait), 10 Sept. 1990, Open General Import Licence (Document Mail from Iraq and Kuwait), 11 Sept. 1990. These two were revoked and replaced by the Open General Import and Supply Licence (Documents) (Iraq and Kuwait), 14 Nov. 1990, in *idem*, pp.363, 364, 376. All these licences were issued by the Secretary of State for Trade and Industry pursuant to Arts.3 and 9 of the UN Sanctions Order.

An amendment order of 29 August³⁰ extended the prohibited activities to any processing of goods exported from the two countries. The order made it a criminal offence to commit any of the prohibited offences and also to use any ship, aircraft or land transport vehicle for the carriage of goods imported to or exported from Iraq or Kuwait. Further offences were created with regard to disobeying any directions or request for information of an authorised enforcement officer, or wilfully obstructing such person. A second amendment, of 31 October,³¹ increased the maximum term of imprisonment for an offence against the order from two to five years and provided a maximum term of two years for an offence by anyone in control of a ship, aircraft or land transport vessel who failed without reasonable excuse to comply with any direction of an authorised officer concerning cargo contrary to the order, or wilfully producing false information or documents. A further Order (No.2),³² made under the United Nations Sanctions Act 1946, implemented the enforcement measures in relation to aircraft imposed in respect of the trade embargo by Resolution 670 and prohibited the overflight of aircraft over the United Kingdom, Channel Islands or Isle of Man without the permission of the Secretary of State, where their destinations were Iraq or Kuwait. Where such permission was granted it might be conditional upon the aircraft landing at an aerodrome (whether in the United Kingdom or elsewhere) for the purpose of inspection of the aircraft and its cargo. It also prohibited on similar conditions overflight of the territory of any State other than the United Kingdom by British registered aircraft or aircraft operated by a British national or British registered company to any destination in Iraq or Kuwait;³³ a further section imposed restrictions on ships registered in Iraq entering UK ports.³⁴

These sanctions-enforcement orders contained detailed provisions on enforcement. Where there was reason to suspect a ship or aircraft contravening the sanctions measures, "authorised officers" might board and search ships or aircraft and request information and documentation concerning the ship or aircraft and its cargo. In respect of shipping suspected of the carriage of goods to Iraq or Kuwait, officers were authorised to cause ships not to proceed with their voyages; or to cause ships in UK ports to remain until their departure was allowed; or to take a ship to a port specified by the officer and to cause it to remain until authorised to depart; or to take a ship to any other destination specified by an officer in agreement with the master.³⁵ In the case of aircraft an officer might cause them to remain in the United Kingdom until future notification. Officers' powers in relation to aircraft also included the entry upon any land and upon aircraft, and detention of aircraft.³⁶ To enforce compliance, officers were entitled to use or authorise the use of reasonable force where it appeared necessary.³⁷

30. The Iraq and Kuwait (UN Sanctions) (Amendment) Order 1990 (29 Aug. 1990, S.I. No.1768), in *idem*, p.356.

31. The Iraq and Kuwait (UN Sanctions) (Second Amendment) Order 1990 (31 Oct. 1990, S.I. No.2144), in *idem*, p.372.

32. The Iraq and Kuwait (UN Sanctions) (No.2) Order 1990 (5 Oct. 1990, S.I. No.1987), in *idem*, p.368 (hereafter UN Sanctions (No.2) Order).

33. *Idem*, Art.3(2).

34. *Idem*, Art.5.

35. UN Sanctions Order, Art.6; UN Sanctions (No.2) Order, Art.4(2)(c).

36. *Idem*, Arts.6(3) and 4 respectively.

37. *Idem*, Arts.6(2), (3) and 4(1)(1), (2) respectively.

Authorised officers in respect of shipping were officers of HM Customs and Excise (the prosecuting authority in respect of breaches), commissioned officers in the naval or military services, officers of the DTI or British consular officers; for aircraft, Customs and Excise officers and any person authorised by the Secretary of State.

