PREM 19/1298

SECRET

Confidential Filing

US Grand Jury Investigation into Laker Charges of alleged Price Fixing and other joint efforts to eliminate competition in the North Atlantic Passenger Transportation.

LEGAL PROCEDURE

March 1983

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
~~18.3.83~~		~~28.7.83~~		23.11.84			
~~29.3.83~~		~~4.6.84~~					
~~25.3.83~~		~~14.9.84~~					
~~24.3.83~~		~~17/9/84~~					
~~5.4.83~~		~~18/9/84~~					
~~6.4.83~~		~~2.10.84~~		PART ENDS			
		~~5.10.84~~					
~~8.4.83~~		~~7.10.84~~					
~~6.5.83~~		~~8.10.84~~					
~~[illegible]~~		~~9.10.84~~					
		~~12.10.84~~					
~~21.6.83~~		~~26.10.84~~					
~~23.6.83~~		~~30.10.84~~					
~~26.6.83~~		3/11/84					
~~30.6.83~~		~~13.11.84~~					
~~1.7.83~~		~~16.11.84~~					
~~5.7.83~~		~~16.11.84~~					
~~7.7.83~~		~~19.11.84~~					
		~~23/11/84~~					

PREM 19/1298

PART 1 ends:-

Baker Case: Lines to Take Undated.

PART 2 begins:-

FCO to Washington tel 2073 4.12.84.

TO BE RETAINED AS TOP ENCLOSURE

Cabinet / Cabinet Committee Documents

Reference	Date
CC(83) 21st Meeting, item 2	30/06/1983

The documents listed above, which were enclosed on this file, have been removed and destroyed. Such documents are the responsibility of the Cabinet Office. When released they are available in the appropriate **CAB** (CABINET OFFICE) CLASSES

Signed J. Gray Date 1/7/2013

PREM Records Team

4

LAKER CASE

Indictments: Line to take

1. The US Department of Justice have decided not to bring any charges following their investigations into allegations concerning British airlines over fare discussions and agreements, involving services on the North Atlantic route. We are naturally glad that no criminal proceedings are to be brought against British companies.

2. As to future arrangements, talks have been going on about general issues between the US and UK governments over the application of US anti-trust law to international civil aviation. We hope these will come to an early and satisfactory conclusion. The aim is to obviate any future difficulties of this kind, while protecting the interests of the travelling public through agreed arrangements to maintain a competitive industry.

QUESTION: Were the Department of Justice considering prosecution of any British airline for bringing down Laker?

ANSWER 1: The DOJ told us that they were not considering any indictment against a British airline for bringing down Lasker.

OR

ANSWER 2: We were not consulted about such a possibility.

QUESTION: Are you going to agree on more liberal arrangements with US Government?

ANSWER: I cannot comment on what might be the outcome of negotiations.

QUESTION: What about the implications for the Laker civil suits?

ANSWER: That is a matter for British Airways and the other defendant airlines.

QUESTION: What is the Government's attitude to price-fixing between airlines?

ANSWER: Discussions between airlines about fares are not unlawful in the United Kingdom. The fares of all UK airlines are approved by the CAA and must be charged as a condition of their licences.

The CAA in considering fares have a duty to safeguard the interests of consumers. US airline fares must be similarly approved by the Department of Transport under the relevant permits.

QUESTION: What about winter fare filings?

ANSWER: The Government had no alternative but disapprove of the winter fares recently filed. Although discussions with the US Government are continuing, the UK Government has not so far been satisfied as regards the risks that such tariffs would expose US airlines to and must challenge in US courts.

QUESTION: Did the British Government know in advance about the decision?

ANSWER: After they had taken their decision US Administration informed us. (If pressed) Question: Was it the Prime Minister who was involved? Answer: Yes.

QUESTION: Did Mr. Wallis come to Britain?

ANSWER: (If pressed) Mr. Wallis personally represented the decision of the US Administration to the Prime Miinister.

QUESTION: Was the political pressure on the US Administration to drop the indictments?

ANSWER: In accordance with arrangements agreed within OECD, the British Government were invited to comment on the international legal aspects including considerations of comity of the issues raised as a result of the Department of Justice's investigation, and did so. The investigations raised issues relating to the appropriateness of the US dealing unilaterally with civil aviation matters, on which our views are well known.

PUS 86

10 DOWNING STREET

From the Private Secretary

23 November, 1984

Aviation and Anti Trust: The Laker Issue

The Prime Minister has seen your Secretary of State's minute of 22 November about the position which we should adopt in the US/UK discussions on future aviation arrangements beginning on 27 November. Subject to the views of colleagues, she is content for Mr. Ridley to proceed along the lines he proposes.

I am copying this letter to Len Appleyard (Foreign and Commonwealth Office), David Peretz (H.M. Treasury), Callum McCarthy (Department of Trade and Industry), Henry Steel (Law Officers' Department) and Richard Hatfield (Cabinet Office).

C. D. POWELL

Miss Dinah Nichols,
Department of Transport

CST

Prime Minister (1)

Content with this approach, subject to the views of colleagues? I think it is consistent with the continuing support for liberalisation which you gave in your meeting with Mr. Wallis.

CDP 22/11

PRIME MINISTER

AVIATION AND ANTI TRUST: THE LAKER ISSUE

US/UK discussions on future aviation arrangements and the interaction with the US anti trust law resume in London on Tuesday 27 November. You have said that you would review our position closely to see what scope there was for some greater degree of liberalisation. In this minute I make proposals on that point.

Before the announcement of the US decision not to bring indictments, we had established a brief for the next round of discussions (my letter of 15 November to the Foreign Secretary, and subsequent correspondence; the outline settlement is in Annex B to Mr Knighton's submission of 12 November, circulated with my private secretary's letter of 13 November). The US have informally indicated their bid in the piece of paper which Ambassador Price pressed into your private secretary's hand after Mr Wallis' visit: a copy is annexed.

The third and fourth US points are essentially the competition part of a settlement and our counterpart to the US getting rid of the treble damage action from aviation. They give no problems of substance, though it must remain our position that price co-ordination talks are not at present governed by US anti trust law, because our dispute about the past remains live until the private suits have been disposed of. We shall also want new commitments expressed in terms of what we agree to, rather than in a blank cheque that our airlines have to comply with US anti trust law. We must take care that our undertaking about the use of the PTI Act in the future extends only to circumstances for which we have an agreed regime and where the Department of Justice are playing to the rules; in particular it must not inhibit us from maintaining in force the present Order and Directions, or using the powers in

the Act against any further civil actions (or Department of Justice enforcement) for events in the past or in the future before a new agreement takes effect.

These competition provisions should, once they are public, provide President Reagan with a strong basis for defending his decision on indictments. By establishing what airline behaviour is allowed and is not allowed, and by providing for UK as well as US enforcement, they will enable him to say that the future is taken care of and that this shows that it was appropriate for him, given the strong differences over the matter, not to seek to punish for the past.

The US also sought liberalisation of the agreement, ostensibly to help them with the argument in Congress over removing the treble damage remedy. We were prepared to accept liberalisation of the arrangements for establishing fares, not least because this suits our own objectives. But we resisted (I sent a message to Mrs Dole) a wide ranging commercial renegotiation, as not appropriate to an urgent settlement of the anti trust dispute.

Now, following the President's decision, the US are raising their sights again and are trying to secure new opportunities for their many airlines. In looking at this I am fully conscious of the political case for a forthcoming approach - though I am also very conscious that the civil suits which we consider unjustified could yet wreck British Airways' privatisation. I must also have in mind that we have just gone to great lengths to strengthen the position of British Caledonian, who are none too strong a participant in the US market and are just about to restart a service to New York. I must not prejudice their position.

In this context the first two points in the US list, relating to the commercial arrangements in Bermuda 2 on pricing, capacity and market entry, raise issues of some importance both for the

travelling public and for our airlines. Bermuda 2 is in practice already one of the most liberal and competitive international aviation arrangements (a reflection of this is that the powerful United States airlines are out-earning ours by a factor of 9 to 5). Our aviation objectives entail liberalisation of the present international regulatory system, but also the maintenance of fair trading conditions for our airlines, not least because, where we liberalise more rapidly than do other countries in their mutual arrangements, there will be a natural pressure for those dealing with us to dump any surplus capacity into our market with them. When liberalising, we still need to be able to protect against unfair trading practices such as dumping and also (as in visible trade) to have some safeguard against trading pressures which would cause unacceptable damage to our industry and perhaps put the airlines of other countries into a position of market dominance which might harm the interests of our consumers.

In applying this approach to Bermuda 2 we have already offered to the United States the 'substantial flexibility in pricing, akin to what is known as dual disapproval' for which they ask. We have said that there must be some 'safety net' arrangement to ensure fair trade and they seem to have accepted this in principle, although the details remain to be finally negotiated. We have however insisted that there must be equality of opportunity between our airlines and theirs; and that, given the competitive advantage which their airlines have by reason of the access which we do not fully share to the vast US domestic market, we must protect the ability of our airlines to compete effectively and with some degree of equality for US traffic into the US gateway cities. We have therefore stuck firmly to a proposal that in respect of pricing between these "behind points" and London, US airlines must charge domestically available (market set) fares for carriage between US "behind points" and US gateways in order to qualify for the liberalised pricing arrangements envisaged. This policy (which we refer to as the "sum of sectors" approach) is a very important element for the UK in any liberalised pricing arrangements.

I have so far declined to include any changes on capacity and market entry in the package - indeed they were not in the original outline. These are the most difficult areas for us, because of the market power which US airlines enjoy in their huge domestic market to which our own and foreign airlines do not have equal access. The provisions covering entry and capacity contained in Bermuda 2 are cardinal for enabling our airlines to have adequate access and opportunities in the US market. I fear therefore that any radical changes in these arrangements which the US might seek to the advantage of their airlines, particularly within the sort of timescales involved, would severely damage the ability of British airlines to compete on equitable terms. I have however identified a modest number of limited proposals in this area, on which the delegation might fall back, if it looks really necessary to do so.

There is one other potential problem: the Department of Justice earlier volunteered, as part of a settlement, the possibility of an amnesty from their enforcement in respect of any past conduct by our airlines which they regarded as contrary to the antitrust law. Their evident dislike of the President's decision may now lead them to resist including this. We however always considered it important and a recent re-evaluation shows that for us this should be a cardinal aim as part of a settlement.

Overall, I consider that the package towards which we were working offers the prospect of a fair agreement. There are signs that the President's decision may make it harder to secure, because of dissensions within the US side. But we shall make strenuous efforts to secure agreement next week. I shall be monitoring progress.

I should be glad to know, by Monday morning, that you and other colleagues are content that our delegation should proceed on the lines set out in the previous correspondence, as qualified by this minute.

I am sending copies to the Foreign Secretary, the Chancellor of the Exchequer, the Secretary of State for Trade and Industry, the Attorney General and to Sir Robert Armstrong.

Sarah Nicholls

pp NICHOLAS RIDLEY
22 November 1984

(approved by the Secretary of State & signed in his absence)

FUTURE AVIATION ARRANGEMENTS

The U.S. needs:

(1) substantial flexibility in pricing, akin to what is known as "dual disapproval";

(2) a relaxation of restrictions on capacity, with regard to both frequencies and designations of carriers;

(3) enforcement of the full disclosure of any price coordination talks in accordance with Bermuda II; and

(4) a commitment from HMG not to invoke its blocking statute against U.S. government enforcement actions in the event of future violations by U.K. carriers, as well as a commitment to impress upon its carriers the need to comply with U.S. antitrust law in the future.

PS
PS/LADY YOUNG
PS/PUS
MR BRAITHWAITE
MR ~~[illegible]~~ O'NEILL
MR AUST, Legal Advisers
MR FREELAND, Legal Advisers
ED/MAED (2)
ED/NAD

PRESIDENT CLERK

PS/S of S
MR LAZARUS, PUS
MR KNIGHTON
MR ~~[illegible]~~ FORNAM
} DEPT OF TRANSPORT

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MR ~~COLES~~ POWELL 10 DOWNING ST

MR GARDINER, ATTORNEY GENERAL'S OFFICE

DD F C O 220900Z

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FM WASHINGTON 220031Z NOV 84
TO IMMEDIATE F C O
TELEGRAM NUMBER 3482 OF 21 NOVEMBER.

M I R P T: LAKER.

"IT IS THE PRACTICE OF THE DEPARTMENT OF JUSTICE TO INVITE DEFENDANTS IN CRIMINAL GRAND JURY INVESTIGATIONS TO COMMENT ON THE EVIDENCE WHICH FORMS THE BASIS OF THE INITIAL D O J ASSESSMENT OF THE ALLEGATIONS. SUCH A MEETING TOOK PLACE. THE AIRLINES ASKED WHETHER THEY WOULD HAVE AN OPPORTUNITY TO COMMENT ON EVIDENCE RELATING TO THE ALLEGATION THAT THEY CONSPIRED TO PUT LAKER OUT OF BUSINESS. THEY WERE TOLD THAT THERE WOULD BE NO NEED TO COMMENT ON THAT ALLEGATION. THE AIRLINES INTERPRET THAT RESPONSE IN LIGHT OF D O J PRACTICE AS MEANING THAT THE DEPARTMENT WERE AWARE OF NO EVIDENCE ON THE BASIS OF WHICH AN INDICTMENT THAT THEY CONSPIRED TO PUT LAKER OUT OF BUSINESS COULD BE BROUGHT."

H M G BELIEVES THAT THIS IS A CORRECT INTERPRETATION OF A GENERALLY KNOWN PROCESS EXTENDED TO ALL POTENTIAL DEFENDANTS IN ALL ANTI-TRUST CASES BEING INVESTIGATED BY D O J.

WRIGHT

PS
PS/LADY YOUNG
PS/PUS
MR BRAITHWAITE
MR ~~[illegible]~~ O'NEILL
MR AUST, Legal Advisers
MR FREELAND, Legal Advisers
ED/MAED (2)
ED/NAD

PRESIDENT CLERK

PS/S of S
MR LAZARUS, PUS
MR ENIGHTON
MR ~~[illegible]~~ FORTNAM
} DEPT OF TRANSPORT

MR ATLING
MR ROBERTS
MR ~~SUNDERLAND~~ LITTON
MR HEMLEY
} DTI

MR BECKETT (Solicitors)

MR ~~COLES~~ POWELL 10 DOWNING ST

MR GARDINER, ~~ATTORNEY GENERAL'S OFFICE~~

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TELEGRAM NUMBER 3481 OF 21 NOVEMBER.

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LAKER

M I P T

THE U K EMBASSY HAS ASKED WHAT H M G CAN AND CANNOT SAY TO SEEK TO DISPEL THE NOTION THAT THE D O J WAS POISED TO INDICT ON PREDATION CHARGES.

BEARING IN MIND THAT THE CONSULTATIONS BETWEEN THE GOVERNMENTS HAVE BEEN AND REMAIN CONFIDENTIAL TO THEM BOTH EXCEPT WHERE OTHERWISE AGREED, THE U S GOVERNMENT RESPONSE TO THIS REQUEST HAS TO TAKE ACCOUNT OF THE NEED TO PRESERVE GRAND JURY SECRECY AND THAT THE CONSULTATIONS MUST INDEED REMAIN CONFIDENTIAL. AT THE SAME TIME, WE UNDERSTAND THAT B A AND B C A L WERE PROVIDED CERTAIN INFORMATION THAT IS NOT SUBJECT TO CONFIDENTIALITY REQUIREMENTS. IF AIRLINES WISH TO STATE THIS PUBLICLY THEY ARE FREE TO DO SO. IF A SENIOR OFFICIAL OF H M G SO DESIRED, HE OR SHE COULD REFER TO THE STATEMENT BY THE AIRLINES BUT SHOULD IN ANY COMMENT NOT IMPLY ANY CORROLATION OF ITS TRUTH SINCE THAT WOULD IMPLICITLY DISCLOSE INFORMATION RECEIVED IN CONFIDENTIAL CONSULTATIONS. HOWEVER, SUCH AN OFFICIAL COULD COMMENT THAT THE AIRLINE STATEMENT WOULD APPEAR TO DISPOSE OF ANY SUGGESTION THAT THE D O J HAD BEEN CONSIDERING BRINGING INDICTMENTS FOR CONSPIRACY TO DRIVE LAKER OUT OF BUSINESS.

WRIGHT

PS
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MR ~~[illegible]~~ GOWAN ~~[illegible]~~
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TO IMMEDIATE F C O
TELEGRAM NUMBER 3480 OF 21 NOVEMBER.

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LAKER: LEG 2

YOUR TELEGRAM NO 1990.

SUMMARY.
LIMITED PROGRESS IN DEALING WITH STATUS OF PREDATORY BEHAVIOUR ALLEGATION.

2. BEARING IN MIND THE THANKSGIVING HOLIDAY, COUNSELLOR (CAS) ON THE BASIS OF TELECON WITH KNIGHTON (DTP) ARRANGED TO DISCUSS THE MATTER WITH SMALL (STATE DEPT) IN THE ABSENCE OF NILES (STATE DEPT) AND IN ADVANCE OF T U R WHICH DID NOT ARRIVE UNTIL CLOSE OF PLAY.

3. WITH REGARD TO THE PROPOSED RESPONSE TO OUR ENQUIRY (PARA 6 OF T U R) SMALL THOUGHT THAT IT WOULD BE POSSIBLE TO AGREE TO A TEXT ALONG THE LINES SUGGESTED WITH SOME AMENDMENTS. THE MAIN DIFFICULTY CONCERNS THE ADDITION AT D OF PARA 6 OF T U R. TO SAY THAT THE AIRLINE'S STATEMENT HAD QUOTE DISPOSED OF ANY SUGGESTION UNQUOTE WOULD BE REGARDED BY THE JUSTICE DEPARTMENT AS AN INFRINGEMENT OF THE CONFIDENTIALITY OF THE CONSULTATIONS. IT WOULD IMPLICITLY DISCLOSE INFORMATION RECEIVED IN CONFIDENTIAL CONSULTATIONS. HOWEVER, SMALL THOUGHT THAT IT WOULD BE POSSIBLE TO SAY THAT QUOTE THIS STATEMENT WOULD APPEAR TO DISPOSE OF ANY SUGGESTION UNQUOTE. A REVISED TEXT IS IN M A F T.

4. WITH REGARD TO THE GENERAL QUESTION OF GRAND JURY SECRECY AND THE CONFIDENTIALITY OF OUR CONSULTATIONS (.PARA 4 OF T U R) SMALL EXPLAINED THAT EVEN THE LIMITED AMOUNT OF INFORMATION WHICH HAD BEEN GIVEN TO H M G DURING THE CONSULTATIONS HAD INVOLVED USE OF MATERIAL SUBJECT TO GRAND JURY SECRECY. THE GUIDELINES UNDER WHICH SOME INFORMATION HAD BEEN GIVEN HAD TO BE [illegible]

BEEN GIVEN TO H M G DURING THE CONSULTATIONS HAD INVOLVED USE OF MATERIAL SUBJECT TO GRAND JURY SECRECY. THE GUIDELINES UNDER WHICH SOME INFORMATION HAD BEEN GIVEN HAD TO BE AGREED BY THE COURT. THE DISTINCTION MADE IN YOUR PARA 4 IS NOT THEREFORE RECOGNISED. MOREOVER, SMALL ADDED THAT IF H M G WERE TO MAKE STATEMENTS ABOUT WHAT HAD TRANSPIRED IN THE CONSULTATIONS THIS WOULD DO SERIOUS DAMAGE TO THE GENERAL PROCESS OF CONSULTING UNDER THE O E C D CODE. OTHER AGENCIES BESIDES THE JUSTICE DEPARTMENT WOULD BE RELUCTANT TO ENGATE IN THE CONSULTATION PROCESS IF THEY SUSPECTED THAT CONFIDENTIALITY COULD BE BREACHED.

5. WITH REGARD TO THE AIRLINE'S STATEMENT (PARA 5 OF T U R) SMALL AGREED TO TRY AND PERSUADE THE JUSTICE DEPARTMENT TO ACCEPT THE PROPOSED AMENDMENTS. BUT HE EMPHASISED THAT HE THOUGHT THERE WAS LITTLE PROSPECT OF THEIR AGREEMENT. MAYNARD EMPHASISED THE POINTS IN PARA 2. SMALL ARGUED THAT THE JUSTICE DEPARTMENT FELT THAT WHILE THEY HAD NOT UNCOVERED EVIDENCE IN RELATION TO THE PREDATION ISSUE THIS WAS TO SOME EXTENT DUE TO THE EFFECT OF H M G'S USE OF THE P T I A. MOREOVER THE JUSTICE DEPARTMENT WERE ANXIOUS TO AVOID ACCUSATIONS BY THE LAKER LAWYERS AND JUDGE GREENE THAT THEY HAD MADE STATEMENTS THAT UNFAIRLY INFLUENCED THE CIVIL CASE. MAYNARD SAID THAT THE OBJECT OF THE STATEMENT WAS TO COUNTER THE UNFAIR INFLUENCE WHICH HAD ALREADY ARISEN FROM THE WAY IN WHICH THE JUSTICE DEPARTMENT HAD BRIEFED THE PUBLIC ABOUT THE DECISION.

6. SMALL SUBSEQUENTLY REPORTED THAT HE HAD DISCUSSED THE MATTER FURTHER WITH THE JUSTICE DEPARTMENT. THEY REMAINED ADAMANT THAT THEY COULD NOT BE SEEN TO AGREE TO ANY STATEMENT MADE BY THE AIRLINES. IT WAS NOT THEIR NORMAL PRACTICE TO DO SO (E G HAD NOT DONE SO AT THE CONCLUSION OF THEIR LEG 3 INVESTIGATION) AND COULD NOT TAKE THE RISK OF ANTAGONISING JUDGE GREENE. SMALL SAID THAT HE CONSIDERED THAT THE REVISED STATEMENT IN MY SECOND W F T WOULD NOT BE CONTRADICTED BY THE DEPARTMENT OF JUSTICE.

7. ROSDEITCHEN (B A) HAS COMMENTED THAT HIS ADVICE TO HIS CLIENT WOULD BE TO AVOID ANY STATEMENT. HE CONSIDERS THAT IN THE CIRCUMSTANCES SILENCE AND TIME TO ALLOW THE DUST TO SETTLE WOULD BE THE MOST BENEFICIAL OUTCOME FOR B A'S INTERESTS IN THE CIVIL CASE. MAYNARD EXPLAINED THAT THERE WERE OTHER CONSIDERATIONS WHICH NECESSITATED H M G PRESSING FOR A MORE SATISFACTORY STATEMENT IN RELATION TO THE PREDATORY BEHAVIOUR ALLEGATION (PARA 2G OF T U R).

COMMENT.
SMALL'S ATTITUDE HAS BEEN UNUSUALLY HELPFUL AND SYMPATHETIC. WE SHOULD REGARD HIS REMARKS AS REFLECTING A GENERAL STATE DEPARTMENT PERSPECTIVE. WE SHOULD ALSO ACCEPT THAT HE HAS FAIRLY REPRESENTED OUR CONCERNS TO THE JUSTICE DEPARTMENT. WHILE THE TWO STATEMENTS STILL FALL SOME WAY SHORT OF OUR OBJECTIVES THERE IS LIKELY TO BE LITTLE ROOM FOR FURTHER IMPROVEMENT. IN PARTICULAR THE RESPONSE TO POINTS IN PARA 4 OF T U R REPRESENT A UNIFIED STATE AND JUSTICE DEPARTMENT VIEW. AND, WHILE THE OPPOSITION TO THE PROPOSED AMENDMENT IN PARA 5B IS CONCENTRATED IN THE JUSTICE DEPARTMENT, THERE IS A GENERAL PERCEPTION THAT B A'S INTERESTS WOULD BE ADVERSELY AFFECTED BY WHAT JUDGE GREENE MIGHT REGARD AS A PREJUDICIAL STATEMENT BY THE DEPARTMENT OF JUSTICE.

FCO PLEASE ADVANCE TO: KNIGHTON FORTNAM DTP, AYLING HEALEY DTI, BRAITHWAITE O'NEILL GRAY FCO, AUST LEGAL ADVISORS FCO GARDINER LOD

WRIGHT

PS
PS/LADY YOUNG
PS/PUS
MR BRAITHWAITE
MR ~~[illegible]~~ O'NEILL
MR AUST, Legal Advisers
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MR LAZARUS, PUS
MR KNIGHTON
MR ~~[illegible]~~ FORTNAM, ~~[illegible]~~
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TO IMMEDIATE F C O
TELEGRAM NUMBER 3479 OF 21 NOVEMBER.

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LAKER: FUTURE ARRANGEMENTS.

1. U S REQUEST THAT THE CONSULTATIONS COMMENCE ON TUESDAY 27 NOVEMBER, PREFERABLY AT 9.30 AM.

2. U S DELEGATION WILL BE LED BY EITHER DAM OR WALLIS (STATE DEPARTMENT) ALTHOUGH THEY RECOGNISE THAT MUCH OF THE DETAIL WILL NEED TO BE LEFT TO WALLIS (STATE DEPARTMENT) AND SEIDEN (JUSTICE DEPARTMENT). REMAINING MEMBERS OF THE DELEGATION ARE LIKELY TO BE TEAL AND STOCKER (STATE DEPARTMENT), SHANE (TRANSPORTATION), SMITH, STREET AND KAPLAN (CAB).

COMMENT
3. THE ADDITION OF EITHER DAM OR WALLIS (AND IT IS LIKELY TO BE WALLIS) IS INTENDED TO UNDERLINE THE NEED FOR POLITICAL GUIDANCE FOR THE TALKS AND WHICH THE AMERICANS CONSIDER WAS ACCEPTED BY THE PRIME MINISTER. IT WOULD BE VERY HELPFUL IF BOTH A FCO MINISTER AND THE SECRETARY OF STATE FOR TRANSPORT COULD FIND TIME ON MONDAY 26 SEPTEMBER TO SEE DAM OR WALLIS. THE U S TEAM IS PLANNING TO ARRIVE ON THE MORNING OF 26 SEPTEMBER.

FCO PLEASE ADVANCE TO BRAITHWAITE, O'NEILL, GRAY FCO, KNIGHTON, FORTNAM DTP, AYLING DTI GARDINER LOD.

WRIGHT

AT File

DD 212130Z WASHINGTON
GR 870
CONFIDENTIAL
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FM FCO 212028Z NOV 84
TO IMMEDIATE WASHINGTON
TELEGRAM NUMBER 1990 OF 21 NOVEMBER

YOUR TELNOS 3449, 3450 AND 3451: LAKER: LEG 2

THIS SEEMS A USEFUL START. WE SHOULD LIKE YOU TO TAKE IT FURTHER, SO THAT WE ESTABLISH MORE PRECISELY WHAT BRITISH AIRWAYS WILL SAY, AND THAT THE DOJ WILL NOT OBJECT, OR WILL EVEN ENDORSE THIS: AND TO STRENGTHEN WHAT ~~HMG CAN~~ SIMILARLY SAY.

2. WE THINK IT RELEVANT THAT -

(A) WE HAVE ALWAYS TAKEN THE POSITION THAT WE WOULD BE CONCERNED IF THERE HAD BEEN A CONSPIRACY TO DRIVE LAKER OUT OF BUSINESS.

(B) ACCORDINGLY WE CO-OPERATED WITH THE DOJ IN THEIR INVESTIGATION OF LEG 2.

(C) THERE IS A CIVIL REMEDY AVAILABLE TO THE LIQUIDATOR IN THE ENGLISH COURT IF HE HAS EVIDENCE OF SUCH A CONSPIRACY, BUT HE HAS NOT SO FAR CHOSEN TO PURSUE THIS .

(D) THE DOJ TOLD US THAT THEY HAD NO BASIS FOR AN INDICTMENT OVER LEG 2. (BA WERE, OF COURSE, NOT INVOLVED IN LEG 3, WHICH HAS ALREADY BEEN DEALT WITH). OUR NOTES SUGGEST THAT MCGRATH TOLD US THAT THE DOJ HAD NO SUFFICIENT EVIDENCE OF A PREDATORY FARES AGREEMENT INTENDED TO DRIVE LAKER OUT OF BUSINESS. HE ADDED THAT THE DOJ HAD NOT HAD ACCESS TO ALL POSSIBLE SOURCES OF EVIDENCE.

(E) GIVEN THE CONCERN WHICH WE HAD EXPRESSED TO THE DOJ ON THIS LEG, WE FEEL ENTITLED TO ASSUME THAT IF THEY HAD HAD EVIDENCE OF ANY MATERIAL KIND THEY WOULD HAVE FOUND A WAY OF INDICATING THIS TO US IN CONFIDENTIAL CONSULTATIONS.

(F) MINISTERS NEED TO BE ABLE TO RESPOND TO QUESTIONS WHICH

MAY ARISE IN PARLIAMENT OR ELSEWHERE SUGGESTING THAT THE BRITISH GOVERNMENT'S REPRESENTATIONS HAVE PREVENTED INDICTMENTS IN RESPECT OF A CONSPIRACY TO DRIVE LAKER OUT OF BUSINESS.

(G) WE WERE GIVEN THE CLEAR IMPRESSION THAT WE WERE NOT DEALING WITH PREDATION INDICTMENTS AND WE SO REPORTED TO MINISTERS. IN THE CONSULTATIONS WITH THE DOJ WE THEREFORE ADDRESSED OUR ARGUMENTS ONLY TO THE PRICE FIXING ALLEGATIONS. THE WAY IN WHICH THE DOJ HAVE HANDLED THE ANNOUNCEMENT OF THE PRESIDENT'S DECISION HAS NOW GIVEN A DAMAGING AND ERRONEOUS IMPRESSION ABOUT THE SCOPE OF THE INDICTMENTS. MINISTERS ARE NOT GOING TO UNDERSTAND IT IF WE CAN'T FIND A SATISFACTORY FORMULA.

3. WE UNDERSTAND FROM GRIFFIN THAT THE NORMAL PROCEDURE OF THE DEPARTMENT OF JUSTICE IN CASES WHERE NO INDICTMENTS ARE BROUGHT IS INDEED ALONG THE LINES, IF THE DOJ ARE DISPOSED TO BE HELPFUL, OF AN AGREED SCENARIO, IN WHICH IT IS ESTABLISHED WHAT THE TARGET WILL SAY AND THAT THE DEPARTMENT WILL NOT DENY THIS OR INDEED MAY CONFIRM IT. BUT THIS IS NOT A NORMAL CASE, INVOLVING AS IT DOES ANOTHER GOVERNMENT, AND WE THINK IT REASONABLE THAT THE DEPARTMENT SHOULD, IF NECEJSSARY, BE PREPARED TO INNOVATE.

4. WE THINK THAT THE DEPARTMENT ARE MAKING A CONFUSING ASSOCIATION BETWEEN GRAND JURY SECRECY AND THE CONFIDENTIALITY OF OUR CONSULTATIONS WITH THEM. OUR UNDERSTANDING FROM WHAT THEY HAVE SAID TO US IN THIS AND OTHER CONTEXTS IS THAT THEY WERE UNABLE TO BREACH THE SECRECY OF EVIDENCE SUBMITTED TO THE GRAND JURY EVEN IN CONFIDENTIAL CONSULTATIONS WITH US. WHAT THEY HAVE TOLD US HAS BEEN THEIR OWN WORK PRODUCT. WE DO NOT SET OUT TO BREACH THE CONFIDENTIALITY OF THE CONSULTATIONS AND WE RECOGNISE THE SENSITIVITY OF COMMENTS ON THEIR SUBSTANTIVE CONTENT. BUT INSOFAR AS THEIR CONTENT DOES NOT ENTAIL BREACHING GRAND JURY SECRECY AND THE US DECISIONS ARE NOW TAKEN THERE SEEMS SCOPE TO SEARCH FOR AN AGREED SOLUTION. INDEED FOR THE LAY PUBLIC TO BE BETTER AWARE THAT THE PRESIDENT'S DECISION DID NOT ENTAIL DROPPING AN INDICTMENT

FOR CONSPIRACY TO BRING DOWN LAKER CAN HARDLY BE UNHELPFUL IN THE US AS WELL AS HERE.

5. WE SHOULD LIKE YOU TO DEVELOP THE PROPOSED AIRLINE STATEMENT IN YOUR TELNO 3451 BY

A THE DELETION OF QUOTE LAST SUMMER UNQUOTE (BECAUSE IT SUGGESTS THAT RELEVANT EVIDENCE MAY HAVE COME SUBSEQUENTLY TO LIGHT)

B THE ADDITION OF QUOTE

THE AIRLINES INTERPRET THAT RESPONSE, IN THE LIGHT OF DEPARTMENT OF JUSTICE PRACTICE, AS MEANING THAT THE DEPARTMENT WERE AWARE OF NO EVIDENCE ON THE BASIS OF WHICH AN INDICTMENT THAT THEY CONSPIRED TO PUT LAKER OUT OF BUSINESS COULD BE BROUGHT. THE DEPARTMENT OF JUSTICE HAVE AGREED THAT THIS IS A CORRECT INTERPRETATION OF THEIR PRACTICE. UNQUOTE

6. WE SHOULD LIKE YOU TO DEVELOP THE PROPOSED RESPONSE TO YOUR ENQUIRY (YOUR TELNO 3450) BY

A ADD AT END OF FIRST SENTENCE, QUOTE, BEARING IN MIND THAT THE CONSULTATIONS BETWEEN THE GOVERNMENTS HAVE BEEN AND REMAIN CONFIDENTIAL TO THEM BOTH EXCEPT WHERE OTHERWISE AGREED. UNQUOTE .

B DELETING THE SECOND AND THIRD SENTENCES AND SUBSTITUTING QUOTE THE US GOVERNMENT RESPONSE TO THIS REQUEST HAS TO TAKE ACCOUNT OF THE NEED TO PRESERVE GRAND JURY SECRECY. UNQUOTE.

C DELETE QUOTE LAST SUMMER UNQUOTE

D DELETE LAST SENTENCE AND SUBSTITUTE QUOTE AND COMMENT THAT THIS DISPOSED OF ANY SUGGESTION THAT THE DOJ HAD BEEN CONSIDERING BRINGING INDICTMENTS FOR CONSPIRACY TO DRIVE LAKER OUT OF BUSINESS. UNQUOTE.

7. PLEASE PURSUE THIS IN CONSULTATION WITH ROSDEITCHER (WHO HAS BEEN ASKED TO COOPERATE WITH YOU) AND THEN WITH THE STATE DEPARTMENT, USING THE ARGUMENTS IN PARAS 2-4 AT YOUR DISCRETION

HOWE

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES

LIMITED

MAED
NAD
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ERD
LEGAL ADVISERS
PS
PS/LADY YOUNG
PS/MR RENTON
PS/PUS
MR BRAITHWAITE

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MR DAVID THOMAS

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3.

File

BRIEF FOR PRIME MINISTER'S QUESTIONS

LAKER - US GOVERNMENT STATEMENT

Line to Take

I welcome the President's decision which is helpful in the context of our differences over the application of US anti trust laws to international aviation. I hope that we can now settle agreed arrangements for the future.

Background Note

The President's decision has been extremely helpful in heading off a crisis over criminal enforcement of US anti trust laws. The private suits remain a serious concern. The actual statement by the US Department of Justice regrettably does not make clear that they did not have the basis for an indictment in respect of a conspiracy to bring down Laker. This is being pursued.

confidential

Department of Transport
20 November 1984

A 640

O/C

AT
Brought over by
Mr. Knighton this evening
CMM.

A Department of Transport spokesman said "We understand that the US Department of Justice is not to bring any charges following their investigations into allegations, concerning British airlines, over fare discussions and agreements, involving services on the North Atlantic route.

2 The Department are naturally glad that no proceedings are to be brought against British companies.

3 As to arrangements for the future, talks have been going on about the general issues between the US and UK governments over the application of US antitrust law to international civil aviation. We hope these will come to an early and satisfactory conclusion. The aim would be to obviate any future difficulties, while protecting the interest of the travelling public through agreed arrangements to maintain a competitive industry."

Notes for use <u>if necessary</u>

1 Q Has this solved the problem with the US?

A No. It must be helpful. But we still have to agree how such issues are to be handled in future. And, of course, civil litigation continues.

2 [If asked about the implications for the Laker civil suits].

A This is a matter for British Airways and the other defendant airlines.

3 [If pressed about contacts between the British and US Governments about the Department of Justice investigations].

A In accordance with arrangements agreed within OECD, the British Government were given notice of the investigation. There is a legitimate dispute on this matter and HMG made its views known to the US Government.

[If further pressed]. The British companies and individuals whose interests were immediately affected were of course consulted by the Government.

4 Q Did the British Government know in advance about the decision?

A After they had taken their decision, US Administration informed us.

[Only if pressed]

Q Was it the Prime Minister who was informed?

A Yes.

5 What is the Government's attitude to price fixing between airlines?

A Discussions between airlines about fares are not unlawful in the United Kingdom. The fares of all UK airlines are approved by the CAA and must be charged as a condition of their licence. The CAA in considering fares have a duty to safeguard the interests of consumers. US airline fares must be similarly approved by the Department of Transport under the relevant permits.

6 Q What about the cheap winter fare filings?

A The Government had no alternative but to disapprove the winter fares recently filed; although discussions with the United States Government are continuing, the UK Government has not so far been satisfied as regards the risk that such tariffs would expose UK airlines to anti trust challenge in US courts.

[see Press Notice 521 of 15 November 1984.]

7 Q Are you going to agree more liberal arrangements with the Americans?

A The US-UK aviation arrangements are already one of the most liberal in the world. We shall be considering whether the existing competitive arrangements can be improved.

TEXT OF DOJ STATEMENT

Department of Justice today announced that it is closing an antitrust Grand Jury investigation into passenger air travel between the US and the UK. The Department announced that it was the President's decision based on foreign policy reasons that this should be done.

cc NO

CONFIDENTIAL

NBPM

AT 22/4

The Rt. Hon. Nicholas Ridley MP
Secretary of State for Transport
Department of Transport
2 Marsham Street
London SW1

20 November 1984

AVIATION AND US ANTI-TRUST: THE "LAKER" ISSUE

Dear Nicholas

I refer to your letter of 15 November to the Secretary of State for Foreign and Commonwealth Affairs which I have seen on my return from abroad.

I understand that the Americans have postponed the negotiations and it may be necessary for further or other instructions in the light of what has happened. However, I record that, subject to that, I am content with what you suggested.

You particularly drew my attention to the proposed assurance as to our policy over the powers in the Protection of Trading Interests Act 1980. I do not think that there is a legal obstacle to giving an assurance but there might be some in Parliament who would see this as a restriction of the powers granted by Parliament. It would be preferable, therefore, to give the assurance in a discreet form if possible.

Accordingly I think that such an assurance would be acceptable in the context of a satisfactory package of the kind you describe and with safeguards on the lines of those set out in your letter.

I am copying this to the Prime Minister, the Secretary of State for Foreign and Commonwealth Affairs, the Chancellor of the Exchequer, the Secretary of State for Trade and Industry and Sir Robert Armstrong.

Yours ever, Michael.

Legal Procedure: Lakes 3/83

NI3819 4 XXX 191

REAGAN ORDERS LAKER PROBE CLOSED

WASHINGTON, MONDAY - PRESIDENT REAGAN HAS ORDERED THAT AN ANTITRUST INVESTIGATION INTO THE COLLAPSE OF BRITISH INDEPENDENT AIRLINE LAKER AIRWAYS SHOULD BE CLOSED, A DEPARTMENT OF JUSTICE SPOKESMAN SAID TODAY.

THE ONE-BILLION-DOLLAR SUIT, BEING HEARD BY A GRAND JURY, WAS INVESTIGATING WHETHER 12 RIVAL AIRLINES HAD CONSPIRED TO PUT THE CUT-PRICE LAKER ACARRIER OUT OF BUSINESS.

LAKER AIRWAYS, THE BRAINCHILD OF FLAMBOYANT BRITISH ENTREPRENEUR SIR FREDDIE LAKER, PIONEERED CHEAP FLIGHTS ACROSS THE ATLANTIC IN 1977, BUT COLLAPSED IN A MOUNT OF DEBT IN FEBRUARY 1982, STRANDING ABOARD AN ESTIMATED 17,000 TRAVELLERS.

JUSTICE DEPARTMENT SPOKESMAN MARK SHEEHAN SAID PRESIDENT REAGAN DECIDED TO CLOSE THE INVESTIGATION LATE LAST WEEK AFTER TALKS WITH TOP OFFICIALS OF THE US JUSTICE AND STATE DEPARTMENTS AND WHITE HOUSE STAFF.

''A CASE LIKE THIS CAN PRESENT DIFFICULT LAW ENFORCEMENT AND FOREIGN RELATIONS ISSUES. THE PRESIDENT IS THE ULTIMATE LAW ENFORCEMENT AUTHORITY IN BOTH OF THOSE AREAS. HE DETERMINED THAT CLOSING THE INVESTIGATION WAS IN THE NATION'S BEST INTERESTS,'' MR SHEEHAN SAID.

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FM WASHINGTON 192310Z NOV 84
TO IMMEDIATE FCO
TELEGRAM NUMBER 3437 OF 19 NOVEMBER

LAKER

1. TEXT OF DEPARTMENT OF JUSTICE ANNOUNCEMENT MADE TODAY WAS AS FOLLOWS:-

BEGINS: THE DEPARTMENT OF JUSTICE TODAY ANNOUNCED THAT IT IS CLOSING AN ANTITRUST GRAND JURY INVESTIGATION INTO PASSENGER AIR TRAVEL BETWEEN THE U.S. AND THE UNITED KINGDOM. THE DEPARTMENT ANNOUNCED THAT IT WAS THE PRESIDENT'S DECISION, BASED ON FOREIGN POLICY REASONS, THAT THIS SHOULD BE DONE.
ENDS

2. PRESS REPORTS SUGGEST THAT JUSTICE DEPARTMENT SPOKESMAN MARK T SHEEHAN MADE CLEAR THAT JUSTICE OFFICIALS, CONSIDERING ONLY LEGAL ISSUES, WANTED TO CONTINUE THE CASE BUT WERE OPPOSED BYO OFFICIALS IN THE STATE DEPARTMENT. HE IS ALSO QUOTED AS SAYING (QUOTE) IF THE JUSTICE DEPARTMENT HAD THOUGHT THE INVESTIGATION SHOULD BE CLOSED ON PURELY LEGAL GROUNDS, THE QUESTION WOULD NOT HAVE GONE TO THE PRESIDET IN THE FIRST PLACE. THERE WAS NOT COMPLETE AGREEMENT BETWEEN THE AGENCIES AS TO WHICH CONSIDERATIONS WERE PARAMOUNT - LEGAL OR FOREIGN RELATIONS CONSIDERATIONS. JUSTICE OBVIOUSLY WAS NOT WILLING TO CLOSE THE INVESTIGATION DOWN OF ITS OWN VOLITION AT THIS TIME. IT IS NOT UNUSUAL FOR SUCH QUESTIONS TO GO TO THE PRESIDENT. (UNQUOTE).

