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Secretary of State for Trade and Industry

DEPARTMENT OF TRADE AND INDUSTRY  
1-19 VICTORIA STREET  
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24 November 1983

The Rt Hon John Biffen MP  
The Lord Privy Seal  
Privy Council Office  
Whitehall  
London SW1A 2AT

*MS*

*Adv Cobes*  
*To note AT 25/11*

Prime Minister.  
*To be aware.*

*A.T.C. 20/11*

*D. John.*

Earlier this year the continued reliance of successive governments on the Import, Export and Customs Powers (Defence) Act 1939 to control imports and exports was challenged in the Courts. The purpose of this letter is to tell you that the case is to be heard by the Court of Appeal soon (though probably not until after Christmas), and of the contingency planning I am putting in hand.

2 At the Court of Appeal the appellants will argue that the powers conferred by the 1939 Act were related exclusively to wartime circumstances and may therefore not now be used for the variety of economic purposes to which they have since been put by all administrations.

3 Our legal advice is that this challenge is unlikely to succeed in the Court of Appeal, but there may nevertheless be criticism of the continued use of the 1939 Act. We should then have to consider whether to seek new powers to replace it.

4 Should the Court of Appeal decide that the continued use of the Act is ultra vires, we should have to introduce stopgap legislation at once. Without it we would, for example, lose our COCOM export controls, and our ability to control the import of firearms and nuclear materials (as well as of bananas, which are the prime target of this Court action). As a piece of contingency planning, I am therefore asking my officials to make preparations for an appropriate short Bill to be drafted, for consideration if the necessity arises. The content of such a Bill would depend on the finding of the Court of Appeal but it might merely declare that the use of the powers conferred by the 1939 Act is not restricted to the emergency for which that Act was passed. While passing such a measure, Parliament might well seek a commitment from the Government to introduce in due course more up-to-date legislation, providing for more Parliamentary scrutiny. The details of such a Bill could then be put together with less haste.



5 I am copying this letter to the Prime Minister, and Willie Whitelaw, Geoffrey Howe, Leon Brittan, Patrick Jenkin, Michael Jopling, Michael Havers, Patrick Mayhew, John Wakeham and Bertie Denham; and to Sir Robert Armstrong.

*Y e*  
*J. Norman*

NORMAN TEBBIT

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ROYAL COURTS OF JUSTICE  
LONDON, WC2A 2LL

The Rt.Hon Norman Tebbit MP  
Secretary of State for Trade & Industry  
1 Victoria Street  
London SW1

*nbpm  
subs  
29/12*

22 December 1983

*Jason Norman*

IMPORT EXPORT AND CUSTOMS POWERS (DEFENCE) ACT 1939

You copied to Michael Havers to to me your letter of 20 December to John Biffen about the type of stop-gap legislation which would be needed if the Court of Appeal rules against the Government on the 1939 Act.

I am sure that you are right to propose that the legislation should be retrospective in the sense that it validated things previously done (and not previously challenged) in reliance on the 1939 Act powers. No fresh challenge could then be brought in respect of such past reliance. But I think that there could be justifiable criticism on grounds of principle if we went further and deprived persons of rights that had already accrued to them by virtue of their recourse to the courts. The legislation should, therefore, not purport to set aside, in respect of the parties concerned, judgments already given or to extinguish rights asserted in proceedings already commenced. The point may prove to be academic except in relation to the plaintiffs in the current proceedings. But, because of the principle involved, this is an area where we do need to tread carefully.

I am copying this letter to the recipients of yours.

*Jason Norman*  
*JAN*

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29 DEC 1983

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20 December 1983

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*W. S. D. R.*

*D. John.*

*A.S.C. 27/n.*

IMPORT EXPORT AND CUSTOMS POWERS (DEFENCE) ACT 1939

Thank you for your letter of 12 December agreeing that stop-gap legislation on this subject may be necessary, depending upon the decision of the Court of Appeal.

In the event of the Court deciding against the Government, its ruling would probably be limited to the use of the Act under challenge (i.e. banana controls); but of course it would have wider implications and unless immediately rectified would attract similar challenges in relation to other controls. My proposition for stop-gap legislation would be to declare that the 1939 powers may be used for the purposes for which we and previous Governments have been using them, and my intention would be to make it clear that this declaratory provision related to past as well as future use.

I am copying this letter to the Prime Minister, Willie Whitelaw, Geoffrey Howe, Leon Brittan, Patrick Jenkin, Michael Jopling, Michael Havers, Patrick Mayhew, John Wakeham, Bertie Denham and Sir Robert Armstrong.

NORMAN TEBBIT



*five*

PRIVY COUNCIL OFFICE  
WHITEHALL, LONDON SW1A 2AT

12 December 1983

*Dear Norman,*

N. S. P. N.

IMPORT, EXPORT AND CUSTOMS POWERS (DEFENCE) ACT 1939

*AD 12.12*

Thank you for your letter of 24 November about the possibility of the need for stop-gap legislation if the case before the Court of Appeal goes against us. I agree that it would be sensible to prepare legislation on the lines you have suggested, although I note that you will not be able to provide final instructions for Counsel until the precise terms of the judgement are known.

Is there meanwhile any cause for concern over retrospection? If the Court of Appeal were to conclude, in the worst case, that the continued use of this Act was ultra vires, would this mean that actions taken under it from the relevant time were illegal, so that the new legislation would have to provide retrospective authority for such actions?

I am copying this letter to the Prime Minister, Willie Whitelaw, Geoffrey Howe, Leon Brittan, Patrick Jenkin, Michael Jopling, Michael Havers, Patrick Mayhew, John Wakeham, Bertie Denham and Sir Robert Armstrong.

*John Biffen*

JOHN BIFFEN

The Rt Hon Norman Tebbit MP  
Secretary of State for Trade and Industry

Trade  
Tariff Barriers  
Pt 3

12 DEC 1983