The first 1990 Order also provided for the disclosure of information obtained from such operations to, *inter alia*, the United Nations in accordance with paragraphs 6 and 7 of Resolution 661.³⁸

(d) *Embargo on goods—dependent territories.* The freeze on financial assets and dealings in gold was extended by Order in Council to the dependent Caribbean territories of Anguilla, British Virgin Islands, Cayman Islands, Montserrat, Turks and Caicos Islands and Bermuda, Gibraltar and Hong Kong.³⁹ In the last territory the Financial Secretary issued notices in similar terms to the Bank of England. The supplement No.1 of 17 September adds some useful elaboration of the operation of the regulations.⁴⁰ Orders under section 1 of the United Nations Act 1946, in similar terms to the UK UN sanctions orders relating to Iraq and Kuwait, together with similar amendments, were made to give effect to UN sanctions in the United Kingdom's dependent territories, and the Channel Islands.⁴¹

These, then, formed the battery of legislative powers exercised by the British government to enforce the UN sanctions: Treasury directions, DTI licences under the Import Export and Customs Powers (Defence) Act 1939 and UN Sanctions Orders. All the primary legislation under which the trade embargo was implemented nationally is remarkable for its width of powers and for the omission of procedures by which traders or others may challenge departmental decisions. It is somewhat surprising that no challenge to their scope has yet been raised. Certainly the involvement of three departments in the drafting and application of

38. UN Sanctions Order, Art.6(6)(c).

39. The Caribbean Territories (Control of Gold, Securities, Payments and Credits: Kuwait and Republic of Iraq) Order 1990 (6 Aug. 1990, UK S.I. No.1625), in Bethlehem, *op. cit. supra* n.5, at p.378. The Iraq and Kuwait (United Nations Sanctions) (Bermuda) Order 1990 (29 Aug. 1990, UK S.I. No.1769), in *idem*, p.395. Gibraltar Exchange Control (General Exemption) (Amendment) Order 1990 (6 Aug. 1990, Legal Notice No.102 of 1990, *Gibraltar Gazette*, 2nd Supp., No.2, 565), in *idem*, p.408. The Hong Kong (Control of Gold, Securities, Payments and Credits: Kuwait and Republic of Iraq) Order 1990 (6 Aug. 1990, L.N. 280 of 1990, *Gazette Extraordinary*, 2nd Supp., No.19/1990), in *idem*, p.408. Notices issued by the Financial Secretary of Hong Kong relating to Kuwait and Iraq, 13 Aug. 1990, in *idem*, pp.410, 416.

40. Supp. No.1 to each of the Financial Secretary's notices, *ibid*, 17 Sept. 1990, in *idem*, pp.423 and 425 respectively.

41. The Iraq and Kuwait (United Nations Sanctions) (Dependent Territories) Order 1990 (8 Aug. 1990, UK S.I. No.1652), in *idem*, p.380, amended 29 Aug. 1990 (UK S.I. No.1770), in *idem*, p.388; the Iraq and Kuwait (United Nations Sanctions) (Dependent Territories) (No.2) Order 1990 (5 Oct. 1990, UK S.I. No.1988), in *idem*, p.390. These orders applied to Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands, S. Georgia and S. Sandwich Islands, Gibraltar, Hong Kong, Montserrat, Pitcairn, St Helen and its dependencies, Turks and Caicos Islands, Virgin Islands.

the legislation led from time to time to complaints by UK traders suffering business losses as a result of the sanctions, of a "merry-go-round of bureaucratic buck passing".⁴²

3. *Restrictions on movement of persons*

The UN Security Council resolutions did not directly prohibit freedom of movement of persons and UN member countries did not generally impose restrictions on movement of Iraqi persons. In the United Kingdom, however, possibly having regard more to the Iraqi government's threat to take terrorist action in the event of Gulf hostilities than to the implementation of economic sanctions, draconian powers were assumed by the Home Secretary over the UK Iraqi community of 10,000 or so.

Steps were taken to curtail new arrivals and to provide the police with an accurate register; in September 1990 an amendment to the Immigration Rules relating to passport holders prevented the entry of any Iraqi to study, and from 18 January 1991 non-resident Iraqis of all ages were required to register with the police, failure to register being a criminal offence.⁴³ Between September and January deportation decisions were taken against some 180 persons (164 being Iraqis). According to the Home Office, out of the total number, 80 left voluntarily, 65 were detained under the Immigration Act and 35 were interned by the Ministry of Defence as prisoners of war.⁴⁴ Prerogative powers were exercised to establish a prisoner of war camp at Rolleston, near Stonehenge, where internment was under the Third 1949 Geneva Convention. The Immigration Act 1971 authorises the Home Secretary to make a deportation order if he believes deportation is "conducive to the public good" and decisions taken on grounds of national security may not be challenged on appeal; representations may be made to a panel of advisers—the "three wise men"—who then tender advice to the Home Secretary, who may disregard it if he sees fit. By 1 March 1991, 33 detainees had appeared before this panel and 19 had been released. Strong and widespread criticism was made of the "over-reactive" action of the Home Office, the use of out-of-date security files and archaic procedures, and the arbitrary nature of the advisory panel and lack of a power of review by the courts.⁴⁵

42. *Financial Times*, 18 Mar. 1992.