3. SHEEHAN IS ALSO REPORTED TO HAVE SAID THAT HE COULD NOT RECALL THE LAST TIME A PRESIDENT HAD ORDERED A CRIMINAL ANTITRUST GRAND JURY INVESTIGATION CLOSED. HE IS FURTHER QUOTED AS SAYING (QUOTE) THE DECISION WAS MADE AFTER DISCUSSIONS BETWEEN REAGAN AND TOP WHITE HOUSE, JUSTICE AND STATE OFFICIALS. ALL THOSE WHO DISCUSSED THE DECISION DIRECTLY WITH REAGAN SUPPORTED IT. REAGAN ACTED ON THE PRESIDENT'S CONSTITUTIONAL AUTHORITY AS THE NATION'S CHIEF LAW ENFORCEMENT OFFICER AND THE OFFICIAL RESPONSIBLE UNDER THE CONSTITUTION FOR CONDUCT OF FOREIGN POLICY (UNQUOTE).

4. SHEEHAN IS REPORTED AS REFUSING TO SAY WHETHER REAGAN SPOKE WITH BRITISH OFFICIALS. HE IS ALSO REPORTED TO HAVE SAID THE DECISION WAS NOT LINKED TO ANY U.S. - BRITISH TALKS ABOUT LOWERED TRANS-ATLANTIC AIR FARES, AND TO HAVE SAID THE TWO SUBJECTS HAVE NEVER BEEN DISCUSSED TOGETHER AND THERE WAS NO QUID PRO QUO.

/S. WILLIS.

5. WILLIS (STATE DEPARTMENT) TOLD COUNSELLOR (CAS) THAT THESE JUSTICE DEPARTMENT COMMENTS WERE NOT APPROVED BY THE WHITE HOUSE AND EFFORTS WERE BEING MADE TO QUOTE BRING THEM INTO LINE UNQUOTE.

FCO PLEASE ADVANCE DESKBY 0900 TO AYLING (DTI) KNIGHTON, FORTNAM (DTPT), GRAY (MAED FCO), AUST (LEGAL ADVISORS), GARDINER (LOD).

WRIGHT

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES

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NAD
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ERD
LEGAL ADVISERS
PS
PS/LADY YOUNG
PS/MR RENTON
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NRPM AT CC NO 19/11

DEPARTMENT OF TRADE AND INDUSTRY
1-19 VICTORIA STREET
LONDON SW1H 0ET
TELEPHONE DIRECT LINE 01-215 5422
SWITCHBOARD 01-215 7877

PS/

Secretary of State for Trade and Industry

19 November 1984

CONFIDENTIAL

Miss Dinah Nichols
Private Secretary to the
Secretary of State for Transport
2 Marsham Street
LONDON
SW1P 3EB

Dear Dinah,

AVIATION AND US ANTITRUST : THE "LAKER" ISSUE

I am writing to confirm what Ruth Thompson has already told you, namely that my Secretary of State has considered the question of limiting our use of the PTI Act, on the basis proposed in your Secretary of State's letter of 15 November. He is content that, in the context of an acceptable overall package which will avoid a recurrence of problems over the application of US antitrust law to bilateral aviation services, the UK could agree not to use the PTI Act to block US enforcement of a ban on undisclosed airline discussions and agreements. This would be subject to satisfactory resolution of the three safeguards set out in your Secretary of State's letter.

2 I am copying this letter to Andrew Turnbull (No 10), David Peretz (Treasury), Richard Gardiner (Attorney General) and Richard Hatfield (Cabinet Office).

Yours sincerely

Callum McCarthy

M C McCARTHY
Private Secretary

JH5BAR

991-1

FUTURE AVIATION ARRANGEMENTS

The U.S. needs:

(1) substantial flexibility in pricing, akin to what is known as "dual disapproval";

(2) a relaxation of restrictions on capacity, with regard to both frequencies and designations of carriers;

(3) enforcement of the full disclosure of any price coordination talks in accordance with Bermuda II; and

(4) a commitment from HMG not to invoke its blocking statute against U.S. government enforcement actions in the event of future violations by U.K. carriers, as well as a commitment to impress upon its carriers the need to comply with U.S. antitrust law in the future.

It is my view that the President would be very grateful for your personal involvement in order to insure that negotiations on a new agreement proceed rapidly and not get bogged down on technicalities by middle level officials who may not place as high a priority on our competitive markets as you and the President do.

The National Archives

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CERTA File 089

File 3

10 DOWNING STREET

From the Private Secretary

18 November 1984

cc MASTER.

Dear Len,

PRIME MINISTER'S MEETING WITH UNDER-SECRETARY WALLIS AT CHEQUERS ON SUNDAY 18 NOVEMBER AT 1015 HOURS

Under-Secretary Wallis called on the Prime Minister at Chequers at 1015 this morning to convey an oral message from President Reagan about the Laker issue. He was accompanied by the US Ambassador.

Mr. Wallis said that the President wanted the Prime Minister to know that he had decided not to proceed with any indictments on the Laker issue. The Prime Minister interjected that this was marvellous news. She wanted to be absolutely clear: the President had decided not to pursue any indictments. Mr. Wallis confirmed this. He was personally pleased at the decision and knew that Secretary Shultz was also.

Mr. Wallis continued that this had been a very difficult decision for the President. Foreign policy considerations and in particular the US's traditionally close relationship with the United Kingdom pointed one way. On the other hand, the President was a firm believer in enforcing the law and in the virtues of economic competition. Enforcement of the anti-trust laws was a matter of particular importance to him. His high regard for the Prime Minister and close personal relations with her had been a very important factor in reaching the decision he had. It was the first time in President Reagan's Administration that he had allowed a matter concerning criminal indictments even to come before him. He believed it was also one of only two cases in the past 50 years where the White House had intervened in a decision on an indictment for foreign policy reasons. There would certainly be a great deal of controversy in the United States as a result. The Prime Minister said that she quite understood that it was a very courageous decision by the President. She also thought it was a wise one. She appreciated that it was the special relationship between Britain and the United States which had helped bring it about. A decision the other way would have been very damaging to our relations.

Mr. Wallis continued that he was not sure whether the Prime Minister had the same picture of the facts as the US Administration had. There was no doubt in their minds that a crime had been committed. The Justice Department were certain that they could have got a conviction. There was very strong evidence that British

/ officials

officials knew that the Bermuda 2 Agreement did not provide exemption from US anti-trust laws. The Prime Minister said that, now the decision not to proceed with indictments had been taken, it was better not to rake over old differences. As Mr. Wallis knew, the United Kingdom did not accept the US Administration's point of view.

Mr. Wallis continued that the purpose of American anti-trust laws was to improve competition, and thus secure benefits for the public. Negotiations were being conducted between the United States and the United Kingdom which could improve competition in air traffic. If these negotiations could be carried quickly to a successful conclusion, the President would be in a position to respond to public clamour about his decision not to proceed with the indictments by showing that the decision had produced demonstrably better results for the travelling public than indictments would have. He hoped therefore that political guidance could be given to the negotiators and that the negotiations themselves could resume in a week or so, once both sides had been able to reflect on how best to take them forward. The United States was thinking of sending a very high level delegation so that the negotiations should not be left in the hands of technical people who did not necessarily share the convictions of their Governments on free competition. The Prime Minister agreed that time was needed for reflection. She would review the position closely to see precisely what scope there was for some greater degree of liberalisation.

Mr. Wallis said that he hoped progress could be made, in particular on pricing. He thought that it had been the United Kingdom side which had expressed readiness to consider "dual disapproval". This would be an important step. The Prime Minister said that predatory pricing had to be avoided. Mr. Wallis said that it was illegal in the United States. Mr. Wallis continued that the Americans would obviously like to have free access on capacity. But they recognised that this was not feasible and that some limit would be required. The Prime Minister said that HMG was committed to genuine competition. With the Laker issue out of the way, it would be easier to go ahead with denationalisation of British Airways. Mr. Wallis said that the President's decision would not directly affect the private damage suits but the US Administration did not think they would have much chance, though juries were always unpredictable.

Mr. Wallis asked that nothing should be said in public until the President's decision had been announced in Washington. The Justice Department would be informing British Airways and their attorneys probably mid-morning local time on 19 November. Once the announcement was made, he naturally hoped that HMG would express satisfaction. The Prime Minister said she fully understood the need for complete security on this matter. She would not inform anyone of the President's decision except the Secretary of State for Transport. Mr. Wallis said that he believed Mr. Dam would be briefing Sir Oliver Wright. It was agreed that it would be useful for Sir Oliver Wright to discuss

/ the

the terms of an announcement with Mr. Dam, though Mr. Wallis thought this could in practice prove difficult. Justice Department lawyers were outraged and very sore.

At the conclusion of the meeting the US Ambassador slipped me the attached note. It sets out US requirements, Mr. Wallis did not speak to it and I do not think that we need regard it as having been handed over officially. However, we should clearly have to admit knowledge of it if it is raised in future.

After the meeting the Prime Minister decided to send a personal message to President Reagan on the direct teleprinter link. I enclose a copy for the information of your Secretary of State only.

I am sending copies of this letter to Dinah Nichols (Department of Transport), Callum McCarthy (Department of Trade and Industry), Henry Steel (Law Officers Department) and David Peretz (HM Treasury) with the request that it should be given no distribution beyond Ministerial Private Offices until mid-afternoon GMT tomorrow, 19 November.

Yours sincerely,

Charles Powell

Charles Powell

Len Appleyard, Esq.,
Foreign and Commonwealth Office.

Sent 18/11

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FOCAB002/18

OO CABINET OFFICE (FOR NO10)

GRS 750
SECRET
D E D I P
FM WASHINGTON 1818OOZ NOV 84
TO IMMEDIATE FCO
TELEGRAM NUMBER 3434 OF 18 NOVEMBER

FOLLOWING FOR PRIVATE SECRETARY NO 10
FROM MINISTER IN AMBASSADOR'S ABSENCE ON SPEAKING TOUR IN FLORIDA AND TEXAS.

YOUR TEL NO 1965: LAKER

1. DEPUTY SECRETARY OF STATE DAM TELEPHONED MINISTER (IN AMBASSADOR'S ABSENCE) ON 18 NOVEMBER.
2. DAM SAID THAT IT HAD BEEN DECIDED LAST WEEK, BEFORE IT WAS KNOWN WHICH WAY THE LAKER DECISION WOULD GO, THAT IN EITHER HYPOTHESIS THE OUTCOME WOULD BE CONVEYED PERSONALLY TO THE PRIME MINISTER BY WALLIS. THE PRESIDENT HAD HELD A MEETING ON 16 NOVEMBER TO CONSIDER THE CASE. THE DEPARTMENT OF JUSTICE RECOMMENDATION WAS FOR TWO INDICTMENTS:

(I) AGAINST BRITISH AIRWAYS AND THREE NAMED OFFICALS FOR FIXING FARES IN 1981 AND 1982
(II) AGAINST BRITISH AIRWAYS AND PAN AMERICAN AIRWAYS FOR FIXING FLIGHT CAPACITY

THE DEPARTMENT OF JUSTICE HAD SAID THAT THE EVIDENCE IN THEIR POSSESSION LEFT NO DOUBT THAT BRITISH AIRWAYS HAD ACTED DELIBERATELY AND KNOWINGLY. AND THE DEPARTMENT OF JUSTICE AND STATE BOTH AGREED THAT THE US HAD A RIGHT TO TAKE ACTION SINCE THE IMPLEMENTATION OF THE TWO ACTIONS COMPLAINED ABOUT HAD BEEN IN THE U.S. (DAM ADDED THAT EVEN THE RECENT HOUSE OF LORDS RULING SEEMED TO POINT THAT WAY, HANNAY SAID WE DID NOT SHARE THAT VIEW, IT WAS AGREED THERE WAS NO NEED TO ARGUE THE TOSS ON THIS POINT AT THIS MOMENT). NEITHER DEPARTMENT REGARDED THE TERMS OF THE BERMUDA 2 AGREEMENT AS OVERIDING ACTION. AND THE DEPARTMENT OF JUSTICE POINTED OUT THAT THEY HAD ALREADY DROPPED THE MOST SERIOUS OF THE CASES (THE HOLLYWOOD INCIDENT) BECAUSE A BRITISH OFFICIAL WAS INVOLVED.
3. DESPITE ALL THIS, DAM SAID, THE PRESIDENT HAD DECIDED ON FOREIGN POLICY AND ON COMPETITION POLICY GROUNDS NOT TO PROCEED WITH THE INDICTMENTS. THIS HAD BEEN A HARD DECISION FOR HIM TO TAKE IN VIEW OF HIS TOUGH LAW AND ORDER STANCE. IT WAS THE ONLY CRIMINAL MATTER WHICH HAD COME TO HIM PERSONALLY. THERE WOULD CERTAINLY BE EXTENSIVE PUBLIC AND CONGRESSIONAL CRITCISM OF WHAT HE HAD DONE. IT WAS THEREFORE MOST IMPORTANT THAT THIS DECISION SHOULD POINT THE WAY, AND BE SEEN FROM THE OUTSET TO BE POINTING THE WAY TO A MORE COMPETITIVE BILATERAL CIVIL AVIATION REQUIRE. THE PRESIDENT HOPED THE PRIME MINISTER WOULD TAKE A PERSONAL INTEREST IN THE NEGOTIATIONS NOW UNDER WAY.
4. DAM THEN OUTLINED THE MAIN POINTS THE AMERICANS WANTED COVERED IN THE NEGOTIATIONS, WHICH THEY HOPED COULD BE RESUMED IN ABOUT A WEEK, IN THE FOLLOWING TERMS:

(I) MORE FLEXIBILITY OVER PRICING ON THE BASIS OF A DUAL DISAPPROVAL APPROACH
(II) SOME RELAXATION OF RESTRICTIONS ON CAPACITY AND WITH REGARD TO FREQUENCY OF SERVICES AND THE DESIGNATION OF CARRIERS
(III) STRICT ENFORCEMENT BY BOTH THE UK AND THE US OF FULL DISCLOSURE BY THE CARRIERS OF ANY COORDINATION TALKS BETWEEN THEM
(IV) UK COMMITMENT NOT TO INVOKE THE PTI ACT AGAINS ANY FUTURE US GOVERNMENT ACTION TO DEAL WITH VIOLATIONS
(V) UK COMMITMENT TO IMPRESS ON BRITISH CARRIERS THE NEED TO AVOID ANY BREACH OF US LAW.

DAM ADDED THAT THE AMERICANS HOPED THAT THE FURTHER WEEK'S PAUSE IN THE NEGOTIATIONS WOULD ALLOW TIME TO REFLECT ON THESE ISSUES IN THE LIGHT OF THE LAKER DECISION AND FOR THE NECESSARY POLITICAL GUIDANCE TO BE GIVEN TO THE NEGOTIATORS.

5. HANNAY THANKED DAM FOR THIS CLEAR INDICATION OF US THINKING. HE COULD ASSURE HIM THAT WE INTENDED TO DO ALL WE COULD TO COMPLETE THE NEGOTIATIONS TO SETTLE THIS PROBLEM IN A WAY SATISFACTORY TO BOTH OF US. THE EARLIER ROUNDS HAD REVEALED A GOOD DEAL OF COMMON GROUND BUT ALSO ONE OR TWO POINTS AMONG THOSE HE HAD MENTIONED WHICH WOULD BE MORE DIFFICULT. BUT THE WILL TO MAKE PROGRESS WOULD BE THERE.

6. HANNAY AND DAM THEN DISCUSSED PUBLIC HANDLING. DAM UNDERLINED THAT IT WAS MOST IMPORTANT TO MAINTAIN COMPLETE CONFIDENTIALITY AND THAT ANY UK COMMENT SHOULD ONLY FOLLOW, AND NOT PRECEDE OR COINCIDE WITH US STATEMENTS ON THE INDICTMENTS. HE DID NOT YET KNOW WHEN THE DEPARTMENT OF JUSTICE WOULD MAKE THEIR ANNOUNCEMENT. IT COULD BE AS EARLY AS 19 NOVEMBER BUT IT COULD BE LATER IN THE WEEK. THERE WAS NO FUTURE IN TRYING TO INFLUENCE THE PRECISE TERMS OF THAT PARTICULAR ANNOUNCEMENT WHICH WOULD REFLECT THE DEPARTMENT'S LEGAL REQUIREMENTS. WHAT WAS IMPORTENT WAS THAT THE TWO GOVERNMENTS SHOULD THEN COMMENT PUBLICLY IN TERMS WHICH WAS AS HELPFUL AS POSSIBLE TO EACH OTHER PARTICULARLY ABOUT FUTURE PROSPECTS AND THE NEGOTIATIONS IT WAS AGREED THAT COUNSELLOR (C AND AS) AND WILLIS (STATE) SHOULD BE IN TOUCH TO WORK UP A DRAFT LINE TO TAKE WHICH COULD BE RECOMMENDED TO MINISTERS ON EITHER SIDE.

WRIGHT

CCN PARA 3 LINE 9 ....MORE COMPETITIVE BILATERAL CIVIL AVIATION REGIME....

NNNN

SENT AT 182018Z GS

QSL??

DE CAB QSL AT 182018Z JEG

CONFIDENTIAL

Department of Transport,
2 Marsham Street,
SW1.

17 November, 1984.

Prime Minister
This is the additional briefing
C.D.P. 18/xi

Dear Powell,

Laker

Ricketts' letter of 16 November suggests the line which the Prime Minister might take when Mr. Allen Wallis delivers President Reagan's message on the Laker case. You will have seen Sir Oliver Wright's telegram (Washington 3433) reporting the oracular comments of Mr. Shultz on the content of this message: this still tends to suggest that there will be at least some indictments - and if so the most likely candidate might be the alleged conspiracy between British Airways and Pan American to fix capacity and schedules.

As I mentioned to you, however, later information obtained by our Embassy (in the strictest confidence) suggests that there may be just a possibility that no indictments will be brought.

I enclose a briefing note for the Prime Minister, when she sees Mr. Wallis, which has been agreed with the Foreign and Commonwealth Office and endorsed by Mr. Ridley. Copies go to Peter Ricketts (Foreign and Commonwealth Office), David Peretz (HM Treasury), Callum McCarthy (Department of Trade and Industry), and Richard Gardener (Law Officers' Department).

Yours sincerely
William Knighton.

W.M. Knighton

Charles Powell, Esq.,
10 Downing Street.

CONFIDENTIAL

Line to take

Decision to indict: Highly objectionable. Can't understand decision, coming while our negotiators are well on the way towards defining a regime which would provide clear understandings for the future about permitted and impermissible airline conduct. On so sensitive an international issue, agreement for the future would provide strong grounds for not seeking to punish past conduct when there is total disagreement between us on whether it should be punished. I may want to send a return message to the President, and so I ask that nothing should be made public in the meantime.

No indictments: Welcome decision, which will encourage the wider official negotiations to settle the dispute. Announcement of decision not to indict will be sensitive for both sides: would like opportunity for my officials to comment in advance on its terms.

Official talks on future arrangements: /In response to suggestions that a higher degree of liberalisation in the aviation agreement should be sought/.
A non committal answer.

Background: It seems highly improbable that a decision conveyed by the President to indict can be altered; the line to take nonetheless suggests an argument.

Indictments are objectionable in principle. Their practical effect for the individuals would be inability to visit the United States without facing trial. For British Airways the chief importance is the potential effect on the private litigation, especially the class actions, and thus on the prospects for privatisation (the maximum fines arising from indictments would be $1 million per count). The content of a US announcement about indictments (even if none were brought) could be materially more or less unhelpful for the civil suits, and it would be in our interest to be able to influence it. For example, the US have already indicated that they did not have the basis for indicting for an alleged conspiracy to bring down Laker (the claim in the liquidator's civil action) and it would be helpful for this to come out publicly.

Ministers will want to decide urgently whether any indictments are (in Mr. Shultz' words) 'acceptable' taking account of anything in the President's message about the negotiations on future arrangements. A very early US public announcement on indictments would narrow political options.

A new round (intended to be final) of negotiations on future arrangements had been fixed to start at 0900 on Monday, 19 November.

/ The

The US had, and have, taken no steps to cancel or postpone it. But our Embassy in Washington have learned that the US side have cancelled their travel plans to London. US officials have declined to say that they were calling off the talks, but have simply referred to the President's message. We have therefore continued to act as though the talks would start on Monday, since we have received no request that they should not.

If the news on indictments is good, the President may ask that as part of the negotiations on future arrangments we should consider a higher degree of liberalisation in the aviation agreement.

The US have been pressing their general aviation policy objectives on us, arguing that liberalisation will help them to sell to Congress the removal of the treble damage suit from aviation. Mr. Ridley has said in a message to Mrs. Dole that these negotiations are fundamentally about settling the anti trust dispute. While we are prepared also to negotiate on fares liberalisation, we cannot renegotiate now over the whole of Bermuda 2. (US proposals would shift the balance of opportunities strongly in US favour: and the US already outearn our airlines 9:5.)

PS
PS/LADY YOUNG
PS/FUS
MR BRAITHWAITE
MR ~~[illegible]~~ O'NEILL
MR AUST, Legal Advisers
MR FREELAND, Legal Advisers
ED/MAED (2)
ED/NAD
~~PRESIDENT CLERK~~

SENT
17 NOV 1984

IMMEDIATE

PS/S of S
MR LAZARUS, FUS
MR KNIGHTON
MR ~~[illegible]~~ GRAHAM
} DEPT OF TRANSPORT

MR ROBERTS
MR ~~SUNDERLAND~~
} DTI
MR BECKETT (Solicitors)

MR ~~COMES~~ POWELL 10 DOWNING ST
MR GARDINER, ATTORNEY GENERAL'S OFFICE

CONFIDENTIAL
DESKBY 170900Z
FM WASHINGTON 170630Z NOV 84
TO IMMEDIATE FCO
TELEGRAM NO 3433 OF 17 NOV

LAKER: CONSULTATIONS.

1. THIS HAS BEEN A PROFESSIONALLY FRUSTRATING AND EMOTIONALLY DRAINING DAY. MY STAFF AND I HAVE BEEN TRYING ALL DAY TO GET AT THE TRUTH BEHIND THE ONLY TWO FACTS KNOWN TO US: FIRST THAT WALLIS WAS CARRYING A MESSAGE FROM THE PRESIDENT TO THE PRIME MINISTER AND SECONDLY THAT NEXT WEEK'S TALKS WERE OFF, BECAUSE NO AMERICAN OFFICIALS WOULD BE LONDON TO CONDUCT THEM. FEW OFFICIALS WERE PRIVY TO THE DECISION AND ALL OFFICIALS IN ALL AGENCIES SEEMED TO HAVE TAKEN A VOW OF SILENCE. WHEN I CALLED ON THE VICE-PRESIDENT THIS MORNING AND MENTIONED LAKER TO HIM, ALL HE DID WAS TO INSTRUCT HIS STAFF TO RECORD THAT THE BRITISH AMBASSADOR HAD RAISED THE SUBJECT OF LAKER, AT WHICH THE VICE-PRESIDENT'S HAIR HAD STOOD ON END. THESE CONTACTS HAD LED US TO THE PRELIMINARY CONCLUSION THAT THE MESSAGE MUST CONTAIN BAD NEWS IN RELATION TO THE INDICTMENTS. OUR REASONING WAS THAT HAD IT BEEN OTHERWISE, THERE WOULD HAVE BEEN NO NEED FOR A SPECIAL EMISSARY AS TO THE CHOICE OF MESSENGER, WALLIS IS KNOWN TO HAVE SPECIAL SHOCK-ABSORBENT QUALITIES AND WE HAD INTENDED TO ASSUME THAT HE WOULD NEED THEM AT CHEQUERS.

2. I DELAYED SENDING YOU A BAD NEWS TELEGRAM SINCE I KNOW I SHOULD BE SEEING SHULTZ AT DINNER TONIGHT AND HOPED TO GET A SIGN FROM HIM OF THE TRUE STATE OF PLAY. HE GREETED ME ON THE RECEIVING LINE WITH A WARM SMILE AND WHEN I SUGGESTED THAT WE MIGHT ALL AS WELL EAT, DRINK AND BE MERRY TONIGHT SINCE WE WERE IN FOR A BAD WEEK-END, HE ASKED ME WHAT ON EARTH I MEANT. WHEN I ANSWERED: "LAKER", HE SAID THAT THERE HAD BEEN A TOUGH DISCUSSION IN CABINET THAT MORNING, THAT THE PRESIDENT HAD TAKEN A FIRM DECISION, THAT IT WAS A COURAGEOUS ONE AND THAT HE THOUGHT IT WOULD BE ACCEPTABLE TO US. AT THIS POINT, I HAD TO MOVE ON. AT THE END OF DINNER HE HAD MOVED SMARTLY AWAY BEFORE I COULD CROSS-EXAMINE HIM.

IT WOULD BE ACCEPTABLE TO US. AT THIS POINT, I HAD TO MOVE ON. AT THE END OF DINNER HE HAD MOVED SMARTLY AWAY BEFORE I COULD CROSS-EXAMINE HIM.

3. AS YOU KNOW, MY SWEET AND GULLIBLE NATURE PRE-DISPOSES ME TO THINK THE BEST OF PEOPLE AND THEIR MOTIVES AND YOU ARE ALWAYS KIND ENOUGH TO MAKE ALLOWANCES FOR THAT FAILING. THE EVENTS OF TODAY CAN BE INTERPRETED AS SIGNIFYING THAT WALLIS BRINGS BAD NEWS, BUT WITH CRUMBS OF COMFORT. ON THE OTHER HAND, I HAVE TO TRUST SHULTZ AND THE STRANGE BEHAVOUR OF THE VICE PRESIDENT CAN BE INTERPRETED TO MEAN THAT WALLIS BRINGS GOOD NEWS, THOUGH WITH PERHAPS A BIT OF DOWNSIDE. THE DISRUPTION OF THE TALKS CAN BE INTERPRETED EITHER WAY: FOR IF THE NEWS IS GOOD, BOTH SIDES WILL NEED A PAUSE FOR REFLECTION.

4. ON THE WHOLE, I BELIEVE THAT WALLIS WILL BE THE BEARER OF GOOD NEWS, OR AT LEAST, GOOD ENOUGH NEWS. IF SO, GIVEN THE TRAVAIL OF THE PAST MONTHS, A MESSAGE OF APPRECIATION FROM THE PRIME MINISTER TO THE PRESIDENT WILL BE IN ORDER, THE WARMTH OF WHICH WILL BE DEPENDENT UPON THE GOODNESS OF THE NEWS. THE VALUE TO US OF THE RIGHT DECISION, IF THAT IS WHAT IT IS, IS ALSO A MEASURE OF THE COURAGE OF THE PRESIDENT IN BEING READY TO ACCEPT DOMESTIC CRITICISM.

WRIGHT

NNNN

Sent By mini fax to Chequers

SENT 17 NOV 1984

PS
PS/LADY YOUNG
PS/PUS
MR BRAITHWAITE
MR ~~[illegible]~~ O'NEILL
MR AUST, Legal Advisers
MR FREELAND, Legal Advisers
ED/MAED (2)
ED/NAD
PRESIDENT CLERK

IMMEDIATE

PS/S of S
MR LAZARUS, PUS
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WRIGHT

NNNN

CHARLES

Rodric Braithwaite rang again:

1. Press handling: see para 6 of telno 3434 from Washington

   Essence is that any comment by us should only follow, not precede or coincide with the US statement on the indictments. The Justice Dept statement could be tomorrow or could be later.

   Stress this to Bernard Ingham

2. William Knighton wishes to speak to you - now already done so.

3. British airlines were due to attend negotiations here tomorrow with the Americans. The Americans are not now going, so British airlines will have to be stood down.

   Consequence: speculation will begin as early as tomorrow.

Debbie

CHARLES

Laker

Rodric Braithwaite has just telephoned. He would like to speak with you fairly urgently. (He is currently sitting in the Resident Clerk's Flat at the FCO).

He has spoken with the American Ambassador and Mr. Wallis, who told him everything that passed between them and the PM. Rodric says there now needs to be some action taken:

1) A press line has to be thought about very carefully, and the sooner the better. Rodric feels someone should talk to William Knighton and to Bernard Ingham, because if the press line goes wrong, it could endanger future negotiations, etc.

2) Rodric would like to telegraph to Washington the piece of paper Mr. Wallis handed you with the American requirements. (He has already seen your telegrams).

Will you have a word with him, or shall I pass a message?

Debbie

NT ZNB ALPHA CHARLIE K

XX
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WONFO 004/17

00 FCO
GRS 500A

DEDIP
CONFIDENTIAL
FM WASHINGTON 162205Z NOV 84
TO IMMEDIATE FCO
TELEGRAM NUMBER 3420 OF 16 NOVEMBER

FOLLOWING PERSONAL FOR PRIVATE SECRETARY AND FOR POWELL (NO 10)
VYOUR TELECONS WITH HANNAY AND KERR: VISIT(S) TO WASHINGTON

1. I GATHER THAT THE PRIME MINISTER WILL BE SEEING AMBASSADOR PRICE AT CHEQUERS ON SUNDAY. SHE MIGHT LIKE TO KNOW IN ADVANCE HOW I SEE THE PRESENT STATE OF PLAY ON THE PROPOSED DECEMBER AND FEBRUARY VISITS.

2. IT IS CLEAR THAT THE PRESIDENT HAS ACCEPTED THE IDEA OF THE SHORT VISIT ON 22 DECEMBER, AND ENVISAGES A THREE-HOUR INFORMAL GET-TOGETHER AT CAMP DAVID. IT IS ALSO CLEAR THAT HE IS BEING ADVISED BY HIS STAFF THAT IT CAN BE REGARDED AS AN ALTERNATIVE TO THE PROPOSED FEBRUARY VISIT. IT IS NOT HOWEVER CLEAR TO ME THAT HE HIMSELF SEES THEM AS ALTERNATIVES, AND WOULD NOT BE DELIGHTED TO SEE THE PRIME MINISTER TWICE THIS WINTER.

3. NSC CONTACTS TELL US THAT AMBASSADOR PRICE WILL BE INSTRUCTED TO SAY THAT THE DECEMBER PLAN HAS FOUND FAVOUR: AND TO SEEK TO PERSUADE THE PRIME MINISTER THAT THE FEBRUARY PLAN SHOULD THEREFORE BE DROPPED. HE HAS BEEN ASKED TO STRESS THAT THE EXCEPTIONAL DECEMBER ARRANGEMENTS WILL BE SEEN AS EVIDENCE OF THE CLOSENESS OF THE RELATIONSHIP: WHEREAS THE FEBRUARY PLAN WOULD BE SEEN AS MORE OF A ROUTINE EVENT. THERE IS SOMETHING IN THIS: BUT OF COURSE WE ENVISAGED THAT THE PROGRAMME IN FEBRUARY WOULD GO WELL BEYOND THE WHITE HOUSE - IN THE ADMINISTRATION, ON THE HILL, AND IN TEXAS AND CALIFORNIA AND MOST OF THIS WOULD BE IMPOSSIBLE IN DECEMBER.

4. IF IT BECOMES CLEAR THAT WE ARE INDEED CONFRONTED BY A CHOICE, I AM SURE THAT WE SHOULD DROP DECEMBER AND CONCENTRATE ON FEBRUARY, AS IS I UNDERSTAND THE PRIME MINISTER'S OWN THINKING. BUT I AM NOT SURE THAT WE HAVE YET REACHED THAT POINT.

5. I OF COURSE RECOGNISE THAT A DECEMBER VISIT WOULD COME AT THE END OF AN EXHAUSTING TOUR: AND IT IS ASKING A LOT OF THE PRIME MINISTER TO CONTEMPLATE COMING HERE THEN, AS WELL AS IN FEBRUARY. IF FOR OUR OWN REASONS WE WANT TO DROP THE DECEMBER PLAN WE SHOULD OF COURSE DO SO FORTHWITH.

6. BUT IT WOULD I BELIEVE BE PREMATURE TO DROP DECEMBER ON THE GROUNDS THAT WE CANNOT HAVE BOTH VISITS, OR THAT IT WOULD BE UNWELCOME T THE PRESIDENT THAT BOTH SHOULD TAKE PLACE. NEITHER POINT IS YET CLEAR.

7. AS AGREED, I SHALL DO NO FURTHER DELVING HERE UNTIL I HEAR FURTHER FROM YOU, IN THE LIGHT OF THE CHEQUERS CONVERSATIONS ON SUNDAY. BUT I WOULD SUGGEST THAT IN THESE CONVERSATIONS IT SHOULD BE MADE PLAIN TO AMBASSADOR PRICE THAT THE PRIME MINISTER'S IDEAS FOR FEBRUARY WERE FOR A TOUR GOING WELL BEYOND WASHINGTON. (INCIDENTALLY, GEORGE BUSH TOLD ME TODAY HOW WARMLY HE WELCOMED THE IDEA THAT THE PRIME MININSTER MIGHT THEN VISIT TEXAS.) PRICE'S REPORT BACK SHOULD THEN HELP TO ESTABLISH WHETHER THE IDEA OF OFFERING US ONLY ONE VISIT (AND IN DECEMBER) IS THE PRESIDENTS' OR, AS I SUSPECT, ONLY THAT OF THE WATCHDOGS AT HIS DOOR.

WRIGHT

NNNN

(15927) Dd.896736 400,750 1/72 G.W.B.Ltd. Gp.863

SECRET

OUTWARD

TELEGRAM

File No. NO. 10

Department

Drafted by (Block Capitals) CHARLES POWELL

Tel. Extn.

Security Classification SECRET

Precedence IMMEDIATE

DESKBY ..... Z

FOR COMMS. DEPT. USE

Despatched (*Date*) ..... (*Time*) ..... Z

POSTBY ..... Z

PREAMBLE

(*Time of Origin*) ..... Z (G.M.T.)

(*Security Class.*) SECRET

(*Codeword*) DEDIP

(*Restrictive Prefix*) .....

(*Caveat/ Privacy Marking*) .....

(*Deskby*) ~~18~~ 18 ~~1~~ 1600 Z

TO IMMEDIATE WASHINGTON *Tel. No.* ..... *of* .....
(precedence) (post)

AND TO (precedence/post) .....

AND SAVING TO .....

REPEATED TO (for info) .....

SAVING TO (for info) .....

Distribution:-

Copies to:-

[TEXT]

FOLLOWING STRICTLY PERSONAL FOR HM AMBASSADOR FROM PRIVATE SECRETARY NO. 10

YOUR TELEGRAM NO. 3433: LAKER CONSULTATIONS

The purpose of Wallis's call on the Prime Minister was to tell her that the President had decided that no (repeat no) indictments would be brought on the Laker ~~case~~ issue. Wallis stressed that this had been a very difficult decision indeed for the President. It was the first time in his Administration that a matter concerning a criminal indictment had even been brought to him. It was a reflection of the special nature of Anglo-American relations and the close personal friendship between the President and the Prime Minister that the decision had gone this way.

/ There

There were no conditions attached. But the President hoped that the official negotiations which had already begun could be carried quickly to a successful conclusion. The American side hoped to resume these in about a week. It would be helpful if the negotiators could be given the necessary political guidance to ensure their success. Finally, Mr. Wallis said that the information about the President's decision ~~should~~ must be treated as secret until it had been communicated to British Airways. It was planned to do this mid-morning, East Coast time, on 19 November. He believed that Dam would be briefing you.

The Prime Minister expressed delight at the President's decision and acknowledged that it must have been very difficult for him. She undertook to reflect how the official negotiations could best be taken forward. She also promised that we would maintain the strictest security at this end. She would tell no-one but the Secretary of State for Transport. The Prime Minister added that it would be helpful if you were able to discuss with Dam the terms in which an announcement would be made in Washington and of our response here. Wallis agreed that this would be useful though thought it might be difficult in practice. The Justice Department who would be making the announcement were "very sore".

The Prime Minister will be sending the President a personal message on the direct link.

Fuller account will follow.

CDP

NOTHING TO BE WRITTEN IN THIS MARGIN

(15927) Dd.896736 400,750 1/72 G.W.B.Ltd. Gp.863

File No.

Department NO.10

Drafted by (Block Capitals) CHARLES POWELL

Tel. Extn.

OUTWARD TELEGRAM

Security Classification: CONFIDENTIAL

Precedence: IMMEDIATE

DESKBY Z

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Despatched (Date) (Time) Z

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(Time of Origin) Z (G.M.T.)

(Security Class.) CONFIDENTIAL

(Codeword)

(Restrictive Prefix)

(Caveat/ Privacy Marking) DEDIP

(Deskby) Z

TO WASHINGTON (precedence) IMMEDIATE (post) Tel. No. of

AND TO (precedence/post)

AND SAVING TO

REPEATED TO (for info)

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[TEXT]

FOLLOWING FOR HM AMBASSADOR FROM PRIVATE SECRETARY NO.10

YOUR TELEGRAM NO. 3420: PRIME MINISTER'S VISITS

I am telegraphing to you separately a brief account of the Prime Minister's meeting with Allan Wallis this morning.

At the end of this, the US Ambassador raised the question of the Prime Minister's visit to Washington. He thought there had been some confusion about this, partly of his making. But the upshot was that the President and Mrs. Reagan would be extremely pleased if the Prime Minister could visit them at Camp David on 22 December. The invitation was for talks between 1000 and 1200 followed by lunch, concluding at 1330. The original suggestion had been that this could be an alternative to a visit in February, with the

/ President

President perhaps stopping off in London on his way to or from the Economic Summit in May. However, he was now authorised to say that it was not an alternative and that a December visit need not impact upon the Prime Minister's proposed February visit. He added that he thought a December visit would be an important opportunity for the Prime Minister and the President to share their views on priorities (at a crucial moment) in a relaxed setting.

The Prime Minister said that she was immensely grateful and would like to take up the President's invitation. She would also like to keep open the possibility of a February visit but would reflect on this further. An alternative might be for her to see President Reagan in London in May and to postpone her visit to the United States until September. There would be more time for a visit during a Parliamentary Recess. She would be in touch further about this. But the December visit should be regarded as fixed.

The earlier discussion with Allan Wallis obviously had a part in this.

CDP

NOTHING TO BE WRITTEN IN THIS MARGIN

(15927) Dd.896736 400,750 1/72 G.W.B.Ltd. Gp.863

MW faxed

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File No. .....

Department .....

Drafted by (Block Capitals) .....

Tel. Extn. .....

OUTWARD

TELEGRAM

Security Classification: SECRET

Precedence: IMMEDIATE

DESKBY 18 1400 Z ..... Z

FOR COMMS. DEPT. USE

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POSTBY ..... Z

PREAMBLE

(Time of Origin) ..... Z (G.M.T.)

(Security Class.) .....

(Codeword) .....

(Restrictive Prefix) .....

(Caveat/ Privacy Marking) DEDIP

(Deskby) ..... Z

TO IMMEDIATE (precedence) WASHINGTON (post) Tel. No. ..... of .....

AND TO (precedence/post) .....

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[TEXT]

Following Strictly Personal for Ambassador from Private Secretary NO.10

My Telno: : Laker Consultations

Following, strictly for your own information, is text of personal message which the Prime Minister has sent to the President on the direct teleprinter link:

Ben

SECRET

NOTHING TO BE WRITTEN IN THIS MARGIN

Dear Ron,

I am absolutely delighted with your decision not to bring any indictments on the Laker issue. Allan Wallis was the bearer of the good news. I know that it must have been very difficult for you and as always I admire your courage in acting as you have. I am most grateful and my colleagues - when they know - will be equally pleased. I am sure that it is the best decision that could have been taken, both from the point of view of passengers on both sides of the Atlantic and in the wider interest of U.S.-U.K. relations. I agree that we must now do all we can to complete the negotiations to settle this whole problem in a way which is satisfactory to both of us.

Charlie Price also told me of your and Nancy's kind invitation to spend some hours with you at Camp David on 22 December. I should love to do this and accept with pleasure.

With best wishes and many thanks.

Yours
Margaret

EPC

Foreign and Commonwealth Office

London SW1A 2AH

16 November, 1984

Prime Minister
Basic note for your meeting with Mr. Wallis.
CDP 16/11.

Dear Charles,

Laker

Allan Wallis, the Under-Secretary in the State Department who is also President Reagan's Representative in the regular preparations for economic summits, is to call on the Prime Minister over the weekend with a personal message from the President about the Laker case which he is under instructions to give to her personally.

A Mr Ridley wrote to the Foreign Secretary on 15 November giving an account of the present state of negotiations between officials which, if successful, would represent a satisfactory long-term arrangement ensuring that we do not get into this sort of trouble again. The Foreign Secretary replied this evening.

B

Mr Price has declined to give any indication of what is in the President's message. It seems possible, however, that it will concern the decision which the US Justice Department is due to take on the question of criminal indictments relating to the Laker case. There are three possible charges on which indictments might be sought. The first relates to an alleged price-fixing agreement between British Airways and Laker. This could be particularly damaging to British Airways, because it could adversely affect the civil cases which Laker has brought in the US courts, where, in the worst case, very large damages could be awarded. The second possible indictment concerns three former British Airways officials for their individual parts in the price-fixing conspiracy. In this case we consider that the Justice Department's pursuit of the individuals goes beyond the requirements of their proper duty, and that it contains an element of unacceptable pressure intended to make the individuals testify in circumstances where the United Kingdom Government has issued an Order and Directions under the Protection of Trading Interests Act to prevent that from happening. The third charge concerns an alleged conspiracy between British Airways and Pan American Airways to fix capacity and schedules on the North Atlantic routes. If the Justice Department decided to indict on this charge, the practical consequences for British Airways would be less serious.

Any of these indictments would be highly objectionable, both in principle and, at least in the case of the first

two, in their implications for the Laker civil actions. At the same time, an agreement of the kind outlined in Mr Ridley's letter would bring the United Kingdom real benefits. If the President's message is to the effect that the Justice Department have decided not to proceed with any indictments the Prime Minister would no doubt wish to welcome that and say that it will be a great encouragement to the official negotiations for a longer term arrangement. If, however, the President says that the Justice Department intend to go ahead on one or more of the counts, the Prime Minister might wish to repeat what she recently said to the American Ambassador abour the serious effect which such a development could have on the future of our relationship with the US in the aviation field as a whole. *

I am sending a copy of this letter to Dinah Nichols (DOT).

