Prime Minister

LAKER

I summarized recent developments in this difficult case in my minute of 1 June. Since then, as you may have seen from Washington Tels 1746 and 1747 (copies attached for convenience) our intention to make a further direction under the Protection of Trading Interests Act to prevent the disclosure of UK-located information to the US District Court provoked a powerful reaction from the US authorities both as regards the timing (immediately before President Reagan's visit) and the text of the direction itself.

Officials have met during the weekend to consider how best to advance our own essential interests while meeting US objections so far as possible. There is no doubt that we have to make a new direction in order to prevent disclosure in the context of the new class actions of the same information which we found it necessary to block last year. The same objections to disclosure apply now as they did a year ago, but in addition failure to act would undermine our case in the House of Lords this week which rests substantially on the fact that the information needed for a fair trial in the US courts cannot be made available and on the fact that the direction preventing disclosure is a clear indication of public policy. If the loop-hole is left and our policy is not reasserted by means of a new direction our case in the House of Lords will be substantially weakened.

However the date set for disclosure by the US courts is 11 June, so we have decided to go some way to meet the US request for postponement by writing a letter to Laker's solicitors today stating that we have decided to make a further direction as soon as it becomes necessary to do so, but leaving the timing of that direction open. In fact it will probably have to

be signed by the Secretary of State for Trade and Industry on Friday 8 June, and communicated on the same day to the main parties concerned (BA, BCal and the Midland Bank) so that they can rely on it in refusing disclosure on 11 June; but it will not be laid in the House of Commons library until 11 June and the earliest date for publication in "Trade and Industry" will be 14 June, so that it need not become public until after President Reagan has left the UK.

Officials have also made some cosmetic changes to the text of the direction which should make it less objectionable to the Americans without in any way undermining its essential purpose and effect, and we shall use the next few days to consult further with them in the hope that their initially hostile reaction may be substantially reduced. But we cannot compromise on the substance of what is intended, or delay the new direction beyond next Friday unless the US courts themselves postpone their requirements for information, so I cannot be absolutely certain that the matter will not be raised with you by President Reagan despite our best endeavours.

This latest flurry confirms my view that you should mention the Laker case to President Reagan, and I suggest that you might do so briefly in the following terms:

"The Laker case has been a source of friction between our two governments for more than a year. (You wrote to President Reagan about it in March 1983 - copy attached). It has brought our legal systems and our governments into conflict. It nearly erupted again this week over a direction needed under the PTI Act to counter new demands for information in connection with new class actions in the US courts.

"We understand your attachment to the Sherman Act but we cannot accept the unilateral use of US law to deal with matters which are bilaterally regulated under our Bermuda 2 aviation agreement.

"The early privatisation of British Airways is an important political objective to which I am publicly committed within the next few months - and with which the President must sympathise. The present dispute means that BA is subject to a contingent liability of between £1 and 2 billion, and it cannot be privatised in that condition.

"Officials are due to meet later this month to devise ways of preventing such disputes arising under our aviation agreement in future, and (we hope) to deal with the present disputes as well. They need to be told to find workable solutions acceptable to both sides and to find them before the summer holidays."

The President may of course react defensively but it should not be hard for him to agree to give officials the firm political steer you are seeking, and we know that this would actually be welcome in some quarters of his own administration.

I am copying this minute as before to Geoffrey Howe, Norman Tebbit, Michael Havers, Nigel Lawson and to Sir Robert Armstrong.

NICHOLAS RIDLEY
4 June 1984

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11.00 2.6.84 (KBB)

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES ADVANCE COPIES

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MR COLES 10 DOWNING ST
MR GARDINER, ATTORNEY GENERAL'S OFFICE

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DESKBY 020900Z
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TO IMMEDIATE FCO
TELEGRAM NUMBER 1746 OF 2 JUN