43. Statement of Changes in Immunity Rules Cm.1219 (with effect from 22 Sept. 1990) amended to cover all Iraqis entering the UK for any purpose by Statement of Changes in Immigration Rules (18 Jan. 1991) H.C. Papers [1990-91] 160. These special restrictions in respect of Iraqi citizens were deleted with effect from 12 Apr. 1991 by the Statement of Changes in Immigration Rules (12 Apr. 1991) Cm.1491. The requirement to register was contained in the Immigration (Variation of Leave) Order 1991 no.77 (18 Jan. 1991) revoked by Immigration (Variation of Leave) (Revocation) Order 1991 (12 Apr. 1991) S.I. 1991 no.980.

44. See S. Grant, "A Just Treatment for Enemy Aliens" (1991) 141 New L. Jo. 305; also see Hansard H.C. Deb 23 Jan. 1991, col.189w; H.C. Deb. 7 Feb. 1991, col.405; H.C. Deb. 19 Feb. 1991, col.76w; H.C. Deb. 13 Mar. 1991, col.511w.

45. Statement of Changes to Immigration Rules, para.157, H.C. Papers [1989-90] no.251. An application for *habeas corpus* and judicial review of the Home Secretary's deportation order made in respect of one detainee, a Lebanese freelance writer, married to a Palestinian living in England since 1975, was dismissed by the CA in *R. v. Secretary of State for the Home Department, ex parte Cheblak* [1991] 2 All E.R. 319 applying *R. v. Secretary of State for the Home Department, ex parte Hosenball* [1977] 3 All E.R. 452 per Lane CJ at 461.

4. Under international law

The legislation discussed in Section C1 and 2 extended to the United Kingdom and its dependent territories and to UK nationals outside those territories. But the Royal Navy also had occasion to enforce the sanctions beyond UK territorial waters and against non-British nationals and ships. If the trade embargo was to be effective, it required enforcement against third-State nationals and ships registered in third States. Prior to 25 August 1990 there was some difference of opinion whether force might lawfully be used to intercept such ships when in international waters and to prevent them carrying on trade with Iraq whether directly or by means of its occupation of Kuwait. The US Secretary of State James A. Baker referred to "an interdiction policy" and the United States announced on 16 August that it would use "only the minimum force needed to halt any shipments of embargoed cargo".⁴⁶ This was contrary to the position adopted by the UN Secretary General Perez de Cueller when he stated "any intervention, whatever the country, would not be in accordance with either the letter or the spirit of the Charter".⁴⁷ Prior to 25 August US warships intercepted two ships suspected of carrying cargoes for Iraq.⁴⁸

The conflict of views as to the scope of enforcement powers was clarified by Security Council Resolution 665 of 25 August, which authorised the maritime forces of the member States "to use such measures as may be commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward shipping, inspect and verify their cargoes and destinations and to ensure strict implementation of Resolution 661". Resolution 665 thus provided a common basis for the embargo operations and also, *inter alia*, for the rules of engagement issued to British naval ships relating to the interception of third-State vessels in international waters. The United Kingdom's position throughout was that it would be inappropriate to ascribe the legal authority to any one particular resolution or article in the UN Charter. The UK government preferred not to straitjacket the development of the law and practice in the United Nations and relied on Resolutions 661, 665, 670 and 678 which cited Chapter VII of the Charter and which left available self-defence as a possible basis of allied action.⁴⁹

"Parliament has conferred on the Secretary of State the power to say when the deportation of a foreign national is conducive to the public good for reasons of national security. Although the reasoning may not been convincing to the court because of lack of information upon which the decision is based, the statement that to give further information might jeopardise national security is one the court is bound to accept" (*per* Nolan LJ at 339).

46. *The Times*, 13 Aug. 1990; M. R. Gorden, "Navy Begins Blockade Enforcing Iraq Embargo", *New York Times*, 17 Aug. 1990, A 10, col.5; see also Notice to Mariners Special Warning 80, 17 Aug. 1990; issued by US Dept. of the Navy reproduced in Lauterpacht, Greenwood, Weller, and Bethlehem ed. *The Kuwait Crisis: Basic Documents* Vol.1, p.248.

47. *Washington Post*, 13 Aug. 1990, A 12, col.1; UN Press Release 16 Aug. 1990; Bethlehem, *op. cit. supra* n.5, Vol.1, p.247.

48. Commons, Chronology of Events, 24 Oct. 1990 H.C. 655-ii.

49. H.L. Deb. 6 Feb. 1991, col.1194-1195. For a full discussion of the legal nature of naval operations in the Gulf, see S. Lyons, "Naval Operations in the Gulf" in P. Rowe (Ed.), *The Gulf War 1990-91 and International Law* (forthcoming).