Yours ever,

Peter Ricketts

(P F Ricketts)
Private Secretary

C D Powell Esq
10 Downing Street

* and would surely also say that the talks between British & US officials due to start on Monday morning would be delayed while we considered the consequences.

CDP 16/xi

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES 27 ADVANCE COPIES

PS (C)
PS/LADY YOUNG
PS/PUS
MR BRAITHWAITE
MR ~~[illegible]~~ O'NEILL
MR AUST, Legal Advisers
MR FREELAND, Legal Advisers
ED/MAED (2)
ED/NAD

RESIDENT CLERK

IMMEDIATE

PS/S of S
MR LAZARUS, PUS
MR KNIGHTON
MR ~~[illegible]~~ FORTNAM
} DEPT OF TRANSPORT

MR AYLING
MR ROBERTS
MR ~~SUNDERLAND~~ LITTON
MR HOMLEY
} DTI

MR BECKETT (Solicitors)

MR ~~COLES~~ POWELL 10 DOWNING ST

MR GARDINER, ATTORNEY GENERAL'S OFFICE

CONFIDENTIAL

DESKBY ~~QOPOPPZ~~ 190900Z

FM WASHINGTON 161850Z NOV 84
TO IMMEDIATE FCO
TELEGRAM NUMBER 3413 OF 16 NOVEMBER

LAKER: GRAND JURY
YOUR TELNO 1960

1. WITHOUT REVEALING THAT DTI WERE CONSIDERING A DRAFT OF A LETTER TO THE UK SOLICITORS FOR MONKS AND DRAPER, COUNSELLOR (CA AND S) ASKED SEIDEN (JUSTICE DEPARTMENT) WHETHER THE JUSTICE DEPARTMENT RECOGNISED THAT THE THIRD CONDITION IN THEIR LETTER TO THE INDIVIDUALS OF 8 NOVEMBER MIGHT BE REGARDED AS A REQUIREMENT UNDER THE PTI ACT.

2. SEIDEN SAID THAT HE DID NOT WISH TO PASS JUDGMENT ON A MATTER OF UK LAW. IN DISCUSSION HOWEVER HE RECOGNISED THAT THE CONDITION WENT BEYOND THOSE THAT HAD BEEN IN THE ORIGINAL OFFER OF IMMUNITY AND MIGHT NECESSITATE FURTHER UK LEGAL ADVICE FOR THE INDIVIDUALS. HE EXPLAINED THAT THE DOJ HAD FELT IT NECESSARY TO INSIST ON THIS CONDITION SINCE IF EVIDENCE ACQUIRED FROM THE INDIVIDUALS' TESTIMONY IMPLICATED THIRD PARTIES THEY WOULD WISH TO USE IT AND TO BE ABLE TO HAVE AN ASSURANCE THAT THE INDIVIDUALS WOULD RETURN TO THE US AT ANY TRIAL.

3. SEIDEN SAID THAT THERE HAD BEEN FURTHER CONTACT BETWEEN THE DOJ AND GLANZER THE US ATTORNEY FOR THE INDIVIDUALS. SEIDEN CONSIDERED GLANZER AS A TOTALLY UNRELIABLE INDIVIDUAL INTENT ONLY ON MANIPULATING EITHER OR BOTH THE DOJ AND HMG INTO CONFLICT.

ON MANIPULATING EITHER OR BOTH THE DOJ AND HMG INTO CONFLICT. HE ALSO ADDED THAT WHETHER OR NOT THE OFFER OF IMMUNITY NOW MADE GAVE RISE TO QUESTIONS UNDER THE PTI ACT WAS QUOTE MUTE UNQUOTE. BY THIS HE MEANT THAT THE DEADLINE FOR THE INDIVIDUAL TO APPEAR IN WASHINGTON WAS TODAY 16 NOVEMBER. THE DOJ WERE NOT GOING TO EXTEND THAT DEADLINE. IT DID NOT MATTER THEREFORE WHAT VIEW HMG TOOK.

4. THIS DISCUSSION WITH SEIDEN SUGGESTS THAT THE DOJ RECOGNISE THAT THE ADDITIONAL CONDITIONS COULD GIVE RISE TO ADVICE ALONG THE LINES OF THE SECOND PARAGRAPH OF THE PROPOSED LETTER FROM AYLING (DTI) TO THE UK SOLICITORS. THEY ARE THEREFORE UNLIKELY TO BE SURPRISED. THIS DOES NOT MEAN THAT THE DOJ MIGHT NOT REACT ADVERSELY IF IT SUITED THEM: BUT IT SUGGESTED THAT THEY WOULD UNDERSTAND THAT HMG HAD BEEN PUT INTO A DIFFICULT POSITION BY THEIR NEW OFFER OF IMMUNITY.

5. IT IS, HOWEVER, POSSIBLE THAT GLANZER WILL SEEK TO STIR UP DIFFICULTIES BETWEEN THE JUSTICE DEPARTMENT AND HMG EG BY SUGGESTING THAT HMG HAD DELIBERATELY PREVENTED THE INDIVIDULAS ACCEPTING THE OFFER OF IMMUNITY OR THAT THE JUSTICE DEPARTMENT HAD MADE AN OFFER WHICH THEY KNEW WOULD BE BLOCKED BY HMG. IT WOULD BE SENSIBLE IN THESE CIRCUMSTANCES TO SHOW SEIDEN A COPY OF THE DTI LETTER AFTER IT HAS BEEN SENT BUT HOPEFULLY BEFORE GLANZER COULD MAKE USE OF IT. SEIDEN'S PRESENCE IN LONDON NEXT WEEK PROVIDES A SUITABLE OPPORTUNITY.

FCO PLEASE ADVANCE TO AYLING HEALEY DTI, KNIGHTON FORTNAM DTP, AUST FCO LEGAL ADVISERS, GARDINER LOD, GRAY MAED FCO

WRIGHT

NNNN

FCS/84/300

SECRETARY OF STATE FOR TRANSPORT

Aviation and US Anti-Trust: The "Laker" Issue

1. Thank you for your letters of 13 and 15 November. I have asked my Private Secretary to inform yours orally that I agree that the UK delegation to next week's talks with the United States officials on a possible settlement on the future working of the Bermuda 2 agreement should be instructed to seek an agreement on the lines you propose.

2. I think that the line you propose on the PTI Act is quite right. We clearly must not use the PTI Act to frustrate the objective of any agreement reached on aviation, but we must also not allow the US Department of Justice to use such an agreement for purposes for which it was not intended - something they are only too likely to do if they are not pinned down.

3. I agree that the package now proposed on future arrangements and tariff liberalisation would, if we can obtain it, be of great benefit to our airlines in the particular competitive climate on the North Atlantic. I also agree, however, that we cannot take a final decision on the package until we know what the US authorities will do on the indictments and what help they are prepared to give us on the civil suits. Officials should make it quite clear that in considering the outcome of the negotiations we shall have in mind very much the US decision on the indictments; but, because the indictments are our immediate target, I do not think that at next week's talks our officials should raise explicitly the question of the Laker civil suits. Our own implementation of the package will also depend on the passage of the appropriate Congressional legislation

/abolishing

abolishing private treble damage actions from the aviation field.

4. I think there is one further point on which we need to be agreed: what we should do if the US authorities indicate in the course of next week's talks that they propose to indict. In that event I believe that our delegation should adjourn the discussions, taking the line that they will need to consult Ministers before they can carry the talks any further. They should not make any substantive comment. In that case, or, indeed, if indictments come later, I think that we should re-convene the small group of Ministers which met under my chairmanship last month, in order to consider how to respond.

5. I am copying this minute to the Prime Minister, the Chancellor of the Exchequer, the Secretary of State for Trade and Industry, the Attorney-General and Sir Robert Armstrong.

GEOFFREY HOWE

Foreign and Commonwealth Office
16 November, 1984

CONFIDENTIAL

NBPM
AT 16/4

01-405 7641 Ext. 3229
Communications on this subject should be addressed to
THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

Miss D Nicholls
Private Secretary
Secretary of State for Transport
Department of Transport
2 Marsham Street
London SW1

16 November 1984

Dear Miss Nicholls,

AVIATION AND US ANTITRUST: THE "LAKER" ISSUE

with CAI?

1. I refer to the Secretary of State of Transport's letter of 15 November to the Secretary of State for Foreign and Commonwealth Affairs in which agreement is sought this afternoon to proposed instructions to the delegation for the next round of negotiations with the Americans.

2. The Attorney General is abroad at present and returns on Monday. He has seen reports on each round the negotiations and has not expressed any adverse view on the emerging package. He has not however, had his attention specifically drawn to the proposed assurance on the powers in the Protection of Trading Interests Act.

3. I understand from Mr Knighton, who has led the UK delegation, that the negotiating strategy would only require this element of the deal to be considered at the very last stage in the negotiations. Accordingly, I suggest that I should invite the Attorney General to consider this as soon as possible on his return and were he to raise any points of difficulty over this aspect of the negotiations these could still be taken into account before the critical stage is reached.

4. I am copying this letter to the Private Secretaries to the Prime Minister, the Chancellor of the Exchequer, the Secretary of State for Trade & Industry and the Cabinet Secretary.

Yours sincerely,

Richard Gardiner

R K GARDINER

CONFIDENTIAL

Legal procedure : Later March '83

CC.AD

DEPARTMENT OF TRANSPORT
2 MARSHAM STREET LONDON SW1P 3EB

01-212 3434

15 November, 1984

The Rt Hon Sir Geoffrey Howe, QC, MP,
Secretary of State for Foreign & Commonwealth Affairs,
Whitehall,
S.W.1

Dear Geoffrey

AVIATION AND US ANTITRUST: THE "LAKER" ISSUE

My private secretary sent to yours on 13 November a copy of the report on the last round of talks with the Americans, which included (Annex B to Mr Knighton's minute of 12 November 1984) the outline of a possible settlement on the future working of the Bermuda 2 agreement. She indicated that I would be giving my views on the latter, after receiving those of the Civil Aviation Authority and our airlines, so that our delegation can be briefed for what may be a final round of discussion starting on Monday 19 November.

The Civil Aviation Authority would support a settlement on the lines indicated, as would British Airways and British Caledonian. My officials will be consulting the management of Virgin Atlantic today or tomorrow on the proposals for the liberalisation of the arrangements for establishing fares; I have no reason to expect them to be opposed to these.

I considered carefully whether we should be prepared to give an undertaking that it would not be our policy to use the PTI Act to hinder the seeking by the United States authorities of information from the United Kingdom, required for the investigation of possible infringements of the requirements forming part of the proposed agreement. We envisage that there should be no secret inter airline discussions relating to fares, capacity or scheduling. Since these requirements would be imposed by both Governments in agreement, it would in principle be logical that we should give such an assurance. I am advised, however, that we should, consistent with the position which we took in discussions earlier this year with the United States on antitrust, seek certain safeguards if we are to acquiesce in the use of the United States discovery procedures which are more extensive than those normally permitted under our law. We might therefore seek -

(a) arrangements for notification and consultation between the United States and our own authorities based on, but rather more extensive than, those to which both sides have already agreed under OECD arrangements.

(b) that consultations should cover such matters as the narrowing of sub poenas, so that matters extraneous to the investigation in question would not be sought

(c) assurances from the US side that information obtained from UK sources for the purpose of an aviation antitrust investigation would not be used for other purposes (eg the United States tax or regulatory investigations, civil actions in the United States etc).

Subject to such safeguards officials consider that it would be appropriate to give an assurance that it would not be our policy to use the PTI Act to impede US investigations into matters arising under Bermuda 2. I think this is right; and I hope that my colleagues, particularly Norman Tebbit and Michael Havers, also agree.

I believe that a package relating to future arrangements on the lines now contemplated would be very worthwhile as part of an overall settlement of this troublesome dispute. It would be a real prize to get rid of the private treble damage action from the aviation field; the Laker and related actions have given the signal for this action to be used increasingly in the aviation field unless something is done to stop it. My colleagues will know that in the United States it has become a weapon of commercial strife which goes well beyond a sound part of competition policy. To secure this we should be altering our own policy about what is permitted and what is not permitted in the behaviour of airlines. But as we move to reduce aviation regulation it is appropriate that we should look for more transparent arrangements for inter-airline discussions of the kind contained in the package and should be prepared to enforce these. The third component of the package, liberalisation of the arrangements for establishing tariffs, whilst not in strict logic an essential part of settling the antitrust dispute, is consistent with our general policy and appropriate in the already highly competitive market of the North Atlantic. The arrangements envisaged hold the balance we need between freer trade and ensuring fair trade (the latter still very necessary on the North Atlantic where our airlines face, as they have always done, very heavy competition from American airlines, who can draw on their own home market in a way that is denied to ours).

I propose that our delegation should be instructed to seek agreement with the US on these lines next week. Such an agreement would be ad referendum to Governments. We would defer our formal decision whether to accept it until we know the US decision on indictments; and (if they did not indict) until we had then explored what US help on the Laker civil suits might then be forthcoming. May I take it, in the absence of adverse comments by close of play tomorrow, that my colleagues agree.

Copies go to the Prime Minister, the Chancellor of the Exchequer, the Secretary of State for Trade & Industry, the Attorney General and Sir Robert Armstrong.

Yours ever
Nicholas

NICHOLAS RIDLEY

legal procedure

March 83

later

File

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES ADVANCE COPIES 18

PS
PS/LADY YOUNG
PS/PUS
MR BRAITHWAITE
MR ~~[illegible]~~ O'NEILL
MR AUST, Legal Advisers
MR FREELAND, Legal Advisers
ED/MAED (2)
ED/NAD

PRESIDENT CLERK

PS/S of S
MR LAZARUS, PUS
MR KNIGHTON
MR STEVENS
MR ~~[illegible]~~ FORNAM
} DEPT OF TRANSPORT

MR AYLING
MR ROBERTS
MR ~~SUNDERLAND~~
MR HENLEY
MR BECKETT (Solicitors)
} DTI

MR ~~COLES~~ POWELL 10 DOWNING ST

MR GARDINER, ATTORNEY GENERAL'S OFFICE

IMMEDIATE

CONFIDENTIAL
DESKBY 140900Z
FM WASHINGTON 132355Z
TO IMMEDIATE FCO
TELEGRAM NUMBER 3373 OF 13 NOVEMBER 1984

LAKER: GRAND JURY

1. COUNSELLOR (CAS) DELIVERED TO MILES (STATE DEPT) FORMAL NOTE SETTING OUT THE POINTS OF COMMTY WHICH HAD BEEN PUT TO THE JUSTICE DEPARTMENT DURING THE CONSULTATIONS ON THE PROPOSED INDICTMENTS (SEE MY TELNO 3206).

2. WITH REGARD TO THE CONTINUING TALKS ON FUTURE ARRANGEMENTS (SEE MY TELNO 3355) MILES SAID THAT A DEAL WAS AVAILABLE PROVIDED THERE WAS A POLITICAL WILL ON BOTH SIDES TO GRASP IT. HE WAS CONCERNED, HOWEVER, THAT ATTEMPTS TO FINE TUNE THE AVIATION POLICY DETAILS I.E. THE PRECISE NATURE OF TARIFF LIBERALISATION, MIGHT OVER-BURDEN THE NEGOTIATIONS.

LIBERALISATION, MIGHT OVER-BURDEN THE NEGOTIATIONS.

3. MAYNARD SAID THAT HE WAS CONFIDENT THAT THE UK NEGOTIATORS HAD THEIR EYE ON THE BASIC ELEMENT OF THE DEAL, NAMELY THE ANTI-TRUST ASPECTS. THE MAIN RISK LAY NOT WITH DETAIL BUT THE CONSEQUENCES OF ANY DECISION BY THE JUSTICE DEPARTMENT TO PROCEED WITH INDICTMENTS. AN AGREEMENT ON FUTURE ARRANGEMENT WOULD BE A MAJOR STEP FORWARD NOT ONLY FOR THE US/UK AVIATION RELATIONSHIP BUT, PERHAPS, MORE WIDELY. THE WILLINGNESS OF HMG TO ACCEPT THAT THE JUSTICE DEPARTMENT COULD, IN JOINTLY AGREED CIRCUMSTANCES, COULD ENFORCE US ANTI-TRUST LAWS IN AVIATION WAS A SIGNIFICANT BENEFIT TO THE US WHICH BALANCED THE ELIMINATION OF CIVIL ANTI-TRUST LIABILITY. THIS MUST SURELY BE A FACTOR IN THE JUSTICE DEPARTMENTS CONSIDERATION OF THE CURRENT CASES.

4. NILES SAID THAT IN THE LIGHT OF THE REPORTS FROM THE US AMBASSADOR IN LONDON ON RECENT MEETINGS WITH THE PRIME MINISTER AND OTHER MINISTERS, ALL CONCERNED IN THE US GOVERNMENT RECOGNISED THAT A ''WRONG'' DECISION BY THE JUSTICE DEPARTMENT COULD DESTROY THE POSSIBILITY OF A VALUABLE AGREEMENT. THE LINK BETWEEN FUTURE ARRANGEMENTS AND THE INDICTMENTS WAS FIRMLY ESTABLISHED EVEN IF RELUCTANTLY SO IN THE JUSTICE DEPARTMENT. THE ISSUE WAS BEING URGENTLY EXAMINED AT CABINET LEVEL.

5. KIMMIT (NSC) HAS ALSO CONFIRMED THAT BOTH THE NEGOTIATIONS ON FUTURE ARRANGEMENTS AND THE JUSTICE DEPARTMENT'S FINAL DECISION ON THE INDICTMENTS ARE BEING CLOSELY MONITORED BY THE WHITE HOUSE. AMBASSADOR PRICE'S REPORT OF HIS MEETING WITH THE PRIME MINISTER WILL BE AN ELEMENT IN THIS AND HAS HIGHLIGHTED THE ACUTE POLITICAL NATURE OF THE JUSTICE DEPARTMENT'S DECISION.

FCO PLEASE ADVANCE TO
KNIGHTON STEVENS FORTNAM DTP
AYLING HEALEY ROBERTS DTI
GRAY MAED FCO
AUST LEGAL ADVISORS FCO
GARDINER MOD

WRIGHT

CONFIDENTIAL

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1. CP to note
I suggest we wait for X before involving PM.
2. CF

AT 13/11

CCNO.

DEPARTMENT OF TRANSPORT
2 MARSHAM STREET LONDON SW1P 3EB

01-212 3434

L V Appleyard Esq
Private Secretary to
the Rt Hon Sir Geoffrey Howe QC MP
Secretary of State for Foreign and Commonwealth Affairs
Foreign and Commonwealth Office
Downing Street
LONDON
SW1

13th November 1984

Dear Len,

AVIATION AND US ANTITRUST: THE "LAKER" ISSUE

My Secretary of State has asked me to circulate for information the attached report by Mr Knighton on the third round of discussions on the Laker problem held last week in Washington.

Mr Ridley has asked me to draw attention to paragraphs 8 and 9 of the report which show that the delegation's brief will need to be reviewed in advance of what may be the final round on this part of the matter next week. Mr Ridley has, of course, kept in close touch with the discussions which have resulted in the outline described at Annex B. However, before commending this to his colleagues he wishes to have the further views of the airlines and the Civil Aviation Authority, which will not be available until later in the week. He does not think that it will be necessary to trouble the Foreign Secretary to take another meeting at this stage. But he is likely to be seeking colleagues' views by letter at fairly short notice, so he thought that they would like to have this forewarning in case there are any matters on which they may wish to take advice before giving their views on the delegates' brief.

I am copying this to Andrew Turnbull (No.10), David Peretz (Treasury), Callum McCarthy (Trade and Industry), Richard Gardiner (Attorney General), and Richard Hatfield (Cabinet Office).

Yours,

Diana

MISS D A NICHOLS

CONFIDENTIAL

from: W M KNIGHTON
12 November, 1984

SECRETARY OF STATE

cc PUSS Mr Spicer
Mr Lazarus
Mr Holmes
Mr Stevens
Mr Blanks
Mr Clarke
Mr Fortnam
Mr Oates
Mrs Ramsay

Mr Colegate CAA
Mr Roberts DTI
Mr Ayling DTI
Mr Healey DTI
Mr O'Neill FCO
Mr Gray FCO
Mr Aust FCO
Mr Gardiner Law Offs Dept
Mr Burgner Treasury

BE Washington
Sir O Wright
Mr Maynard

AVIATION AND US ANTITRUST: THE 'LAKER' ISSUE

In our third round of discussions with the US about future arrangements we made further progress (see Washington telno 3355 at Annex A). It may be possible in the next round on 19-21 November to complete a package which in itself could be commended to Ministers. On the prospect for indictments there are contradictory signals.

2 At the outset of the discussions we said you were concerned that the US side were trying to expand the outline package to cover a substantial renegotiation of Bermuda 2, which was inappropriate and for which in any case there was no time. Your message to Mrs Dole, which HM Ambassador arranged to deliver on Thursday, backed this up. The US side made a brief stand on the proposition that they needed capacity and market entry liberalisation, as well as fare liberalisation, in order to sell the removal of treble damages to the Congress. But when we resisted this they quickly resumed discussions on the basis of fare liberalisation alone.

3 We got the US side to engage in a practical discussion of the problems they have seen in the 'sum of sector' policy which the CAA apply to fares to and from points behind the gateways, and which we regard as necessary to provide for fair competition with US airlines, and also providing a fare set by competitive market forces. They seemed as a result to understand it better and while they have not yet committed themselves, they may now be readier to accept it. In a bizarre closing discussion, after consulting their airlines, the US side - or at least the aviation experts - seemed to be drawing back and hinting that they might wish for less liberalisation than they had pressed for throughout the earlier discussion.

4 On the arrangements for requiring transparency of airline discussions on tariffs we concentrated on developing arrangements for consultation on enforcement. Our reasoning is that if the US side feel we are prepared to commit ourselves wholeheartedly to this change of policy, they may be more ready to give weight to this as a factor against indictments; and that consultation arrangements could give us some influence to use against over-harsh enforcement by the US. Mr Seiden (DoJ) to our surprise volunteered that he would also consider as part of the package an 'amnesty' for any past conduct of the airlines (we understood this as not including the Laker issues); we should not yet regard this as a firm proposal, but it was symptomatic of the apparent wish to secure these arrangements.

5 At the finish the US side were talking of completing negotiations and drafting on a future arrangements package by 21 November.

6 On the other hand, in respect of indictments against individuals, the noises from the DoJ are as minatory as ever, though difficult to interpret since the Washington counsel for the individuals seems to have appalling personal relations with the DoJ enforcment staff (see Washington telno 3361, not annexed).

Comment

7 Next week may be an important time in Washington. The US will have to sort out a position, taking account of airline unease about too much tariff liberalisation and Administration hawks on antitrust (eg the Deputy Secretary for Transportation) who may not want to see abolition of treble damages at all.

8 Upsets apart, it seems possible that next week a deal on future arrangements on the lines indicated at Annex B may be attainable. A text embodying such a deal might be agreed in essentials, subject to further consideration of detailed drafting, and ad referendum to Governments. We should envisage deferring our decision until the US had decided on indictments, and until we had then explored what US help on the Laker civil suits might be forthcoming (US contacts agree with our own feeling that it would be counter-productive to discuss this before the DoJ has taken decisions on indictments).

9 However, we cannot expect to renegotiate the deal later if it is struck next week, and we must therefore review our brief before then. We shall be meeting the airlines on Wednesday and will advise you of their views (as you know, they were broadly content when we consulted them after the first round). We should also by then know the views of the CAA Board (Mr Colegate took part in the Washington discussions). You will wish to give your colleagues an opportunity to comment; and in particular you will wish to agree with them on the response to the US request that we should agree not to use the PTI Act to hamper their enforcement of contemplated arrangements for enforcing transparency; I shall be discussing this with DTI officials tomorrow.

10 We will submit further advice after the meeting on Wednesday.

W.M.K.

W M KNIGHTON
Deputy Secretary
S.11/04, 2 Marsham St.
212 3109
12 November, 1984

Annex A

GPS 500

CONFIDENTIAL

DESKBY 120900Z

FROM WASHINGTON 100023Z NOV 84.

TO IMMEDIATE F C O

TELEGRAM NUMBER 3355 OF 9 NOVEMBER.

MR.KNIGHTON.
DEPT OF TRANSPORT.
2.MARSHAM STREET.

LAKER: FUTURE ARRANGEMENTS.

SUMMARY

1. FURTHER PROGRESS IN A THIRD ROUND OF NEGOTIATIONS. A FINAL ROUND IN LONDON 19-21 NOVEMBER.

DETAIL

2. A THIRD ROUND OF CONSULTATIONS ABOUT NEW ARRANGEMENTS FOR MANAGING THE RELATIONSHIP BETWEEN US ANTI-TRUST LAW AND BILATERAL AVIATION MATTERS TOOK PLACE IN WASHINGTON 8-9 NOVEMBER. UK DELEGATION WAS LED BY KNIGHTON (DTP) AND US DELEGATION WAS LED JOINTLY BY SEINDEN (JUSTICE DEPARTMENT) AND WILLIS (STATE DEPARTMENT).

3. KNIGHTON EMPHASISED AT THE START OF THE MEETINGS THAT, BASED ON HIS REPORT ON THE PROGRESS THUS FAR MADE. HIS MINISTER WAS CONCERNED THAT THE NEGOTIATIONS WERE EXPANDING BEYOND THE ORIGINAL FRAMEWORK. THE CORE OF THE NEGOTIATIONS MUST BE A RESOLUTION OF THE ANTI-TRUST ISSUES. THIS INVOLVED SIGNIFICANT CONCESSIONS BY THE UK CONCERNING THE POLICY TOWARD INTER-CARRIER DISCUSSION OF PRICING AND ON THE US SIDE A COMMITMENT TO ABOLISH THE THREAT OF CIVIL ANTI-TRUST LIABILITY FOR UK AIRLINES. HOW THIS WAS PRESENTED TO CONGRESS WAS A MATTER FOR THE US GOVERNMENT. WE HAD AGREED TO CONSIDER SOME LIBERALISATION OF THE TARIFF REGIME IN ORDER TO ASSIST THIS PROCESS BUT IT HAD NOT BEEN ENVISAGED THAT NEGOTIATIONS WOULD INVOLVE CHANGES IN THE CAPACITY AND ROUTE ENTRY REGIME. THE UK WAS IN NO WAY REPUDIATING THE BASIC FRAMEWORK OF THE NEGOTIATIONS AND WAS READY TO ENGAGE IN SERIOUS DISCUSSION OF A LIBERALISED TARIFF REGIME. BUT 'WHOLESALE RENEGOTIATION OF BERMUDA 2 WAS NOT POSSIBLE'.

4. ALTHOUGH THE US DELEGATION EXPRESSED CONSIDERABLE DISAPPOINTMENT AND OCCASIONALLY PROBED THE FIRMNESS OF THE UK POSITION, THE SUBSEQUENT NEGOTIATIONS WERE CONFINED TO THE FRAMEWORK SET OUT IN THE OPENING STATEMENT.

5. ON THE ANTI-TRUST REGIME FOR INTER-CARRIER DISCUSSIONS THE NEGOTIATIONS MADE SOLID PROGRESS. PARTICULAR DEVELOPMENTS OF NOTE WERE:-

(A) THE US, CONTINUED TO PRESS FOR UNDERTAKINGS FROM THE UK CONCERNING RESTRAINT IN THE USE OF THE PTI ACT:

(B) THE US RECOGNISED THE UK CONCERN TO AVOID DOCUMENTS OBTAINED UNDER THE PUBLIC ENFORCEMENT MEASURES BEING USED FOR ANY OTHER PURPOSES (EG SEC, IRS):

(C) IT WAS AGREED THAT ONE OF THE FACTORS INFLUENCING A DECISION TO START A PROSECUTION WOULD BE WHETHER THE OTHER PARTY TO THE AGREEMENT WAS CONTEMPLATING OR HAD STARTED A SIMILAR PROSECUTION.

6. THE DISCUSSION OF TARIFF LIBERALISATION WAS MORE DIFFICULT. THE US RESISTED STRENUOUSLY THE UK VIEW THAT FOR FARES TO AND FROM ''BEHIND POINTS'' A SUM OF SECTOR FARE POLICY WOULD BE ESSENTIAL TO PROVIDE FOR FAIR ANDEQUAL OPPORTUNITY. HOWEVER AFTER A DISCUSSION OF PRACTICAL PROBLEMS THAT HAD ARISEN IN THE PAST, THE US DELEGATION INDICATED THAT WITH SOME IMPROVEMENTS IN THE IMPLEMENTATION OF THE POLICY AND SUBJECT TO CONSULTATION WITH US CARRIERS, THE REGIME MIGHT IN FACT BE ACCEPTABLE.

7. ON FARES BETWEEN GATEWAYS THE UK INDICATED WILLINGNESS TO MOVE TO A DOUBLE DISAPPROVAL REGIME SUBJECT TO AN ADEQUATE SAFEGUARD MECHANISM TO PREVENT MARKET DISRUPTION. RIGHT AT THE END OF THE DISCUSSION, THERE WERE SIGNS THAT US AIRLINES WERE BECOMING APPREHENSIVE THAT THE TARIFF REGIME MIGHT BECOME TOO LIBERAL, AND THAT THIS WAS CAUSING SOME DISARRY IN THE US DELEGATION.

8. IT WAS AGREED THAT SUFFICIENT PROGRESS HAD BEEN MADE ON THE SUBSTANCE TO ANTICIPATE THAT THE NEXT ROUND OF NEGOTIATIONS IN LONDON COULD PROVIDE A PACKAGE ON FUTURE ARRANGEMENTS. IT WOULD THEN BE FOR GOVERNMENTS TO DECIDE WHETHER THIS, TAKING INTO ACCOUNT OTHER ELEMENTS (IE FOR THE UK THE POSITION ON THE INDICTMENTS AND ON ANY US HELP IN RELATION TO THE CIVIL SUITS) WOULD PROVIDE THE BASIS FOR OVERALL SETTLEMENT OF THE INTER-GOVERNMENTAL ISSUES.

WRIGHT

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES

LIMITED

MAED
NAD
NEWS D
ERD
LEGAL ADVISERS
PS
PS/LADY YOUNG
PS/MR RENTON
PS/PUS
MR BRAITHWAITE
MR J THOMAS
MR O'NEILL
MR DAVID THOMAS

ADDITIONAL DISTRIBUTION
US ANTI-TRUST ACTION
AGAINST BRITISH AIRLINES

COPIES TO:-
MR CARTLEDGE CABINET OFFICE

Annex B

FUTURE ARRANGEMENTS: OUTLINE OF SETTLEMENT

Transparency

1 British and US airlines may discuss fares and conclude fares agreements with each other and with airlines of third countries flying between Britain and the US, provided that they give advance notice of discussions so that Govern ment observers can attend and that they provide minutes of meetings.

2 Britain and the US will both penalise airline discussions and agreements on fares not conducted according to the arrangements at 1. There will be co-operation over enforcement. [The UK would not use the PTI Act to hinder enforcement of the agreed arrangements, subject to satisfactory assurances to prevent or limit any wider use of UK located information]. There may be a Department of Justice 'amnesty' in respect of any past inter-airline discussions.

3 US antitrust law enforcement will not touch airport scheduling committees as such at UK airports. [The position on other airline discussions on capacity/scheduling remains to be clarified].

4 Discussions between Governments and their own airlines are unaffected by 1-3.

Removal of civil treble damage liability

5 Civil treble damage antitrust actions will not be possible against British airlines in respect of their scheduled operations to and from the US.

Liberalisation of arrangements for establishing fares

6 Arrangements for establishing fares will be liberalised -

a) For fares between the gateway points, airline proposals will be approved unless the Governments agree that they are unfairly low [the mechanism for this is still under discussion] or unless the Government of the airline considers them too high.

b) Fares to and from points behind gateways will be dealt with as at (a), if they are not lower than the sum of fares with comparable conditions for the transAtlantic sector between gateways and for the sector between the gateway and the behind point (by whatever routeing). Fares which are lower than the sum of sectors fare will be treated as at present (which means that either country can ultimately disapprove them).

Interlinking

7 All the above would be inter-related obligations. They would come into force when the US passed the necessary legislation. The US would probably make them specific to their overall aviation relations with us being not less liberal than at present.

CONFIDENTIAL

FILE

de

10 DOWNING STREET

From the Private Secretary

8 November 1984

Dear Callum,

Laker

I enclose an excerpt from the record of the Prime Minister's conversation with the US Ambassador today, dealing with Laker.

I am copying this letter and enclosure to Dinah Nichols (Department of Transport), Henry Steel (Law Officers' Department) and David Peretz (HM Treasury).

Yours sincerely

C.D. Powell

Callum McCarthy, Esq.,
Department of Trade and Industry.

CONFIDENTIAL

7. Ambassador Price raised the question of Laker (just beating the Prime Minister to the draw). He was concerned that the issue should not get out of hand or emotions run riot. It was a dispute which needed to be managed carefully. By his own interpretation of Article 12(4) of the Bermuda Agreement the United States was on strong ground in acting as it had. The Prime Minister said that she took a very grave view of the matter. While she welcomed the official talks which were going on and which seemed to be making some progress, it must be clear that if the Department of Justice were to bring indictments against British airlines and former British Airways' employees, we should face a very difficult situation. It would be worse, distinctly worse, than the Siberian pipeline dispute. She very much hoped that the Department of Justice would exercise its discretion not to indict.

26 JD

10 DOWNING STREET

From the Principal Private Secretary

8 November, 1984.

Just a note to thank you very much for your letter of 2 November and taking the trouble to explain the procedure if British Airways were to plead no contest.

As you will know, the Prime Minister and the Ambassador had a word about this subject at their meeting today, and it was very useful to have your letter in advance of that meeting.

I look forward to meeting you again soon.

The Hon. R.G.H. Seitz

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ZZ NEW DELHI

GRS 150
CONFIDENTIAL
FM FCO 031100Z NOV 84
TO FLASH NEW DELHI
TELEGRAM NUMBER 788 OF 3 NOVEMBER 1984
PLEASE PASS TO PRIME MINISTER IN TIME FOR HER MEETING WITH SECRETARY OF STATE SHULTZ.
LAKER : LONDON CONSULTATIONS 1/2 NOVEMBER
1. LATEST ROUND OF OFFICIAL CONSULTATIONS WITH AMERICANS ON QUOTE FUTURE ARRANGEMENTS UNQUOTE IN LAKER DISPUTE ENDED IN LONDON ON 2 NOVEMBER. NEXT ROUND WILL BE IN WASHINGTON 8/9 NOVEMBER.
2. TALKS WERE FRIENDLY AND FRANK. PROGRESS MADE ON DETAIL OF AGREEMENT TO ALLOW QUOTE TRANSPARENT UNQUOTE INTER-AIRLINE DISCUSSIONS ON TARIFFS IN RETURN FOR NEW US LEGISLATION TO RELIEVE BILATERAL AIR SERVICES OF CIVIL ANTI-TRUST LIABILITY, BUT STILL A LONG WAY TO GO ON REST OF PACKAGE, IE MORE LIBERAL ARRANGEMENTS FOR TARIFF SETTING.
3. CHEAP WINTER FARES PROBLEM STILL UNRESOLVED: US SIDE AGREED TO CONSIDER OUR IDEAS TO TIGHTEN US ANTI-TRUST IMMUNITY GUARANTEES SO FAR OFFERED.
HOWE

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EMBASSY OF THE UNITED STATES OF AMERICA

LONDON

November 2, 1984

Mr. Robin Butler
Private Secretary to the
Prime Minister
10 Downing Street
London SW1

Dear Robin:

I wanted to get back to you on one point which you raised at lunch.

If indictments against British Airways are handed down by the Department of Justice and if B.A. pleads no-contest, a Federal judge would fix the fine. Last year we negotiated a "non-paper" with HMG which sets forth terms for a no-contest plea. I understand the fines would not exceed $1 million per count. There are likely to be two counts.

On a more general concern, I have taken some time to inform myself about this complicated case. I am convinced that: (1) the U.S. has a telling legal case entirely consistent with the Bermuda II agreement; (2) a no-contest plea is a quick and acceptable way to close the matter; (3) a no-contest plea (largely because evidence is sealed) will make it more difficult for private litigants to pursue their antitrust cases in U.S. courts; and (4) there is presently under way a genuine effort on the part of officials on both sides of the Atlantic to work out a supplementary agreement to Bermuda II which would foreclose the likelihood of similar cases arising in the future.

As I mentioned to you, my deepest concern is that emotional reactions might carry the political day. This would be unfortunate. I do not believe the legal analysis would support the contention that the case represents an act of extraterritorial hubris. When the facts are assembled, the conclusion is different.

I hope we can continue to have the opportunity -- perhaps under the Powell umbrella -- to get together from time to time.

Sincerely yours,

Raymond

R. G. H. Seitz
Minister

CONFIDENTIAL

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CC No 2

DEPARTMENT OF TRANSPORT
2 MARSHAM STREET LONDON SW1P 3EB

01-212 3434

NBPM

AT 31/10

L V Appleyard Esq
Private Secretary to
The Rt Hon Sir Geoffrey Howe QC MP
Secretary of State for Foreign
and Commonwealth Affairs
Foreign and Commonwealth Office
Downing Street
LONDON SW1

30th October 1984

Dear Len,

AVIATION AND US ANTITRUST: THE 'LAKER' ISSUE

I enclose a copy of the report to my Secretary of State by Mr Knighton, as the leader of the delegation which had talks with the US in Washington last week on the 'Laker' aviation dispute. Your officials will have received this direct.

Unless any colleague would like one, my Secretary of State sees no need for a further meeting of Ministers before the next round of discussions with the US. But he would however like to point out that he endorses the recommendations on immediate tactics at paragraphs 13-15 of the report.

Copies go to Andrew Turnbull (No 10), David Peretz (Treasury), Callum McCarthy (Trade and Industry), Richard Gardiner (Attorney General), and Richard Hatfield (Cabinet Office).

Yours,

Dinah

MISS D A NICHOLS
Private Secretary

CONFIDENTIAL

from: W M KNIGHTON
29 October, 1984

SECRETARY OF STATE

cc PUSS Mr Spicer
Mr Lazarus
Mr Holmes
Mr Stevens
Mr Blanks
Mr Clarke
Mr Beetham
Mr Oates
Mr Fortnam
Mr Wakeling
Mr Reardon
Mrs Ramsay

Mr Roberts DTI
Mr Ayling DTI
Mr Healey DTI
Mr O'Neill FCO
Mr Aust FCO
Mr Chase FCO
Mr Gardiner
Law Off Dept
Mr Burgner Trsy

BE Washington

Sir O Wright
Mr Braithwaite
Mr Maynard

AVIATION AND US ANTITRUST: THE 'LAKER' ISSUE

An account of our consultations with the US last week is in Washington telno 3205 at Annex A and Sir Oliver Wright's comments in telno 3204 at Annex B. In this report I summarise and give my own comments.

2 Briefly, on prospective indictments the Department of Justice (DoJ) were clear that they had evidence of breaches of US criminal law. Our briefing in Washington produced nothing to counter this as regards price fixing between British Airways (BA) and Laker; as regards agreements on scheduling between BA and Pan Am, although BA's attorneys had said the evidence of any agreements were predominantly circumstantial, the DoJ claimed clear evidence of agreements. We presented the considerations (Washington telno 3206 at Annex C) which we argued should lead the DoJ as a matter of comity (self-restraint) not to prefer indictments against our companies, or, especially, the individuals. Mr McGrath, the Assistant Attorney General for antitrust, raised critical 'observations' to which we replied. He gave no clues about his decision - certainly nothing of cheer. The DoJ will be seeing the attorneys for BA and the individuals this week as the next stage in their process. I formally asked that, if after consideration they were still minded to indict, we should be informed of this before final decisions were taken.

3 On future arrangements for Bermuda 2, the important development was that the US side can contemplate going to a new Congress to propose removing private civil antitrust liability (treble damage suits) from aviation. The necessary quid pro quo, for competition policy and associated political reasons is sufficient liberalisation in the bilateral arrangements for establishing aviation tariffs, to enable this to be justified to the Congress. Thus, it appears that this change would be limited to the aviation agreements with particular bilateral partners. As in June, the US was prepared to some inter-airline discussion on tariffs subject to transparency; but they continue to oppose discussion of capacity or scheduling. We maintained our readiness to compel transparency.

4 On the Laker civil suits, while we reiterated that we were looking for something here as part of an overall settlement and the US agreed we should need to discuss this, I deliberately deferred doing so, because their stance will be influenced by the outcome on indictments.

5 On winter low fares, the US made a further proposal, which we have undertaken to consider, for establishing that they do not consider the fares predatory. But it appears that this would still not proof them against treble damage actions, or against DoJ enforcement if there should prove to have been inter airline discussion prior to the filings. We have sought advice on this from our US attorneys. Our immediate reaction was to warn that Ministers were unlikely to be satisfied with anything less than watertight; and that we could give no expectation of a favourable response before 1 November.

6 We are meeting the US side in London on Thursday 1st-Saturday 3rd November and have also reserved 7-9 November, 19-21 November and the week of 26 November. We must maintain momentum. We think Mr McGrath will strongly wish to decide on the indictments before 7 December, when the present Grand Jury's life expires.

Assessment

7 These discussions have opened for the first time a prospect of achieving our objective on future arrangements (para 2 c of the officials' paper which you recently circulated to your colleagues). We want to secure this as far as possible before the privatisation of BA. The US have clearly taken a seminal step at senior level in being ready to get rid of the treble damage suit from aviation and more than once emphasised that they had decided to 'keep it simple' and not have it applying in some circumstances but not in others.

8 But their price is mostly in furthering US commercial aviation objectives. We are not yet clear after initial probing just what this price will be: indeed, the US position is not finally determined. So we have to feel our way forward, rapidly.