YOUR TELEGRAMS 1033 AND 1034
LAKER: PRESIDENT REAGAN'S VISIT

THE AMERICANS ARE VERY CROSS ABOUT OUR PROPOSED NEW DIRECTION UNDER THE PROTECTION OF TRADING INTERESTS ACT, AND THE STATE DEPARTMENT CLAIM TO FEAR THAT ITS PUBLICATION ON 4 JUNE WOULD NECESSITATE A PUBLIC AMERICAN RESPONSE WHICH WOULD LEAD TO A MAJOR ROW AND SOUR THE PRESIDENT'S VISIT. THEY CANNOT UNDERSTAND WHY THE DIRECTION NEEDS TO BE ISSUED SO SOON, AND WHY IT HAS TO REPEAT LANGUAGE DRAWN FROM LAST YEAR'S DIRECTION WHICH THEY REGARDED AS GRAVELY OFFENSIVE TO THEIR SOVEREIGNTY. THE STATE DEPARTMENT CLAIM THAT OUR ACTION COULD DEAL A MORTAL BLOW TO THE PROGRESS WE HAVE BEEN MAKING IN THE WIDER TALKS ON EXTRATERRITORIALITY.

2. THE DETAILS ARE IN M.I.F.T. MY PEOPLE HAVE EXPLAINED THAT THE TIMING IS DICTATED BY THE HOUSE OF LORDS HEARING, AND THAT THE LANGUAGE OF THE DIRECTIVE REFLECTS LEGAL REQUIREMENTS ON WHICH WE ARE NOT COMPETENT TO SPECULATE. PROGRESS IN THE WIDER TALKS REMAINED IN THE INTERESTS OF BOTH SIDES, SO THAT WE COULD DO BETTER IN FUTURE. MEANWHILE WE ALL HAD TO MANAGE THE UPS AND DOWNS OF THE LAKER AFFAIR AS BEST WE COULD: WE TOO HAD HAD TO SWALLOW SURPRISES RECENTLY (THE CLASS ACTIONS AND LEG 5). THOUGH THE AMERICANS HAVE NOT ACCEPTED OUR ARGUMENTS, AND HAVE APPARENTLY SENT (UNSPECIFIED) INSTRUCTIONS TO THEIR EMBASSY IN LONDON, THERE ARE SLIGHT SIGNS OF A MORE MEASURED REACTION IN PARTS OF THE STATE AND JUSTICE DEPARTMENTS.

EMBASSY IN LONDON, THERE ARE SLIGHT SIGNS OF A MORE MEASURED REACTION IN PARTS OF THE STATE AND JUSTICE DEPARTMENTS.

3. I DO NOT MYSELF BELIEVE THAT THE PRESIDENT WILL WANT HIS LONDON VISIT TO BE MARRED BY A ROW: AND IT IS FOR THE LEGAL EXPERTS IN LONDON TO JUDGE WHAT IS ESSENTIAL TO SUSTAIN OUR CASE IN THE HOUSE OF LORDS. BUT THE RISK OF A ROW, OR OF A SETBACK TO THE WIDER TALKS, CANNOT BE DISCOUNTED ENTIRELY - HOWEVER CONTRARY THAT WOULD BE TO THE AMERICANS' OWN INTERESTS. THE RISK WOULD BE REDUCED OR ELIMINATED IF THE TWO POINTS OF PARTICULAR DIFFICULTY TO THE AMERICANS (PARA 7 AND 8 OF M.I.F.T.) COULD BE MODIFIED: AND THE STATE DEPARTMENT AT LEAST WOULD BE RELIEVED IF PUBLICATION OF THE DIRECTION COULD BE DELAYED UNTIL THE PRESIDENT HAS LEFT LONDON.

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GRS 1150
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TO IMMEDIATE FCO
TELEGRAM NUMBER 1747 OF 2 JUNE

NIPT

LAKER: PRESIDENT REAGAN'S VISIT

1. COUNSELLOR (CAS) DISCUSSED THE PROPOSED DRAFT DIRECTION UNDER THE PTI ACT WITH SEIDEN (JUSTICE DEPARTMENT) AND TEAL (STATE DEPARTMENT). BOTH REQUESTED TIME IN WHICH TO STUDY THE TEXT AND CONSULT WITH THEIR SUPERIORS.

2. SUBSEQUENTLY KELLY (DEPUTY ASSISTANT SECRETARY, STATE DEPARTMENT) TELEPHONED MINISTER TO EXPRESS DISMAY AT THE SUBSTANCE OF THE PROPOSED DIRECTION AND THE METHOD OF CONSULTATION. KELLY SAID THAT LAWYERS IN BOTH THE JUSTICE DEPARTMENT AND STATE DEPARTMENT WERE EXTREMELY UPSET AT THE SUBSTANCE AND THE STATE DEPARTMENT IN PARTICULAR WERE CONCERNED THAT THE ISSUE MIGHT LEAD TO A MAJOR ROW COINCIDING WITH THE ARRIVAL OF THE PRESIDENT IN LONDON NEXT WEEK.