*D. Specific Issues Under UK Legislation**1. Application*

The scope of the legislation was based on territorial and nationality principles, including place of residence, and in the case of businesses interpreted to include place of operation and of control. The States of Kuwait and Iraq were the target of this legislation. Thus broadly the legislation was directed against the State itself, its nationals, and also extended to acts done or persons within their territories. The prohibitions operated on the same basis; thus British nationals outside UK territory and persons and acts within it were obliged to observe the prohibitions.

(a) *Persons with whom dealings prohibited.* The Kuwait and Iraq Treasury directions froze accounts and transactions of the governments of Iraq and Kuwait or of persons ordinarily resident in those countries at any time while the directions remained in force.⁵⁰ The position of branches of companies was complicated. Broadly, dealings were prohibited by branches in Iraq and Kuwait of UK incorporated companies and of branches in the United Kingdom of Iraqi or Kuwaiti incorporated companies, but the position differed in respect of the two countries.⁵¹ Among branches to be regarded as residents of Kuwait were the Kuwait Industrial Office, Kuwait Petroleum Corporation and branches of the National Bank of Kuwait⁵² (until 20 September when the Bank of England announced they were to be treated as UK residents).⁵³ The frozen accounts of such were to be designated and any payment in relation to them prohibited. Nor was any parting with gold or securities (defined in the directions and including a share in an oil royalty) permitted or the making of any change in the persons to whose orders the securities were to be held.

Similarly, the Export of Goods (Control) (Iraq and Kuwait Sanctions) Order 1990 applied to all goods (unless licensed) exported from the United Kingdom to a person for the purpose of any business carried on in or operated from Iraq or Kuwait.⁵⁴

The UN Sanctions Order prohibited exportation, except under licence, from either Iraq or Kuwait and prohibited supply of goods to "any person in Iraq or Kuwait", defined as including "any body constituted or incorporated under the law of Iraq or Kuwait or any body carrying on business (whether within Iraq or Kuwait or not) which is controlled by persons or bodies resident in Iraq or Kuwait or constituted or incorporated as aforesaid".⁵⁵ Ships registered in Iraq were also prohibited entry into UK ports except with permission or where entry was required by adverse weather or *force majeure*.⁵⁶

50. Treasury Directions, *supra* n.20, Art.2.

51. Bank of England notices, *supra* n.21, relating to Kuwait, paras.5-8, relating to Iraq, paras.5-8.

52. Bank of England notice relating to Kuwait, para.7.

53. Supp. No.4, *supra* n.24, at para.4.

54. *Supra* n.25, Art.2(1).

55. UN Sanctions Order, Art.1(4).

56. *Idem*, Art.5.

(b) *Persons required to comply with the prohibitions.* The persons required to comply with the Treasury directions were "all persons", including bodies corporate, in the United Kingdom (including the Channel Islands and Isle of Man) and all other persons (wherever they may be) ordinarily resident in the United Kingdom.⁵⁷

The UN Sanctions Orders applied to any person within the United Kingdom (or dependent territories to which the order had been extended) or to any person elsewhere who was a British national or company registered in the United Kingdom or dependent territory.⁵⁸ The prohibition on carriage by sea, air or land applied to ships and aircraft registered in the United Kingdom, or chartered or operated by a British national or British incorporated company (including the Channel Islands and Isle of Man) and where a ship, aircraft or land transport vehicle was used in contravention of the Orders.⁵⁹ The owner, charterer or master of a ship, operator or commander of an aircraft, or operator of a land transport vehicle was made liable for a criminal offence.⁶⁰ Liability was strict, the burden of proof being on the accused to show he did not know and had no reason to suppose that the goods were being exported from Iraq or Kuwait.⁶¹

2. *Exceptions*

The Bank of England notices took some account of the need to balance the protection of the assets of the legitimate government of Kuwait with the daily needs of residents of Kuwait and Iraq in the United Kingdom and of UK citizens in Iraq. Permission was given to debit accounts of residents in Kuwait or Iraq with living, medical and similar expenses of residents of Kuwait or Iraq in the United Kingdom⁶² and to pay pensions due to residents of Kuwait or Iraq and salaries of persons living in the United Kingdom.⁶³ Applications to make other payments of a current nature were required to be made to the Bank. The Treasury directions and DTI import embargo were lifted in respect of accounts and possessions of UK nationals returning from Kuwait and Iraq.⁶⁴ The DTI import restrictions were relaxed in respect of personal effects and certain supplies to any Iraqi or Kuwaiti person outside Iraq or Kuwait for personal use.⁶⁵

A further exception to the import and export embargo was made in respect of personal mail to Iraq and Kuwait; the initial licence defined personal correspondence as excluding "a technological document or any other material that is not a personal communication", "personal communication" in turn being defined to

57. Bank of England notices, *supra* n.21, at para.4.

58. UN Sanctions Order, Art.4(1).

59. *Idem*, Art.5(3).