9 On fares liberalisation, I have warned the US side against locking themselves into too high a demand pointing out that your over-riding objective is to restore the bilateral to health in respect of antitrust, before considering changes in the commercial side of it. I did this partly for negotiating tactics. But partly because your objective on the commercial side combines a wish to reduce regulation, with maintaining sufficient ability to fight unfair trading, including dumping. The Bermuda 2 safeguards against dumping are partly in the tariff provisions, partly in the capacity provisions of Annex 2, which expire on 23 July 1986 unless renewed in some form by agreement of both parties, and partly in the general provisions on fair competition in Article 11. In the early 1970s we had only the first and third of these safeguards and these proved inadequate when the US airlines were ruthlessly dumping capacity in a way that they could afford to do because of the size of their home market. We had a number of rows; despite these our market share dropped to 25 per cent. It is now around 35 per cent. This was part of the background to the negotiation of Bermuda 2.

10 Looking as you are for reduction of regulation, it is logical to tackle fares first, capacity second and market entry third, as we are doing in Europe. But you may have hesitations in the Bermuda 2 case about a major loosening up on fares until you are clearer about the future of the capacity arrangements (on which Mr Stevens has been having preliminary informal discussions with the US, planned quite separately, this last weekend). You will want the views of the CAA and of our airlines on this and on the US ideas on transparency and we are seeking these.

11 A package acceptable in itself on future arrangements is likely to be tied by the US to the competition content of Bermuda 2. This seems both unavoidable and acceptable. It could be agreed in advance, but come into force only after legislation to enable the US to move on treble damages, thus reducing the risk of a second negotiation inspired by the US Congress. We shall want to tie it to the absence of any indictments; but it may not be possible to discuss this with the DoJ; and it may prove unnegotiable. We need not yet decide whether you would be prepared to acquiesce in some indictments. We should aim to seal off any new DoJ investigation of past conduct: if this could be done in time, it would help over the BCal US documents, which for the time being BCal are still able to withhold. I would still aim for some DoJ help on the civil suits, eg an indication that they had found no evidence of predation against Laker.

12 Our disapproval of the winter low fares and our manifest intention to enforce this has clearly helped greatly to concentrate minds in Washington on our proposition that the aviation agreement is in disarray. It has thus for the present supplied the leverage we were seeking. And the impact on the airlines

will touch US commercial interests. We shall be advising on the latest US proposal when US legal advice is available. But without the 100 per cent security from treble damage action which seems unlikely to be available, I think we should be justified in declining to approve the low fares for the time being. If we can arrange an overall settlement by end November or early December, we might then be justified in taking a risk. At that stage we could be looking for a good atmosphere in the Congress.

13 The gathering of evidence which would enable enforcement against carriage at the disapproved low fares needs to be handled with care: as far as possible it should be directed at airlines rather than passengers. Our stance should be to maintain our position firmly, rather than, at this stage, to raise the temperature. We shall discuss with Mr Spicer.

14 For contacts in the coming days with senior US people (outside the Justice Department) I recommend that Ministers might take the following line. The discussion of future arrangements has opened up a possibility of sensible settlement of the dispute: but there is a long way to go. The prospects could yet be jeopardised if the DoJ decided to indict; this would present Ministers here with a severe political problem in accepting any settlement. Conversely, we have put considerations of principle to the DoJ on why they should not indict in this disputed matter; and agreement on future arrangements would further strengthen these considerations: so if we agree on the prevention of anticompetitive actions by airlines for the future, the DoJ should consider leniency (in their terms) for the past.

15 We do not recommend a high level message on indictments at this stage. But the Embassy will be keeping their ears to the ground with this in mind.

W.M.K.

W M KNIGHTON
Deputy Secretary
S.11/04, 2 Marsham St.
212 3109
29 October, 1984

File

GRS 750
CONFIDENTIAL
DESKBY 310900Z
FM WASHINGTON 302159Z OCT 84
TO IMMEDIATE FCO
TELEGRAM NUMBER 3221 OF 30 OCTOBER

LAKER: MY TELNO 3204 AND JERUSALEM TEL NO 106

SUMMARY

1. I SAW DEPUTY SECRETARY DAM TODAY TO REVIEW THE POSITION REACHED IN THE LAKER ISSUE IN THE LIGHT OF THE CONSULTATIONS LAST WEEK. MODERATELY ENCOURAGING.

DETAIL

2. I SAID THAT THERE SEEMED TO BE TWO DISTINCT PARTS TO THE CONSULTATIONS: THE PROPOSED JUSTICE DEPARTMENT INDICTMENTS: AND THE DISCUSSION OF FUTURE ARRANGEMENTS. CONCERNING THE INDICTMENTS WE HAD PUT FORWARD ARGUMENTS WHICH WOULD BEAR ON THE DOJ'S PROSECUTORIAL DISCRETION. I DREW ATTENTION TO TWO GENERAL ASPECTS OF THOSE ARGUMENTS WHICH SEEMED TO BE OF CRUCIAL IMPORTANCE TO HMG'S APPROACH TO THE MATTER AND THEREFORE WE HOPED OF PARTICULAR INTEREST TO THE STATE DEPARTMENT. FIRST, WE CONSIDERED IT UNWISE FOR THE DOJ TO PROCEED WITH A PROSECUTION ON A MATTER WHICH THEY KNEW WOULD BE AN ATTEMPT TO IMPOSE THEIR POLICIES ON THE UK IN AN AREA WHICH WAS PRE-EMINENTLY INTERNATIONAL. SECONDLY, THE EVIDENCE ON WHICH THE DOJ WOULD BASE ANY INDICTMENTS RELATED TO AN ARRANGEMENT BETWEEN TWO BRITISH AIRLINES, AN ACTION NOT PUNISHABLE UNDER BRITISH LAW, DEPENDED ON EVIDENCE FOUND IN THE UK, AND PROVIDED BY A PARTY WHOSE MOTIVATION MUST BE SUSPECT. I POINTED OUT THAT HMG WOULD FIND IT VERY HARD TO ACCEPT INDICTMENTS ON THAT BASIS AND I HOPED THAT THE STATE DEPARTMENT WOULD ENSURE THAT THESE POINTS WERE AT THE FOREFRONT OF THE CONSIDERATION BY THE JUSTICE DEPARTMENT.

3. THE SECOND PART OF THE CONSULTATIONS RELATED TO THE FACT THAT BOTH GOVERNMENTS NOW AGREED THAT THERE WAS A PRACTICAL PROBLEM OF MANAGING THE AVIATION RELATIONSHIP AND THAT SOLUTIONS HAD TO BE FOUND. WHILE WE UNDERSTOOD AND ACCEPTED THAT THE JUSTICE DEPARTMENT MUST DECIDE ABOUT THE INDICTMENTS STRICTLY IN ACCORDANCE WITH US LAW AND THAT THEY MUST MAINTAIN A DISTINCTION BETWEEN THE DISCUSSIONS ON FUTURE ARRANGEMENTS AND INDICTMENTS, COMMON SENSE SUGGESTED THAT THE TWO COULD NOT BE ENTIRELY DIVORCED. IF THE GOVERNMENTS FOUND A SOLUTION TO THE PRACTICAL PROBLEMS THAT AROSE FROM THE CONFLICTS OF POLICY IN LAW THERE SHOULD BE SOME FEEDBACK TO THE DOJ'S CONSIDERATION OF INDICTMENTS: THERE WOULD NOT SEEM MUCH SENSE IN PROCEEDING WITH A PROSECUTION IF AN AGREED SOLUTION TO THE PRACTICAL PROBLEMS WOULD SATISFY BOTH GOVERNMENTS.

4. DAM, WHO INDICATED THAT HE HAD SINCE OUR LAST MEETING GIVEN MORE CAREFUL ATTENTION TO THE ISSUE, UNDERTOOK TO EMPHASISE THE

/ POINTS

POINTS AT PARA 2 ABOVE TO THE DOJ. HE COMMENTED, HOWEVER, THAT WITH THE NARROWING OF THE DOJ'S PROPOSED INDICTMENTS (IE THE ELIMINATION OF THE PREDATORY PRICING ALLEGATION AND THE HOLLYWOOD PRICE FIXING ALLEGATION) THE LIKELY RISKS TO THE BRITISH AIRLINES IN RESULTING TREBLE DAMAGE ACTIONS WAS MUCH REDUCED. HMG NEEDED TO KEEP A SENSE OF PROPORTION. NEVERTHELESS HE RECOGNISED THE IMPORTANCE OF THE CONTINUING DISCUSSIONS IN RESOLVING THE RESULTING PRACTICAL PROBLEMS AND SAID THAT HE RECOGNISED THE POSSIBLE LINKAGE WITH THE INDICTMENTS. THIS WOULD HOWEVER, BE DIFFICULT AND WOULD HAVE TO BE RELATED MORE TO THE PROSECUTORIAL DISCRETION OF THE DOJ RATHER THAN ANY AUTOMATIC RETROACTIVITY IN AN AGREEMENT ON FUTURE ARRANGEMENTS.

COMMENT

5. DAM'S RESPONSE WAS SOMEWHAT MORE FORTHCOMING THAN HITHERTO (SEE MY TELNO 2967). IN PARTICULAR HIS CALM IF CAUTIOUS RESPONSE TO LINKAGE SUGGESTS THAT WE ARE RIGHT IN SEEING THE NEGOTIATIONS THIS WEEK AS HAVING SOME INFLUENCE ON THE DOJ'S VIEW OF THE INDICTMENTS. AS TO A POSSIBLE MESSAGE, I AM GLAD THAT YOU AGREE THAT A MESSAGE AT THE RIGHT TIME WOULD BE OPPORTUNE AND AM GRATEFUL THAT YOU WOULD BE PREPARED TO WRITE TO SHULTZ.
AS TO TIMING, IN VIEW OF MY TALK WITH DAM, AND BEARING IN MIND THAT WE ALSO UNDERSTAND THAT THE DOJ ARE DELAYING DISCUSSIONS WITH THE AIRLINES' ATTORNEYS ABOUT THE INDICTMENTS I THINK THAT THE RIGHT MOMENT MIGHT WELL BE WHEN WE HAVE SOME FEEL FOR THE OUTCOME OF THIS WEEKS TALKS.

FCO PLEASE ADVANCE TO KNIGHTON, STEVENS, FORTNAM (DTP), AYLING HEALEY (DTI), O'NEILL, GRAY (MAED), AUST (LEGAL ADVISERS), GARDINER (LOD)

WRIGHT

(ADVANCED AS REQUESTED)

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES

LIMITED

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LEGAL ADVISERS
PS
PS/LADY YOUNG
PS/MR RENTON
PS/PUS
SIR C TICKELL
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MR O'NEILL
MR DAVID THOMAS

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AGAINST BRITISH AIRLINES

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MR FREELAND, Legal Advisers
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ED/NAD
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MR HOLMES
MR KNIGHTON
MR WAKELING
MR ~~[illegible]~~ FORNAR
} DEPT OF TRANSPORT

MR ROBERTS
MR ~~[illegible]~~ AC HUTTON
MR HEALEY OT2
MR BECKETT (Solicitors)
MR AYLING (")
POWELL
} DTI

MR ~~COLES~~ 10 DOWNING ST

MR GARDINER, ATTORNEY GENERAL'S OFFICE

DESKBY 290900Z

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FM WASHINGTON 280359Z
TO IMMEDIATE FCO
TELEGRAM NUMBER 3206 OF 26 OCTOBER 1984

MIPT
COMITY POINTS

1. ON THE ASSUMPTION THAT THE JUSTICE DEPARTMENT CAN ESTABLISH THE FACTS WHICH CAN JUSTIFY THE INDICTMENTS, IN PARTICULAR THAT TWO UK CARRIERS IN LODON DISCUSSED FARES PRIOR TO THEIR APPROVEL BY CAA, HMG URGES THAT THE DOJ SHOULD NEVERTHELESS NOT INDICT EITHER BRITISH AIRLINES OR THEIR OFFICIALS BECAUSE

- IT IS THE VIEW OF HMG THAT SUCH INDICTMENTS WOULD BE A DIRECT ATTACK ON UK POLICY WHICH PERMITS AND ENCOURAGES FARE DISCUSSIONS BETWEEN AIRLINES AND A FORTIORI BRITISH AIRLINES.
- THIS POLICY REFLECTS THE HISTORICAL INTERNATIONAL ARRANGEMENT IN CIVIL AVIATION. MANY BILATERAL AGREEMENTS EXPRESSLY PROVIDE THAT AIRLINES WILL DISCUSS FARES
- IT WAS SPECIFICALLY THE POLICY OF HMG DURING 1981 THAT THE FARES OF UK AIRLINES SHOULD BE INCREASED
- IT IS OUR POLICY (THE MERITS OF WHICH ARE NOT OPEN TO DEBATE) AND WHICH WE INVITE YOU TO ACCEPT AS BEING THE BONA FIDE POLICIES OF OUR GOVERNMENT
- IN EFFECT A DECISION TO INDICT WOULD BE THE UNILATERAL IMPOSITION BY THE US OF ITS POLICY IN RELATION TO UK AIRLINES
- FARES ARE APPROVED BY UK AUTHORITIES BY OBJECTIVE STANDARDS TO PROTECT THE CONSUMER. ALL THE FARES THE SUBJECT OF THE PROPOSED INDICTMENTS WERE APPROVED BY THE CAA
- THE AIRLINES ARE BRITISH: THE INDIVIDUALS RESIDE AND RESIDED IN THE UK AND ARE BRITISH CITIZENS
- THE FACT, IN RELATION TO THE INDIVIDUALS, THAT THEY SHOULD NOT BE PENALISED FOR ACTING IN ACCORDANCE WITH THE POLICY OF THE BRITISH GOVERNMENT THE POLICY OF THEIEIR EMPLOYER A BRITISH DESIGNATED AIRLINE, AND FOR DOING IN THE UK WHAT

A BRITISH DESIGNATED AIRLINE, AND FOR DOING IN THE UK WHAT IS LAWFUL THERE

- THE EXTENT TO WHICH THE ACTIVITY IN QUESTION TOOK PLACE OUTSIDE THE UNITED STATES
- THE FACT THAT SINCE THE UK IS ENTITLED TO DESIGNATE ONE, OR MORE, AIRLINES THE COMPETITIVE CONSEQUENCES INTER SE OF DESIGNATING MORE THAN ONE AIRLINE ARE PRINCIPALLY A MATTER FOR UK
- IN ECONOMIC AND PLITICAL TERMS THE DESIGNATION OF MORE THAN ONE UK AIRLINE SHOULD LEAD THE DOJ TO TREAT AGREEMENT BETWEEN UK AIRLINES INTER SE AS DECISIONS WITHIN THE UNDERTAKING (ANALOGOUS TO AGREEMENTS BETWEEN SUBSIDIANES AND PARENTS)
- THE FACT THAT UNILATERAL ENFORECEMENT OF ANTI-TRUST CANNOT ACHIEVE POLICY OF US LAW WITHOUT AGREEMENT OF UK: HMG COULD EXERCISE ITS SOVERIEGN POWER TO COMPETL AIRLINES TO DISCUSS FARES OR SCHEDULES BEFORE FILINGS ARE MADE WITH CAA
- THE FACT THAT HMG DID NOT KNOW AT THE TIME OF THE EVENTS IN QUESTION AND WOULD NOT HAVE ACCEPTED THAT DISCUSSIONS BETWEEN TWO UK CARRIERS COULD UNDER US LAW ATTRACT ANTI-TRUST LIABILITY. IT IS WHOLLY UNREALISTIC TO ATTRIBUTE SUCH KNOWLEDGE TO UK ARILINES
- THE US INTEREST IS THE PROTECTION OF US CONSUMERS. THE INTEREST OF UK IS TO PROTECT UK AIRLINES AND UK CONSUMERS. IN RELATION TO UK AIRLINES THE POLICY INTERESTS OF THE UK OUTWEICH THOSE OF US
- A CRIMINAL INDICTMENT IN THE TERMS PROPOSED AND ESPECIALLY OF THE INDIVIDUALS CONCERNED WOULD HAVE THE MOST SERIOUS CONSEQUENCES FOR OUR AVIATION RELATIONSHIP AND MORE WIDELY, AS YOU ARE AWARE
- A DECISION TO INDICT WOULD PREJUDGE AND PREJUDICE THE OUTCOME OF ANY RESOLUTION OF THE DISPUTE. THE ESSENCE OF THE US OBJECTION AS WE UNDERSTAND IT AND ITS POLICY OBJECTIVE IS TO PREVENT SECRET AGREEMENTS. THIS IS NEGOTIABLE FOR THE FUTURE.

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WRIGHT

28/05/82

GRS 1060

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FM WASHINGTON 280356Z OCT 84
TO IMMEDIATE FCO
TELEGRAM NUMBER 3205 OF 26 OCTOBER

MIPT

LAKER CONSULTATIONS

SUMMARY

1. JUSTICE DEPARTMENT AGREED TO CONSIDER THE ARGUMENTS PUT FORWARD BY THE BRITISH IN REACHING THEIR DECISION ON THE POSSIBLE INDICTMENT OF BRITISH AIRWAYS. ON FUTURE ARRANGEMENTS US TABLED NEW PROPOSALS WHICH INCLUDED THROUGH LEGISLATION LIMITATION OF TREBLE DAMAGE REMEDIES. DISCUSSIONS WILL BE RESUMED NEXT WEEK IN LONDON.

DETAIL

2. THE UK DELEGATION LED BY KNIGHTON (DTP) HAD CONSULTATIONS WITH THE DEPARTMENT OF JUSTICE ON 24/26 OCTOBER CONCERNING THE PRELIMINARY INTENTIONS OF THE JUSTICE DEPARTMENT TO INDICT BRITISH AIRWAYS AND A NUMBER OF UK CITIZENS UNDER THE US ANTI-TRUST LAWS. MCGRATH (JUSTICE DEPARTMENT) LED FOR THE US SUPPORTED BY REPRESENTATIVES OF THE STATE DEPARTMENT AND THE TRANSPORTATION DEPARTMENT.

3. MCGRATH GAVE A BRIEF DESCRIPTION OF THE FACTS ON WHICH THE DOJ HAD REACHED THEIR TENTATIVE CONCLUSION, DURING WHICH HE INDICATED THAT WHILE THE DOJ HAD FOUND NO EVIDENCE OF A CONSPIRACY TO PUT LAKER OUT OF BUSINESS, THEY WERE CONFIDENT THAT IN ADDITION TO THE INDICTMENTS PROPOSED THERE HAD ALSO BEEN AN ILLEGAL PRICE FIXING MEETING AT HOLLYWOOD IN EARLY 1982. THEY HAD NEVERTHELESS DECIDED NOT TO PROCEED WITH AN INDICTMENT IN THAT CASE BECAUSE OF THE INVOLVEMENT OF BRITISH OFFICIALS. HE REMINDED THE DELEGATION HOWEVER OF THE STRONG FEELINGS THAT THIS EVENT HAD AROUSED ON THE US SIDE AND WHICH HAD BEEN EXPRESSED IN SECRETARY SHULTZ'S LETTER TO MR PYM OF 30 JUNE 1983.

4. MCGRATH EMPHASISED THAT HE HAD A CLEAR DUTY AND OBLIGATION TO SEE THE LAWS OF THE UNITED STATES ENFORCED AND NOTED THAT LEGAL AUTHORITY OF THE UNITED KINGDOM, NAMELY THE HOUSE OF LORDS, HAD AGREED THAT US LAWS SHOULD PREVAIL IN THIS CASE. NEVERTHELESS HE RECOGNISED THAT BECAUSE OF THE CONCERNS EXPRESSED BY HMG A DECISION TO INDICT HAD TO BE TAKEN IN THE CONTEXT OF BROADER ISSUES. THERE WAS A DEGREE OF PROSECUTORIAL DISCRETION WHICH HE INVITED THE DELEGATION TO ADDRESS.

CONFIDENTIAL

15.

5. KNIGHTON UNDERLINED THE SERIOUS NATURE OF THE DISPUTE BETWEEN THE TWO GOVERNMENTS ON ALL MATTERS CONNECTED WITH THE LAKER CASE AND NOT JUST THE GRAND JURY INVESTIGATION. THIS WAS UNDERMINING THE FABRIC OF THE AVIATION RELATIONSHIP WHICH COULD BE BASED, AS HAD BEEN RECOGNISED FROM THE INITIATION OF AIR SERVICES, ONLY ON A BILATERALLY AGREED BASIS. THERE WAS NO ROOM IN THIS INTERNATIONAL INDUSTRY FOR UNILATERAL ACTIONS STRIKING AT THE HEART OF THE GROUND RULES FOR COMPETITION. KNIGHTON, WHILE EXPRESSING THE HOPE THAT THE JUSTICE DEPARTMENT WOULD NOT CONSIDER INDICTMENTS WITHOUT THE STRONGEST EVIDENCE, CONCENTRATED ON RESPONDING TO MCGRATH'S INVITATION TO PRESENT ARGUMENTS OF COMITY WHICH MIGHT INFLUENCE A USE OF PROSECUTORIAL DISCRETION. THE UK DELEGATION THEREFORE PRESENTED TO THE JUSTICE DEPARTMENT AN ASSESSMENT OF THE POINTS WHICH SHOULD BE TAKEN INTO ACCOUNT (SEE MIFT).

6. MCGRATH INDICATED THAT HE WOULD GIVE CAREFUL CONSIDERATION TO THE POINTS WHICH HAD BEEN RAISED BY THE DELEGATION: MANY OF THEM HAD OCCURRED TO THE JUSTICE DEPARTMENT AND ALREADY BEEN GIVEN CAREFUL THOUGHT. HE REFRAINED FROM ANY FORMAL RESPONSE TO THE POINTS ON THE BASIS THAT THEY WOULD NEED FURTHER THOUGHT. NEVERTHELESS IN SOME QUOTE OBSERVATIONS UNQUOTE MCGRATH OUTLINED THE DIFFICULTIES WHICH WOULD FACE JUSTICE DEPARTMENT IN ACCEPTING THE COMITY ARGUMENTS. IN PARTICULAR IT WOULD BE DIFFICULT FOR THE JUSTICE DEPARTMENT TO ACCEPT THAT THE UK INTEREST IN THE MATTER WAS IN ANY SENSE OVERRIDING GIVEN THE CLEAR AND SUBSTANTIAL EFFECTS ON US COMMERCE AND THE SIGNIFICANT ECONOMIC IMPACT OF THE CONSPIRACY TO FIX PRICES AND SCHEDULES. MOVEOVER, A NUMBER OF HMG'S CONCERNS DERIVED FROM AN INTERPRETATION OF BERMUDA 2 WHICH WAS NOT ACCEPTABLE TO THE US. IT WOULD THEREFORE BE DIFFICULT TO GIVE WEIGHT TO THESE ARGUMENTS. KNIGHTON POINTED OUT THAT EACH SIDE MUST RESPECT THE OTHERS VIEWS ON THE RELEVANCE OF BERMUDA 2. THERE WAS CLEARLY A DISPUTE AND THE UK POSITION IN THIS MUST BE RELEVANT TO COMITY. THE US SHOULD NOT EXCLUDE DUE CONSIDERATION OF THE MERIT OF COMITY POINTS BY ADOPTINT THEIR OWN BERMUDA 2 POSITION.

7. MCGRATH RESISTED ATTEMPTS TO EXPAND THE DISCUSSIONS UNDER HIS PERSONAL CHAIRMANSHIP INTO CONSIDERATION OF FUTURE ARRANGEMENTS: WHILE RECOGNISING THAT THE LAKER CASE AND MORE PARTICULARLY RECENT DECISIONS BY HMG IN RESPECT OF WINTER FARES UNDERLINED THE URGENCY OF FINDING MUTUALLY AGREED WAYS OF MAKING THE BILATERAL AGREEMENT WORK, MCGRATH EMPHASISED THAT THIS COULD HAVE NO RELATIONSHIP WITH THE ENFORCEMENT DECISIONS IN WHICH HE WAS PERSONALLY INVOLVED. MEANWHILE HE WOULD COMMENCE THE SERIOUS CONSIDERATION OF THE POINTS MADE BY THE UK DELEGATION.

8. HOWEVER, MCGRATH ENCOURAGED THE DELEGATION TO ENGAGE URGENTLY IN SUCH WIDER DISCUSSIONS WITH A DIFFERENTLY CONSTITUTED US DELEGATION. THERE HAVE BEEN CLEAR INDICATIONS THAT THE US WANT TO CARRY THESE WELL FORWARD BEFORE MCGRATH IS UNDER TIME PRESSURE TO TAKE HIS ENFORCEMENT DECISIONS (IT IS MOST UNLIKELY THAT HE CAN DELAY BEYOND 7 DECEMBER, WHEN THE GRAND JURY DISOLVES).

9. IN THE SUBSEQUENT DISCUSSION OF FUTURE ARRANGEMENTS THE US DELEGATION INDICATED THAT THEIR THINKING HAD INDEED MOVED SIGNIFICANTLY FORWARD FROM THE ABORTIVE DISCUSSION IN LONDON IN JUNE (YOUR TELNO 1184). THE MAIN PROPOSITIONS WHICH WERE IDENTIFIED WERE:
(A) THE US GOVERNMENT COULD CONTEMPLATE GOING TO CONGRESS TO REMOVE PRIVATE CIVIL ANTI-TRUST LIABILITY (TREBLE DAMAGE SUITS) FROM AVIATION SUBJECT TO AN OVERALL SATISFACTORY SETTLEMENT AND PROGRESS IN THE AREA OF TARIFF LIBERALISATION SUFFICIENT TO JUSTIFY SUCH LEGISLATION:
(B) THE UK, SUBJECT TO AN OVERALL SATISFACTORY SETTLEMENT, COULD CONTEMPLATE COMPELLING TRANSPORT DISCLOSURE OF ALL CARRIER COORDINATION AND PROVIDING FOR PUBLIC ENFORCEMENT OF THAT REQUIREMENT IN RELATION TO TARIFFS:
(C) THE US WOULD PERMIT, SUBJECT TO TRANSPARENCY, VOLUNTARY CARRIER COORDINATION ON TARIFFS: NEITHER PARTY HOWEVER WOULD COMPEL IT.

10. THERE WAS A BRIEF DISCUSSION OF THE POSSIBILITY THAT (B) AND (C) MIGHT INCLUDE CAPACITY ISSUE. THE US SIDE INDICATED THAT THIS WOULD BE VERY DIFFICULT FOR THEM GIVEN THEIR EVEN GREATER HISTORICAL ANTIPATHY TO AIRLINE COORDINATION OF CAPACITY AND SCHEDULING.

11. THE US SIDE MADE IT CLEAR THAT THE ESSENCE OF SUCH A DEAL FOR THEM WOULD BE A CONSIDERABLE INCREASE IN THE FREEDOM FOR AIRLINES TO SET TARIFFS UNILATERALLY WITHOUT GOVERNMENT INTERFERENCE: THIS WOULD BE ESSENTIAL TO SELL REMOVAL OF CIVIL ACTION TO THE CONGRESS. THEIR OBJECTIVE WOULD BE A DOUBLE DISAPPROVAL SYSTEM BUT THEY SEEM READY TO DISCUSS LESSER CHANGES.

12. BOTH SIDES RECOGNISED THAT THE ISSUES WERE BOTH COMPLEX AND DIFFICULT AND OF COURSE DEPENDANT ON THE QUOTE OVERALL SATISFACTORY SETTLEMENT. UNQUOTE

13. RECOGNISING THE URGENCY OF THE ISSUES IT WAS AGREED THAT DISCUSSIONS WOULD BE RENEWED IN LONDON ON 1 NOVEMBER.

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TO IMMEDIATE FCO

TELEGRAM NUMBER 3204 OF 26 OCTOBER 1984

LAKER CONSULTATIONS

I HAVE BEEN FOLLOWING VERY CLOSELY THIS WEEK'S NEGOTIATIONS, THE DETAILS OF WHICH ARE IN MY TWO I.F.T'S. I MUST CONGRATULATE MR KNIGHTON AND HIS TEAM ON THEIR ACHIEVEMENT. FOR THE FIRST TIME, WE HAVE GOT THE AMERICANS TO NEGOTIATE SERIOUSLY ON THE FUNDAMENTAL ISSUE: A PERMANENT ARRANGEMENT TO PREVENT THE US ANTITRUST LAWS UNDERMINING THE SMOOTH WORKING OF THE BILATERAL AVIATIONS RELATIONSHIP. THE AMERICANS HAVE BEEN BROUGHT TO THIS POINT BY A COMBINATION OF POLITICAL PRESSURE FROM YOURSELF AND YOUR COLLEAGUES, A GENUINE DESIRE TO AVOID A MAJOR ROW WITH THE BRITISH, AND A DAWNING REALISATION THAT THE AVIATION MACHINERY WAS INDEED BREAKING DOWN, AND NOT JUST BECAUSE OF BRITISH BLOODYMINDEDNESS.THE THREATS BY MR BRANSON OF VIRGIN ATLANTIC TO SUE EVERYONE IN SIGHT, AND OUR CONSEQUENT DISAPPROVAL OF THE CHEAP WINTER FARES, ILLUSTRATED OUR CONTENTION FORCEFULLY, AND AT JUST THE RIGHT TIME.

2. BUT THIS IS STILL ONLY THE END OF THE BEGINNING. THE DETAILS OF THE PERMANENT ARRANGEMENT WILL BE TRICKY TO NEGOTIATE. THEY WILL REQUIRE ADJUSTMENTS IN OUR OWN TRADITIONAL PRACTICES, PERHAPS MAJOR ONES. AND THE AMERICANS WILL ALMOST CERTAINLY NEED LEGISLATION, AND WILL NEED TO DEPLOY A GOOD DEAL OF POLITICAL MUSCLE ON A SUSPICIOUS CONGRESS IF THEY ARE TO GET WHAT WE REQUIRE. WE ARE STILL A VERY LONG WAY FROM HAVING ANY BANKABLE ASSURANCES.

3. MOREOVER, IT IS STILL NOT AT ALL CLEAR WHERE THE JUSTICE DEPARTMENT WILL END UP WITH THE LAKER INDICTMENTS. THEY INSIST THAT THEY ARE BOUND TO DO THERE DUTY IN THE LIGHT OF THE EVIDENCE. THEY HAVE LISTENED CAREFULLY TO OUR POLITICAL AND LEGAL ARGUMENTS THAT THEY SHOULD EXERCISE THEIR PROSECUTORIAL DISCRETION. THEY BELIEVE THAT THEY HAVE ALREADY MADE A SUBSTANTIAL CONCESSION BY DROPPING THE CHARGE INVOLVING PARTICIPATION TO IN PRICE FIXING BY A BRITISH GOVERNERS OFFICIAL. I BELIEVE THAT THEY STILL FEEL THAT TO GO BEYOND THAT, AND TO DROP THE OTHER CHARGES, WOULD NOT BE EASY TO DEFEND BEFORE THE CONGRESS, THE COURTS OR PUBLIC OPINION. THERE IS NO CHANCE THAT OTHERS IN THE US GOVERNMENT, INCLUDING THE PRESIDENT, WILL RISK OPENING THEMSELVES TO ACCUSATIONS THAT THEY HAVE PUT POLITICAL PRESSURE ON THE JUSTICE DEPARTMENT TO DEFLECT THE CAURSE OF THE LAWS.

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4. BUT THAT IS NOT THE END OF THE STORY. IN ADDITION TO THEIR DETERMINATION NOT TO SEEM TO BOW TO IMPROPER PRESSURE, WE KNOW THAT THE JUSTICE DEPARTMENT ARE WORRIED THAT, IF THEY DROP THE CASE AGAINST BRITISH AIRWAYS, THEY WILL WEAKEN THEIR ABILITY TO ENFORCE THE LAW AGAINST WRONGDOERS IN FUTURE. THIS IS WHY THEY ARE INTERESTED IN THE PERMANENT ARRANGEMENT, WHICH IF IT WORKED, WOULD ENABLE THEM TO CONTINUE DOING THEIR DUTY WITHOUT THE PROSPECT OF ENDLESS ROWES WITH THE BRITISH. CONVERSELY, THEY MAY REALISE THAT, IF THEY PURSUE BRITISH AIRWAYS RELENTLESSLY, THEIR CHANCES OF GETTING A SATISFACTORY DEAL OUT OF US WILL ALL BUT DISAPPEAR. THEY MIGHT THUS CONCLUDE THAT THEY COULD JUSTIFY DROPPING SOME OR ALL OF THE CHARGES AGAINST BRITISH AIRWAYS (PARTICULARLY THE CHARGES AGAINST INDIVIDUALS, WHICH HAVE A WHIFF OF BLACKMAIL ABOUT THEM), IN THE LIGHT OF OUR POLITICES AND LEGAL ARGUMENTS AND OUR WILLINGNESS TO CONCLUDE ARRANGEMENTS WHICH WILL STRENGTHEN THEM IN THE PURSUIT OF THIER DUTY. I DO NOT THINK THAT THE CHANCES ARE PARTICULARLY HIGH. BUT I AND MY PEOPLE WILL DO WHAT WE CAN TO REINFORCE THIS TRAIN OF THOUGHT IN THE STATE AND JUSTICE DEPARTMENTS AND ELSEWHERE. AND A CAREFULLY WORDED MESSAGE FROM YOURSELF OR THE PRIME MINISTER, PERHAPS JUST AFTER THE ELECTION, MIGHT DRIVE THE POINT HOME. ANY MESSAGE YOU DECIDE TO SEND WOULD HAVE TO BE VERY CAREFULLY DRAFTED, BOTH IN TONE AND SUBSTANCE, AND I HOPE I MIGHT BE ALLOWED TO ADVISE ON BOTH.

5. THERE REMAINS THE QUESTION OF THE WINTER FARES. OUR ACTION HAS ALREADY HAD ITS EFFECT ON THE NEGOTIATIONS, AND I DOUBT IF THERE IS MUCH MORE TO BE GAINED IN THE THAT CONTECT. BUT WE STILL NEED GUARANTEES THAT MR BRANSON CANNOT SUE. THE AMERICANE HAVE PROPOSED VARIOUS REMEDIES. NONE GIVE ONE HUNDRED PERCENT SECURITY: SOMETHING IN THE MID-EIGHTIES IS PROBABLY THE BEST WE CAN HOPE FOR. THERE IS A BALANCE TO BE DRAWN BETWEEN THIS AND THE EFFECT ON THE NEGOTIATIONS AND THE TRAVELLING PUBLIC IF WE SUSTAIN OUR OBJECTION TO THE CHEAP FARES FOR A PROTRACTED PERIOD.

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TO IMMEDIATE FCO
TELEGRAM NUMBER 3056 OF 12 OCTOBER

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YOUR TELNO 1753: LAKER CONSULTATIONS.

1. I WAS MOST INTERESTED TO SEE THE ADMIRABLE PAPER PREPARED BY OFFICIALS, AND IN PARTICULAR THE SECRETARY OF STATE FOR TRANSPORT'S COVERING MINUTE WHICH UNDERLINES THE NEED TO EXERT EFFECTIVE POLITICAL LEVERAGE BOTH INSIDE AND OUTSIDE THE CONSULTATIONS, IF WE ARE TO ACHIEVE THE OBJECTIVES SET OUT SO SUCCINTLY IN THE THIRD SENTENCE OF YOUR TOR. I ENTIRELY AGREE.

2. WHAT WE NEED, AS MR RIDLEY POINTS OUT, IS A SUCCESSFUL OUTCOME TO THE DISPUTE RESTING ON AGREEMENT BETWEEN OURSELVES AND THE AMERICANS. WE SHALL NOT ACHIEVE SUCH AN AGREEMENT IF WE ALLOW THE AMERICANS TO OVERRIDE OUR BASIC POSITION OF PRINCIPLE: NOR SHALL WE BE SUCCESSFUL, IN MY VIEW, IF WE TRY TO MAKE THEM ABANDON THEIR PRINCIPLES. WE THEREFORE NEED AN OUTCOME WHICH DOES NOT CONTRADICT THE AMERICANS' VIEW OF THE RELATIONSHIP - UNDER THEIR CONSTITUTION- BETWEEN DOMESTIC AND INTERNATIONAL LAW, BUT AT THE SAME TIME ENSURES THAT OUR OWN PRINCIPLE, NAMELY THAT OUR BILATERAL AGREEMENT CANNOT BE SUBJECTED TO THE ARBITRARY WHIM OF AMERICAN LAW, IS ALS O FULLY PROTECTED. THE KEY TO THIS WILL OF COURSE BE THE EVENTUAL NEGOTIATION OF A FUTURE ARRANGEMENT FOR MANAGING OUR AVIATION RELATIONSHIPS WHICH MAY ITSELF ENTAIL PRACTICAL AND EVEN LEGISLATIVE CHANGES ON BOTH SIDES.

3. AS MR RIDLEY POINTS OUT, WE HAVE TWO WAYS OF PUTTING PRESSURE ON THE AMERICANS. ONE IS THE MOUNTING CONCERN BEING EXPRESSED AT POLITICAL LEVEL HERE BY MYSELF AND IN LONDON BY BRITISH MINISTERS, WHICH AMBASSADOR PRICE APPEARS TO BE RELAYING TO THE RIGHT PEOPLE IN WASHINGTON. SECOND IS THE THREAT OF ARBITRATION OR DENUNCIATION. HERE TOO WHILE I AGREE WITH MR RIDLEY THAT WE NEED TO HAVE A CREDIBLE THREAT UP OUR SLEEVES, MY PREFERENCE FOR THE MOMENT IS TO KEEP THE AMERICANS GUESSING. W E CAN HINT DURING THE CONSULTATIONS THAT WE ARE CONSIDERING OUR OPTIONS. BUT WE SHOULD TAKE NO ACTION UNTIL WE HAVE BEEN ABLE TO ASSESS THE CONSULTATIONS' OUTCOME.

P4. AS FOR THE CHOICE BETWEEN ARBITRATION AND DENUNCIATION, IF AND WHEN THE TIME COMES, I COME DOWN FIRMLY ON THE SIDE OF ARBITRATION. DENUNCIATION WOULD OF COURSE UPSET THE US AIRLINES, AND THAT WOULD HAVE A USEFUL

EFFECT HERE. THERE WOULD BE COMMERCIAL COSTS FOR US TOO, BUT YOU HAVE NO DOUBT TAKEN THOSE INTO ACCOUNT. DENUNCIATION IS HOWEVER BOTH THE ULTIMATE AND AN IMPRECISE WEAPON. THERE WOULD HAVE TO BE NEGOTIATIONS FOR A NEW AIR SERVICES AGREEMENT, AND THESE COULD NOT BE CONFINED SOLELY TO THE PROBLEMS OF ANTITRUST IN AVIATION. THE AMERICANS WOULD ALSO SEEK TO SECURE COMMERCIAL ADVANTAGES, SINCE THEIR FOLK MEMORY IS THAT THE US WAS OUTMANOEUVRED BY THE BRITISH IN NEGOTIATING BERMUDA II. MOREOVER, SINCE THE WORLD WOULD

BRITISH IN NEGOTIATING BERMUDA II. MOREOVER, SINCE THE WORLD WOULD KNOW THAT WE HAD DENOUNCED THE AGREEMENT BECAUSE OF OUR DISSATISFACTION OVERTHE SHERMAN ACT, THE AMERICANS WOULD BE UNDER VERY STRONG DOMESTIC POLITICAL PRESSURE HERE TO MAKE NOT THE SLIGHTEST MOVE TOWARDS US ON THE CENTRAL ISSUE OF PRINCIPLE.

5. ARBITRATION WOULD, ON THE OTHER HAND, FOCUS PRECISELY ON THE PRACTICAL ISSUE OF HOW TO MANAGE THE AVIATION RELATIONSHIP, EVEN IN THE ABSENCE OF AGREEMENT ON THE ISSUE OF PRINCIPLE .

OF COURSE WE COULD NOT EXPECT COMPLETE VICTORY: BUT THEN COMPLETE VICTORY ON PRINCIPLES IS NOT WITHIN OUR SIGHTS. BUT EVEN PARTIAL DEFEAT IN ARBITRATION WOULD MEAN FOR THE AMERICANS THAT THEIR POSITIO N

OF PRINCIPLE HAD TAKEN A SERIOUS BLOW AND THAT IS WORTH GOING FOR. THOUGH THEY BELIEVE THAT THEIR CASE BEFORE AN ARBITRATION TRIBUNAL WOULD BE GOOD, THEY ALSO KNOW THAT ALMOST ANY TRIBUNAL WOULD HAVE A MAJORITY OF PEOPLE ON IT OPPOSED TO AMERICAN ANTI-TRUST PRETENSIONS. THIS IS WHY THEY HAVE FEARED THE THREAT IN THE PAST AND RIGHTLY SO.

MOREOVER, OUR MAIN LINE OF ARGUMENT IS THE NEED TO OBSERVE CONTRACTUAL OBLIGATIONS. IT WOULD BE IN THE SPIRIT OF THOSE OBLIGATIONS TO USE THE ARRANGEMENTS OPEN TO US UNDER BERMUDA 2 TO BEGIN WITH - NAMELY ARBITRATION- RATHER THAN GO AT OVER TO THE MORE DRASTIC OPTION OF DENUNCIATION, WITH ITS UNFORESEEABLE CONSEQUENCES.

6. PERHAPS THE CONCLUSIVE ARGUMENT IS THAT WE CAN STILL DENOUNCE AFTER WE HAVE LAUNCHED AN ARBITRATION: BUT WE CANNOT DO IT THE OTHER WAY ROUND. AT THIS STAGE, THEREFORE, ARBITRATION YES, DENUNCIATION NO.

7. I SHOULD PERHAPS COMMENT ON THE SUGGESTION IN THE PAPER FOR AND AD HOC TRIBUNAL. SO FAR THE INDICATIONS ARE THAT THE JUSTICE DEPARTMENT HAVE FOUND NO EVIDENCE OF A CONSPIRACY TO PUT LAKER OUT OF BUSINESS. IF SO, THE ONLY PEOPLE WHO MIGHT CLAIM COMPENSATION FROM AN AD HOC TRIBUNAL WOULD BE THOSE WHO HAD INITIATED THE CLASS ACTION ON BEHALF OF TRANSATLANTIC PASSENGERS. THUS AT FIRST SIGHT THIS PROPOSAL WOULD NOT BE MUCH OF A BAIT FOR THE AMERICAN GOVERNMENT AND COULD CONCEIVABLY WORK AGAINST US.

8. MY CONCLUSION IS THAT THE RIGHT WAY TO PUT PRESSURE ON THE AMERICANS IS TO CONTINUE OUR MINISTERIAL INTERVENTIONS, TO HINT IN CONSULTATIONS THAT WE ARE CONSIDERING ALTERNATIVES, TO BE QUITE SURE IN OUR OWN MINDS THAT WE WOULD BE PREPARED TO CARRY THROUGH ANY THREATS, BUT TO AVOID COMMITTING OURSELVES AT THIS EARLY STAGE. MENAWHILE I WOULD ADVISE AGAINST FORCING THE AMERICANS INTO A CONFRTONTATION ON PRINCIPLES, WHICH SEEMS BOUND TO BE STERILE.