3. KELLY AND NILES SUBSEQUENTLY EXPANDED ON THE POINTS WHICH HAD GIVEN RISE TO THIS ADVERSE REACTION. IN A TELEPHONE CONVERSATION WITH MINISTER (COMMERCIAL). THESE WERE:

A) THERE WERE GRATUITOUS AND IN THE U S VIEW TOTALLY UNNECESSARY REFERENCES TO THE GRAND JURY IN THE TEXT OF THE DIRECTION. THESE HAD CAUSED GREAT IRRITATION IN THE JUSTICE DEPARTMENT.

B) DESPITE ASSURANCES TO THE CONTRARY, (PARA 2 OF FCO TELNO 1033) THE DIRECTION [illegible] RESTRICT ACCESS TO DOCUMENTS AND

B) DESPITE ASSURANCES TO THE CONTRARY, (PARA 2 OF FCO TELNO 1033) THE DIRECTION DID PURPORT TO RESTRICT ACCESS TO DOCUMENTS AND INFORMATION ON U S TERRITORY. THE TEXT OF THE DIRECTION IN RELATION TO DOCUMENT AND COMMERCIAL INFORMATION WAS UNCHANGED FROM LAST YEAR'S DIRECTION (PARA 1 OF THE OPERATIVE SECTION OF THE PROPOSED TEXT.

C) THE TEXT AS A WHOLE WOULD GIVE FURTHER EXCUSES TO THE LAWYERS TO DISCOURAGE UK CITIZENS THAT MIGHT BE WILLING TO GIVE VOLUNTARY INFORMATION TO THE GRAND JURY.

D) THE STATE DEPARTMENT COULD NOT UNDERSTAND WHY THE DIRECTION HAD TO BE ISSUED ON 4 JUNE, WHEN THE CLASS ACTION'S WOULD NOT BEGIN TO BE HEARD IN THE U S COURTS UNTIL 11 JUNE, AND DOCUMENTS AND WITNESSES MIGHT NOT BE REQUIRED UNTIL WEEKS LATER.

4. THE STATE DEPARTMENT EMPHASISED THAT ASIDE FROM THESE PARTICULAR POINTS THE U S GOVERNMENT REGARDED THE PROCESS OF CONSULTATION AS WHOLLY INADEQUATE. TO BE ASKED TO COMMENT ON A TEXT ON A FRIDAY AFTERNOON IN ORDER TO ALLOW A DIRECTION TO BE ISSUED THE FOLLOWING MONDAY MORNING WAS NOT GENUINE CONSULTATION. IT WAS PARTICULARLY SURPRISING THAT HMG SHOULD ACT IN THIS WAY HAVING RECENTLY SIGNED A COMMITMENT IN THE OECD WHICH ENCOURAGED PROPER CONSULTATION ON SUCH MATTERS. THERE WAS A REAL RISK THAT THE U S WOULD WANT TO TERMINATE THE PROPOSED TALKS ON FUTURE ARRANGEMENTS FOR DEALING WITH ANTI-TRUST IN AVIATION AND THE WIDER DISCUSSION OF EXTRATERRITORIALITY.

5. BRAITHWAITE EXPLAINED THAT THE TIMING OF THE DIRECTION WAS DETERMINED PRIMARILY BY THE COMMENCEMENT OF THE HOUSE OF LORDS HEARING ON 5 JUNE. AND TERMINATION OF THE WIDER DISCUSSIONS OF EXTRATERRITORIALITY WOULD BE INCONSISTENT WITH THEIR PURPOSE WHICH WAS TO TRY AND PROVIDE A MEANS OF MANAGING DISPUTE WHICH WERE BOUND TO OCCUR.