60. *Idem*, Art.5(4); UN Sanctions Order (No.2), Arts.2(3), 3(2), 4(6).

61. UN Sanctions Order, Art.5(5).

62. *Ibid.*

63. Bank of England notices, *supra* n.21, Kuwait at para.12(a), Iraq at paras.11(a), 14.

64. Supp. No.2, *supra* n.22.

65. Open General Licence (Personal Effects), 21 Aug. 1990; this concession would *inter alia* allow deportees to take personal effects with them, Open General Supply Licence (Essential Goods), 10 Aug. 1990, *supra* n.29. The schedule to this Open General Supply Licence covering these goods includes foodstuffs, gas, solid fuel, medical products, water and goods for personal hygiene or cleaning.

exclude anything "sent in any public official capacity, or wholly or partly for the purpose of the sender's business". Import of mail from Iraq and Kuwait was also allowed, provided it was confined to documents of correspondence and not for the purpose of promoting the export of goods from or supply to persons in Iraq or Kuwait.⁶⁶ In the revised licence of 14 November the definitions of permitted and excluded documents which might be sent to or from Kuwait or Iraq were much more detailed; those prohibited included any document enabling payment for exported goods or specified services to promote the economy of Iraq or Kuwait.⁶⁷

3. *Services*

There was some uncertainty as to the application of the sanctions to services generally⁶⁸ and in particular to payments for the supply of services which were only indirectly connected with a dealing or sale to an Iraqi or Kuwaiti in Iraq or Kuwait. Such cases could include performance bonds, insurance contracts and legal or other professional services. Performance bonds were not specifically mentioned in the Treasury directions of 2 August and Bank of England notices. But the question soon arose: would a payment made into a UK bank by a UK purchaser to meet an indemnity given under a performance bond to an Iraqi purchaser be included in the prohibited activities? It was likely that non-performance, as a result of the sanctions, of the underlying contract by the UK contractor would trigger such a demand for payment. On 25 August Supplement No.1 to the Bank of England notice of 9 August withdrew permission to make such payments, where they were initiated by demand on a performance bond made by the government or a resident of Kuwait or Iraq.⁶⁹ An amendment to the UN Sanctions Order similarly prohibited payment in respect of contract bonds to the order of any person in Iraq or Kuwait.⁷⁰

Insurance contracts also caused problems. Supplement No.1 to the Bank of England notice allowed payment of insurance premiums made to Kuwaiti or Iraqi accounts in the United Kingdom but Supplement No.3 of 13 September withdrew such general authorisation in respect of contracts of insurance (including reinsurance).⁷¹

The whole issue of services was eventually clarified by EC Regulation 3155/90 of 29 October, which provided that the provision of non-financial services with the object or effect of promoting the economy of Iraq or Kuwait carried out in or from Community territory was prohibited (Article 1). Even then, the provision of legal or auditing services remained an area where the application of the sanctions raised doubt. Were such services "acts calculated to promote" the economy of

66. Open General Supply and Export Licence (Personal Mail to Iraq and Kuwait) and Open General Import Licence (Document Mail from Iraq and Kuwait), *supra* n.29.

67. Open General Import Export and Supply Licence (Documents) (Iraq and Kuwait), *supra* n.29.

68. This problem was referred to at reply to question 6(a) of the UK government's replies to the Questionnaire, *supra* n.19. For Questionnaire see Bethlehem, *op. cit. supra* n.5, at p.517, and for UK replies, pp.628-631.

69. See *supra* n.23.

70. Iraq and Kuwait (United Nations Sanctions) (Amendment) Order 1990, Art.4A.

71. Supp. No.3 to Bank of England notice of 7 Aug. 1990 in respect of Kuwait, 13 Sept. 1990, in Bethlehem, *op. cit. supra* n.5, at p.365.