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RT 12/10

Foreign and Commonwealth Office

London SW1A 2AH

12 October 1984

Dear Dinah,

Laker

Thank you for your letter of 5 October conveying Mr Ridley's suggestion that the Foreign Secretary chair a meeting of the Ministers most closely concerned with the Laker dispute. Sir Geoffrey Howe has agreed to this. The meeting will be at 4.45 pm on Tuesday, 16 October. The Cabinet Office have kindly agreed to provide a room (Conference Room A) and a Secretariat. They will be circulating their own meeting notice.

We agreed on the telephone that Mr Ridley would be accompanied by the two officials most closely involved. May I suggest that to keep numbers at the meeting down, other Ministers should be accompanied by one official if they wish?

Sir Geoffrey Howe proposes that the meeting should begin by discussing the line our delegation should take at the forthcoming consultations in Washington, including the use which might be made at those consultations of threats to move to arbitration, or of notice of termination of the Bermuda II Agreement, and then move on to consider the place of the consultations in the broader strategy set out in your Department's paper.

It will be important in discussing the questions of arbitration or termination also to identify the implications of either course for the British airlines. The Foreign Secretary believes that for that purpose it is important that the meeting should have before it an authoritative view on each of these courses from all the major British airlines operating on the North Atlantic routes, and also their views on a settlement for the future on the lines of paragraph 9(a) of your Department's paper. He would therefore welcome hearing at next week's meeting Mr Ridley's assessment

/of

of the views of the airlines' senior management on these points. The wider consequences of uncertainty in trans-atlantic air communications for the consumar, the tourist industry, the City of London and for BA's privatisation will also be relevant.

I am copying this letter to David Peretz (Treasury), Callum McCarthy (Trade and Industry), Henry Steel (Attorney General), Richard Hatfield and Bryan Cartledge (Cabinet Office) and, for information, to Andrew Turnbull (10 Downing Street).

Yours ever,

Peter Ricketts

(P F Ricketts)
Private Secretary

Miss D A Nichols
Private Secretary
Department of Transport

LEGAL PROCEEDING: Lakes
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TO IMMEDIATE WASHINGTON
TELEGRAM NUMBER 1760 OF 11 OCT
YOUR TELNO 2948 AND MIPT: LAKER
BEGINS:

1.(USUAL OPENING) AND HAS THE HONOUR TO REFER TO THE UNRESOLVED DISPUTE BETWEEN OUR TWO GOVERNMENTS AS TO WHETHER IT IS CONSISTENT WITH THEIR RESPECTIVE RIGHTS AND OBLIGATIONS UNDER BERMUDA 2 FOR THE PROVISONS OF UNITED STATES ANTITRUST LAW TO APPLY TO THE ACTIVITIES OF THEIR DESIGNATED AIRLINES.

2. WITH REGARD TO ONE FACET OF THE DISPUTE, THE PROCEEDINGS BEFORE THE GRAND JURY IN RESPECT OF TARIFFS AND CAPACITY AGREEMENTS, THE US GOVERNMENT HAS INDICATED THAT IT IS CONSIDERING THE POSSIBILITY OF INDICTMENTS AGAINST BRITISH AIRLINES, AND HER MAJESTY'S GOVERNMENT HAVE AGREED TO THE SUGGESTION OF THE US GOVERNMENT THAT THERE SHOULD BE CONSULTATIONS UNDER THE NON-PAPER ARRANGEMENTS ABOUT THIS. HER MAJESTY'S GOVERNMENT WISH, HOWEVER, TO PLACE ON RECORD (QUITE APART FROM THEIR POSITION IN RELATION TO THE INTERPRETATION OF BERMUDA 2) THEIR EXTREME SURPRISE AND DISSATISFACTION THAT THE UNITED STATES GOVERNMENT SHOULD EVEN BE CONSIDERING THE POSSIBILITY OF INDICTING BRITISH AIRLINES AND OFFICIALS OF THOSE AIRLINES IN RELATION TO DISCUSSIONS AND ACTS OF COMPETITION WHICH WERE CONSISTENT WITH UK LAW AND POLICY.

3. HER MAJESTY'S GOVERNMENT CONSIDER THAT QUITE APART FROM THE PARTICULAR POINTS WHICH ARISE FROM THE DECISION OF THE UNITED STATES GOVERNMENT TO INVITE HMG TO DISCUSS THE QUESTION OF INDICTMENTS, IT UNDERLINES THE URGENCY FOR REPRESENTATIVES OF THE TWO GOVERNMENTS TO CONTINUE EFFORTS TO ACHIEVE A COMPREHENSIVE RESOLUTION OF THE DISPUTE. THE NEED FOR THESE EFFORTS IS ALSO CLEAR FROM THE RECENT JUDGEMENTS OF BOTH THE HOUSE OF LORDS AND THE US COURT OF APPEALS FOR THE D C CIRCUIT

WHICH HAVE RECOGNISED THAT THERE IS INDEED A DISPUTE NOT CAPABLE OF RESOLUTION BY THE COURTS, BUT ONLY BY THE TWO GOVERNMENTS AT THE DIPLOMATIC AND EXECUTIVE LEVELS. PERHAPS MORE IMPORTANTLY, BECAUSE THE DISPUTE HAS NOT BEEN RESOLVED THERE IS A SERIOUS DANGER OF THE AVIATION RELATIONSHIP BECOMING UNWORKABLE. THIS IS ILLUSTRATED BY THE FAILURE OF RECENT ENQUIRIES TO ELICIT WHETHER THE US AUTHORITIES CONSIDER A PROPOSED AIRLINE TARIFF TO BE, AS ALLEGED BY A COMPETING AIRLINE, PREDATORY. HMG HAD NOT HITHERTO THOUGHT IT NECESSARY TO RAISE THIS QUESTION BEFORE CONSIDERING A TARIFF SINCE IN THEIR VIEW THE ACT OF APPROVAL BY THE TWO GOVERNMENTS IS DETERMINATIVE OF COMPETITION QUESTIONS SUCH AS PREDATION. HOWEVER IN VIEW OF THE DISPUTE (BUT WITHOUT PREJUDICE TO HMG'S POSITION) IT IS CLEARLY NECESSARY FOR AIRLINES TO KNOW WITH CERTAINTY THAT APPROVED TARIFFS CAN BE CHARGED WITHOUT RISK OF LIABILITY. MOREOVER THE POSSIBILITY OF CIVIL TREBLE DAMAGE LIABILITY ON A POTENTIALLY CRIPPLING SCALE FROM SUITS ALREADY BROUGHT AND STILL IN PROSPECT TOGETHER WITH THE POSSIBILITY OF INDICTMENTS OF BRITISH AIRLINES CALLS IN QUESTION THE CONTINUED VALIDITY OF THE ROUTE RIGHTS GRANTED TO BRITISH AIRLINES UNDER BERMUDA 2.

4. DISCUSSIONS WOULD HAVE AS THEIR AIM A SOLUTION WHICH WOULD NOT ONLY PREVENT A SIMILAR DISPUTE FROM ARISING AGAIN, THROUGH AGREEMENT ON PROCEDURES TO CONTROL ANTI-COMPETITIVE CONDUCT, BUT WOULD ALSO DEAL SATISFACTORILY WITH ALL THE CURRENT PROBLEMS ARISING FROM THE DISPUTE, THAT IS TO SAY THE CIVIL ACTIONS BROUGHT BY LAKER AIRWAYS IN THE US DISTRICT COURT, THE ASSOCIATED 'CLASS ACTIONS' AND THE CRIMINAL PROCEEDINGS.

5. AS STATED IN THE EMBASSY'S NOTE 39 OF 28 MARCH 1983, HER MAJESTY'S GOVERNMENT BELIEVE THAT THE OBLIGATION OF EACH GOVERNMENT TO PERFORM THE AGREEMENT IN GOOD FAITH REQUIRES THAT EACH GOVERNMENT SHOULD DO ITS UTMOST TO RESOLVE THE DISPUTE AND THAT IT IS IN THE INTERESTS OF BOTH GOVERNMENTS THAT THIS DISPUTE SHOULD BE RESOLVED AS SOON AS POSSIBLE.

6. THE OCCASION OF CONSULTATIONS SUGGESTED BY THE USG IN RELATION TO THE PROPOSED INDICTMENTS ALSO PRESENTS A GOOD OPPORTUNITY AT WHICH THE DISCUSSIONS SUGGESTED ABOVE MIGHT

BE TAKEN UP ON AN INFORMAL BASIS. HMG WISH TO INFORM THE USG HOWEVER THAT THEY RESERVE THE RIGHT TO CALL FOR FURTHER FORMAL CONSULTATIONS UNDER ARTICLE 16 OF BERMUDA 2 SHOULD THAT BE NECESSARY

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TO IMMEDIATE WASHINGTON
TELEGRAM NO. 1759 OF 11 OCT 1984

LAKER CONSULTATIONS

1 WE CAN ACCEPT THE US PROPOSAL THAT THE CONSULTATIONS SHOULD TAKE PLACE ON 24 AND 25 OCTOBER. PLEASE DELIVER THE NOTE SET OUT IN MIFT TO STATE DEPARTMENT PROVIDED YOU SEE NO OBJECTION.

2. SOME TACTICAL CONSIDERATIONS SHOULD INFLUENCE HOW YOU PURSUE THE ARRANGEMENTS FOR THE CONSULTATIONS. THE NOTE MAKES CLEAR THAT WE EXPECT THE US SIDE TO BE READY TO DISCUSS THE ISSUES COMPREHENSIVELY UNDER THE THREE HEADS OF THE INDICTMENTS, THE INTERPRETATION OF BERMUDA 2, AND THE CIVIL SUITS. WE ARE CONSCIOUS THAT FROM THE US POINT OF VIEW THE FIRST IS PREDOMINANTLY FOR THE DEPARTMENT OF JUSTICE AND THAT THEY MAY BE DISINCLINED TO DISCUSS THE SECOND, ON WHICH IN ANY CASE STATE LEAD. WE SEE IT AS ESSENTIAL TO CAPTURE THE EAR OF MCGRATH BUT NOT TO BE CONSTRAINED IN OUR BREADTH OF TREATMENT OF THE ISSUE, AND TO HAVE ADEQUATE SENIOR LEVEL PARTICIPATION BY OTHER AGENCIES IN THE TALKS. BUT WE WANT TO AVOID PRIOR THEOLOGICAL DEBATE OVER THE AGENDA. YOU SHOULD KNOW THAT WE ARE READY TO CONTINUE THE TALKS FOR A FURTHER DAY (ANY CHANGE OF PERSONNEL OR LEADERSHIP ON THE US SIDE BEING FOR THEM) IN ORDER TO EXPLORE FULLY THE POSSIBILITY OF A COMPREHENSIVE NEGOTIATED OUTCOME.

3. FROM VERY INFORMAL DISCUSSION WITH WILLIS WHEN HE WAS RECENTLY IN LONDON, WE JUDGE THAT THE DIALOGUE OVER THE VIRGIN ATLANTIC CASE HAS GIVEN FURTHER IMPETUS TO US INTERNAL DISCUSSION OF THE PROPER WORKING OF BERMUDA 2, BUT THAT MUCH STILL REMAINS TO BE DONE TO DEVELOP THEIR POSITION BEYOND THAT EXPRESSED

LAST JUNE AND THAT WILLIS WILL NOT BE GIVING MUCH ATTENTION TO THIS BEFORE THE WEEK OF 15 OCTOBER. A FURTHER CONSIDERATION IS THAT WE WANT TO INCREASE THE PACE OF THESE DISCUSSIONS NOW THAT THE GRAND JURY INVESTIGATION STAGE IS COMPLETE: BUT WE EMPHATICALLY DO NOT WANT THE DOJ TO REGARD THE CONSULTATION OVER THE INDICTMENTS AS A ONE ROUND AFFAIR IN WHICH THEY LISTEN TO WHAT WE HAVE TO SAY AND TELL US ON THE SECOND DAY THAT IT MAKES NO DIFFERENCE. WE MADE THIS POINT STRONGLY TO WILLIS WHO SAID HE WOULD REPORT IT. HE ENCOURAGED US TO TAKE A BROAD APPROACH IN PUTTING THE ISSUES TO MCGRATH, BUT WAS DISCOURAGING ABOUT THE POSSIBILITY OF USEFUL EXCHANGE IN THE WEEK OF 15 OCTOBER ON THE WORKING OF THE AGREEMENT. BUT NOW THAT THE DISCUSSIONS ARE EIGHT DAYS LATER WE WOULD HOPE THAT HIS THINKING MAY HAVE ADVANCED.

4. WE LEAVE YOU TO JUDGE HOW BEST AND AT WHAT LEVELS TO HANDLE THESE ASPECTS. BUT WHEN DELIVERING THE NOTE YOU SHOULD REEMPHASISE FIRMLY OUR VIEW THAT THE AGREEMENT IS BECOMING UNWORKABLE, AND THE POLITICAL AND OPERATIONAL NECESSITY FOR A COMPREHENSIVE RESOLUTION OF THE MATTER, WHICH MUST BE EXPLORED IN DEPTH IN THE COMING ROUND. YOU SHOULD MAKE CLEAR THAT THE DEPARTMENT OF JUSTICE MUST NOT FACE US WITH A CRISIS OVER INDICTMENTS BY APPROACHING THE TALKS AS A ONE-ROUNDER (WE IMAGINE THAT THEY WILL THEMSELVES PREVER TO AVOID A CRISIS AT THE TIME OF THE ELECTION.

5. WE HAVE ADDED QUOTE FURTHER UNQUOTE IN THE LAST SENTENCE OF PARAGRAPH 6 OF THE NOTE AS RECOMMENDED IN YOUR TUR, TOGETHER WITH THE TWO BRACKETED CAVEAT PHRASES IN LAST SENTENCE OF PARAGRAPH 2 AND PENULTIMATE SENTENCE OF PARAGRAPH 3.

HOWE

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES

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TO IMMEDIATE FCO
TELEGRAM NUMBER 3011 OF 9 OCT

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LAKER: GRAND JURY

SUMMARY

1. ROSDEITCHER (BRITISH AIRWAYS) HAS PROVIDED DETAILS OF THE EVIDENCE BELIEVED TO BE IN THE POSSESSION OF THE JUSTICE DEPARTMENT TO SUPPORT THE PROPOSED INDICTMENTS.

DETAIL

2. ROSDEITCHER OUTLINED TO BRAITHWAITE AND MAYNARD THE EVIDENCE WHICH HE BELIEVED FORMED THE BASIS OF THE DOJ'S CONCLUSIONS. ALTHOUGH HE EXPRESSED CONSIDERABLE RELUCTANCE TO SET OUT THE INFORMATION IN WRITTEN FORM OR INDEED TO PROVIDE MORE THAN A BRIEF RESUME OF HIS KNOWLEDGE, IN THE EVENT HIS DESCRIPTION WAS EXTREMELY DETAILED. A TRANSCRIPTION OF ROSDEITCHER'S PRESENTATION WILL THEREFORE FOLLOW BY NEXT AVAILABLE BAG TO AYLING DTI. THE FOLLOWING REPRESENT THE MAIN POINTS IN RELATION TO THE VARIOUS ALLEGATIONS.

3. WITH RESPECT TO THE ALLEGATION OF A CONSPIRACY TO FIX PRICES ROSDEITCHER BELIEVES THAT THE DOJ HAVE EVIDENCE OF TWO SEPARATE INCIDENTS. THE FIRST WERE DISCUSSIONS BETWEEN LAKER AND BA WHICH THE DOJ BELIEVE CULMINATED AT THE WALDORF HOTEL LONDON IN FEBRUARY 1981 AND INVOLVED AGREEMENT TO RAISE PRICES ON THE UK/US ROUTES ON WHICH THOSE CARRIERS OPERATED. THIS AGREEMENT APPEARS TO HAVE BEEN EFFECTIVE FOR LESS THAN A MONTH. THE DOJ HAVE SOME EVIDENCE FOR THE INVOLVEMENT OF THE US CARRIERS BUT CLEARLY INSUFFICIENT TO INCLUDE THEM IN A POTENTIAL INDICTMENT. ROSDEITCHER HAS MADE SOME ESTIMATES FOR THE ECONOMIC IMPACT OF THE AGREEMENT WHICH SUGGESTS THAT A WORST CASE SCENARIO WOULD PRODUCE LESS THAN DOLLARS 3 M. IN ADDITIONAL FARES PAID BY TRAVELLERS. MORE PROBABLY THE IMPACT CAN BE DEMONSTRATED TO HAVE BEEN VERY MUCH LESS.

4. THE SECOND INCIDENT WAS A MEETING IN JULY 1981 AT THE VICTORIA STATION TERMINAL BETWEEN LAKER AND BA CONCERNING INCREASES IN STAND-BY AND SUPER APEX FARES FOR THE FOLLOWING PEAK SEASON. AGAIN

STAND-BY AND SUPER APEX FARES FOR THE FOLLOWING PEAK SEASON. AGAIN THE DOJ HAVE VERY LITTLE EVIDENCE OF THE INVOLVEMENT OF US CARRIERS WHICH HAS NO DOUBT LED TO THEIR EXCLUSION FROM THE PROPOSED INDICTMENTS. ALSO THE AGREEMENT HAD LITTLE IF ANY EFFECT: SINCE LA' WENT OUT OF BUSINESS BEFORE THE FOLLOWING PEAK SEASON.

5. CONCERNING THE LEG 5 ALLEGATIONS ROSDEITCHER BELIEVES THE DOJ HAVE SOME QUOTE EVIDENCE UNQUOTE OF THREE AGREEMENTS. THE FIRST CONCERNS THE DETROIT/WASHINGTON/LONDON ROUTE IN THE WINTER OF 1980/81. THIS APPEARS TO BE BASED ON ONE BA DOCUMENT WHICH HAS COME INTO THEIR POSSESSION SUGGESTING THAT BA HAD ADVANCE KNOWLEDGE OF PAN AM'S PLANS FOR THAT ROUTE AND WHICH IN CONJUNCTION WITH THE VARIOUS FILINGS UNDER BERMUDA 2 HAD LED TO THE CONCLUSION THAT THE FREQUENCIES THAT WINTER WERE THE RESULT OF AN AGREEMENT. THEY HAVE NO EVIDENCE FROM PAN AM.

6. THE SECOND ALLEGED AGREEMENT CONCERNS THE SAME ROUTE IN THE FOLLOWING WINTER. THE EVIDENCE IS OF A SIMILAR NATURE ALTHOUGH ON THIS OCCASION THEY ALSO HAVE FOUND A COPY OF A BA DOCUMENT SUGGESTING THAT THERE WAS ADVANCE KNOWLEDGE OF THE PAN AM PROPOSALS ON THE PAN AM FILES. HOWEVER IN THIS CASE THE PROPOSALS DESIRED BY BOTH AIRLINES WERE NOT IMPLEMENTED IN THE ACTUAL FILINGS.

7. THE THIRD AGREEMENT CONCERNS LOS ANGELES/LONDON IN THE WINTER OF 1981/82 AND RELIES ON THE SAME DOCUMENTS AS USED TO CONSTRUCT THE ALLEGATION CONCERNING WASHINGTON/LONDON FOR WINTER 1981/82. THE EVIDENCE IS AMBIGUOUS AND DEPENDS LARGELY ON CIRCUMSTANTIAL INTERPRETATION OF BERMUDA 2 FILINGS.

COMMENT

8. THE EXTENT OF THE EVIDENCE APPARENTLY AVAILABLE TO THE DOJ ESPECIALLY IN RELATION TO LEG 5 IS A GOOD DEAL LESS CONVINCING THAN MIGHT HAVE BEEN EXPECTED. IT SUGGESTS THAT PARTICULARLY IN RELATION TO LEG 5 THERE ARE REAL OPPORTUNITIES TO CAST DOUBT ON ITS SUFFICIENCY. THIS COULD HAVE INFLUENCED THE WILLINGNESS OF THE DOJ TO USE THE DISCRETION WHICH WE KNOW THEY HAVE AND SHOULD BE URGED TO EXERCISE IN VIEW OF THE IMPORTANT FOREIGN RELATIONS ASPECT OF THE CASE. EVEN IN RELATION TO LEG 1 THE EVIDENCE IS SUCH THAT EVEN IF THE AIRLINES HAD AN AGREEMENT ITS IMPACT WAS MINIMAL AND THEREFORE AMENABLE TO DISCRETION.

FCO PLEASE ADVANCE TO:-
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01-212 3434

Peter Ricketts Esq
Private Secretary to
the Rt Hon Sir Geoffrey Howe QC MP
Secretary of State for Foreign and Commonwealth Affairs
Foreign and Commonwealth Office
Downing Street
LONDON
SW1

8th October 1984

Dear Peter,

LAKER

I regret that in the paper on the Laker problem circulated with my letter of 5 October paragraph 7 was somewhat garbled. Would you please substitute the attached revised text in your copy?

I am copying this as before to David Peretz, Callum McCarthy, Richard Gardiner and Andrew Turnbull.

Yours,

Dinah

MISS D A NICHOLS
Private Secretary

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THE LAKER DISPUTE - THE NEXT STEP

REVISE OF PARAGRAPH 7

Notice of termination of Bermuda II is considered in Annex B. In day to day aviation terms we perceive little risk in a renegotiation; at present the US benefits more in commercial terms than we do, and therefore has more to lose. The complication might be that the US would seek commercial aviation concessions from us in return for an acceptable competition regime. This pressure would have to be resisted as unacceptable in principle. We would hope that denunciation of Bermuda II of itself should not affect privatisation of BA, particularly if carried out in a low key way which emphasised the year's grace for renegotiation. We are however taking further advice on this aspect. If it is to be effective, a decision to opt for denunciation carries with it, at the limit, an implied willingness to face an interruption in direct air services - in reality the ultimate leverage that we possess, since without Government agreement, no commercial air services can lawfully take place.

LEGAL PROCEDURE : Labor

March 88

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LAKER: CIVIL ACTION

SUMMARY

1. JUDGE GREENE HEARD ORAL ARGUMENT ON 5 OCTOBER ON LAKER'S MOTION FOR A PRELIMINARY INJUNCTION RESTRAINING BA AND BCAL FROM TAKING ANY STEPS ''IN A FOREIGN COURT OR OTHERWISE'' THAT WOULD INTERFERE WITH THE JURISDICTION OF THE DC COURT. A DECISION WILL BE GIVEN ON 9 OCTOBER.

DETAIL

BA AND BCAL ARE ALREADY ENJOINED BY A TEMPORARY RESTRAINING ORDER ISSUED IMMEDIATELY FOLLOWING THE HOUSE OF LORDS DECISION. BUT THEY ARGUED THAT THE PROPOSED TERMS OF THE PRELIMINARY INJUNCTION WERE TOO BROAD. THE PHARSE ''IN A FOREIGN COURT OR OTHERWISE'' COULD PREVENT BA AND BCAL FROM COMMUNICATING WITH HMG AND FROM INITIATING OR LOBBYING FOR UK LEGISLATION DESIGNED TO INTERFERE WITH LAKER'S SUIT. A SUBSTANTIAL PART OF THE HEARING WAS DEVOTED TO THIS MATTER

OR LOBBYING FOR UK LEGISLATION DESIGNED TO INTERFERE WITH LAKER'S SUIT. A SUBSTANTIAL PART OF THE HEARING WAS DEVOTED TO THIS MATTER WHICH GREEN CHARACTERISED AS A ''WEIGHTY AND UNIQUE ISSUE''.

3. GREEN CONCLUDED THE HEARING BY PROMISING THAT A NEW INJUNCTION WOULD BE ISSUED ON 9 OCTOBER: ITS SCOPE, HOWEVER, REMAINS UNCERTAIN AND COULD ADDRESS THE ISSUE OF THE AIRLINES DEALINGS WITH HMG. HOWEVER ROSDEITCHER (BA) CONSIDERS THIS UNLIKELY.

4. ROSDEITCHER HAS EXPLAINED TO COUNSELLOR (CAS) THAT THE POSSIBILITY OF THE AIRLINES INITIATING OR PROMOTING UK LEGISLATION WAS ALLUDED TO IN THE WRITTEN BRIEFS SUBMITTED TO THE COURT (COPIES HELD BY AYLING DTI) BUT WAS HIGHLIGHTED BY ROSDEITCHER TO PROVIDE AN EXAMPLE OF THE OVER-BROAD NATURE OF THE PROPOSED INJUNCTION. THERE WAS NO INTENTION ON THE PART OF THE AIRLINES TO LOBBY IN THIS WAY AND, INDEED, THE TEMPORARY RESTRAINING ORDER PREVENTED IT. ROSDEITCHER RECOGNISED THAT JUDGE GREENE, HOWEVER, MIGHT CONSIDER THE AIRLINES CAPABLE OF SUCH TACTICS. THE HEARING CONTAINED A NUMBER OF BARBED REMARKS BY GREENE ABOUT THE ''INGENIOUS TACTICS'' OF THE AIRLINES AND THEIR WILLINGNESS TO TAKE ACTION ''IN THE DARK OF THE NIGHT''.

5. NEVERTHELESS, ROSDEITCHER CONSIDERS THAT THE INJUNCTION ON 9 OCTOBER WILL REFRAIN FROM RESTRAINING BA AND BCAL DEALING WITH HMG. ROSDEITCHER HAS UNDERTAKEN TO GREENE THAT BA WILL ACT AS IF THE CURRENT RESTRAINING ORDER HAD CONTINUED AND TO PREPARSE A BRIEF ON THE ISSUE WITHIN 30 DAYS. UNLESS GREENE CONSIDERS ROSDEITCHER'S UNDERTAKING WITHOUT VALUE, WHICH SEEMS UNLIKELY, THE INJUNCTION SHOULD NOT BE CONTRAVERSIAL.

FCO PLEASE ADVANCE TO AYLING, HEALEY DTI. KINIGHTON, STEVENS, FORTNAM DTP. GRAY MAED FCO. AUST LEGAL ADVISORS. GARDINER LOD

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FM WASHINGTON 052236Z OCT 84
TO IMMEDIATE FCO
TELNO 2996 OF 5 OCT 84.
MIPT: LAKER CONSULTATIONS.

1. THE FOLLOWING ARE OUR COMMENTS ON PARTICULAR ISSUES THAT MAY COME UP IN THE CONSULTATIONS.
BERMUDA 2 AND DOMESTIC LAW.

2. SINCE THERE IS NO POSSIBILITY OF SHIFTING THE AMERICANS ON THE ISSUE OF PRINCIPLE, WE SHOULD (SUBJECT TO THE NEED TO PREPARE THE GROUND FOR AN EVENTUAL ARBITRATION IF NECESSARY) AIM FOR A RECOGNITION BY BOTH SIDES THAT THERE IS A FUNDAMENTAL DISAGREEMENT BETWEEN THE TWO GOVERNMENTS ON A CENTRAL ISSUE OF INTERNATIONAL LAW. THIS CAN THEN BE PLAYED BY THE AMERICANS INTO THE CIVIL CASES (SEE PARA 6 BELOW).

THE JUSTICE DEPARTMENT INVESTIGATIONS.
3. IN CONNECTION WITH THE LAKER BANKRUPTCY, THE JUSTICE DEPARTMENT HAVE BEEN INVESTIGATING ALLEGATIONS OF PRICE FIXING, PREDATORY PRICES AND FINANCIAL CONSPIRACY (LEGS 1, 2 AND 3). THEY HAVE INDICATED TO US THAT THEY HAVE INSUFFICIENT EVIDENCE TO PURSUE LEGS 2 AND 3. IN RELATION TO LEG 1 THEY CLAIM TO HAVE EVIDENCE AGAINST BRITISH AIRWAYS AND PERHAPS AGAINST LAKER. BUT THEY SEEM TO BE SAYING THAT THEY DO NOT HAVE SUFFICIENT EVIDENCE TO INVOLVE ANY AMERICAN AIRLINE.
WE MIGHT DEPLOY THREE ARGUMENTS:
A) THE JUSTICE DEPARTMENT SHOULD NOT SEEK AN INDICTMENT AT ALL: THEY SHOULD INSTEAD USE THEIR DISCRETION, AS THEIR OWN INTERNAL PROCEDURES PERMIT, TO TAKE ACCOUNT OF THE INTERESTS OF THE BRITISH GOVERNMENT AND THE CONFUSION IN THE LAW, BOTH OF WHICH ARE UNDOUBTEDLY PRESENT IN THIS CASE.
B) IF THEY GO FOR AN INDICTMENT, IT SHOULD ALSO COVER LAKER SINCE THAT WILL PLAY WELL IN THE LAKER CIVIL CASE.
C) IN ANY CASE WE CANNOT BELIEVE THAT THE ALLEGED CONSPIRACY (IF IT EXISTED) DID NOT INVOLVE AMERICAN AIRLINES. ANY IMPRESSION THAT THE AMERICANS ARE DISCRIMINATING AGAINST BRITISH AIRLINES WOULD PRODUCE A DEPLORABLE EFFECT ON BRITISH PUBLIC OPINION.

BRITISH OFFICIAL INVOLVEMENT.

4. IF THE AMERICANS RAISE, EVEN FOR THE RECORD, THE ISSUE OF BRITISH OFFICIALS' INVOLVEMENT IN THE ALLEGED PRICE FIXING (LEG 4) WE SHOULD RESPOND SHARPLY. WE HAVE MAINTAINED THROUGHOUT THAT IT IS NOT FOR THE AMERICAN JUSTICE DEPARTMENT TO HAVE ANY VIEWS ON THE WAY IN WHICH BRITISH OFFICIALS CARRY OUT BRITISH POLICY IN RELATION TO BRITISH AIRLINES. WE SHOULD THEREFORE REFUSE TO ACCEPT ANY EXPRESSION OF OPINION ON THEIR PART.

CAPACITY FIXING.

5. THE JUSTICE DEPARTMENT'S INVESTIGATION, THOUGH NOT RULED OUT BY THE WORDING OF THE NON-PAPER, IS HARDLY IN ACCORDANCE WITH ITS SPIRIT. BUT THE ALLEGED TALKS BETWEEN BRITISH AND AMERICAN AIRLINES ON CAPACITY ILLUSTRATE OUR BASIC CONTENTION THAT SOME MANAGAMENT OF THE NORTH ATLANTIC ROUTES IS NECESSARY. WHATEVER THEIR THEORETICAL POSITION, AMERICAN OFFICIALS REGULARLY CONTACT US (AND PERHAPS THEIR OWN AIRLINES) ON THESE MATTERS. THAT SIMPLY SHOWS THAT WE NEED A FUTURE ARRANGEMENT .

THE LAKER CIVIL CASES.

6. THE US GOVERNMENT CANNOT ORDER THESE NOT TO PROCEED. BUT, WITHOUT VIOLATING THEIR OWN PRINCIPLES, THEY COULD CONVEY TO THE COURT THAT THERE WAS INDEED A FUNDAMENTAL DISAGREEMENT BETWEEN THE TWO GOVERNMENTS ON LAW AND POLICY, WHICH THEY WERE SEEKING TO RESOLVE BY NEGOTIATION: THAT THE JUSTICE DEPARTMENT HAD FOUND NO EVIDENCE OF A CONSPIRACY TO PUT LAKER OUT OF BUSINESS: THAT THE ONLY PRICE FIXING OF WHICH THEY HAD FOUND EVIDENCE INVOLVED LAKER, AND WAS INTENDED TO KEEP HIM IN BUSINESS. SUCH A STATMENT TO THE COURT WOULD MAKE IT MUCH HARDER FOR LAKER TO PURSUE HIS CASE THERE, AND PUT PRESSURE ON HIM TO SETTLE REASONABLY. WE SHOULD PRESS THE AMERICANS VERY HARD FOR SUCH A STATEMENT.

FUTURE ARRANGEMENTS.

7. WE WILL NOT HAVE TIME TO NEGOTIATE A FINISHED ARRANGEMENT AT THIS ROUND OF CONSULTATIONS. BUT WE SHOULD SEEK TO MOVE THE AMERICANS FROM THEIR PRESENT POSITION THAT IT IS ALL TOO DIFFICULT TOWARDS A POSITIVE COMMITMENT TO FIND PRACTICAL SOLUTIONS. WE SHOULD NOT ACCEPT THEIR USUAL ARGUMENT THAT A CHANGE IN THE EXISTING SYSTEM WOULD REQUIRE LEGISLATION WHICH CONGRESS WILL NOT GIVE: THEY HAVE SUCCESSFULLY SOUGHT LEGISLATION IN OTHER ANTITRUST AREAS WHERE US NATIONAL INTEREST SEEMED TO REQUIRE IT, AND THE CHIEF OF THE ANTITRUST DIVISION HAS ALREADY INDICATED PUBLICLY THAT THEY ARE BEGINNING TO THINK ABOUT THE PROBLEMS OF INTERNATIONAL TRANSPORT AS WELL. INDEED MCGRATH TOLD US IN THE SUMMER THAT HE WOULD HOPE TO COME UP WITH NEW IDEAS FOR DISCUSSION AFTER THE ELECTION: WE SHOULD ASK HIM WHEN HE NOW PROPOSES TO DELIVER.

ADVANCE COPIES TO:

O'NEILL, AUST, GRAY (MAED) FCO, KNIGHTON STEVENS FORTNAM DTP, AYLING DTI.

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01-212 3434

Peter Ricketts
Private Secretary to
The Rt Hon Sir Geoffrey Howe QC MP
Secretary of State for Foreign
and Commonwealth Affairs
Foreign and Commonwealth Office
Downing Street
LONDON SW1

5 October 1984

Dear Peter,

LAKER

I mentioned to you over the telephone earlier today that my Secretary of State will be circulating the attached paper on the Laker problem. He would like urgently to discuss the issues with colleagues as soon as possible, so as to clarify the UK's strategy for resolving the dispute with the US Government. He would be grateful if the Foreign Secretary would be prepared to chair a meeting of Ministers most closely concerned - the Chancellor, the Secretary of State for Trade and Industry, the Attorney General and of course himself. You thought it might be possible to fix such a meeting on Monday, 15 October, which would give sufficient time to decide our objectives and negotiating strategy before our official delegation meets their counterparts in Washington on 24/25 October.

I am copying this letter to David Peretz (Treasury), Callum McCarthy (Trade and Industry), Richard Gardiner (Attorney General) and, for information at this stage, to Andrew Turnbull (No 10).

Yours,

Dinah

MISS D A NICHOLS
Private Secretary

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UK-US AVIATION AGREEMENT AND
US ANTITRUST LAW: THE "LAKER" ISSUE

Note by the Secretary of State for Transport

I have reviewed our strategy for trying to resolve the row with the United States over the application of their antitrust law to aviation matters. The attached paper by officials considers the position.

2 Following the US notification that they are considering indictments against British Airways and perhaps Laker, together with three individual ex-employees of British Airways, and that they wish to consult with us before making their decisions, we must clearly make a hard push to resolve this dispute. Pressure will be needed for this. The US must be brought to recognise at senior political level the importance which we attach to more satisfactory arrangements; it may be right for the Prime Minister to send a further message to President Reagan, since the Department of Justice Grand Jury investigation, which he declined in May 1983 to halt, has now been completed; but the timing of this would need care. We also need more specific leverage if the US are to recognise that we are in earnest.

3 The paper by officials considers two means of conveying this: reactivating the preliminaries to arbitration under Bermuda 2; and giving notice of termination of Bermuda 2. I prefer the latter. Arbitrators tend to try to split the difference between positions. Our position is one of principle: we do not accept that a bilateral Air Services Agreement can be overridden by US domestic law. I do not see how we can have our position arbitrated. To agree to it is to agree that our position is tentative. The truth is that a successful outcome to this dispute must rest on agreement between us and the United States, otherwise one or the other of us will find we

cannot live with it. We do not need to make a final choice in advance of a round of consultations with the United States; indeed, for the US to be kept guessing about our precise intentions may be helpful.

4 What we must determine now is whether we intend to fight this case through to a substantially more satisfactory outcome: it is no use implying threats which we are in no circumstances prepared to carry through. At the end of the day, this could include being prepared to suspend air services for a time, if that should prove to be the only way to show that an agreed regime for regulation and the prevention of anti-competitive behaviour is essential in this industry. I consider that we must fight. I therefore seek my colleagues' agreement to our delegation being instructed on the lines set out in paragraph 13 of the paper by officials.

5 I also agree with officials that for the time being we should not undermine our position of principle by issuing consents to our airlines under the Protection of Trading Interests Act. This will not please Lord King, who wishes to visit the United States in the normal course of business, and who is willing to give the evidence that has been sought from him. He would thus be placed in the invidious position, if he does and is subpoenaed, that he would be subject to conflicting requirements under UK and US law (although it is inconceivable that in practice we would prosecute him here).

N.R.

5 October 1984

THE LAKER DISPUTE - THE NEXT STEP

It is becoming increasingly urgent to resolve the dispute which underlies the Laker cases. The fundamental dispute between the Governments can only be resolved by the Governments; and the issues have come again to a head because the US contemplate indicting British Airways and possibly Laker. We have reviewed our strategy for resolving the dispute.

2 Our original objectives are unchanged:

a. on the criminal side (the Department of Justice (DoJ) Grand Jury investigation) to secure no indictment from the DoJ;

b. on the civil side to halt if possible the private treble damage suits in the US courts, as regards the fare fixing allegations; or to influence matters so that any damages against British airlines are confined to minimal levels:

c. to get acceptable inter Governmental arrangements under Bermuda 2 which would ensure no repetition of the "Laker" experience (and which might be helpful in resolving the current disputes). By acceptable arrangements we mean an unambiguous and agreed system of regulation which would:

i. ensure that airlines acting in accordance with decisions of the aeronautical authorities (eg charging fares or operating schedules approved by both governments) would be free from the risk of exposure to domestic criminal or civil competition law enforcement in respect of those matters;

ii. indicate clearly to the airlines the regulatory framework within which they are to operate and the rules which have to be observed, the rules in question being ones which should make sense both from an airline and regulatory policy point of view. We are ready to negotiate changes from past practice to secure this.

3 Our intensive efforts over the last year and a half have produced few positive results -

a. on the criminal side BCal were cleared of the allegations of wrecking the Laker financial rescue package. But we have now been formally invited to consultations on the basis that the DoJ are considering indicting BA and possibly Laker in respect of pricing agreements in 1981 that would afford Laker a favourable price differential; and BA for scheduling discussions with Pan Am. Furthermore if certain BCal Washington-located documents get to the Department of Justice (as they now seem likely to do) further investigations and perhaps indictments aimed at BA and BCal seem to be a real possibility.

b. on the civil front matters have got worse: following the House of Lords decision in July the Laker liquidator is

now vigorously pursuing his suit; and four other class action suits emerged earlier this year. We have to face the prospect of further and serious class actions against BA if the DoJ indicts them on per se offences and if the BCal documents get into the hands of the DoJ.

c. on acceptable arrangements under Bermuda II, discussions in June with the US Government revealed little if any willingness on their part to address the problem with any imagination or any serious intent to head off future problems. This is not an academic issue. A current case illustrates the unworkability of the Bermuda 2 arrangements when US anti-trust law is superimposed upon them. Virgin Atlantic have complained that certain BA (and US carriers) low fare proposals are "predatory". Even if both authorities examine the complaint, conclude that it is not justified, and approve the fares, under US anti- law, Virgin could, in the future, bring a treble damage Laker-type suit in the US courts in respect of fares which the airlines would be required to charge by the authorities. We are still discussing this issue with the US authorities.

Our Strategy So Far

4 At the outset in March 1983, the Prime Minister asked President Reagan to halt the Department of Justice investigation, proposing instead that any problems seen by the US should be handled as an aviation matter. The President refused, on the ground that he had to see that US antitrust laws were enforced. He said that this did not preclude further consultations. Since then our strategy for handling the directly intergovernmental issues in this dispute (2(a) and (c) above) has been first to try to get BCal, the more vulnerable of our airlines, out of the DoJ line of fire; then to wait to see whether the DoJ indeed proposed to indict BA; to be ready if they did to react strongly; and to hope to negotiate a satisfactory outcome. Our strategy for the Laker liquidator's civil action (2(b) above) necessarily had to evolve in relation to developments in the US and English courts. But the use of the PTI Act a year ago marked the point at which we registered within the UK our objection of principle to those actions, insofar as they put in question our position under the Bermuda II agreement (we have, of course, taken no position in the courts on the allegations that BCal sought unlawfully to halt the Laker financial rescue package). The harsh reality is that we have no power directly to affect the subsequent class actions by US plaintiffs in the US courts; nor, since the House of Lords' decision in July, the continuation in the US courts of the Laker liquidator's action. But we are striving to influence their outcome. We have sought to agree with the US an agreed interpretation of the Bermuda 2 agreement which (as well as applying to the future and offering a supporting reason for the DoJ dropping indictments) might have some influence on the handling of the civil cases - though this has always been recognised as a long shot because the interpretation

could not be in terms retrospective. Attempts to achieve an agreed interpretation were also needed before any subsequent stronger reaction to proposed indictments. But (3(c) above) our opening discussions last May/June showed, despite significant movement on our part, that the US side had not then moved far enough from their traditional positions for a successful outcome. There are signs that our sharp reaction to the failure of that round and the practical example of the current Virgin Atlantic case may have caused them to re-examine their position; but that they have not completed this reassessment.

Negotiations backed by leverage

5 This strategy remains sound: but more pressure on the US Government is now needed to back it; and we need to prepare our next steps if this fails. We should still seek an outcome by agreement: both because a sound trading regime for international aviation must rest on such agreement and for wider political reasons. Pressure is needed because the US appears to lack the political will to modify in this area the claims of its antitrust law, and even given this, will find it far from easy for domestic law and political reasons to respond. Essentially there is a political problem to get the US Administration to recognise that we are not prepared to continue with the aviation agreement on the basis, implicit in their contemplation of indictments, that their antitrust law will apply unconstrained. What ministers say to them over the coming weeks will be important: and there may be a case for a further high level message. But we need more specific indications of our determination and have considered recourse to arbitration under article 17 of Bermuda 2 and notice of termination of Bermuda 2.