6. SEIDEN SUBSEQUENTLY CONFIRMED TO MAYNARD THAT THERE WAS INDEED CONSIDERABLE ANGER ON THE U S SIDE AT BOTH THE SUBSTANCE OF THE DIRECTION AND THE WAY IN WHICH THE UK HAD CONSULTED ABOUT IT. MAYNARD POINTED OUT THAT THERE HAD LIKEWISE BEEN ANGER IN LONDON AT THE EXTENSION OF THE GRAND JURY INVESTIGATION INTO ALLEGED CAPACITY AGREEMENTS WHICH HAD BEEN REGARDED AS INCONSISTENT WITH THE NON-PAPER .
BUT THESE THOUGHTS HAD BEEN SUPPRESSED IN ORDER TO PRESERVE SENSIBLE MANAGEMENT OF THE DISPUTE. SEIDEN RECOGNISED THAT IT WAS STILL INCUMBENT UPON BOTH SIDES TO TRY TO MANAGE THE PROBLEM. FURTHER ASSURANCES FROM HMG THAT THEY WOULD MAINTAIN EXISTING COOPERATION WITH RESPECT TO THE GRAND JURY COULD OVERCONE THE PARTICULAR PROBLEM. AT PARA 3(C) ABOVE, THIS WAS A MATTER OF DETAIL. SEIDEN SAID THAT TWO POINTS IN OUR TEXT CAUSED PARTICULAR CONCERN. THE FIRST WAS THE GRATUITOUS REFERENCES TO THE GRAND JURY. GIVEN THAT THE EXISTING DIRECTIONS WERE STILL VALID THE U S COULD NOT SEE ANY LEGITIMATE REASON WHY THE PROPOSED DIRECTION, WHICH WAS DESIGNED TO CLOSE A LOOP HOLE IN RELATION TO THE CLASS ACTIONS, SHOULD NEED TO INCLUDE REFERENCES TO THE DEPARTMENT OF JUSTICE'S INVESTIGATION. IF PARAGRAPH 2 OF THE DRAFT DIRECTION COULD BE AMENDED TO AVOID SUCH REFERENCES THIS WOULD BE HELPFUL. LIKEWISE IF IT WERE POSSIBLE TO AVOID THE

OF THE DRAFT DIRECTION COULD BE AMENDED TO AVOID SUCH REFERENCES THIS WOULD BE HELPFUL. LIKEWISE IF IT WERE POSSIBLE TO AVOID THE HISTORICAL PREAMBLE TO THE DIRECTION THIS TOO WOULD CONTRIBUTE TOWARDS A MORE MEASURED U S RESPONSE.

7. THE SECOND POINT OF CONCERN WAS THE REFERENCE TO COMMERCIAL INFORMATION. SEIDEN SAID THAT THE U S WERE TOTALLY SURPRISED THAT THE PROPOSED DIRECTION WAS VIRTUALLY IDENTICAL TO THE TEXT IN THE DIRECTION ISSUED LAST YEAR. HMG WAS WELL AWARE OF THE STRONG OBJECTIONS RAISED BY THE U S AT THAT TIME. THE UK HAD CONFIRMED THEN THAT THE DIRECTION DID REACH COMMERCIAL INFORMATION LOCATED IN THE U S AND IN PRACTICE ACCEPTED THAT THIS WOULD AFFECT U S LOCATED DOCUMENTS. INDEED HMG AS A CONSEQUENCE HAD PROVIDED CONSENTS FOR SUCH DOCUMENTS SO AS TO MEET THE DOT CONCERNS ABOUT THE GRAND JURY PROCESS. SEIDEN RECOGNISED THAT AS A MATTER OF PRACTICE HMG HAS COOPERATED WITH THE GRAND JURY BUT THE DEPARTMENT OF JUSTICE MUST TAKE EXCEPTION TO THIS RENEWED INTRUSION ON U S SOVEREIGNTY: THEY COULD NOT BE EXPECTED TO DISTINGUISH PUBLICLY BETWEEN U S RIGHTS IN A GRAND JURY AND IN CIVIL CASES. MOREOVER, AS HMG HAD RECOGNISED IN THE DISCUSSIONS LAST YEAR, THE U S COURTS AND THE DEPARTMENT OF JUSTICE HAD THE POWER TO INSIST ON THE PRODUCTION OF DOCUMENTS AND COMMERCIAL INFORMATION LOCATED IN THE U S. IN THESE CIRCUMSTANCES WHY DID THE UK CONTINUE TO ASSERT A CLAIM WHICH COULD NEVER BE MADE EFFECTIVE?

FCO PLEASE ADVANCE AS IN M I P T

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