Iraq or Kuwait? EC Regulations 2340/90 and 3155/90 contained no express provision for additional exceptions to the trade embargo to be granted either by a EC institution or a member State other than for products for humanitarian purposes. The nature of the prohibition in Regulation 3155/90 appeared sufficiently all-embracing to prevent law firms in member States providing legal representation for the Republic of Iraq or Iraqi companies in matters relating to the securing of funds.⁷² In the event, English solicitors representing the Republic of Iraq in litigation before English courts⁷³ obtained exemption from the national implementing agencies: permission to provide legal services was granted by the DTI and authorisation of payment obtained from the Bank of England, on the basis that applications for individual licences to provide legal services should be granted if not to do so would compromise Iraq's right to a fair trial. Though not without doubt, it may be argued that the adoption of this course was legal under EC law as well as national law: although the EC Regulation enacted the prohibition, its implementation was left to national authorities. The enactment of criminal offences to give effect to the Regulation was left to national legislation and consequently the implementation of the Regulation was left to the national agencies.

Two further types of transaction were identified in the notice of the Financial Secretary, Hong Kong, of 13 August.⁷⁴ The freezing of Kuwaiti accounts was enormously disruptive of general business. One step taken to moderate its effect was the operation of a "ring fence", whereby transactions relating to Kuwaiti accounts were permitted provided they in no way changed the financial position in Kuwait or Iraq. To operate the "ring fence", transfers of assets from Kuwaiti accounts in Hong Kong to an overseas jurisdiction were permissible provided the Financial Secretary was satisfied that the overseas jurisdiction guaranteed a system of control in relation to Kuwaiti assets similar to and no less effective than that which operated in Hong Kong. Permission for such transfer was conditional on the provision of an option of an independent legal adviser as to such system of similar and effective control and the notification by the legal adviser and applicant of any subsequent material changes in that system of control. In addition, discretionary management of portfolios of securities on behalf of residents of Kuwait was permitted provided proceeds, dividends and interest were paid into the frozen Kuwait accounts and permission was given to transfer assets and securities

72. Letters of Dr H. A. Neumann, Head of Division External Relations, European Commission to J. M. Kosky, Landau & Scanlan, 29 Feb. and 15 Apr. 1992. The Commission confirmed this to be the position, save where the provision of legal services was made pursuant to a contract concluded and part performed before 9 Aug. 1990 (whether a legal retainer agreement entered into before 9 Aug. 1990 would extend this exemption to legal services provided after 9 Aug. was left open).

73. *Kuwait Airlines Corp. v. Iraq Airways Co. and Republic of Iraq*, Evans J, transcript, 19 Apr. 1992; Landau & Scanlan represented the Republic. An appeal is pending; *Re Rafidain Bank*, *Financial Times*, 16 July 1991. Hobson Hudley represented the Embassy of Iraq in *Re Rafidain Bank* where initially the provisional liquidator applied to the court for directions; the judge ordered £20,000 to be made available to the Iraqi Embassy out of the provisional liquidator's fund for the purpose of enabling legal advice and representation to be obtained: transcript, 16 July 1992.

74. See *supra* n.39.

comprising the portfolio of the Kuwait Investment Office from Hong Kong to London.

In sum, it can be seen that the application of sanctions to the multiplicity of services likely to be provided to an embargoed State presents considerable problems of definition. Difficult decisions will be required whether to include services only remotely connected with trade in goods and to the scope of any exceptions. Further decisions will be required as to the compatibility of performance of existing contractual obligations with the observance of sanctions.

4. *Existing contracts*

A recurrent problem in a trade embargo is its effect on pre-existing contracts. The Security Council required UN member States and called on non-member States (Security Council Resolution 661/1990, paragraph 5) from 6 August to impose an embargo on goods and finance, and later, from 25 September, on transport of goods by air notwithstanding prior contracts or licences. It did not immediately declare what legal effect these UN resolutions would have on pre-existing arrangements and in particular on the liability of foreign contractors under contracts with Iraq and Iraqi private parties. In declaring Iraq's liability for direct loss and damage as a result of the invasion and occupation of Kuwait, Resolution 687 was stated to be "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990 which will be addressed throughout the normal mechanisms". Whilst the effect of a UN trade embargo implemented into the domestic law of UN member States was likely to make contracts unenforceable on grounds of illegality, *force majeure* or frustration, a diversity of rulings from different jurisdictions was anticipated. An additional difficulty was that many of the contracts affected were made subject to Iraqi law and the jurisdiction of Iraqi courts and an Iraqi law No.57 of 1990, which came into effect on 6 August, enacted that foreign contractors remained liable under their contracts with the Iraq government, its agencies or Iraqi private contractors, that there was no liability for delay or damage on the part of Iraq or Iraqi contractors for non-performance of contracts, and denied recognition by its courts to any law or judgment imputing liability to Iraq. The effect of this legislation was uncertain; it might be held by non-Iraqi courts to be invalid as contrary to international law; but there was a probability that foreign parties to contracts governed by Iraqi law, which had not been performed by reason of the UN embargo and implementing national legislation, would be faced with liability under Iraqi law. Whilst this might not be of concern in relation to purely Iraqi contractors, many of their contractual obligations were underwritten by or affected trading parties who were nationals of other States. Commercial pressures thus built up to find a mechanism to relieve foreign traders and banks of such liabilities which arose as a consequence of the imposition of UN sanctions.