6 Arbitration under Bermuda 2 is considered more fully at Annex A. Briefly, the likely outcome is uncertain; the threat of arbitration worried the US in 1983, but might do so less now. In one sense the consequence for us of an unfavourable outcome would not be too serious - certainly compared with the course of continuing to acquiesce in the reach of US antitrust law in aviation - because we could always terminate Bermuda 2 if we did not like the arbitration award. But so could the US. Unless it led the US to make fresh efforts at negotiation, arbitration (as distinct from the threat of it) would leave the issues unresolved for some time.

7 Notice of termination of Bermuda 2 is considered in Annex B. In day to day aviation terms we perceive little risk in a renegotiation; at present the US benefits more in commercial terms than we do and therefore has more to lose. The complication might be that the US would seek commercial aviation concessions from us in return for an acceptable competition regime. This pressure would have to be resisted as unacceptable in principle. Denunciation of Bermuda 2 of itself should not affect the privatisation of BA, particularly if carried out in a low key way which emphasised the year's grace for renegotiation.

We are taking advice on the effect on the privatisation of BA of denouncing Bermuda 2.

8 A final decision on the leverage to be employed would be better deferred until after a new round of discussions with the US. A decision to be ready to employ leverage is desirable now.

Outline of a negotiated settlement

9 Our ideas are on these lines -

(a) Our proposals for the interpretation of Bermuda 2 would provide for a closer supervision of airline consultation than we currently engage in, with regulatory penalties if airlines did not obey the Governments' rules, in return for assurances that once a tariff has been approved there could be no question of private civil actions against airlines for applying it; we should propose a comparable arrangement on discussions about scheduling and capacity.

(b) If we could reach accord on these lines, it would remain difficult, legally and politically, for the US to find a way to halt the current Laker cases, because any action by them could be criticsed as a retroactive confiscation of rights. If this seemed likely to help them to agree to take such action, we would be prepared to suggest to the US authorities that the more serious Laker charges - ie the charges of predatory behaviour by the other airlines designed to put Laker out of business - should be the subject of an ad hoc international tribunal which could award compensation if it found good cause to do so.

(c) We would expect the Department of Justice to drop any charges under the Grand Jury investigation.

Retaliatory action

10 We are considering and will report further on the possibility of action against US airlines, if all else seems likely to fail, to penalise them financially, if our own airlines suffered unjust financial penalties: this would require primary legislation.

Acquiescence in the US position

11 The alternative to deciding now to fight hard for a settlement is to fudge the issues. The maximum fine on British Airways from DoJ indictments would be $1 million on each of (probably) two counts. No doubt the civil suits, like the vast majority of such actions, can be - indeed may eventually have to be - settled: at a price. But we cannot recommend such a fudging, since it would fail to restore, indeed gravely compromise, the sound operation of the whole aviation relationship. No doubt uncertainty about the impact of US antitrust law

in the field has, latently, been present for many years. But until this case the US Government had held back from major antitrust enquiries and - even more important - there had been few private actions. The Virgin Atlantic case (paragraph 3(c) above) clearly shows the practical problems for airlines and Governments which have now been exposed. We are at a turning point - the end of the long drawn out preliminaries - and must now fight strongly, if flexibly, for an acceptable solution.

Consents

12 We have before us requests by the airlines for consents (under the Protection of Trading Interests Act instruments) for the release of UK based information for use in their defence in the US civil actions. The House of Lords assumed that we should grant such consents to the extent necessary to enable the British airlines to defend themselves; but if we do so we shall be sacrificing, at a critical juncture, the principle that we do not accept the unilateral application of US anti-trust law in this field. We need not give a final refusal to such requests: if matters go badly we might later consider on balance that it was right for our airlines to have every means to defend themselves. A reasonable stance for the time being would be to say that we were in active discussion with the US Government on the dispute and that we were not prepared to consider granting these requests at the present time.

Recommendations

13 Ministers are invited to agree that in the course of the consultations following the DoJ proposed indictments, our delegation should:

a make clear that it is now urgent to reach an overall settlement of this dispute;

b be authorised, if the US side appear unwilling to make an adequate response, to make it clear to the United States that Ministers have determined that they cannot any longer continue to leave the working of the agreement in an unsatisfactory condition;

c if the US side seem willing to negotiate seriously with us, should be authorised to offer to co-operate with them before an international ad hoc tribunal to determine any appropriate compensation arising from the circumstances of Laker's demise.

Ministers are also invited to agree that:

d requests for consents under the PTI Act instruments should be dealt with as proposed in para 12 above.

Annex A

Arbitration under Bermuda 2

When Ministers first looked at the question of arbitration and agreed that we should be prepared to resort to it (the threat which led to the non-paper arrangements being agreed by the US Government) it was considered that on the strict legal merits the chances of success were not more than 40%, but that these prospects would be enhanced by the nature and composition of an international arbitration panel. Since then the terms of Lord Diplock's speech in the House of Lords' judgment have not improved the chances of success. He pointedly avoided making any finding on the effect of Bermuda 2 while at the same time saying the British airlines operating in the United States were subject to US law. Obviously if we lost on arbitration on all counts we should have a Bermuda 2 agreement as interpreted by the arbitration which was completely unsatisfactory from our point of view. But that is the de facto position now and we would still have the option of regnegotiating Bermuda 2 - though we would be facing a US Government with their tails up. If the US was unsuccessful (and anything less than 100% success would be of severe embarrassment to them) it is difficult to predict how they might react; they might themselves seek to renegotiate Bermuda 2. Broadly speaking we conclude that the downside risks of going to arbitration are not great.

2 We would expect a hostile reaction from the US Government if we went for arbitration. An immediate effect might be to dissuade the Department of Justice from proceeding with any indictments they may be currently contemplating let alone instituting any new Grand Jury investigations. If they did not agree to this the arbitral tribunal might require the United States not to take any steps which might prejudge the outcome of the reference. How it might affect discussions with the US Government on an agreed interpretation of Bermuda 2 is unpredictable. They might well refuse to discuss the matter until the arbitration was settled. Or they might be so concerned about the implications of losing that they might move quickly to get the whole dispute, including future arrangements, settled as quickly as possible.

3 The effect upon the private suits of launching an arbitration is uncertain. In strict legal terms there is no reason why the US courts should take any account of this development. However this would be new ground and there might be beneficial effects. It would certainly give our airlines more ammunition in the US courts and enable them to show directly that there was a serious inter-governmental dispute. Nor is it to be ruled out that the arbitration panel might request the US Government to

intervene in the domestic US proceedings with a view to getting those proceedings stayed pending the outcome of the arbitration. Failure to go to arbitration might weaken the position of our airlines in the US court since they wish to use arguments relating to Bermuda 2 and the position of HMG. (The same argument, namely that failure to go to arbitration represents a positive weakening of our position, would be equally valid in the criminal case if for example we failed to react in that way to a DoJ indictment.) Finally, a decision to arbitrate might affect the perceptions and attitudes of the private parties in the Laker case - for example it might promote an acceptable out of court settlement.

Annex B

Notice of termination of Bermuda 2

The agreement provides that a year's notice of termination can be given by either party. Notice once given can only be withdrawn with the consent of the other party.

2 The US airlines currently and in recent years have earned more than the UK airlines (roughly £900 million as against £500 million in 1983/84) from the bilateral air services. The US Government and airlines might therefore see themselves as the more vulnerable in a major renegotiation.

3 Renegotiation following notice of termination based on the antitrust dispute might be difficult to confine to that issue: the US might well bring forward other objectives. So unless we adopted a determined and single minded approach the process could be long drawn out and the antitrust issue might well get muddied and confused by being handled as part of a wider package deal - rather as it was in 1977.

4 The Laker litigation has unavoidably brought uncertainty (over and above its immediate financial implications) about the regulatory regime over the North Atlantic, which cannot be helpful for the market's assessment of British Airways' privatisation. Notice of termination might increase this uncertainty - or it might increase confidence, by displaying our determination to resolve the dispute. Logically, since the present or any changed regime would apply to all airlines, the market should not consider this factor as affecting the competitive position of BA relative to US airlines. Perception of a serious UK/US crisis might make the market nervous.

5 If a satisfactory resolution of the dispute had not been negotiated by the end of the year's notice period, both sides would face the question whether they were prepared to make interim arrangements for services to continue, to retreat from their positions, or to face an interruption in services. If we are not to be in a weak position from the outset, we must be prepared to contemplate the last, which would pose problems for US as much as for UK airlines: Pan Am for example remains in a very weak position and is heavily dependent on UK routes.

Flag B

DRAFT TO STATE DEPARTMENT

(Usual opening) and has the honour to refer to the unresolved dispute between our two Governments as to whether it is consistent with their respective rights and obligations under Bermuda 2 for the provisions of United States antitrust law to apply to the activities of their designated airlines.

2 With regard to one facet of the dispute, the proceedings before the Grand Jury in respect of tariffs and capacity agreements, the US Government has indicated that it is considering the possibility of indictments against British airlines, and Her Majesty's Government have agreed to the suggestion of the US Government that there should be consultations under the non-paper arrangements about this. Her Majesty's Government wish, however, to place on record their extreme surprise and disappointment that the United States Government should even be considering the possibility of indicting British airlines and officials of those airlines in relation to discussions and acts of competition which were consistent with UK law and policy.

3 Her Majesty's Government consider that quite apart from the particular points which arise from the decision of the United States Government to invite HMG

contd/.....

to discuss the question of indictments, it underlines the urgency for representatives of the two Governments to continue efforts to achieve a comprehensive resolution of the dispute. The need for these efforts is also clear from the recent judgments of both the House of Lords and the US Court of Appeals for the D C Circuit which have recognised that there is indeed a dispute not capable of resolution by the Courts, but only by the two Governments at the diplomatic and executive levels. Perhaps more importantly because the dispute has not been resolved there is a serious danger of the aviation relationship becoming unworkable. This is illustrated by the failure of recent enquiries to elicit whether the US authorities consider a proposed airline tariff to be, as alleged by a competing airline, predatory. HMG had not hitherto thought it necessary to raise this question before considering a tariff since in its view the act of approval by the two Governments is determinative of competition questions such as predation. However in view of the dispute it is clearly necessary for airlines to know with certainty that approved tariffs can be charged without risk of liability. Moreover the possibility of civil treble damage liability on a potentially crippling scale from suits already brought and still in prospect together with the possibility of indictments of British airlines calls in question the continued validity of the route rights granted to British airlines under Bermuda 2.

contd/.....

4 Discussions would have as their aim a solution, which would not only prevent a similar dispute from arising again, through agreement on procedures to control anticompetitive conduct, but which would also deal satisfactorily with all the current problems arising from the dispute, that is to say the civil actions brought by Laker Airways in the US District Court, the associated "class actions" and the criminal proceedings.

5 As stated in its Note 39 of 28 March 1983, Her Majesty's Government believe that the obligation of each Government to perform the Agreement in good faith requires that each Government should do its utmost to resolve the dispute and that it is in the interests of both Governments that this dispute should be resolved as soon as possible.

6 The occasion of consultations suggested by the USG in relation to the proposed indictments also presents a good opportunity at which the discussions suggested above might be taken up on an informal basis. HMG wish to inform the USG however that they reserve the right to call for further formal consultations under Article 16 of Bermuda 2 should that be necessary.

PS
PS/LADY YOUNG
PS/PUS
SIR C TICKELL
MR ~~ADAMS~~ O'NEILL
MR AUST, Legal Advisers
MR FREELAND, Legal Advisers
ED/MAED (2)
ED/NAD

RESIDENT CLERK

PS/S of S
MR LAZARUS, PUS
MR KNIGHTON
MR ~~ROBERTS~~ FORNHAM
} DEPT OF TRANSPORT

MR ROBERTS
MR ~~SUNDERLAND~~ JC HUTTON
} DTI
MR BECKETT(Solicitors)

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

File

AT
CN.

GRS 755
CONFIDENTIAL
FM WASHINGTON 041425Z OCT 84
TO IMMEDIATE F C O
TELEGRAM NUMBER 2967 DATED 4 OCTOBER

YOUR TELNO 1708: LAKER GRAND JURY.

1. I CALLED ON DAM THIS AFTERNOON TO DELIVER YOUR MESSAGE TO SECRETARY SHULTZ ON THE SAN JOSE MEETING (FCO TELNOS 1698 AND 1699 REFER). RECORD FOLLOWS BY BAG. I WENT ON TO RAISE THE LAKER CASE COMMENTING THAT IT WOULD BE HELPFUL IF THE DEPARTMENT OF JUSTICE COULD SHOW EQUAL SENSITIVITY TO INTERNATIONAL DIMENSIONS OF THEIR WORK AS THEY DID TO THE DOMESTIC.

2. I SAID THAT I HAD BEEN INSTRUCTED TO PROTEST AT THE RECENT ACTION OF THE DEPARTMENT OF JUSTICE IN INFORMING THREE BRITISH AIRWAYS EX-EMPLOYEES THAT THEY WERE IMPLICATED IN A CRIME UNDER INVESTIGATION BY A GRAND JURY. THERE WERE TWO ASPECTS. FIRST THE AMERICANS HAD GONE AHEAD WITHOUT INFORMING US IN ADVANCE. SECONDLY THEY HAD GONE AHEAD IN ADVANCE OF THE CONSULTATIONS IN OCTOBER. IN THE LIGHT OF THE DAM/RIFKIND EARLY WARNING SYSTEM IT SEEMED STRANGE THAT THE DEPARTMENT OF JUSTICE HAD ACTED DESPITE WHAT WE UNDERSTOOD TO BE AN OBLIGATION TO CONSULT US. I SAID THAT I WAS AFRAID THAT DOJ'S ACTION MAY HAVE SOURED THE ATMOSPHERE FOR THE CONSULTATIONS.

3. ON A MORE PERSONAL LEVEL I ADDED THAT IT SEEMED WE WERE STEERING INTO DEEP TROUBLE. IF THE DEPARTMENT OF JUSTICE DECIDED TO GO AHEAD, THE WHOLE BASIS OF THE GOVERNMENT-TO-GOVERNMENT BERMUDA TREATY SEEMED TO BE CALLED INTO QUESTION. MR TEBBIT HAD MADE THIS POINT TO THE U.S. AMBASSADOR IN LONDON, SAYING THAT HMG COULD NOT ACCEPT A CRIMINAL PROSECUTION IN THE U.S. AGAINST SOMETHING WHICH HAD BEEN DONE WITH THE KNOWLEDGE AND CONSENT OF THE TWO

WHICH HAD BEEN DONE WITH THE KNOWLEDGE AND CONSENT OF THE TWO GOVERNMENTS CONCERNED. AS FAR AS WE COULD TELL FROM THE DOJ THERE WAS NO EVIDENCE OF PREDATORY ACTION TO DRIVE LAKER OUT OF BUSINESS. RATHER IT WAS AN ANTI-TRUST CASE AGAINST THE AGREEMENT ON PRICE FIXING AND SCHEDULING EVEN THOUGH THESE ARRANGEMENTS WERE APPROVED BY THE GOVERNMENTS UNDER BERMUDA. I SAID WE BELIEVED CERTAIN DISCRETION WAS ALLOWED TO THE DEPARTMENT OF JUSTICE IN CASES WHERE U.S. INTERNATIONAL RELATIONS MIGHT BE HARMED. I HOPED THERE WOULD BE ADVOCATES IN THE STATE DEPARTMENT PERSUADING THE DOJ TO EXERCISE THIS DISCRETION.

4. IN REPLY DAM SAID THAT HE WAS NOT AWARE OF ALL THE DETAILS BUT THAT HE UNDERSTOOD THE LETTERS WHICH HAD BEEN ISSUED WERE A CIVIL LIBEROTIES MEASURE IN ORDER TO GIVE THE RECIPIENTS AN OPPORTUNITY TO PERPARE THEIR DEFENCE. THE JUSTICE DEPARTMENT MIGHT NOT SEEK AN INDICTMENT. ON CONSULTATION HE SAID THAT THERE HAD BEEN A GOOD DEAL ALREADY. DAM WENT ON TO SAY THAT HE DID NOT KNOW THE NAME OF THE BA EMPLOYEE WHICH HAD BEEN WITHHELD FROM US. HE WAS GLAD THAT CONSULTATIONS WOULD BE HELD. THIS WOULD BE A GOOD VEHICLE FOR VOICING OUR CONCERNS. THE STATE DEPARTMENT HAD TO BE VERY CAREFUL AS THE DEPARTMENT OF JUSTICE HAD TO ACT INDEPENDENTLY. DISCRETION WAS EXERCISED BY THE DEPARTMENT OF JUSTICE ITSELF.

5. I SAID I DID NOT TAKE MUCH COMFORT FROM THAT EXPLANATION ALTHOUGH I WAS GRATEFUL FOR IT. THERE SEEMED TO BE A CONFLICT OF JURISDICTION: AMERICAN ANTI-TRUST LAWS ON THE ONE HAND AND A BINDING INTERNATIONAL AGREEMENT ON THE OTHER. THE DEPARTMENT OF STATE WAS THE REPOSITORY OF UK/US BILATERAL RELATIONS. WE LOOKED TO THE STATE DEPARTMENT TO HARMONISE THE U.S.'S INTERNATIONAL OBLIGATIONS WITH DOMESTIC LAW.

6. ONE OF DAM'S STAFF WENT ON TO SAY THAT ENFORCEMENT UNDER THE SHERMAN ACT WAS CONSISTENT WITH THE US'S INTERNATIONAL OBLIGATIONS. THIS HAD BEEN DISCUSSED WITH THE BRITISH GOVERNMENT. IN THE US'S VIEW THE BERMUDA II PROVISIONS WERE WRITTEN TO ALLOW CONTINUED ENFORCEMENT OF THE SHERMAN ACT. PRICE-SETTING AGREEMENTS COULD GO AHEAD ONLY AFTER ANTI-TRUST IMMUNITIES HAD BEEN OBTAINED.

7. IN CONCLUSION I INVITED DAM TO ACQUAINT HIMSELF PERSONALLY WITH THE DETAILS OF THIS CASE. I HOPED THE POLITICAL, IN ADDITION TO THE LEGAL, WING OF THE STATE DEPARTMENT WOULD BECOME INVOLVED.

8. COMMENT. THIS WAS NOT AN ENCOURAGING INTERVIEW. WHILE DAM IS A POLITICAL APPOINTMENT IN THE AMERICAN SENSE, HE IS NOT A POLITICIAN IN THE BRITISH SENSE. INDEED, THERE ARE ONLY TWO POLITICIANS IN THE U.S. ADMINISTRATION: THE PRESIDENT AND THE VICE-PRESIDENT. SO I WISH I COULD BE SURER THAN I AM THAT THE POLITICAL SENSITIVITY OF THIS ISSUE HAD BEEN REGISTERED WHERE IT COUNTS. I DO NOT SENSE THAT THE DEPARTMENT OF STATE IS VERY ZEALOUS IN REPRESENTING THE INTERNATIONAL INTERESTS OF THE UNITED STATES. AT THE RIGHT MOMENT I MAY HAVE TO RECOMMEND THAT THE PRIME MINISTER WEIGH IN WITH THE PRESIDENT: BUT NOT YET.

WRIGHT

File

AT

CONFIDENTIAL

GPS 400
CONFIDENTIAL
DESKBY 040900Z
FROM WASHINGTON 032320Z OCT 84.
TO IMMEDIATE F C O
TELEGRAM NUMBER 2964 OF 3 OCTOBER.

YOUR TELEGRAM NO 1740 AND TELECON ANGELL (CHASEAND BRAITHWAITE) GRAY

LAKER: GRAND JURY.

BRAITHWAITE PUT YOUR TWO QUESTIONS TO ELLIOTT SEIDEN.

2. SEIDEN SAID THAT THE LETTERS WERE NOT INTENDED TO PUT PRESSURE ON WITNESSES TO PROVIDE NEW EVIDENCE TO THE JUSTICE DEPARTMENT: THE LATTER ALREADY HAD ALL THE EVIDENCE THEY NEEDED TO MAKE UP THEIR MINDS ABOUT AN INDICTMENT. NOR DID THE LETTERS CONTAIN AN OFFER OF IMMUNITY. THEY WERE SIMPLY A ROUTINE OFFER TO POTENTIAL TARGETS OF AN APPEARANCE BEFORE THE GRAND JURY IN CASE THE TARGETS WISHED TO PRODUCE NEW EVIDENCE TO HEAD OFF AN INDICTMENT: THEY WERE THUS A DEVICE FOR ASSURING THAT TARGETS COULD HAVE A FIAR HEARING. IN SEIDEN'S EXPERIENCE THE LAWYERS OF POTENTIAL TARGETS NEARLY ALWAYS ADVISED THEM NOT TO TAKE ADVANTAGE OF THE OFFER. THE SECOND PART OF THE LETTER, OFFERING THE TARGET'S LAWYERS THE CHANCE OF MAKING A PRESENTATION TO JUSTICE DEPARTMENT OFFICIALS, WAS OCCASIONALLY TAKEN UP. USUALLY THE LAWYERS SIMPLY PRESENTED ARGUMENTS AS TO WHY THEIR CLIENTS SHOULD NOT BE INDICTED. VERY OCCASIONALLY THEY WOULD SEEK TO BARGAIN FOR SOME SORT OF IMMUNITY. BUT THE JUSTICE DEPARTMENT HAD NO INTENTION OF MAKING SUCH BARGAINS: NOT ONLY DID THEY NOT NEED ADDITIONAL EVIDENCE, BUT THEY DID NOT WISH TO TAINT THE EVIDENCE THEY ALREADY HAD BY INTERING INTO PLEA BARGAINING.

3. ON THE NOTIFICATION TO LAKER, SEIDEN SAID THAT - FOLLOWING THE INDICATION FROM MR MAYNARD THAT HMG WISHED TO CONTACT LAKER THEMSELVES - THE DEPARTMENT OF JUSTICE HAD CALLED IN THE LAKER LAWYERS YESTERDAY (2 OCTOBER) TO TELL THEM:-

A) THE JUSTICE DEPARTMENT WERE CONSIDERING ISSUING AN INDICTMENT AGAINST LAKER:

B) THEIR DECISION WOULD NOT TURN ON THE FACTS, OF WHICH THE JUSTICE

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/ DEPARTMENT

DEPARTMENT ALREADY HAD A SUFFICIENCY, BUT ON THE QUESTION OF WHETHER, BY PROVIDING ESSENTIAL EVIDENCE WHICH HAD ENABLED THE JUSTICE DEPARTMENT TO LAUNCH THE GRAND JURY INVESTIGATION IN THE FIRST PLACE, LAKER WERE ENTITLED TO CORPORATE CLEMENCY UNDER THE JUSTICE DEPARTMENT POLICY OF 1978 WHICH HAD EXTENDED THE POSSIBILITY OF CLEMENCY FROM INDIVIDUALS TO CORPORATE BODIES.

C) TO REQUEST THE LAKER LAWYERS TO MAKE A PRESENTATION ON THIS POINT.

4. SEIDEN SAID THAT THE PRESENTATION BY THE LAKER LAWYERS WOULD NOW TAKE PLACE ON 4 OCTOBER. HE SAID THAT THE JUSTICE DEPARTMENT DID NOT AT PRESENT INTEND TO SET OUT IN A LETTER THE POINTS THEY HAD MADE TO THE LAKER LAWYERS YESTERDAY. HE EMPHASISED THAT IT WAS NOT THE TREBLE DAMGE CASE BROUGHT BY LAKER THAT HAD TRIGGERED OFF THE GRAND JURY INVESTIGATION, BUT THE EVIDENCE SUBSEQUENTLY MADE AVAILABLE TO THE JUSTICE DEPARTMENT BY LAKER.

FCO ADVANCE COPIES TO: GRAY, AUST (FCO) KNIGHTON, STEVENS, FORTNAM (DTP) AYLING (DTI)

WRIGHT

(ADVANCED AS REQUESTED)

LIMITED

MAED
NAD
NEWS D
ERD
LEGAL ADVS
PS
PS/LADY YOUNG
PS/MR RENTON
PS/PUS
SIR C TICKELL
MR J THOMAS
MR O'NEILL

ADDITIONAL DISTN:
US ANTI-TRUST ACTION
AGAINST BRIRISH AIRLINES

COPY TO.
MR CARTLEDGE, CABINET OFFICE
MR STEVENS DTP

Prime Minister (2)

This isn't going well.

AT 3/10

SECRETARY OF STATE FOR TRANSPORT

US GRAND JURY INVESTIGATION AND LAKER CASE:
ATTORNEY GENERAL'S LUNCH WITH US AMBASSADOR ON 1 OCTOBER

1. I had lunch yesterday with Ambassador Price and Mr Deal of the US Embassy to discuss the possibility of indictments against British Airways and Laker Airways for alleged illegal fare fixing (see Washington telegrams Nos. 2870 and 2871 attached). Mr Ayling also was present.

2. I made the following points : -

i) we were surprised and disappointed that the Department of Justice thought it necessary even to consider indicting two British airlines for discussing fares questions in London prior to CAA fare filings;

ii) the overwhelming British interest should lead the Department of Justice to exercise its discretion not to indict;

iii) the decision called in question the value of British airlines route rights under Bermuda 2 and emphasised the need to resolve the dispute as a whole to avoid a similar controversy in the future;

iv) there was sufficient common interest between the two Governments to be able to reach an agreement;

v) the forthcoming discussions with the Department of Justice provided an opportunity to discuss the broader implications;

vi) it was important for the wider US/UK relationship that the matter was resolved. It was politically an important matter here and Ministers would react strongly against a decision to proceed with indictments;

vii) the discussions with the Department of Justice must therefore be a genuine consultation.

3. Ambassador Price listened sympathetically to these points and undertook to report back the serious concern felt by the British Government. He said that similar points had already been made to him by the Secretary of State for Trade and Industry and he was in no doubt of the Government's attitude.

4. I am copying this minute to the Prime Minister, the Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for Trade and Industry.

MH

Attorney General's Chambers
Law Officers' Department
Royal Courts of Justice
Strand
London WC2

2 October 1984.

GR 850

CONFIDENTIAL

CONFIDENTIAL
DESKBY 270900Z
FM WASHINGTON 270350Z SEP 84
TO IMMEDIATE F C O
TELEGRAM NUMBER 2870 OF 26 SEPTEMBER.

LAKER: GRAND JURY

SUMMARY

1. JUSTICE DEPARTMENT HAS INVITED H.M.G. FOR CONSULTATIONS UNDER THE NON-PAPER ARRANGEMENTS ON 15-16 OCTOBER. THE D.O.J.S PRELIMINARY CONCLUSION IS THAT B.A. AND POSSIBLY LAKER SHOULD BE INDICTED FOR PER SE PRICE FIXING AND B.A. AND PANAM FOR FIXING SCHEDULES.

DETAIL

2. SEIDEN (JUSTICE DEPARTMENT) FLANKED BY THE DEPARTMENTS TEAM OF LAWYERS WHO HAVE STAFFED THE GRAND JURY INVESTIGATION INFORMED COUNSELLOR (CAS) ON 26 SEPTEMBER THAT UNDER THE NON-PAPER ARRANGEMENTS THE D.O.J. WISHED TO INVITE H.M.G. TO CONSULTATIONS IN WASHINGTON ON OCTOBER 15 AND 16. SEIDEN HANDED MAYNARD A STATEMENT OF THE D.O.J.S PRELIMINARY CONCLUSIONS OF THE GRAND JURY INVESTIGATION
WHICH WOULD FORM THE BASIS OF THE CONSULTATIONS (TEXT IN M.I.F.T.).

3. SEIDEN EMPHASISED THAT THE D.O.J. STATEMENT SHOULD BE REGARDED AS A GOVERNMENT TO GOVERNMENT COMMUNICATION AND, CONSISTENT WITH THE NATURE OF THE NON-PAPER, CONSIDERED CONFIDENTIAL. IT SHOULD NOT BE SHOWN TO THE AIRLINES OR IN ANY OTHER WAY MADE PUBLIC. IT SHOULD ALSO BE REGARDED AS A FORMAL NOTIFICATION ENCOMPASSING US INTERNATIONAL OBLIGATIONS SUCH AS THOSE COVERED BY THE O.E.C.D.

4. SEIDEN INDICATED THAT WHILE THE CONSULTATIONS COULD BE DELAYED IF THE PRECISE DATES OFFERED WERE INCONVENIENT IT WAS MCGRATH'S (ASSISTANT ATTORNEY-GENERAL) INTENTION TO CHAIR THE U.S. DELEGATION AND THE 15 AND 16 OCTOBER WERE THE ONLY TWO POSSIBILITIES IN THAT WEEK.

5. MAYNARD SAID THAT THE NEED FOR CONSULTATIONS WOULD BE A MAJOR DISAPPOINTMENT TO H.M.G. HE NOTED THE DESIRE FOR CONFIDENTIALITY (SEE PARA 3) WHICH WOULD OF COURSE BE RESPECTED BUT SINCE B.A. WERE AWARE OF THE D.O.J.'S VIEWS FROM THE DISCUSSIONS BETWEEN THEIR LAWYERS AND THE JUSTICE DEPARTMENT THE ESSENCE OF THE D.O.J. STATEMENT WAS ALREADY KNOWN OUTSIDE GOVERNMENT. SEIDEN RECOGNISED THIS BUT INDICATED THAT SOME ASPECTS OF THE D.O.J.'S CONCLUSIONS HAD CHANGED SINCE THE DISCUSSIONS WITH B.A. (ALTHOUGH SEIDEN DID

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/ NOT

NOT REFER TO LEG 4 IN THIS CONTEXT ITS OMISSION FROM THE STATEMENT IS A SIGNIFICANT CHANGE - SEE PARA BELOW). SEIDEN ACCEPTED ALSO THAT B.A.'S LAWYERS HAD BEEN PROMISED A FURTHER CHANCE TO ARGUE THEIR CASE WITH THE JUSTICE DEPARTMENT AT A HIGHER LEVEL (MCGRATH) BUT CONSIDERED THAT THIS SHOULD TAKE PLACE AFTER CONSULTATIONS WITH H.M.G. THE CONSULTATIONS WERE MEANT TO BE QUOTE GENUINE UNQUOTE AND QUOTE ANYTHING WAS POSSIBLE UNQUOTE AS A RESULT.

6. IN RESPONSE TO QUESTIONS AND FURTHER DISCUSSION CONCERNING MORE DETAILED INFORMATION TO SUPPORT THE D.O.J.'S PRELIMINARY CONCLUSIONS SEIDEN REITERATED THE PROBLEMS POSED BY GRAND JURY SECRECY REQUIREMENTS. IT WOULD NOT BE POSSIBLE TO PROVIDE INFORMATION ABOUT THE EVIDENCE SUCH AS THE STATEMENTS OF WITNESSES. H.M.G. WOULD HAVE TO RELY ON BRIEFING FROM B.A. WHO WERE AWARE OF THE EVIDENCE GIVEN TO THE GRAND JURY AND WERE NOT THEMSELVES BOUND BY THE SECRECY RULES. MAYNARD SAID THAT NEVERTHELESS H.M.G.'S ABILITY TO MAKE A CONSTRUCTIVE CONTRIBUTION TO THE CONSULTATIONS WOULD BE HANDICAPPED IN THE ABSENCE OF SOME DETAIL. HE POINTED OUT THAT THE D.O.J. STATEMENT CONCERNING PER SE PRICE FIXING GAVE NO INDICATION OF THE DURATION OF THE ALLEGED CONSPIRACY. SEIDEN AGREED THAT THIS MIGHT BE AN AREA IN WHICH FURTHER CLARIFICATION COULD BE SOUGHT.

7. SEIDEN CONFIRMED THAT THE ABSENCE OF ANY REFERENCE TO U.S. CARRIERS IN THE D.O.J. STATEMENT MEANT THAT THE D.O.J. DID NOT HAVE SUFFICIENT EVIDENCE CONCERNING THEIR INVOLVEMENT TO CONSIDER AN INDICTMENT. HE ALSO CONFIRMED THAT THE D.O.J. DID NOT INTEND TO PROCEED FURTHER WITH THE LEG 2 (PREDATORY PRICING) ALLEGATION. MAYNARD SAID THAT HE WOULD EXPECT THAT H.M.G. WOULD WANT THE D.O.J.'S HANDLING OF ITS CONCLUSIONS ON LEG 2 TO BE PART OF THE CONSULTATIONS. SEIDEN SAID THAT THIS WAS UNDERSTOOD ALTHOUGH NO THOUGHT HAD YET BEEN GIVEN TO THIS BY THE JUSTICE DEPARTMENT.

8. CONCERNING THE ALLEGED CONSPIRACY ON CAPACITY SEIDEN WAS AT PAINS TO EMPHASISE THAT THE REFERENCE TO A THREE COUNT INDICTMENT (PARA 3 OF M.I.F.T.) DID NOT REPRESENT ANY UNWILLINGNESS TO FULFILL THE OBLIGATIONS SET OUT IN THE EXCHANGES IN MAY THIS YEAR (SEE MY TEL NOS 1472 AND 1473). IN DESCRIBING THE PROPOSED INDICTMENT THE JUSTICE DEPARTMENT HAD TO INDENTIFY THE QUOTE COGNISABLE UNQUOTE EFFECTS OF ANY CONSPIRACY AS WELL AS THE ALLEGED ILLEGAL COLLUSION. SINCE THE EFFECTS RELATED TO TWO SEPARATE ROUTES AND SEPARATE SEASONS THEIR WOULD HAVE TO BE A THREE COUNTS. THIS DOES NOT PRECLUDE THE JUSTICE DEPARTMENT ACCEPTING NOLO CONTENDERE PLEA TO ONE COUNT AS QUOTE THE TOTAL DISPOSITION UNQUOTE OF THE INDICTMENT. (PARA 4 OF MY TELNO 1473).

9. SEIDEN AGREED THAT THERE WAS NO REFERENCE TO LEG 4 (HOLLYWOOD) IN THE STATEMENT. THIS REPRESENTED A TENTATIVE DECISION NOT TO BRING AN INDICTMENT FOR THE ACTIVITIES OF U.K. AIRLINES AT THE I.A.T.A. MEETING IN HOLLYWOOD IN EARLY 1982. IT DID NOT MEAN THAT THE GRAND JURY HAD INSUFFICIENT EVIDENCE. SEIDEN SAID THAT THE REASONS FOR THIS WOULD BE EXPLAINED TO H.M.G. DURING THE CONSULTATIONS: THE U.S. WOULD WANT HOLLYWOOD TO BE ON THE AGENDA.

F.C.O. PLEASE ADVANCE TO:
AYLING, HEALEY, D T I
KINGHTON, STEVEN, FORTNAM, D T P
GRAY, M A E D, F C O
AUST, LEGAL ADVISERS, F C O
GARDINER, L O D

WRIGHT

[ADVANCED AS REQUESTED]

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PS/LADY YOUNG
PS/MR RENTON
PS/PUS
SIR C TICKELL
MR J THOMAS
MR O'NEILL

ADDITIONAL DISTN:
US ANTI-TRUST ACTION
AGAINST BRIRISH AIRLINES

COPY TO.
MR CARTLEDGE, CABINET OFFICE.
PLUS
ADVANCE ADDRESSEES

CONFIDENTIAL

GRS 370

CONFIDENTIAL
DESKBY 270900Z
FM WASHINGTON 270351Z SEPTEMBER 84
TO IMMEDIATE FCO
TELEGRAM NUMBER 2871 OF 26 SEPT

MIPT: LAKER

TEXT OF JUSTICE DEPARTMENT STATEMENT OF PRELIMINARY CONCLUSIONS AS FOLLOWS:

THE ANTITRUST DIVISION HAS BEEN CONDUCTING A GRAND JURY INVESTIGATION OF ANTICOMPETITIVE CONDUCT IN THE NORTH ATLANTIC AIR TRANSPORTATION MARKET. THE GRAND JURY INVESTIGATION HAS GATHERED SUBSTANTIAL EVIDENCE IMPLICATING BRITISH AIRWAYS (BA), LAKER AIRWAYS AND THREE FORMER SENIOR BA OFFICIALS IN A CONSPIRACY TO FIX THE PRICE OF AIR TRAVEL BETWEEN THE UNITED STATES AND THE UNITED KINGDOM. THE ANTITRUST DIVISION IS CONSIDERING A ONE COUNT INDICTMENT OF BA, THE THREE INDIVIDUALS, AND POSSIBLY LAKER AIRWAYS FOR THIS CONSPIRACY.

THE EVIDENCE SHOWS THAT ON AT LEAST TWO OCCASIONS IN 1981, SENIOR OFFICIALS OF BA AND LAKER AIRWAYS NEGOTIATED, AND THEN IMPLEMENTED, PRICE-FIXING AGREEMENTS. THE ESSENCE OF BOTH AGREEMENTS WAS THAT LAKER AIRWAYS WOULD GO ALONG WITH SUBSTANTIAL FARE INCREASES IN THE PROMOTIONAL FARE CATEGORIES (STANDBY AND SUPERAPEX) IF BA WOULD ACCORD LAKER AIRWAYS A NOMINAL PRICING DIFFERENTIAL AT THE NEW HIGHER FARES.

THE GRAND JURY INVESTIGATION HAS ALSO GATHERED SUBSTANTIAL EVIDENCE IMPLICATING BA AND PAN AM IN A CONSPIRACY TO REDUCE CAPACITY AND ALLOCATE DAYS OF SERVICE FOR CERTAIN U.S.-U.K. ROUTES FOR THE 1980-81 AND 1981-82 WINTER SEASONS. THE EVIDENCE SHOWS THAT FOR THE 1981-82 WINTER SEASON, BA AND PAN

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AM AGREED JOINTLY TO REDUCE CAPACITY AND ALLOCATE DAYS OF SERVICE FOR THE LONDON/WASHINGTON AND LONDON/LOS ANGELES ROUTES. FOR THE 1980-81 WINTER SEASON, THE EVIDENCE SHOWS THAT PAN AM AND BA AGREED JOINTLY TO REDUCE CAPACITY AND ALLOCATE DAYS OF SERVICE FOR THE LONDON/WASHINGTON-DETROIT ROUTE. THE AGREEMENTS FOR THE 1980-81 AND 1981-82 WINTER SEASONS WERE IMPLEMENTED, AND FLIGHT SCHEDULES WERE FILED ACCORDINGLY. THE ANTITRUST DIVISION IS CONSIDERING A THREE COUNT INDICTMENT OF PAN AM AND BA FOR THIS CONSPIRACY.

FCO PLEASE ADVANCE:-
AYLING HEALEY DTI
KNIGHTON STEVENS FORTNAM DTP
GRAY MAED FCO
AUST FCO LEGAL ADVISERS
GARDINER L.O.D.

WRIGHT (ADVANCED AS REQUESTED)

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PS/LADY YOUNG
PS/MR RENTON
PS/PUS
SIR C TICKELL
MR J THOMAS
MR O'NEILL

ADDITIONAL DISTN:
US ANTI-TRUST ACTION
AGAINST BRIRISH AIRLINES

COPY TO.
MR CARTLEDGE, CABINET OFFICE.
PLUS
ADVANCE ADDRESSEES.

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn

14 September, 1984

Sir,

You carried a report on 13 September that the Attorney General would be flying to Washington to press the United States to drop its investigations into alleged price-fixing agreements by airlines before the Laker collapse. It inferred that his purpose would be to avoid any adverse effect of the investigation on the BA flotation. In his letter of 14 September, perhaps in reliance on your report, Mr. Whitaker suggests that for the Attorney General to do so would be improper.

I am writing to correct the false impression that has been given. Sir Michael flew to the USA on 9 September on a visit fixed some time ago, involving speaking engagements in New Orleans followed by a private visit to Philadelphia. He will break his Philadelphia visit to spend one day in Washington taking up an invitation from a legal colleague in the US administration with whom he has on several occasions discussed legal problems arising between the UK and the USA.

In Washington Sir Michael will discuss a number of matters, each of them legal in nature and the subject of previous contacts between Sir Michael and his US legal counterparts. Among them is the disputed claim of jurisdiction by the USA in a number of areas, including the claim to apply anti-trust laws to activities of airlines regulated under the international Agreement between the UK and the USA ("Bermuda 2"). There has for some time been a serious dispute on the interpretation of Bermuda 2. One issue is whether the USA has a right to apply its own laws to investigate and regulate the consequences of airlines charging fares established pursuant to Bermuda 2, approved by both Governments and thereafter required by the laws of both countries to be charged.

/These

These matters raise important questions of law for the United Kingdom on which it is the function and duty of the Attorney General to represent the United Kingdom's views regardless of the policy of the Government to privatise any particular undertaking.

Yours faithfully

Patrick Mayhew

The Editor
The Times
New Printing House Square
Gray's Inn Road
London WC1

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES ADVANCE COPIES

PS
PS/LADY YOUNG
PS/PUS
SIR C TICKELL
MR ~~[illegible]~~ ~~O'NEILL~~ J. THOMAS
MR AUST, Legal Advisers
MR FREELAND, Legal Advisers
ED/MAED (2)
ED/NAD
RESIDENT CLERK

IMMEDIATE

PS/S of S
MR LAZARUS, PUS
MR KNIGETON
MR STEVENS
MR ~~[illegible]~~ FORTNAM ~~[illegible]~~
~~[illegible]~~
} DEPT OF TRANSPORT

MR AYLING
MR ROBERTS
MR HUTTON
MR ~~[illegible]~~ HEALEY
MR BECKETT (Solicitors)
} DTI

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

CONFIDENTIAL
DESKBY 190900Z
FM WASHINGTON 182305Z SEP 84
TO IMMEDIATE FCO
TELEGRAM NUMBER 2776 OF 18 SEPTEMBER
YOUR TELNO 1605: LAKER: ATTORNEY-GENERAL'S VISIT.
SUMMARY.

