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ABR12 – SCSA NOTA – FORMAL CONSECUENSES OF A STATE OF WAR BETWEEN THE UNITED KINGDOM AND ARGENTINA (cab 148/211)

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12 April 1982

CABINET

DEFENCE AND OVERSEA POLICY COMMITTEE

SUB-COMMITTEE ON THE SOUTH ATLANTIC AND
THE FALKLAND ISLANDS

FORMAL CONSEQUENCES OF A STATE OF WAR BETWEEN
THE UNITED KINGDOM AND ARGENTINA

Note by the Secretaries

In accordance with the Sub-Committee's invitation on 11 April
(OD(SA)(82) 4th Meeting, Conclusion 4), the attached Note has
been prepared by the Foreign and Commonwealth Office Legal Adviser.

Signed ROBERT ARMSTRONG
R L WADE-GERY
D H COLVIN

Cabinet Office

12 April 1982

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FORMAL CONSEQUENCES OF A STATE OF WAR BETWEEN THE UK AND ARGENTINA

Note by the FCO Legal Adviser

1. This note is based on the assumption that Argentina might formally declare war on the UK within the next few days, or make a statement indicating that a state of war now existed between the two countries, following a successful attack on an Argentine naval vessel in the maritime exclusion zone.

Question 1. Do we need to respond by formally declaring war on Argentina?

No.

Question 2. Would we nonetheless be at war with Argentina following such a declaration or statement?

Yes. War may begin, first, by a declaration of war. Second, it may begin after the commission of an act of force against another State which that State elects to regard as creating a state of war. We did not so elect following the invasion of the Falkland Islands but are relying instead on our inherent right of self-defence. Argentina may elect to regard an attack upon one of her naval vessels in the maritime exclusion zone as giving rise to a state of war between the two countries.

Question 3. What formal action would be required in the UK following such a declaration or statement?

In the UK, the power to declare war (and peace)

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rests with the Crown. The formal method of declaring war is by proclamation, passed under the Great Seal, coupled with a simultaneous delivery to the enemy state of the formal declaration. In the circumstances envisaged, this would not be necessary. There would however have to be a Government statement declaring or acknowledging that a state of war exists between the UK and Argentina. This would have to be cleared with the Palace.

Question 4. What is the essential distinction between a conflict which neither party regards as giving rise to a state of war, and the state of war itself?

The most noticeable distinction between a conflict not amounting to war and war itself is that the former is essentially limited, while the latter is not. Belligerents in a war may apply any amount and any kind of force, save only those means or methods forbidden by international law.

Question 5. What happens to the UK's right of self-defence in the event of the outbreak of war?

The UK would not be limited by the restrictions involved in exercise of the right of self-defence (e.g. reasonableness of degree of force in response to the force used against it), but would be entitled to exercise the full rights of a belligerent. See also answer to Question 4 above.

/Question 6.

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Question 6. What are the legal consequences that flow from a declaration of war or acknowledgement that a state of war exists?

- (1) Rupture of diplomatic relations (this has already occurred);
- (2) Suspension of most, but not necessarily all, bilateral treaties to which the belligerents are parties (most multi-lateral treaties will continue to be operative);
- (3) Nationals of belligerents on enemy territory are liable to be interned if the security State where they are of the / makes this absolutely necessary, and must be interned if they voluntarily demand internment and their situation renders this step necessary (Article 42 of the Fourth Convention of 1949).
- (4) Trading with the enemy legislation, supplementing the common law rules on the subject, becomes activated (Department of Trade are responsible for this legislation);
- (5) Contracts between nationals of the belligerents will, as a general rule, be abrogated: new contracts with enemies (in the sense of the Trading with the Enemy Act, 1939) become unlawful;

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- (6) Enemy merchant vessels in harbour or on the high seas are liable to capture and condemnation as prize (Prize Courts will have to be set up);
- (7) Third countries uninvolved in the dispute become neutrals. They acquire certain rights and duties as such (see Question 7 below);
- (8) The four Red Cross Conventions of 1949 come into operation (in our view, the Fourth Convention at least is already operative).

It should be stressed that these are by no means exhaustive lists of the legal consequences flowing from the existence of a state of war.

Question 7. Would a third (neutral) State be legally required to prevent use of its ports for supply of the UK task force?

A neutral State must prevent belligerent warships admitted to its ports from taking in such a quantity of provisions as would enable them to continue their naval operations. As to the quantity of provisions which a belligerent warship may be allowed to take in, the UK has in the past (1904) supported the position that no more may be permitted than is necessary to bring them safely to the nearest port of their own country. The UK

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also stated (later in 1904) that even this rule should not be understood as applying to the case of a 'belligerent fleet proceeding ... to the seat of war; and such fleets were not to be permitted to make use of any British ports, roadsteads or waters for coaling either direct from shore or from colliers accompanying such fleets ...'. (This was in the context of the Russo/Japanese War of 1904.)

The principle that neutral ports and waters must not be allowed to be made the basis of naval operations and preparations applies to warships and to naval auxiliaries, but not to merchant vessels: the neutral State is not forbidden to permit the fuelling of merchant vessels even when they are suspected of unneutral supply to belligerent warships. Although it is difficult to predict the reaction of particular third States, the possibility cannot be excluded that some of them at least would invoke duties of neutrality as a justification for refusing to permit supply to any vessel involved in the UK task force.

Question 8. Would the existence of a state of war between the UK and Argentina affect the right of UK vessels (whether warships or merchant vessels) to transit the Panama Canal?

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No. Articles II and III(e) of the Treaty of 1977 provide for the neutrality of the canal 'both in time of peace and in time of war' and for vessels of war and auxiliary vessels to be entitled 'at all times' to transit the canal.