The question, essentially, was where the loss arising from non-performance of contracts affected by the UN embargo should fall. Paragraph 29 of Resolution 687 sought to provide a solution; whilst not determining on whom and to what extent the loss should fall, it provided that:

All States . . . including Iraq shall take the necessary measures to ensure that no claim shall lie at the instance of the Government of Iraq or of any person or body, in Iraq or of any person claiming through or for the benefit of any such person or body, in

connection with any contract or transaction where its performance was affected by reason of the measures taken by the Security Council in resolution 661 (1990) and related resolutions.

The implementation of this Resolution has proved difficult. A draft order by the United Kingdom was deferred in favour of an EC regulation, a draft proposal for which was submitted by the Commission to the Council and published in the *Official Journal* of 3 August 1991. It has subsequently been considerably revised⁷⁵ and its scope has given rise to much discussion. The aim as expressed in the preamble is reasonably clear: as a consequence of the embargo against Iraq economic operators in the community are exposed to risk and the Regulation is to protect them against claims "by the Iraqi side" and to prevent Iraq from obtaining compensation for the "negative effects of the embargo".

The legal basis of the Regulation is uncertain. The draft invokes Article 235 of the Treaty of Rome, there being no other power available in the Treaty, and the political co-operation of the member States; the opinion of the European Parliament is also referred to. Acting under these powers the Regulation proposes to prohibit the honouring of any claim by the government of Iraq or any person or body in Iraq or any person claiming directly or indirectly through such persons in connection with any contract or other transaction where its performance was affected by any of the measures taken by the Security Council in Resolution 661 and related resolutions.

The prohibition is to extend to any claim made for performance, extension or compensation in respect of an affected contract which is to be defined to include performance bonds, standby credits, indemnities, etc., on such contracts; the prohibition will also cover counterclaims and recognition and enforcement of judgments arising out of such affected contracts.

The central issue concerning the availability of the defence turns on the meaning and proof of the requirement "the performance being affected by the UN sanctions and related measures". The first draft contained a clause which would effectively have left the determination of this issue to the court of the member State, which had "faithfully implemented" the Security Council sanctions including paragraph 29 of Resolution 687. This was perceived as returning the problem of implementation of paragraph 29 to the member States in their national legal orders. In the latest draft a more detailed attempt is made to identify contracts which, by reason of their timing—i.e. where the insurable event or claim was received before the sanctions took effect—or their nature, such as contracts of employment or payment out from frozen accounts, do not substantially advantage Iraq.

In both drafts any assumption in favour of the validity of a contract is reversed, the burden of proof being placed on the claimant to show that satisfying the claim is not prohibited. The complexity of contracts and parties likely to be covered was always likely to make the regulation a difficult one to draft. More fundamental, however, has been a difference of opinion between member States on how extensive the blanket protection of paragraph 29 and the EC regulation should be for non-performance of contracts made with Iraq and Iraqi contractors. Whilst a

75. Draft Reg. SN 1584/92.

majority of member States favour protection for claims made against foreign contractors, a few remain unwilling to include all indemnities and financial transactions made by foreign banks within the protection. Meanwhile, in the absence of a regulation, national courts may have to find their own solutions to give effect to paragraph 29 of Resolution 687.

The prohibitions cover not only those contracts where the performance was affected by the UN trade and finance embargo and the EC (or other international organisations) and any national measures taken to implement the embargo (this would give protection even where the national legislation is wider in scope than the UN measures), but also those affected by actions authorised by the Security Council such as military activities in connection with the liberation of Kuwait. It would seem that a defence to a claim or non-performance of contract could be raised under this head in respect of interference with contracts arising from measures of self-defence taken by the allied armed forces prior to the invasion, and for damage (such as to communications or installations) during the military activities leading to the restoration of the government of Kuwait.