1. THE ATTORNEY-GENERAL CALLED, AS PLANNED, ON BOTH THE PRESIDENT'S COUNSEL, FIELDING, AND THE ASSISTANT ATTORNEY GENERAL FOR ANTI-TRUST AFFAIRS, MCGRATH. TO BOTH HIS INTERLOCUTORS HE UNDERLINED THE CONSIDERABLE POLITICAL IMPORTANCE OF THE LAKER CASE TO BRITISH MINISTERS, AND THE PRIME MINISTER'S OWN PERSONAL INTEREST. HE EMPHASISED THAT THER E WERE SERIOUS LEGAL ISSUES OF PRINCIPLE AT STAKE. MOREOVER WE EXPECTED THE JUSTICE DEPARTMENT TO USE THEIR DISCRETION OVER THE CRIMINAL INVESTIGATION INTO ACTIVITIES OF BRITISH AIRLINES, TO USE THEIR IMAGINATION IN FINDING WAYS OF MITIGATING THE DAMAGE WHICH OUR AIRLINES MIGHT SUFFER IN THE CIVIL CASES, AND TO NEGOTIATE CONSTRUCTIVELY OVER FUTURE ARRANGEMENTS DESIGNED TO PREVENT THESE THINGS OCCURRING AGAIN. HE MADE IT QUITE CLEAR THAT, WHATEVER THE OUTCOME OF THE JUSTICE DEPARTMENT'S CONSIDERATION OF THE GRAND JURY CASE, WE RETAINED THE RIGHT TO GO TO ARBITRATION UNDER THE BERMUDA 2 AGREEMENT IF NECESSARY. BUT HE EMPHASISED THAT, IN OUR VIEW, BOTH GOVERNMENTS HAD A RESPONSIBILITY TO SEEK A SENSIBLE OUTCOME TO THE CURRENT PROBLEMS, WHATEVER THEIR VIEWS ON THE LEGAL ISSUES INVOLVED. THE ATTORNEY GENERAL SUCCESSFULLY DEFUSED ANY BAD FEELING THAT MAY HAVE REMAINED ABOUT LAST WEEK'S LEAK IN THE LONDON TIMES.

DETAIL

DETAIL

2. FIELDING WAS EVIDENTLY VERY WELL AWARE OF THE POLITICAL IMPORTANCE OF THE LAKER CASE TO HER MAJESTY'S GOVERNMENT. HE ASSURED THE ATTORNEY-GENERAL THAT HE WOULD CONTINUE TO TAKE A CLOSE INTEREST IN IT. HE SAID THAT THE LEAK IN THE BRITISH PRESS HAD OF COURSE COMPLICATED MATTERS. MCGRATH HAD SAID TO HIM THAT HE COULD NOT NOW AFFORD TO GIVE THE APPEARANCE THAT HIS EVENTUAL DECISION ON AN INDICTMENT HAD BEEN AFFECTED BY BRITISH POLITICAL PRESSURE, AND THAT THE CONSULTATIONS WITH THE BRITISH UNDER THE NON-PAPER WOULD HAVE TO BE POSTPONED UNTIL THE THIRD OR FOURTH WEEK OF OCTOBER. FIELDING THOUGHT THAT THIS MIGHT BE CONVENIENT POLITICALLY, SINCE IT WOULD GIVE TIME FOR ANY PRESS INTEREST TO ABATE SOMEWHAT.

3. IN HIS INTERVIEW WITH MCGRATH, THE ATTORNEY-GENERAL EMPHASISED THAT INTERNATIONAL TRANSPORT, AND IN PARTICULAR INTERNATIONAL AVIATION, COULD NOT BE SUBJECTED TO THE UNILATERAL APPLICATION OF THE LAW OF ONE OF THE PARTIES. THIS WAS OUR LEGAL POSITION: BUT IT ALSO FLOWED FROM THE NATURE OF INTERNATIONAL TRANSPORTATION ITSELF. THE AIRLINES IN THE LAKER CASE HAD COMMUNICATED THEIR PROPOSED TARIFFS TO THE AVIATION AUTHORITIES OF BOTH GOVERNMENTS, WHICH HAD APPROVED THEM. BOTH GOVERNMENTS HAD AN EVIDENT RESPONSIBILITY TO STAND BY THE APPROVALS THEY HAD GIVEN. WE KNEW THAT THE JUSTICE DEPARTMENT HAD DISCRETION IN THESE CASES, AND THAT THE CONSIDERATIONS THEY NORMALLY TOOK INTO ACCOUNT INCLUDED THE INTERESTS OF FOREIGN GOVERNMENTS AND THE CLARITY OR OTHERWISE OF THE LEGAL SITUATION. IN THE PRESENT CASE THE BRITISH GOVERNMENT'S INTEREST WAS CLEAR, AND THE LEGAL DISPUTE BETWEEN THE TWO GOVERNMENTS SHOWED THAT THE LAW WAS OBSCURE. IN ALL THESE CIRCUMSTANCES WE WOULD FIND IT VERY DIFFICULT TO UNDERSTAND A DECISION BY THE JUSTICE DEPARTMENT TO INDICT: AND, BY THE SAME TOKEN, WE BELIEVED THAT A DECISION NOT TO INDICT OUGHT TO BE DEFENSIBLE TO AMERICAN PUBLIC OPINION, AS WELL AS BEING NATURALLY MOST WELCOME TO THE BRITISH GOVERNMENT. ALTHOUGH THE JUSTICE DEPARTMENT INVESTIGATION RAISED MAJOR QUESTIONS OF PRINCIPLE FOR US, THE CIVIL CASES WERE LIKELY IN PRACTICE TO BE MUCH MORE DAMAGING TO OUR AIRLINES. WE THEREFORE LOOKED TO THE JUSTICE DEPARTMENT TO HANDLE MATTERS IN SUCH A WAY AS TO LIMIT THE DAMAGE THAT COULD BE CAUSED IN THE CIVIL CASES. AND WE LOOKED EQUALLY TO THEM, AND TO THE REST OF THE ADMINISTRATION, TO NEGOTIATE WITH US CONSTRUCTIVELY ABOUT ARRANGEMENTS TO PREVENT THESE DIFFICULTIES RECURRING IN THE FUTURE. THOUGH WE UNDERSTOOD THE REASONS OF AMERICAN LAW AND POLITICS WHICH MADE THIS DIFFICULT, WE LOOKED TO THE ADMINISTRATION FOR AN IMAGINATIVE APPROACH APPROPRIATE TO RELATIONS BETWEEN TWO CLOSE ALLIES.

4. MCGRATH SAID THAT NO DECISION HAD YET BEEN TAKEN IN THE JUSTICE DEPARTMENT ABOUT WHETHER THE EVIDENCE MIGHT JUSTIFY

JUSTICE DEPARTMENT ABOUT WHETHER THE EVIDENCE MIGHT JUSTIFY AN INDICTMENT. THE AMERICANS WOULD OF COURSE CONSULT WITH US BEFORE PROCEEDING TO AN INDICTMENT, AND WOULD INDEED HAVE DONE SO EVEN IF THE NON-PAPER HAD NOT EXISTED. BUT THE ISSUES WERE COMPLEX, AND THE RESPONSIBLE OFFICIALS HAD OTHER PRESSING TASKS: FOR EXAMPLE ELLIOTT SEIDEN HAD TO PREPARE FOR AND PARTICIPATE IN THE COMING MEETING OF ECAC. FOR THESE REASONS MCGRATH DID NOT THINK CONSULTATIONS COULD TAKE PLACE BEFORE MID-OCTOBER. AS FOR THE PRESS LEAK, THAT WAS NOW SPILT MILK: IT WOULD NOT AFFECT HIS APPROACH ONE WAY OR THE OTHER.

COMMENT

5. MCGRATH'S EXPLANATION OF THE REASONS FOR SUBSTANTIAL AND FURTHER DELAY BEFORE CONSULTATIONS TAKE PLACE WAS THIN. THE REASONS MAY BE POLITICAL: THE ADMINISTRATION MAY NOT WISH TO TAKE A FINAL DECISION UNTIL AFTER THE ELECTION. THIS CUTS BOTH WAYS AS FAR AS WE ARE CONCERNED. A COOLING OFF PERIOD AFTER THE PRESS LEAK IS PROBABLY NECESSARY. AND, IN THE PRE-ELECTION PERIOD THE JUSTICE DEPARTMENT WOULD HAVE TO BE PARTICULARLY CAREFUL ABOUT NOT SEEMING TO TRUCKLE TO FOREIGNERS. MOREOVER, THIS IS PROBABLY A NETTLE WHICH THE PRESIDENT (WHO WILL NOW ALMOST CERTAINLY HAVE TO BE INVOLVED) WOULD PREFER NOT TO HAVE TO GRASP WHILE HE IS CAMPAIGNING. ON THE OTHER HAND, THE JUSTICE DEPARTMENT MAY CALCULATE THAT DELAY IS TO THEIR TACTICAL ADVANTAGE. WE WILL PROBE THEIR MOTIVES FURTHER.

6. THE PRESS LEAK HAS CERTAINLY LEFT SOME SORE FEELINGS, THOUGH WE DOUBT IF THE AMERICANS NOW THINK THAT WE DELIBERATELY SET THEM UP. WE HAVE TOLD THEM THAT WE INTEND TO TAKE THE LINE IN THE SOLICITOR GENERL'S LETTER (YOUR TELNO 1599) IF WE ARE APPROACHED BY THE PRESS. WE SHALL DRAW ON THE ADDITIONAL PRESS MATERIAL YOU HAVE SENT US AS NECESSARY.

FCO PLEASE ADVANCE TO:
KNIGHTON STEVENS FORTNAM DTP
AYLING HEALEY DTI
GRAY MAED FCO
AUST FCO LEGAL ADVISORS
GARDINER L.O.D.

WRIGHT

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GRS 420

CONFIDENTIAL
DESKBY 171700Z
FM FCO 171100Z SEPTEMBER 1984
TO IMMEDIATE WASHINGTON
TELEGRAM NUMBER 1605 OF 17 SEPTEMBER

YOUR TELNOS 2712, 2713 AND MIFT : LAKER : ATTORNEY GENERAL'S VISIT

1. THE DEFERMENT OF THE OFFICIAL CONSULTATIONS AND THE INACCURATE LEAK ABOUT THE OBJECTIVE OF THE ATTORNEY GENERAL'S VISIT (WHICH THE US MAY NONETHELESS SUSPECT WE INSPIRED) SEEMS TO US LIKELY FROM THE POINT OF VIEW OF THE US SIDE TO HEIGHTEN THE SIGNIFICANCE OF THE ATTORNEY'S ENCOUNTER WITH FIELDING. BUT WE ARE STILL UNSIGHTED ABOUT THE POSITION WHICH THE US INTEND TO TAKE BOTH IN SUBSTANCE AND IN DETAIL. BECAUSE OF THIS, WE DO NOT THINK WE SHOULD ASK THE PRIME MINISTER TO SEND A FURTHER MESSAGE NOW, SINCE WE FEEL WE SHOULD KEEP THIS SCARCE CURRENCY IN RESERVE. BUT THE ATTORNEY GENERAL SHOULD BE BRIEFED TO REFLECT THE HIGH POLITICAL CONCERN OVER THIS ISSUE, BY REFEFENCE BACK TO EARLIER MESSAGES. MOREOVER, IF THE US ARE REVIEWING POLICY AT A HIGH LEVEL WE THINK THAT WE SHOULD POINT UP STILL MORE CLEARLY, AS WE HAD IN MIND TO DO IN THE OPENING REMARKS IN THE OFFICIAL LEVEL CONSULTATION, THAT WE HAVE ALWAYS BEEN LOOKING FOR A RESOLUTION OF THIS DISPUTE WHICH PROVIDES AN ACCEPTABLE OUTCOME ON THREE ISSUES: NOT ONLY THE DEPARTMENT OF JUSTICE ENFORCEMENT, BUT ALSO ON FUTURE ARRANGEMENTS AND THE CIVIL SUITS. THIS IS ALREADY INCORPORATED IN THE LINE TO TAKE FOR THE ATTORNEY GENERAL BUT, IN THE LIGHT OF THE ABOVE ANALYSIS WE PROPOSE THE AMENDMENTS SET OUT IN MIFT.

2. WITH REGARD TO POINT 6 IN THE DRAFT IN OUR TELNO 1581 WE

AGREE THAT FIELDING MIGHT ASK US FOR OUR PROPOSALS IN RELATION TO THE PRIVATE SUITS. WE THINK IT ESSENTIAL TO REGISTER THAT SOMETHING HELPFUL TO THE PRIVATE SUITS IS PART OF WHAT WE EXPECT FROM THE US, OTHERWISE THEIR POLICY REVIEW MAY BE INADEQUATE. WE SEE NO PROBLEM FOR THE ATTORNEY IN DEALING WITH ANY QUESTION ABOUT WHAT WE PROPOSE: HE IS ENTITLED TO SAY THAT THE PROBLEM HAS BEEN CREATED BY THE FACT THAT US GENERAL ANTITRUST LAW HAS BEEN LEFT UNTRAMMELLED IN RELATION TO AVIATION COMPETITION ISSUES, DESPITE THE FACT THAT COMPETITION IS REGULATED BY BERMUDA II. IT IS FOR THE US SIDE TO CONSIDER WHAT CAN BE DONE ABOUT THIS. WE DO NOT ACCEPT AS FINAL THE FACT THAT PEOPLE AT STAFF LEVEL HAVE BEEN UNABLE TO THINK OF ANY SOLUTION. THIS CASE HAS ALREADY PRODUCED PRECEDENTS ON BOTH SIDES OF THE ATLANTIC. THE INGENUITY OF SENIOR LEGAL FIGURES IN THE US NEEDS TO BE DEPLOYED ON THE PROBLEM - AS IT HAS BEEN ON OTHER SERIOUS INTERNATIONAL PROBLEMS FACED BY THE UNITED STATES IN THE PAST.

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PS/MR WHITNEY
PS/PUS
SIR C TICKELL
MR J THOMAS
MR O'NEILL

ADDITIONAL DISTN:
US ANTI-TRUST ACTION
AGAINST BRIRISH AIRLINES

COPY TO.
MR CARTLEDGE, CABINET OFFICE

OO WASHINGTON
GRS 120
CONFIDENTIAL
FM FCO 171205Z SEPT 84
TO IMMEDIATE WASHINGTON
TELEGRAM NUMBER 1602 OF 17 SEPTEMBER
YOUR TELNO 2737.
LAKER: PRESS LINE FOR ATTORNEY-GENERAL'S VISIT

1. WE AGREE YOUR PRESS LINE SUBJECT TO FOLLOWING AMENDMENT TO PARA 3 OF TUR.

2. DELETE LAST TWO SENTENCES: 'WE THINK.....HMG'S VIEWS ON THIS DISPUTE' AND INSERT 'WE THINK THAT US ANTI-TRUST LAWS ARE INCOMPATIBLE WITH THE UK-US BILATERAL AGREEMENT AND THAT IT IS QUITE INAPPROPRIATE FOR THE AMERICAN GOVERNMENT TO BE PURSUING A CRIMINAL INVESTIGATION AGAINST BRITISH AIRLINES IN THESE CIRCUMSTANCES. THIS HAS BEEN MADE CLEAR TO THE AMERICAN GOVERNMENT ON A NUMBER OF OCCASIONS. THE ATTORNEY-GENERAL HAS TODAY REITERATED HMG'S STRONGLY-HELD VIEWS ON THIS MATTER'.

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PS/PUS
SIR C TICKELL
MR J THOMAS
MR O'NEILL

ADDITIONAL DISTN:
US ANTI-TRUST ACTION
AGAINST BRIRISH AIRLINES

COPY TO.
MR CARTLEDGE, CABINET OFFICE

DD 171200Z WASHINGTON
GRS 946
UNCLASSIFIED
DESKBY 171200Z
FM FCO 170930Z SEPT 84
IMMEDIATE WASHINGTON
TELEGRAM NUMBER 1599 OF 17 SEPTEMBER
YOUR TEL 2737 AND TELECON CHASE/MAYNARD
LAKER BRITISH PRESS
FOLLOWING IS TEXT OF WHITAKER'S LETTER IN 'TIMES' OF 14 SEPTEMBER AND OF SOLICITOR GENERAL'S LETTER IN 'TIMES' OF 17 SEPTEMBER IN REPLY
TEXT OF WHITAKER'S LETTER BEGINS
1. SIR, NEXT WEEK'S VISIT BY THE ATTORNEY GENERAL, SIR MICHAEL HAVERS, TO WASHINGTON TO PRESS THE US JUSTICE DEPARTMENT TO DROP ITS LAKER ENQUIRY INTO THE ALLEGED CRIMINAL CONSPIRACY BY, INTER ALIA, BRITISH AIRWAYS TO DRIVE SIR FREDDIE LAKER OUT OF BUSINESS, LEAVES ONE IN OPEN-MOUTHED ASTONISHMENT AND DISGUST.
2. FIRST, IT IS A BARE-FACED ATTEMPT BY THE CRIMINAL LAW-ENFORCEMENT AUTHORITIES OF ONE COUNTRY TO INTERFERE WITH THOSE OF ITS NEIGHBOUR, AND FOR THE EVIDENT PURPOSE OF SECURING A COMMERCIAL ADVANTAGE. IF SIR MICHAEL SUCCEEDS, IT WILL GO A LONG WAY TOWARDS UNDERMINING THE US DOLLARS 100M 'ANTI-TRUST' CLAIM BY THE LAKER LIQUIDATORS AGAINST A NUMBER OF AIRLINES, INCLUDING BRITISH AIRWAYS IN THE UNITED STATES. SELF-EVIDENTLY, THE PROPOSED FLOTATION OF BRITISH AIRWAYS AS A PRIVATE COMPANY NEXT MARCH WITH THAT POTENTIAL LIABILITY ON ITS PRICE-TAG WILL BE A GOOD DEAL LESS ATTRACTIVE THAN IT WOULD BE WITHOUT IT.
3. MIGHT ONE ASK SIR MICHAEL TO LOOK FOR A MOMENT IN HIS OWN BACK YARD? WHILE THE LAW OF CONTEMPT MAY BE DIFFERENT IN THE UNITED STATES FROM WHAT IT IS HERE, HE MAY REMEMBER HOW HIS PREDECESSOR, THE PRESENT LORD RAWLINSON, WAS AT PAINS IN 1973 TO STOP THE SUNDAY TIMES PUTTING PRESSURE OF ANY SORT ON DISTILLERS TO INCREASE THEIR OFFER TO THE

INJURED THALIDOMIDE CHILDREN.

4. FORTUNATELY, IN THE END, HE DID NOT SUCCEED. UNFORTUNATELY, DESPITE THE JUDGEMENT OF THE EUROPEAN COURT, THE CONTEMPT OF COURT ACT 1981 CONTAINS NO ENDORSEMENT OF A NEWSPAPER'S RIGHT TO PUT PRESSURE ON LITIGANTS, AS IT SHOULD HAVE DONE. DOES SIR MICHAEL FEEL NO UNEASE, SEE NO PARADOX, IN THIS SITUATION?

5. BUT THE SECOND POINT IS EVEN MORE OFFENSIVE TO ONE'S SENSE OF FAIRNESS. IF THE LAKER LIQUIDATOR'S CLAIM IS SOUND, AN AWARD OF AROUND US DOLLARS 100M WOULD PROBABLY BE ENOUGH NOT MERELY TO PAY OFF SIR FREDDIE'S CREDITORS, BUT ALSO TO PUT HIM BACK IN BUSINESS.

6. IT IS NOW SOME EIGHT YEARS SINCE SKYTRAIN - THE 'LOW COST, NO FRILLS' TRANSATLANTIC SERVICE - BEGAN FLYING IN 1977. IT WAS LAKER'S BABY, AND A VERY CONSIDERABLE ACHIEVEMENT. A SIX-YEAR BATTLE HAD PRECEDED THE GRANT OF THE SKYTRAIN LICENCE, WHICH HIS BEATEN ADVERSARY, THE LABOUR GOVERNMENT RECOGNIZED BY KNIGHTING HIM THE FOLLOWING YEAR.

7. YOUR CORRESPONDENT, DAVID WOOD, COMMENTED AT THE TIME FREDDIE LAKER ... IS THE ANTITHESIS OF WHAT MR CALLAGHAN AND HIS GOVERNMENT ARE SUPPOSED TO STAND FOR, AND THE EXEMPLAR OF WHAT MRS THATCHER AND HER BRAND OF CONSERVATISM STAND FOR ...

8. DOES MRS THATCHER STILL STAND FOR BRINGING TRANSATLANTIC TRAVEL, AS LAKER DID, WITHIN THE ORDINARY MAN'S POCKET? OR HAS SHE SENT SIR MICHAEL ON A MISSION TO ENSURE THAT BRITISH AIRWAYS' SHARE FLOTATION LIFTS OFF THE RUNWAY NEXT MARCH INTO A CLOUDLESS, UNCLUTTERED SKY, FREE FROM CUT-PRICE COMPETITION?

9. WHEN THE US JUSTICE DEPARTMENT OFFICIALS MEET SIR MICHAEL NEXT WEEK, THEY SHOULD TELL HIM, RATHER POINTEDLY, TO MIND HIS OWN BUSINESS AND LEAVE THEM TO MIND THEIRS. AND REGARDLESS OF THE OUTCOME OF THE CONSPIRACY INVESTIGATION AND THE ANTI-TRUST CLAIM, WHEN THE FLOTATION DOES OCCUR, I HOPE YOU WILL REMIND THOSE OF YOUR READERS WHO MIGHT BE

TEMPTED TO APPLY FOR IT - THEY WILL NOT INCLUDE ME - OF THE LONG LAKER SHADOW THAT LIES BEHIND IT.

YOURS FAITHFULLY

ANTHONY WHITAKER

14 BELMONT ROAD

TWICKENHAM, MIDDLESEX.

SEPTEMBER 13.

TEXT ENDS.

TEXT OF SOLICITOR GENERAL'S LETTER

SIR, YOU CARRIED A REPORT ON SEPTEMBER 13 THAT THE ATTORNEY GENERAL WOULD BE FLYING TO WASHINGTON TO PRESS THE UNITED STATES TO DROP ITS INVESTIGATIONS INTO ALLEGED PRICE-FIXING AGREEMENTS BY AIRLINES BEFORE THE LAKER COLLAPSE. IT INFERRED THAT HIS PURPOSE WOULD BE TO AVOID ANY ADVERSE EFFECT OF THE INVESTIGATION ON THE BA FLOTATION. IN HIS LETTER OF SEPTEMBER 14, PERHAPS IN RELIANCE ON YOUR REPORT, MR WHITAKER SUGGESTS THAT FOR THE ATTORNEY GENERAL TO DO SO WOULD BE IMPROPER.

2. I AM WRITING TO CORRECT THE FALSE IMPRESSION THAT HAS BEEN GIVEN. SIR MICHAEL FLEW TO THE USA ON SEPTEMBER 9 ON A VISIT FIXED SOME TIME AGO, INVOLVING SPEAKING ENGAGEMENTS IN NEW ORLEANS FOLLOWED BY A PRIVATE VISIT TO PHILADELPHIA. HE WILL BREAK HIS PHILADELPHIA VISIT TO SPEND ONE DAY IN WASHINGTON TAKING UP AN INVITATION FROM A LEGAL COLLEAGUE IN THE US ADMINISTRATION WITH WHOM HE HAS ON SEVERAL OCCASIONS DISCUSSED LEGAL PROBLEMS ARISING BETWEEN THE UK AND THE USA.

3. IN WASHINGTON SIR MICHAEL WILL DISCUSS A NUMBER OF MATTERS, EACH OF THEM LEGAL IN NATURE AND THE SUBJECT OF PREVIOUS CONTACTS BETWEEN SIR MICHAEL AND HIS US LEGAL COUNTERPARTS. AMONG THEM IS THE DISPUTED CLAIM OF JURISDICTION BY THE USA IN A NUMBER OF AREAS, INCLUDING THE CLAIM TO APPLY ANTI-TRUST LAWS TO ACTIVITIES OF AIRLINES REGULATED UNDER THE INTERNATIONAL AGREEMENT BETWEEN THE UK AND THE USA ('BERMUDA 2').

4. THERE HAS FOR SOME TIME BEEN A SERIOUS DISPUTE ON THE

INTERPRETATION OF BERMUDA 2. ONE ISSUE IS WHETHER THE USA HAS A RIGHT TO APPLY ITS OWN LAWS TO INVESTIGATE AND REGULATE THE CONSEQUENCES OF AIRLINES CHARGING FARES ESTABLISHED PURSUANT TO BERMUDA 2, APPROVED BY BOTH GOVERNMENTS AND THEREAFTER REQUIRED BY THE LAWS OF BOTH COUNTRIES TO BE CHARGED.

5. THESE MATTERS RAISE IMPORTANT QUESTIONS OF LAW FOR THE UNITED KINGDOM ON WHICH IT IS THE FUNCTION AND DUTY OF THE ATTORNEY GENERAL TO REPRESENT THE UNITED KINGDOM'S VIEWS REGARDLESS OF THE POLICY OF THE GOVERNMENT TO PRIVATISE ANY PARTICULAR UNDERTAKING.

PATRICK MAYHEW
SOLICITOR GENERAL
ROYAL COURTS OF JUSTICE, WC2
SEPTEMBER 14.
HOWE

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LEGAL ADVS
PS
PS/LADY YOUNG
PS/MR WHITNEY
PS/PUS
SIR C TICKELL
MR J THOMAS
MR O'NEILL

ADDITIONAL DISTN:
US ANTI-TRUST ACTION
AGAINST BRIRISH AIRLINES

COPY TO.
MR CARTLEDGE, CABINET OFFICE

10 DOWNING STREET

Prime Minister (2)

Sir Oliver Wright sought advice on whether another message from you to President Reagan would be appropriate at this time (you sent a message in March 1983 and spoke to him during this year's Summit).

Departments have concluded that a message from you now would be premature. The next move will be when the Foreign Secretary sees Mr Schultz next week.

But to note that you may be asked to intervene later.

AT
17/9

DEPARTMENT OF TRANSPORT
2 MARSHAM STREET LONDON SW1P 3EB

01-212 3434

Len Appleyard Esq
Private Secretary to
Foreign Secretary
Foreign and Commonwealth Office
Whitehall
LONDON
SW1

14th September 1984

Dear Len,

LAKER: ATTORNEY GENERAL'S VISIT

Our officials have, in the absence of my Secretary of State, been considering Sir Oliver Wright's suggestion that the Attorney General might be armed with a personal message from the Prime Minister in his discussions with Fielding next Tuesday.

Our view, which is I think shared by your officials, is that we should keep a possible Prime Ministerial message in reserve for the time being, but that it would be right for the Attorney General to be briefed to reflect the high political concern over this issue. The attached draft telegram to Washington sets out our thinking in more detail.

We may want to come back to Sir Oliver's suggestion, as matters develop in the days ahead, and when we are satisfied that the US Government at the highest levels has taken in that we are looking for a response on all aspects of the dispute ie. the civil suits and the issue of future arrangements as well as the possible Department of Justice indictments. It could be damaging to our overall objectives and give the US a false signal if we were to use up Prime Ministerial currency simply to head off the Department of Justice.

I understand that you wish to see the revised draft telegram tonight so that the Foreign Secretary has an opportunity to consider it before he goes abroad. I will let you know my Secretary of State's views on Monday morning in time for you to despatch revised instructions to Washington before the Attorney General's meeting.

I am copying this to Andrew Turnbull at No.10, Callum McCarthy (PS/Secretary of State for Trade and Industry) and Richard Gardiner (Attorney General's office).

Yours,

Dinah

MISS D A NICHOLS
Private Secretary

2F

IMMEDIATE CONFIDENTIAL

TO WASHINGTON

LAKER: ATTORNEY GENERAL'S VISIT

Your telnos 2712 and 2713

1 The deferment of the official consultations and the inaccurate leak about the objective of the Attorney General's visit (which the US may nonetheless suspect we inspired) seems to us likely from the point of view of the US side to heighten the significance of the Attorney's encounter with Fielding.

But we are still unsighted about the position which the US intend to take both in substance and in detail. Because of this, we do not think we should ask the Prime Minister to send a further message now, since we feel we should keep this scarce currency in reserve. But the Attorney General should be briefed to reflect the high political concern over this issue, by reference back to earlier messages. Moreover, if the US are reviewing policy at a high level we think that we should point up still more clearly, as we had in mind to do in the opening remarks in the official level

consultation, that we have always been looking for a resolution of this dispute which provides an acceptable outcome on three issues: not only the Department of Justice enforcement, but also on future arrangements and the civil suits. This is already incorporated in the line to take for the Attorney General but, in the light of the above analysis we propose the amendments set out in MIFT.

2 With regard to point 6 in the draft in our telno 1581 we agree that Fielding might ask us for our proposals in relation to the private suits. We think it essential to register that something helpful to the private suits is part of what we expect from the US, otherwise their policy review may be inadequate. We see no problem for the Attorney in dealing with any question about what we propose: he is entitled to say that the problem has been created by the fact that US general antitrust law has been left untrammelled in relation to aviation competition issues, despite the fact that competition is regulated by Bermuda II. It is for the US side to consider what can be done about this. We do not accept as final the fact that people at staff level have been unable to think of any solution. This case has already produced precedents on both sides of the Atlantic. The ingenuity of senior legal figures in the US needs to be deployed on the problem - as it has been on other serious international problems faced by the United States in the past.

DRAFT TELEGRAM

CONFIDENTIAL TO IMMEDIATE WASHINGTON

MIPT

Following is revised Laker brief for Attorney General's meetings with Fielding and McGrath, taking into account postponement of consultations and your telno 2713 of 13 September.

TEXT BEGINS

POINTS TO MAKE

1 Our position has been fully explained in earlier bilateral discussions and there has since been extensive co-operation from HMG under the non-paper. We would now be extremely disappointed if the Department of Justice should think it necessary to consider the possibility of indicting British Airways for discussing Bermuda 2 approved fares with other airlines.

2 The consequences of a decision to indict by the Department of Justice would be regarded as extremely serious by the United Kingdom. Charges against British Airways for fare discussions would in effect be an attack on fare decisions of the British Government. If there was any discussion of fares with Laker this was essentially a British, not American concern.

3 A decision to indict would be legally objectionable and

could only be interpreted as a challenge to HMG's stated interpretation of Bermuda 2. HMG continues to reserve all its rights to arbitrate the question of anti trust enforcement under the arbitration provisions of Bermuda 2.

4 Apart from any possible action by the Department of Justice we are also very concerned about the private actions. For us these are equally objectionable. They threaten British airlines with huge penalties for operating services on fares approved by our two governments. These consequences of American law are not acceptable and call in question the basis on which air services operate between our two countries.

5 An acceptable outcome on future arrangements is of equal importance to us. We must avoid recurrances and formulate between us a sensible and practicable regulatory system. The US response so far on this aspect has been extremely disappointing.

6 Since indictments would be objectionable to us on legal grounds we also feel entitled to draw attention to their adverse practical and political consequences for the Government's policy of selling British Airways, though the emphasis given by the Press to this point has been exaggerated

7 We believe this dispute can be resolved both for the past and the future. We strongly encourage the United States to consider its policy objectives both in the field of civil aviation

and more widely. There is an impression in London (no doubt misguided) that American anti trust law is being enforced for its own sake without regard for the consequences.

8 The seriousness of this whole issue for the UK was made clear at the outset when the Prime Minister sent a personal message to the President and more recently restated our concern in the margins of the Economic Summit. This concern has if anything increased and all my Ministerial colleagues wish me to leave you in no doubt as to the importance of resolving this bilateral issue.

BACKGROUND

After the Attorney General left London for the United States McGrath informed Braithwaite that although the Department of Justice had not reached a final decision, they were ready for consultations under the non-paper on Legs 1 and 2 (price fixing and discussions on scheduling). These consultations were then arranged to be held in Washington on 19-20 September following the Attorney General's meeting with McGrath. But late last week the Department of Justice told us that they would not be ready and the consultation meeting was postponed with no new date being fixed.

2 It is safe to infer from the original message to Braithwaite that McGrath thinks there is sufficient evidence on which to proceed. This in itself is a disappointment because while BA's Washington lawyers accept there is evidence of price discussions between Laker and BA, the evidence of any involvement by Pan Am and TWA is thin. However the postponement of consultations suggests that political factors are now being taken into account in Washington before the Department of Justice decides whether to proceed further.

3 It is difficult for us to argue on evidential grounds. Only the Department of Justice know what evidence was given to the Grand Jury and only British Airways know exactly what happened at the time. But political and international law points can be underlined at this stage of the American deliberations.

4 Our case is partly political and partly legal. The political side is that if any fare discussions occurred they arose out of the operation of a British carrier and attempts to accommodate that carrier on the route. The fares charged by the British and the American airlines were all approved by the British and US Governments, who were satisfied that they were economically justified. Anti trust enforcement by the Department of Justice is in effect a challenge to these actions of the British Government.

5 The legal side is that under the Air Services Agreement the enforcement of American anti trust is displaced by the provisions of the agreement.

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES ADVANCE COPIES 184

File

PS
PS/LADY YOUNG
PS/PUS
SIR C TICKELL
MR ~~MILLS~~ O'NEILL
MR AUST, Legal Advisers
MR FREELAND, Legal Advisers
ED/MAED (2)
ED/NAD

RESIDENT CLERK

PS/S of S
MR LAZARUS, PUS
MR KNIGETON
MR ~~ROBERTS~~ FORTNUM
MR ~~LEWIS~~ STEVENS
} DEPT OF TRANSPORT

MR ROBERTS
MR ~~SUNDERLAND~~ MC HUTTON
MR HEALEY
MR BECKETT (Solicitors)
MR AYLING "
POWELL
} DTI

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

DD FCO (DESKBY 140900Z)

GR 380
CONFIDENTIAL
DESKBY 140900Z
FM WASHINGTON 132339Z
TO IMMEDIATE FCO
TELEGRAM NUMBER 2712 OF 14 SEPTEMBER 1984

ADVANCE COPY

IMMEDIATE

YOUR TELNO 1581: LAKER: ATTORNEY-GENERAL'S VISIT

1. MY IMPRESSION IS THAT THE AMERICANS ARE NOW CONSIDERING, ON A POLITICAL AND NOT A BUREAUCRATIC LEVEL, WHAT THEY ARE TO DO WITH THE MESS THEY FIND THEMSELVES IN OVER LAKER. IT IS ENCOURAGING THAT THEY EVIDENTLY REALISE THAT THEY CAN NO LONGER SIMPLY ALLOW THE MACHINERY OF THE JUSTICE DEPARTMENT TO OPERATE BLINDLY. WE KNOW THAT THEY HAVE A CERTAIN AMOUNT OF DISCRETION TO DECIDE WHETHER OR NOT TO GO FOR AN INDICTMENT IN THE CRIMINAL CASES AGAINST THE BRITISH AIRLINES: WE SUSPECT THAT THEY ARE AT A LOSS AS TO WHAT TO DO ABOUT THE CIVIL CASES. ONCE THE ADMINISTRATION HAVE DECIDED, AT THIS POLITICAL LEVEL, WHAT THEIR FUTURE POLICY IS TO BE, IT IS LIKELY TO BE MUCH HARDER FOR US TO DEFLECT THEM, HOWEVER GOOD OUR ARGUMENTS.

2. THE ATTORNEY-GENERAL'S MEETING WITH FIELDING PROVIDES A MOST TIMELY OPPORTUNITY TO CONVEY THE FULL EXTEND OF OUR POLITICAL (REPEAT POLITICAL) CONCERN: FIELDING IS A CLOSE AND TRUSTED ASSOCIATE OF THE PRESIDENT, TO WHOM HE REPORTS DIRECTLY.

3. YOU ARE NO DOUBT CONSIDERING WHETHER THE ATTORNEY-GENERAL (WHO BECAUSE OF HIS ABSENCE IN NEW ORLEANS CANNOT SPEAK FROM

(WHO BECAUSE OF HIS ABSENCE IN NEW ORLEANS CANNOT SPEAK FROM PERSONAL KNOWLEDGE OF THIS WEEK'S DISCUSSIONS AMONGST MINISTERS IN LONDON ABOUT AVIATION MATTERS) SHOULD BE ARMED WITH SOME KIND OF MESSAGE FOR FIELDING, PERHAPS TO BE PASSED ON TO THE PRESIDENT HIMSELF. I AM NORMALLY LOATH TO RECOMMEND MESSAGES FROM THE PRIME MINISTER. BUT IF SHE WERE INCLINED TO INTERVENE, IT WOULD OF COURSE GREATLY REINFORCE THE ATTORNEY-GENERAL'S ARGUMENT. AND HER MESSAGE WOULD HAVE MORE IMPACT IF IT ARRIVED WHILE THE AMERICANS WERE STILL FORMULATING THEIR POSITION. THERE HAVE BEEN OCCASIONS IN THE PAST WHEN PRIME MINISTERIAL MESSAGES HAVE ARRIVED AFTER AMERICAN POLICY HAS BEEN APPROVED BY THE PRESIDENT: AT THAT POINT IT HAS NATURALLY BEEN HARDER FOR THE AMERICANS TO SHIFT.

4. MY IMMEDIATELY FOLLOWING TELEGRAM CONTAINS SOME COMMENTS ON THE LINE PROPOSED FOR THE ATTORNEY-GENERAL IN YOUR TELNO 1581.

FCO PLEASE ADVANCE TO:
KNIGHTON STEVENS FORTNAM DTP
AYLING HEALEY DTI
O'NEILL, GRAY (MAED) FCO
AUST (LEGAL ADVISORS) FCO
GARDINER LAW OFFICERS DEPT

WRIGHT

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File

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CON

DD 131400Z WASHINGTON
GRS 776
CONFIDENTIAL
DESKBY 131400Z
FM FCO 131200Z SEPT 84
TO IMMEDIATE WASHINGTON
TELEGRAM NUMBER 1581 OF 13 SEPTEMBER
LAKER ATTORNEY GENERAL'S VISIT

1. FOLLOWING IS REVISED LAKER BRIEF FOR ATTORNEY GENERAL'S MEETINGS WITH MR FIELDING, GENERAL COUNSEL TO THE PRESIDENT AND MR MCGRATH, ASSISTANT ATTORNEY GENERAL AND HEAD OF THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE IN WASHINGTON ON 18 SEPTEMBER 1984. GRATEFUL FOR ANY COMMENTS BY 0800Z ON 14 SEPTEMBER. THE BRIEF MAY NOT TAKE FULL ACCOUNT OF LATEST NEWS REGARDING POSTPONEMENT OF THE CONSULTATIONS.

TEXT BEGINS

POINTS TO MAKE

1. WE ARE EXTREMELY DISAPPOINTED THAT THE DEPARTMENT OF JUSTICE SHOULD THINK IT NECESSARY TO CONSIDER THE POSSIBILITY OF INDICTING BRITISH AIRWAYS. WE HAD HOPED THAT FOLLOWING EARLIER BI-LATERAL DISCUSSIONS AND HAVING HAD EXTENSIVE COOPERATION FROM HMG THE DEPARTMENT WOULD NOT THINK IT NECESSARY TO CONSIDER CHARGES AGAINST BA.

2. THE CONSEQUENCES OF A DECISION TO INDICT BY THE DEPARTMENT OF JUSTICE ARE OF HIGH POLITICAL IMPORTANCE IN THE UNITED KINGDOM. CHARGES AGAINST BRITISH AIRWAYS FOR FARE DISCUSSIONS WOULD IN EFFECT BE AN ATTACK ON FARE DECISIONS OF THE BRITISH GOVERNMENT. IF THERE WAS ANY ACCOMMODATION FOR LAKER THIS WAS MORE ESSENTIALLY A BRITISH, NOT AMERICAN CONCERN.

3. THE BRITISH GOVERNMENT'S HIGH PRIORITY IS TO PUT BRITISH AIRWAYS IN THE PRIVATE SECTOR. CRIMINAL CHARGES WOULD PREJUDICE THIS OBJECTIVE.

4. WE EXPECT THE CONSULTATIONS TO BE TAKEN SERIOUSLY BY THE DEPARTMENT OF JUSTICE AND TRUST THAT HAVING HEARD WHAT WE HAVE TO SAY IN MORE DETAIL IT WILL BE UNNECESSARY FOR CHARGES

TO BE LAID.

5. A DECISION TO INDICT COULD ONLY BE TAKEN AS A CHALLENGE TO HMG'S STATED INTERPRETATION OF BERMUDA 2. HMG HAS RESERVED ALL ITS RIGHTS TO ARBITRATE THE QUESTION OF ANTI-TRUST ENFORCEMENT UNDER THE ARBITRATION PROVISIONS OF BERMUDA 2.

6. APART FROM THE DEPARTMENT OF JUSTICE'S ACTION WE REMAIN VERY WORRIED ABOUT THE PRIVATE ACTIONS. SOMETHING HAS TO BE DONE ABOUT THE EXISTING SUITS AND THE POTENTIAL SUITS WHICH COULD WELL LEAD TO THE BANKRUPTCY OF BCAL AND DELAY OR DEFER INDEFINITELY THE SALE OF BA. THESE SUITS AND THEIR POSSIBLE EFFECTS ARE NOT ACCEPTABLE AND CALL INTO QUESTION THE BASIS ON WHICH AIR SERVICES OPERATE BETWEEN OUR TWO COUNTRIES.

7. WE BELIEVE THIS DISPUTE CAN BE RESOLVED BOTH FOR THE PAST AND THE FUTURE. WE STRONGLY ENCOURAGE THE UNITED STATES TO CONSIDER ITS POLICY OBJECTIVES BOTH IN THE FIELD OF CIVIL AVIATION AND MORE WIDELY. THERE IS AN IMPRESSION IN LONDON (NO DOUBT MISGUIDED) THAT AMERICAN ANTITRUST LAW IS BEING ENFORCED WITHOUT REGARD FOR THE WIDER CONSEQUENCES.

BACKGROUND

1. MCGRATH HAD INFORMED BRAITHWAITE THAT ALTHOUGH THE DEPARTMENT OF JUSTICE (DOJ) HAD NOT REACHED A FINAL DECISION, THEY WERE READY FOR CONSULTATIONS UNDER THE NON-PAPER ON LEGS 1 AND 5 (PRICE FIXING AND DISCUSSIONS ONHEDULING). THESE CONSULTATIONS WERE DUE TO BE HELD IN WASHINGTON ON 19-20 SEPTEMBER, BUT WE HAVE JUST BEEN INFORMED BY THE DOJ THAT THEY HAVE BEEN POSTPONED TO ALLOW MORE TIME FOR HIGH LEVEL REVIEW OF THE ISSUE.