E. Lifting of Sanctions: Kuwait

Since the liberation of Kuwait none of the UK delegated legislation imposing sanctions has been amended to remove reference to Kuwait. Rather, the lifting of sanctions was effected by the issue of the Open General Licence and Permission (Kuwait) of 7 March 1991, which provides for the resumption of all trading links including the carriage of goods and air links.⁷⁶

F. Practice and the Efficacy of Sanctions

To ensure effective enforcement the UK government set up an Embargo Enforcement Unit which, organised out of the Cabinet Office, was designed to ensure co-ordination between departments. The DTI and Customs and Excise took steps to identify suspect imports and to inform exporters and managers responsible for ports and airports of the import and export controls. Customs established a central intelligence reference point to collect and disseminate information to operational staff to make them aware of the dangers not only of direct traffic to Iraq but also of diversion via other countries.⁷⁷ In the period up to 12 April 1991 the Royal Navy challenged 3,171 merchant ships and participated in 36 boardings. RAF Nimrod aircraft flew 295 surveillance sorties in support of embargo operations. In one case a tanker MV *Tadnor* was forcibly diverted to a friendly port.⁷⁸ Any assessment of the efficacy of the embargo measures must be approximate as

76. This practice of amending the licences rather than amending the statutory instruments was also adopted in relation to the export of foodstuffs to Iraq following the adoption of SC Res.687 (para.20); and if Iraq should accept the sale of oil in accordance with SC Res.706 and 712, then such imports will be governed by the Open General Import and Dealing Licence—Oil from Iraq, 1 Oct. 1991, and permission to UK suppliers for the export of humanitarian goods to Iraq for civil end use is granted by the Open General Licence to Tender—Iraq, 1 Oct. 1991.

77. UK government's replies to the Questionnaire, *supra* n.19, in Bethlehem, *op. cit. supra* n.5, at pp.628–631.

78. Second supp. to the *London Gazette* of 28 June 1991, No.52589, G29.

no figures as to the number of investigations and prosecutions which have been undertaken, or number of convictions obtained, are available from Customs and Excise.⁷⁹ In reply to a parliamentary question, on 15 April 1991 the Minister for Trade and Industry commented:⁸⁰

The legislation giving effect to the Resolution [661] applies to all persons and companies in the UK and to all UK nationals and companies abroad. Compliance is carefully monitored. Very few breaches of the embargo have come to light and the few cases are being pursued vigorously.

An earlier Export of Goods (Control) Order, under the Import Export Customs Powers (Defence) Act 1939, prohibited the export of certain goods and components to Iraq.⁸¹ Customs and Excise, acting under the Customs and Excise Management Act 1979, initiated three prosecutions relating to breaches of licences granted by the DTI under this Order in respect of military equipment exported to Iraq. Most notorious was the case relating to the export of components to Iraq said to be for petrochemical pipes but in fact for a "supergun". This affair led to an enquiry by a House of Commons committee and to civil proceedings for condemnation of goods exported in breach of the terms of the licence.⁸² The committee enquiring into breaches of these earlier export controls in the "supergun" case found no explanation for such breaches, other than inadequate procedures and communications in government departments and "serious and important questions about the accountability of the intelligence services both to ministers and parliament".⁸³

Following the release of Ian Richter, a Briton who had been held in Iraq since before the invasion of Kuwait, the United Kingdom unfroze £70 million of Iraqi assets in exchange for food and humanitarian supplies ordered from British companies.⁸⁴ The UN Sanctions Committee authorised this limited lifting of sanctions and designated an Iraqi plane to fly to the United Kingdom to pick up humanitarian supplies. At the time all assets of the Republic of Iraq and Iraq Airlines within the United Kingdom were subject to an order of the English High Court authorising their attachment to satisfy judgments in default obtained against them; the court order, despite an application by Iraq Airlines, was not modified and the Iraqi air flight authorised by the UN Sanctions Committee accordingly did not take place.⁸⁵

HAZEL FOX and C. WICKREMASINGHE

79. There have been isolated reports of suspected breaches of sanctions in the press: *The Times*, 8 Apr. 1991, p.20; 9 Apr. 1991, p.2.

80. H.C. Deb. 15 Apr. 1991, cols.30–31 (w).

81. S.I. 1989 No.2376.

82. *Commissioners of Customs and Excise v. Ministry of Industries and Military Manufacturing, Republic of Iraq*, 13 Jan. 1992, QBD. Master Foster—no issue as to State immunity was raised in connection with the proceedings. For further proceedings under consideration by the DTI, see *H.C. Written Answers*, 13 May 1992, col.144.

83. H.C. Trade and Industry Committee, 2nd Rep. Exports to Iraq, Project Babylon and Long Range Guns.

84. H.C. Deb. 29 Nov. 1991, col.685 (w) and *Financial Times*, 25 Nov. 1991, p.3.

85. *Kuwait Airlines Corp. v. Iraqi Airways Co. and Republic of Iraq*, order of Webster J, 31 July 1991; letter dated 20 Dec. 1991 from A. P. Serraro, Vice-Chairman, UN Sanctions Committee to Mr A. A. Al-Anbari, Perm. Rep. of Iraq to UN.