2. THE AMERICANS HAVE BEEN SCRUPULOUS IN OBSERVING THE NON-PAPER AGREEMENT BY NOT REACHING ANY DECISION (EVEN A PROVISIONAL ONE) ON WHETHER TO INDICT BRITISH AIRWAYS, BUT IT IS SAFE TO INFER FROM THE MESSAGE TO BRAITHWAITE THAT MCGRATH THINKS THERE IS SUFFICIENT EVIDENCE ON WHICH TO PROCEED. THIS IN ITSELF IS A DISAPPOINTMENT BECAUSE WHILE BA'S WASHINGTON LAWYERS ACCEPT THERE IS EVIDENCE OF PRICE DISCUSSIONS BETWEEN LAKER AND BA, THE EVIDENCE ON ANY INVOLVEMENT BY PAN AM

AND TWA IS THIN. THE DEPARTMENT OF JUSTICE APPARENTLY INFER FROM PAN AM'S FARE FILINGS AND ONE OR TWO TENUOUS CONTACTS BETWEEN BA AND PAN AM THAT THE AMERICAN AIRLINES WERE PARTIES TO THE AGREEMENT. BUT IT IS DIFFICULT FOR US TO ARGUE ON EVIDENTIAL GROUNDS. ONLY THE DEPARTMENT OF JUSTICE KNOW THAT EVIDENCE WAS GIVEN TO THE GRAND JURY AND ONLY BRITISH AIRWAYS KNOW EXACTLY WHAT HAPPENED AT THE TIME. WE HAVE THEREFORE LEFT THIS SIDE OF THE QUESTION TO BE ARGUED BY BRITSH AIRWAYS LAWYERS.

3. OUR COMPLAINT IS PARTLY POLITICAL AND PARTLY LEGAL. THE POLITICAL SIDE IS THAT IF ANY FARE DISCUSSIONS OCCURRED THEY AROSE OUT OF THE OPERATION OF A BRITISH CARRIER AND ATTEMPTS TO ACCOMODATE THAT CARRIER ON THE ROUTE. THE FARES CHARGES BY THE BRITISH AND THE AMERICAN AIRLINES WERE ALL APPROVED BY THE BRITISH AND US GOVERNMENTS, WHO WERE SATISFIED THAT THEY WERE ECONOMICALLY JUSTIFIED. ANTITRUST ENFORCEMENT BY THE DEPARTMENT OF JUSTICE IS IN EFFECT A CHALLENGE TO THESE ACTIONS OF THE BRITISH GOVERNMENT.

4. THE LEGAL POINT IS THAT UNDER THE AIR SERVICES AGREEMENT THE ENFORCEMENT OF AMERICAN ANTITRUST IS DISPLACED BY THE PROVISIONS OF THE AGREEMENT. TEXT ENDS

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PS/MR WHITNEY
PS/PUS
SIR C TICKELL
MR J THOMAS
MR O'NEILL

ADDITIONAL DISTN:
US ANTI-TRUST ACTION
AGAINST BRIRISH AIRLINES

COPY TO.
MR CARTLEDGE, CABINET OFFICE

Line to take

"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.

THE LAKER CASE - BRIEF BACKGROUND

1. Laker Airways collapsed in February 1982 in spite of efforts (orchestrated by the Bank of England) to mount a financial rescue. In the event the rescue package fell short of what the Civil Aviation Authority (CAA) regarded as essential to ensure the survival of the airline throughout the summer of 1982. The airline failed essentially because it was vastly over-extended and could not service its debts in a period of airline recession.

2. Towards the end of the year the Laker liquidator launched a $1 billion treble damage anti trust suit in the US courts alleging in effect that other US and European airlines including notably British Airways (BA) and British Caledonian (BCal) had deliberately caused Laker's downfall by concerted predatory pricing policies and by conspiring to thwart the financial rescue package. Early last year the US Department of Justice launched a criminal Grand Jury investigation into the same allegations.

3. These developments caused us the greatest possible alarm. The prospect of the two major British airlines facing possible ruin in foreign courts as a result of the unfortunate failure of another British airline was unacceptable, particularly as we firmly believed that there was no merit in the allegations brought by Laker, and that under our Bermuda 2 Air Services Agreement air service matters between the UK and the USA are subject to joint governmental regulation and not, in our view, subject to the unilateral application of US domestic law - particularly US anti trust law to which we have longstanding objections both as regards their reach and nature.

The Civil Suits

4. BA and BCal sought an injunction in the English courts to prevent the Laker liquidator from proceeding against them in the US courts. The Attorney General intervened to explain the position of the British Government and the Government introduced instruments under the Protection of Trading Interests Act (PTI Act) to protect our position. The Court of Appeal ruling in favour of BA and BCal is currently being challenged in the House of Lords. Meanwhile in the United States the frustrated American judge handling the suit has been seeking ways and means of circumventing the English courts. We have had some influence on US thinking on this and it looks as though the American Judge will await the House of Lords hearing. Unfortunately what are called "class" actions based on similar allegations have been launched in the US courts on behalf of US citizens. Again the potential sums involved are very large. It will be necessary for us to use the PTI Act to maintain our position in respect of these class actions. But the English courts are themselves powerless to prevent these from proceeding.

The Grand Jury Investigation

5. We strenuously protested to the US Government about this, and whilst we failed to prevent the investigation from being launched, our threat to take the matter to international arbitration resulted in an agreement as to how it should be handled. The process has dragged on for longer than we would have wished, but the Grand Jury has recently cleared BCal (and other European airlines) of charges relating to the financial rescue package, and we await the outcome on the other allegations. Our ability to go to arbitration in the event of an unacceptable outcome has not been prejudiced.

The Present Position

6. As a result of recent events, notably the launching of class actions in the United States, we have made it clear once again to the US Government that ways and means of resolving the dispute must be found soon if a major row is to be avoided. For example if substantial damages were awarded against a British airline, and it refused to pay up because of the PTI Act Directions, the US courts might move inexorably towards impounding aircraft. This could rapidly lead to a cessation of UK/US air services. Discussions between the two Governments have therefore been initiated on how to avoid such disputes in the future. We hope that by agreeing arrangements for the future we might open the way to handling the Laker case itself in a way which will not expose our airlines to crippling civil liabilities. For this to have any hope of succeeding, a powerful political impetus will be required on the American side.

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.

NR

NICHOLAS RIDLEY
4 June 1984

3F

11.00 2.6.84 (RJB)

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES ADVANCE COPIES

PS/SOS [Mr Dorrwent] 21

PS
PS/LADY YOUNG
PS/PUS
SIR C TICKELL
MR ADAMS
MR AUST, Legal Advisers
MR FREELAND, Legal Advisers
HD/MAED (2)
HD/NAD

RESIDENT CLERK
MR J THOMAS

IMMEDIATE

PS/S of S
MR LAZARUS, PUS
MR KNIGHTON
MR FORTNAM
STEVENS
} DEPT OF TRANSPORT

MR AYLING (SOLS)
MR ROBERTS
MR SUNDERLAND
MR BECKETT (Solicitors)
MR HEALEY (OT2)
} DTI

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

ADVANCE COPY

DESKBY 020900Z
CONFIDENTIAL
FM WASHINGTON 020543Z JUNE 84
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.

ADVANCE COPIES FCO: PS/SOFS, PS/PUS, ADAMS, J.THOMAS, GRAY (MAED)
DTI: ROBERTS, AYLING (SOLS), HEALEY (OT2)
DTP: KNIGHTON, STEVENS
ATTORNEY GENERAL'S OFFICE: GARDINER

WRIGHT

NNNN

PS
PS/LADY YOUNG
PS/PUS
SIR C TICKELL
MR ADAMS
MR AUST, Legal Advisers
MR FREELAND, Legal Advisers
HD/MAED (2)
HD/NAD

RESIDENT CLERK
MR. J THOMAS

IMMEDIATE

PS/S of S
MR LAZARUS, PUS
MR KNIGHTON
MR FORTNAM
MR STEVENS
} DEPT OF TRANSPORT

MR AYLING (BCAS)
MR ROBERTS
MR SUNDERLAND
MR BECKETT (Solicitors)
MR HEALEY (OT2)
} DTI

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

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GRS 1150
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FM WASHINGTON 020547Z MAY 84
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 WOULD PROBABLY 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 OVERCOME 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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1984

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1) Mr. Tyrrell
2) Prime Minister.
A.P.C. 5

Prime Minister

UNITED STATES AIRLINE ANTITRUST INVESTIGATION

You will recall the concern last year when the United States Department of Justice initiated the Grand Jury investigation into allegations that British and other airlines had broken the US antitrust laws in conspiring together to put Laker out of business. Taken with the similar action brought by the Laker liquidator in the US civil courts, involving claims of more than $1 billion, these cases threatened to bankrupt British Caledonian and to frustrate our plans to privatise British Airways. Despite your intervention with President Reagan, the Americans refused to call off their investigation. But we reached a limited understanding with them about handling it; and we subsequently responded to the civil cases by using the Protection of Trading Interests Act to prevent the disclosure of UK located information. These events were reported to you in minutes dated 26 May and 5 July 1983.

Neither the Grand Jury investigation nor the civil litigation has yet been disposed of. Indeed, while we have made some useful progress in the handling of the Grand Jury and the original civil cases, further civil litigation, which we may be almost powerless to influence, has recently been launched. I thought I should bring you up to date on the position, particularly because of the significance of this for the privatisation of British Airways. We may need your help later by an intervention with President Reagan.

GRAND JURY INVESTIGATION

One piece of good news is that we have disposed, as far as the US Department of Justice is concerned, of the allegation that BCal conspired with others to frustrate the refinancing package which might have rescued Laker early in 1982. BCal recently had a letter saying that the Department would not be bringing any civil or criminal proceedings against them. But the allegations of tariff fixing involving BA are still under enquiry; and the Department of Justice have now extended their enquiries into an alleged illegal agreement between airlines (including BA but probably not BCal) on frequency and scheduling.

When all the remaining investigations are complete - we have been told mid-June - and if the Department of Justice consider there may be an offence against US law, there will be consultations with us before any charges are framed. We will try to avert any punitive measures under US law, in line with our position that complaints by the US against airlines operating under our bilateral agreement should be resolved between us, rather than by unilateral application of US law. If we fail, we have reason to believe that fines would not exceed $2-3 million. Overall, we should know where we stand on all the Grand Jury allegations before we have to finalise BA's prospectus at the end of the year.

CIVIL LITIGATION

The Laker liquidator's case in the US courts against BA and BCal is becalmed, because of the injunction against his pursuing it which was maintained in the Court of Appeal here last July following our use of the Protection of Trading Interests Act (letter to your private secretary dated 3 August 1983). But the case goes to appeal in the House of Lords on 5 June and BA and BCal cannot be certain of winning. In any case the US Judge has been considering whether to appoint a US citizen to represent Laker's US creditors, or to find other ways of getting the case back onto its feet. And recently new cases have been brought by individuals alleging that unlawful tariff agreements caused them to pay too much for their transatlantic air fares; since these are "class actions" (the individuals representing the whole class of people concerned) the financial implications could again run into billions of dollars. There is no serious possibility that these claims will be disposed of by trial this year.

FUTURE AVIATION ARRANGEMENTS

These developments have lent increased urgency to the arrangements we are now (with the BCal part of the Grand Jury investigation out of the way) exploring with the Americans, to define the circumstances in which their antitrust laws might apply to matters essentially governed by our bilateral aviation agreement. But there is a large gap between their ambitions and what we could regard as acceptable and the negotiations will be far from easy.

If we could reach both a tolerable resolution of the Grand Jury investigation and satisfactory arrangements for the future, we should then try to get this to reflect back favourably on the outstanding civil cases, for example by seeking a State Department intervention in these cases to argue that the issue had been resolved Governmentally. US officials have given us no reason to hope that this would be possible or helpful, but we shall continue to explore it.

To prepare the ground for a political intervention, I have firmly impressed on Mrs Dole the political importance we attach both to resolving the outstanding legal disputes in a sensible way which minimises the risk of outrageous and unacceptable claims being endorsed by the US courts, and to making arrangements which will prevent such disputes occuring again. And I warned her that you were interested in this matter and might wish to raise it with President Reagan. It is clear that this message got through rapidly to her officials in Washington.

If the civil cases are outstanding at the planned time of privatisation early next year we should then face difficult choices between: urging British Airways to settle (which might only be at high cost at that time); leaving the claims overhanging (which could damage the privatisation); guaranteeing British Airways against any judgment debt (which would simply encourage the plaintiffs); or delaying privatisation (highly unpalatable). I am, of course, considering whether there is any other useful action we could take.

You will have many other matters to raise when you meet President Reagan at the Summit, so I hesitate to add this one to the list. Nonetheless it would be very helpful, if there were the opportunity, for you to say plainly to the President, as I have done to Mrs Dole, that it is politically imperative that solutions should be found to these problems over the litigation following the Laker collapse (and it would not be enough simply to say that US law must take its course, in a matter of shared concern like aviation). An observation by you on these lines would re-engage his interest: the time is not ripe for anything more detailed.

Copies go to Geoffrey Howe, Nigel Lawson, Norman Tebbit, Michael Havers and to Sir Robert Armstrong.

NICHOLAS RIDLEY pp HCS Dawnewt
(approved by the Secretary of State for Transport and signed in his absence).

1 June 1984

LIAISON?

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JH 276

cc NP

WM 8/8

DEPARTMENT OF TRADE AND INDUSTRY

Room 11.01 Ashdown House 123 Victoria Street SW1E 6RB

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Telephone Direct Line 01-212 3301
Switchboard 01-212 7676

PS/Secretary of State for Trade and Industry

3 August 1983

Private Secretary to the
Prime Minister
10 Downing Street
London SW1

Dear Michael,

AVIATION ANTI-TRUST CASE: COURT OF APPEAL DECISION

Last month my Secretary of State, with the agreement of the Foreign and Commonwealth Secretary, the Attorney General and the Secretary of State for Transport, made an Order and Directions under the Protection of Trading Interests Act 1980. This action was taken to help British Airways and British Caledonian against the application of US anti-trust laws, and to make clear the Government's own position on the application of such laws to matters covered by the Bermuda II air services agreement.

2 One of the main specific aims in using the PTI Act was to strengthen the position of the two airlines in their appeal against the refusal of Mr Justice Parker in the High Court to require the Laker liquidator to discontinue the private anti-trust action which he had instituted against them in the US Courts.

See SS/Transport to Att Gen 28.7.

3 The Prime Minister will have seen that the Court of Appeal on 26 July upheld the airlines' appeal and issued an injunction requiring the Laker liquidator to drop his action against them in the US. The Court also confirmed the validity of the PTI Act Order and Directions, which the liquidator had challenged. It is clear from the Court's judgement on the main issue that the Order and Directions had a decisive influence on the outcome.

4 The Court refused the liquidator leave to appeal to the House of Lords, but it is open to him to seek leave from the Judicial Committee of the House of Lords. Should he do so successfully, the case will go to the House of Lords for final decision, which would not be for several months.

5 I am copying this letter to the Private Secretaries to the

Foreign and Commonwealth Secretary, the Attorney General and the Secretary of State for Transport.

Yours sincerely,

Ruth Thompson

RUTH THOMPSON
Private Secretary

LEGAL PROCEDURE: US Grand Jury

March 83

Legal Procedure

DEPARTMENT OF TRANSPORT
2 MARSHAM STREET LONDON SW1P 3EB

01-212 3434

(2)

Prime Minister

MCS 29/7

The Rt Hon Sir Michael Havers QC MP
Attorney General
Law Officers Department
Royal Courts of Justice
Strand
LONDON WC2A 2LL

28 July 1983

Dear Michael

AVIATION ANTITRUST LITIGATION

I have seen that the Court of Appeal have given judgment in favour of British Airways and British Caledonian on the question whether the Laker Liquidator should be enjoined against pursuing his treble damage antitrust suit against them in the United States courts. It appears that a key element leading to this judgment was the Order and Directions made under the Protection of Trading Interests Act (and that the validity of these, which had been challenged, was successfully defended).

I recognise that there may even in this civil litigation still be further hurdles for the airlines, because of the possibility of appeal to the House of Lords by the liquidator and because the US Court might react adversely and seek of its own motion to take the liquidator's case forward. But I would like at this point to express my appreciation for the very great efforts which I know have been made by your own officials and by Counsel in the thorough preparation of your own part in this case and in its presentation to the High Court and to the Court of Appeal. Perhaps I might express similar appreciation for the contribution of those concerned in the Foreign Office and in the Department of Trade and Industry.

I am sending copies of this letter to the Prime Minister, the Foreign Secretary and the Secretary of State for Trade and Industry.

Yours

TOM KING

File

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7 July 1983

Antitrust : Dispute with the United States

The Prime Minister has noted the contents of Mr. King's minute of 5 July.

A J COLES

Miss Dinah Nichols,
Department of Transport.

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ce NO (2)

1) Mr. Scholar
2) Prime Minister

A. S. C. 6/7.

PRIME MINISTER

ANTITRUST : DISPUTE WITH THE UNITED STATES

I thought you would like to know that the intensive discussions that have taken place since last Monday have now been brought to what I believe is a very acceptable conclusion. They lasted for five days in Washington, and then yesterday and today here in London. Agreement has now been reached in which we have successfully resisted the request of the Americans to rescind the Protection of Trading Interests Act Directions (thus giving the best protection to British Airways and British Caledonian in their current case before the Court of Appeal) and at the same time have preserved the "non-paper" (containing the basic agreement with the Department of Justice to limit the damage that might arise to our airlines from the Grand Jury investigation). This has been achieved without concessions on either side but by clarification of the extent of the PTI Direction and Consents. We have agreed to give one brief written answer to Parliament, a Consent in respect of the American airlines in the US, and a letter confirming a technical legal point about the freedom to co-operate with the Department of Justice of those who are willing voluntarily to do so. The Americans, for their part, have confirmed that they will not now proceed with the additional subpoenas on British Caledonian in particular, which they were threatening to issue.

As you know, this is a most difficult issue of conflict of jurisdiction which does seriously threaten BA and B.Cal. I believe the outcome of the present negotiation has been as good as we could have looked for in the circumstances

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and reflects great credit on Mr Handley Stevens and his team who conducted these "trans-continental" negotiations under very considerable pressure. I would also like to express my appreciation for the excellent support given by Sir Oliver Wright and his staff at the Embassy.

This is not, of course, the end of the story as we have the Court of Appeal hearing at this moment and it is impossible to tell just what the impact may yet be of either the Grand Jury investigation or the Civil Treble Damage Suit in the United States courts. Nonetheless, I think that we have achieved at least this first objective of giving the best support that we can to our airlines in their Court of Appeal case while preserving our separate understanding with the Department of Justice.

I am copying this to the Foreign and Commonwealth Secretary, Secretary of State for Trade and Industry and the Attorney General.

TOM KING

5 July 1983

DD 051800Z WASHINGTON
GRS 270
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DESKBY 051800Z
FM FCO 051645Z JULY 1983
TO IMMEDIATE WASHINGTON
TELEGRAM NUMBER 1116 OF 5 JULY
MIPT: LAKER: PTI ACT

1. FOLLOWING IS TEXT OF THE LETTER FROM SENIOR AMERICAN OFFICIAL TO SENIOR BRITISH OFFICIAL:

BEGINS THANK YOU FOR YOUR LETTER OF 5 JULY 1983 CONCERNING THE CIRCUMSTANCES UNDER WHICH PERSONS IN THE UK WHO RECEIVE REQUESTS FROM THE DEPARTMENT OF JUSTICE TO PROVIDE COMMERCIAL INFORMATION MAY DO SO WITHOUT BREACHING THE ORDER AND DIRECTIONS RECENTLY ISSUED BY HMG UNDER THE PROTECTION OF TRADING INTERESTS ACT.

AS OUR DELEGATIONS AGREED IN LONDON THE DEPARTMENT OF JUSTICE MAY USE THE CONTENT OF YOUR LETTER TO APPRISE POTENTIAL WITNESSES IN THE UK OF THE CIRCUMSTANCES UNDER WHICH THEY MAY COOPERATE WITH DEPARTMENT REQUESTS FOR COMMERCIAL INFORMATION, BUT WE WILL NOT INCLUDE YOUR LETTER WITH OUR INITIAL REQUEST FOR COOPERATION NOR PLACE QUOTATION MARKS AROUND THE LANGUAGE WE DO INCLUDE IN OUR INITIAL REQUEST. MOREOVER YOU HAVE AN ASSURANCE THAT, WHILE WE MAY PROVIDE YOUR LETTER ITSELF TO PERSONS WHO RECEIVE SUCH DEPARTMENT REQUESTS FOR COOPERATION, WE WILL PROVIDE THE LETTER ONLY AFTER WE HAVE TAKEN OTHER MEASURES TO EXPLAIN THE PTI ACT ISSUE TO THE INDIVIDUAL, INCLUDING ENQUIRING WHETHER THE INDIVIDUAL HAS SOUGHT CONFIRMATION FROM THE SOLICITOR, DEPARTMENT OF TRADE AND INDUSTRY.

FINALLY I FURTHER CONFIRM THAT IN ACCORDANCE WITH THE STANDING ARRANGEMENTS OF MY DEPARTMENT AND THE REQUIREMENTS OF US LAW ANY APPROACH MADE BY THE DEPARTMENT OF JUSTICE TO WITNESSES OR POTENTIAL WITNESSES, AND WHAT THEY SAY, ARE CONFIDENTIAL TO THE DEPARTMENT OF JUSTICE AND THE GRAND JURY.ENDS

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US ANTI TRUST ACTION AGAINST BRITISH AIRLINES

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FM FCO 051100Z JULY 1983
TO IMMEDIATE WASHINGTON
TELEGRAM NUMBER 1115 OF 5 JULY
MIPT: LAKER: PTI ACT

1. FOLLOWING IS THE TEXT OF THE LETTER FROM SENIOR BRITISH OFFICIAL TO SENIOR AMERICAN OFFICIAL:
BEGINS IN THE COURSE OF RECENT CONSULTATIONS HELD BETWEEN OUR TWO GOVERNMENTS IN WASHINGTON DC AND LONDON THE UNITED STATES HAS INQUIRED WHETHER, UNDER THE RECENT ACTIONS TAKEN BY THE UK UNDER THE PTI ACT RELATING TO THE US ANTI-TRUST LAWS, PERSONS IN THE UK WHO RECEIVE REQUESTS FROM THE DOJ TO PROVIDE COMMERCIAL INFORMATION VOLUNTARILY MAY DO SO UNDER ANY CIRCUMSTANCES.

IN RESPONSE TO THE US INQUIRY WE INDICATED THAT IF A PERSON IN THE UK IS REQUESTED BY THE DOJ, PURSUANT TO ITS LAW ENFORCEMENT RESPONSIBILITIES, TO FURNISH COMMERCIAL INFORMATION IN RELATION TO THE CASES MENTIONED IN PARAGRAPH 2 OF THE PROTECTION OF TRADING INTERESTS (US ANTITRUST MEASURES) ORDER 1983, IS AT THE SAME TIME PROVIDED WITH AN ABSOLUTE AND IRREVOCABLE GUARANTEE, IN RELATION TO THE MATTERS TO WHICH THE REQUEST RELATES, SUCH THAT NO REQUIREMENT TO THE SAME EFFECT AS THE REQUEST COULD BE IMPOSED ON HIM BY THE DOJ UNDER US LAW SO LONG AS SUCH PERSON REMAINS KN THE UNITED STATES IN CONNECTION WITH THE REQUEST, THEN SUCH PERSON IN PROVIDING COMMERCIAL INFORMATION IN RESPONSE TO THE REQUEST WOULD NOT BE ACTING IN BREACH OF THE ORDER OR GENERAL DIRECTIONS GIVEN UNDER THE PTI ACT.

WE ASKED YOU TO EMPHASISE THAT THIS ADVICE, WHICH CAN BE USED IN LETTERS YOU MAY BE SENDING TO POTENTIAL WITNESSES, IS GIVEN ONLY IN RELATION TO REQUESTS MADE BY THE DOJ.

WE AUTHORISED YOU TO TELL POTENTIAL WITNESSES THAT THEY MAY OBTAIN CONFIRMATION OF THIS ADVICE FROM THE SOLICITOR OF THE DEPARTMENT OF TRADE AND INDUSTRY, 10 VICTORIA STREET, LONDON SW1. ENDS

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US ANTI TRUST ACTION AGAINST BRITISH AIRLINES LIMITED

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FM FCO 051700Z JULY 1983
TO IMMEDIATE WASHINGTON
TELEGRAM NUMBER 1114 OF 5 JULY
MIPT: LAKER: PTI ACT

1. FOLLOWING IS THE TEXT OF THE CONSENT BY THE SECRETARY OF STATE DEALING WITH UK EMPLOYEES IN THE US OF A US AIRLINE WITH OFFICES IN THE UK:

BEGINS WHEREAS THE SECRETARY OF STATE HAS DIRECTED BY A GENERAL DIRECTION, MADE BY HIM ON 1 JULY 1983 PURSUANT TO SECTION 2 OF THE PROTECTION OF TRADING INTERESTS ACT 1980, THAT EXCEPT WITH HIS CONSENT NO PERSON OR PERSONS IN THE UNITED KINGDOM SHALL COMPLY OR CAUSE OR PERMIT COMPLIANCE WITH ANY REQUIREMENTS TO PRODUCE ANY COMMERCIAL DOCUMENT OR TO FURNISH COMMERCIAL INFORMATION IN THE CIRCUMSTANCES THERE SPECIFIED:

(1) THE SECRETARY OF STATE HEREBY CONSENTS TO ANY UNITED STATES'DESIGNATED AIRLINE IN THE UK CONSENTING TO OR PERMITTING COMPLIANCE WITH ANY REQUIREMENTS TO FURNISH COMMERCIAL INFORMATION IN THE UNITED STATES OF AMERICA BY AN OFFICER, SERVANT OR AGENT OF THAT AIRLINE THERE.

(2) IN THIS CONSENT 'UNITED STATES' DESIGNATED AIRLINE' MEANS AN AIRLINE DESIGNATED BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA UNDER THE AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA SIGNED AT BERMUDA ON 23 JULY 1977, AND SUBSEQUENTLY AMENDED, CONCERNING AIR SERVICES.

(3) THIS CONSENT SHALL COME INTO OPERATION ON 1983.ENDS

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FM FCO 051700Z JUL 83
TO IMMEDIATE WASHINGTON
TELEGRAM NUMBER 1113 OF 5 JULY
MIPT: LAKER: PTI ACT

1. FOLLOWING IS TEXT FOR PARLIAMENTARY WRITTEN QUESTION AND ANSWER TO COVER SCOPE OF SECTION 1 DIRECTION: BEGINS.

QUESTION: TO ASK SECRETARY OF STATE FOR TRADE AND INDUSTRY WHETHER HE HAS BEEN ABLE TO GIVE ANY INDICATION TO THE UNITED STATES GOVERNMENT THAT THE DIRECTION HE GAVE UNDER SECTION 1(3) OF THE PTI ACT ON 23 JUNE DOES NOT REQUIRE UK AIRLINES TO VIOLATE THE SHERMAN ACT.

ANSWER: YES. THE UNITED STATES GOVERNMENT HAS BEEN INFORMED THAT UNDER THE PTI ACT, THE ORDER AND DIRECTIONS DO NOT INVITE OR REQUIRE UK AIRLINES TO DO ANYTHING WHICH IS CONTRARY TO THE SHERMAN ACT ITSELF. ENDS.

HOWE

US ANTI TRUST ACTION AGAINST BRITISH AIRLINES

LIMITED

MAED
NAD
ERD NEWS D
→ LEGAL ADVISERS
PS
PS/LADY YOUNG
PS/MR WHITNEY
PS/PUS
MR EVANS
MR GIFFARD
MR THOMAS
MR ADAMS

ADDITIONAL DISTRIBUTION

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES

COPY TO
MR GOODALL CABINET OFFICE

MA. Sheehy

I think this means that we have reached a satisfactory agreement. Will you ensure that someone gets to Cabinet tomorrow?

A.J.C. 6/7

DD 051800Z WASHINGTON
GRS 220
CONFIDENTIAL
DESKBY 051800Z
FM FCO 051645Z JULY 83
TO IMMEDIATE WASHINGTON
TELEGRAM NUMBER 1112 OF 5 JULY
YOUR TEL NO 1864: LAKER: PTI ACT

1. THE US DELEGATION LED BY SCOCCOZA AND COMPRISING SEIDEN, SMALL, SHANE AND KASPER, MET UK DELEGATION LED BY STEVENS IN LONDON ON 4 JULY AS AGREED. AFTER REFERENCE TO MINISTERS THE FOLLOWING AGREEMENTS WERE REACHED.

2. ON THE SCOPE OF THE SECTION 1 DIRECTION, A WRITTEN PQ WILL BE LAID AND ANSWERED: SEE MY FIRST IFT.

3. ON THE QUESTION OF UK EMPLOYEES IN THE UNITED STATES OF US AIRLINES WITH OFFICES IN THE UK THE CONSENT IN MY SECOND IFT WILL BE ISSUED.

4. ON THE QUESTION OF ACCESS TO COMMERCIAL INFORMATION IN THE UK, BECKETT (DTI SOLICITOR) WILL SEND BAXTER (DOJ) THE LETTER IN MY THIRD IFT: AND BAXTER WILL REPLY AS IN MY FOURTH IFT.

5. ON THIS BASIS, THE AMERICANS WILL NOT ISSUE EXPANDED SUBPOENAS TO BA AND BCAL. BOTH SIDES REMAIN COMMITTED TO THE PROCEDURE IN THE NON-PAPER.

6. PRESS LINE. STEVENS HAS AGREED WITH SCOCCOZA THAT THE PRESS ARE TO BE TOLD NO MORE THAN THAT WE CAN CONFIRM THAT CONSULTATIONS HAVE BEEN CONTINUING BUT THAT THERE IS NOTHING TO REPORT AS YET. (FOR YOUR OWN INFORMATION, THE CONSENT AND PARLIAMENTARY QUESTION AND ANSWER WILL ISSUE IN THE NEXT WEEK OR TWO: WE WILL GIVE SCOCCOZA ADVANCE WARNING ON THE TIMING AND ON THE PRESS LINE WE PROPOSE TO FOLLOW THEN.)

HOWE

US ANTI TRUST ACTION AGAINST BRITISH AIRLINES

LIMITED

MAED
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ERD
LEGAL ADVISERS
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PS/LADY YOUNG
PS/MR WHITNEY
PS/PUS
MR EVANS
MR GIFFARD
MR THOMAS
MR ADAMS

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MR GOODALL CABINET OFFICE

Legal Procedure

IMMEDIATE

PS
PS/LADY YOUNG
PS/PUS
MR EVANS
MR ADAMS
MR AUST, Legal Advisers
MR FREELAND, Legal Advisers
HD/MAED (2)
HD/NAD

RESIDENT CLERK

PS/MR KING
MR LAZARUS, PUS
MR KNIGHTON
MR FORTNAM
} DEPT OF TRANSPORT

Mr Stevens, Mr Fortnam.

MR ROBERTS
MR SUNDERLAND
MR BECKETT(Solicitors)
} DTI

Mr Ayling

MR COLES 10 DOWNING ST

MR GARDINER, ATTORNEY GENERAL'S OFFICE

CONFIDENTIAL
DESKBY 040800Z
FM WASHINGTON 031830Z
TO IMMEDIATE F C O
TELNO 1865 OF 3 JULY 1983.

N. Scholar.
AR 4/7.

LAKER: PTI ACT

1. HAVING AGREED TO CONTINUE TALKING IN LONDON ON MONDAY THE CHANCES ARE THAT THE AMERICANS WILL SETTLE. EVEN IF YOU DO NOT NOW MEET SHULTZ ON TUESDAY YOU WILL DO SO NEXT WEEK, SO THAT WILL BE A MAJOR INCENTIVE FOR THEM. SHULTZ HAS NO DESIRE TO GET INVOLVED AND HAS MADE THAT CLEAR TO HIS OFFICIALS. IF THE TALKS HAVE BEEN SUCCESSFUL I DOUBT HE WILL RAISE THE SUBJECT.

Not coming now. AR 4/7.

2. EVEN SO, I RECOMMEND THAT YOU DRAW ATTENTION TO THE MATTER. IT IS OF CONTINUING IMPORTANCE, FOR THE BASICS HAVE NOT ALTERED. ONCE AGAIN US ASSERTION OF THE SCOPE OF THEIR LAWS HAS CAUSED OR THREATENED A SERIOUS BILATERAL DISPUTE. ONE OF THE CONSTRUCTIVE IDEAS ARISING OUT OF THE ARRANGEMENT FOR DEALING WITH THE LAKER CASE AGREED IN LONDON AT THE END OF MAY WAS A JOINT EFFORT TO FIND SATISFACTORY ARRANGEMENTS FOR THE FUTURE. THE AMERICANS MUST REALISE THAT THE STRENGTH OF THEIR REACTIONS TO THE APPARENT INTRUSION INTO THEIR SOVEREIGNTY BY THE PTI ORDERS IS EXACTLY MIRRORED IN THE UK: BUT WE HAVE HAD TO PUT UP WITH US INTRUSIONS FOR A DECADE. SHULTZ SHOULD RECOGNISE THAT OTHER CASES WILL NO DOUBT OCCUR AND WE MUST JOINTLY BE READY TO MANAGE THEM SENSIBLY. THERE ARE, IN PARTICULAR, LESSONS FOR THE AMERICANS IN THEIR ATTITUDE TO THE EXPORT ADMINISTRATION ACT, IN WHICH THE BRITISH, THE EUROPEANS AND THE U S ADMINISTRATION HAVE SO FAR CONDUCTED A DIALOGUE OF THE DEAF.

~~ADMINISTRATION HAVE SO FAR CONDUCTED A DIALOGUE OF THE DEAF.~~

3. IF THE TALKS FAIL ON MONDAY THERE IS REAL DANGER OF THE DISPUTE ESCALATING FURTHER. SHULTZ HAS BEEN BRIEFED TO AVOID SUBSTANTIVE DISCUSSION BUT TO EXPRESS REGRET AT THE PROVOCATIVE NATURE OF THE PTI ORDERS WHICH HAS CAUSED THE REPUDIATION OF THE LONDON ARRANGEMENTS.

4. IN THESE CIRCUMSTANCES I SUGGEST YOU DO NOT LET HIM TAKE THE INITIATIVE IN WASHINGTON. THE AMERICANS HAVE NEVER APPRECIATED THE FORCE OF OUR OBJECTIONS AGAINST THEIR CONTINUED INTRUSIONS INTO OUR SOVEREIGNTY. OUR NORTH ATLANTIC SHIPPING COMPANIES ARE STILL SUFFERING EFFECTS OF THE ANTI-TRUST ACTIONS THAT WERE TAKEN AGAINST THEM SOME YEARS AGO, AND TO COUNTER WHICH THE PTI ACT WAS PASSED IN THE FIRST PLACE. AMERICAN PRETENTIONS TO CONTROL THE TRADE OF BRITISH COMPANIES FOR FOREIGN POLICY REASONS WERE AT THE BASIS OF LAST YEARS PIPELINE ROW. THE PRESENT CASE CONCERNS ALLEGATIONS THAT TWO BRITISH COMPANIES ATTEMPTED SUCCESSFULLY TO PUT A THIRD BRITISH COMPANY OUT OF BUSINESS. WHATEVER THE STATE OF AMERICAN LAW, THE LAKER AFFAIR IS A MATTER OF MAJOR BRITISH INTEREST, IN WHICH MATERIAL AMERICAN INTERESTS INVOLVED ARE EITHER MINIMAL OR ENTIRELY THEORETICAL. NEITHER POLITICAL NOR PUBLIC OPINION IN BRITAIN CAN UNDERSTAND WHY THE AMERICAN COURTS AND THE AMERICAN LAW ENFORCEMENT AUTHORITIES SHOULD TAKE IT UPON THEMSELVES TO BE THE ARBITERS OF THE RIGHTS AND WRONGS OF THE AFFAIR. MOREOVER, IT HAS DONE SO IN AN AREA OF INTERNATIONAL COMMERCE THAT BY ITS VERY NATURE CAN ONLY BE HANDLED THROUGH BILATERAL AGREEMENT. I SUGGEST THAT YOU SHOULD LEAVE SHULTZ IN NO DOUBT ABOUT THE STRENGTH OF OUR FEELINGS.

5. YOU MIGHT GO ON TO SAY THAT THE ARRANGEMENTS WORKED OUT AT THE END OF MAY FOR DEALING WITH THE ISSUE WERE A RECOGNITION OF THE STRONG EMOTIONS ON BOTH SIDES: THEY WERE AN ATTEMPT TO BE PRACTICAL. AND WE HOPED THAT IT WOULD BE A BASIS FOR DEVISING MECHANISMS FOR PREVENTING THIS KIND OF ROW OCCURRING AGAIN. THIS MUST REMAIN THE PRIORITY OF BOTH GOVERNMENTS.

6. I SHALL ADVISE FURTHER IN THE LIGHT OF DEVELOPMENTS BETWEEN NOW AND YOUR ARRIVAL IN WASHINGTON.

7. FCO ADVANCE COPIES TO :

FCO : PS/S OF S, PS/PUS, MR EVANS, MR ADAMS, MR GRAY, MR FREELAND, MR AUST.

DTI : ROBERTS, BECKETT, SUNDERLAND, AYLING.

DTP : KNIGHTON, STEVENS, FORTNAM.

WRIGHT

IMMEDIATE

PS
PS/LADY YOUNG
PS/PUS
MR EVANS
MR ADAMS
MR AUST, Legal Advisers
MR FREELAND, Legal Advisers
ED/MAED (2)
ED/NAD
Mr Graff/MAED
~~PRESIDENT CLERK~~

PS/MR KING
MR LAZARUS, PUS
MR KNIGHTON
MR FORTNAM
} DEPT OF TRANSPORT

MR ROBERTS
MR SUNDERLAND
} DTI
MR BECKETT(Solicitors)

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

IMMEDIATE

CONFIDENTIAL
DESKBY 010730Z
FM WASHINGTON 010228Z JUL 83
TO IMMEDIATE F C O
TELEGRAM NUMBER 1842 OF 1 JULY

Mr. Schofer.
AR 1/7.

LAKER: PTI ACT: COMMENT

1. THE AMERICANS ARE STILL CLEARLY ANXIOUS TO AVOID A BREAK. THEY ARE PREPARED TO LEAVE THE NON-AGREEMENT IN EXISTENCE IF THEY POSSIBLY CAN. THEY RETAIN THEIR STRONG FEELINGS ABOUT THE WAY IN WHICH THE PTI ORDER APPEARS TO COMPEL VIOLATIONS OF AMERICAN LAW AND TO OBSTRUCT THE JUSTICE DEPARTMENT IN THE ENFORCEMENT OF THAT LAW, EVEN ON AMERICAN TERRITORY. THEY ARE OF COURSE PILING ON THE AGONY AS WE COME UP AGAINST THEIR DEADLINE IN ORDER TO SQUEEZE AS MUCH OUT OF US AS THEY CAN. WE NOW KNOW WHERE THEIR CHIEF CONCERNS LAY, BOTH OF PRINCIPLE AND OF PRACTICE. WE HAVE ALREADY GONE A LONG WAY TO MEET THEM WITHIN THE CONSTRAINTS IMPOSED BY THE NEED TO MAINTAIN OUR POSITION BEFORE THE COURT OF APPEAL AND BY A POSSIBLE ARBITRATION. WITHIN THOSE CONSTRAINTS, IT MAY NOT BE POSSIBLE TO CLOSE THE GAP SUFFICIENTLY TO SAVE THE NON-PAPER.

2. NEVERTHELESS WE RECOMMEND THAT OUR OFFER TOMORROW SHOULD GO NO FURTHER THAN THE FOLLOWING:

(A) SCOPE OF SECTION 1 DIRECTION:

WE SHOULD PROCEED AS PROPOSED IN PARA 3(A) OF YOUR TELNO 1081. WE SHALL NEED TO SHOW THE AMERICANS A TEXT, AS PROPOSED IN YOUR PARAGRAPH 5.

(B) COMMERCIAL INFORMATION HELD IN THE US BY US AIRLINES.

(B) COMMERCIAL INFORMATION HELD IN THE US BY US AIRLINES.
WE SHOULD REST WITH THE PROPOSAL IN PARA 4 OF YOUR TELNO 1076, AS AMPLIFIED BY PARA 3(B) OF YOUR TELNO 1081. WE BELIEVE THIS SHOULD SATISFY THE AMERICANS.

(:) COMMERCIAL INFORMATION HELD BY UK PERSONS IN THE USA.
THIS PRESENTS PROCEDURAL DIFFICULTIES. WE COULD OFFER TO DRAW UP A LIST OF UK EMPLOYEES OF BA IN THE US WITH KNOWLEDGE OF TARIFF DISCUSSIONS RELEVANT TO LEG 1, AND ISSUE SPECIFIC CONSENTS FOR EACH OF THEM: OR WE COULD TELL THE AMERICANS THAT WE WOULD INVIDE BA TO TELL US WHENEVER THEIR UK EMPLOYEES HERE RECEIVED A SOBPOENA, SO THAT WE COULD PROVIDE THE NECESSARY CONSENT. THE AMERICANS MAY STILL REGARD THIS AS AN UNACCEPTABLE CONSTRAINT ON THEIR LAW ENFORCEMENT PROCEDURES: BUT MIGHT ACCEPT IT IF THEY WANT A SETTLEMENT. WITH THIS REFINEMENT WE WOULD PROPOSE RESTING WITH THE PROPOSAL IN PARA 5 OF YOUR TELNO 1076.

(D) COMMERCIAL INFORMATION IN THE UK.
IF THE AMERICANS ARE RIGHT IN SAYING THAT THEY HAVE NO LEGAL POWER TO REQUIRE TESTIMONY FROM INDIVIDUALS OUTSIDE AMERICA OTHER THAN THEIR OWN NATIONALS AND RESIDENTS, THEIR REQUESTS PRESUMABLY CANNOT BE TREATED AS REQUIREMENTS WITHIN THE MEANING OF SECTION 2(5) OF THE PTI ACT. THEY WOULD NEED SOME FORMAL CONFIRMATION OF THIS, PERHAPS IN THE FORM OF A LETTER. I ASSUME THAT WE WOULD NOT WISH THEM TO PUBLISH IT, BUT THEY COULD REFER TO THEIR UNDERSTANDING OF THE SCOPE OF THE PTI DIRECTION IN ANY REQUESTS THEY ADDRESS TO INDIVIDUALS.

3. THESE CLARIFICATIONS MAY NOT BE SUFFICIENT TO DETER THE AMERICANS FROM OVERTHROWING THE NON-PAPER. IF THEY LOOK LIKE DOING SO, STEVENS WOULD - IF YOU AGREE - SAY THAT, IN AN ISSUE OF THIS IMPORTANCE, IT WOULD BE QUITE WRONG FOR OUR UNDERSTANDING'S TO COLLAPSE AT OFFICIAL LEVEL WITHOUT TAKING ADVANTAGE OF THE EARLY OPPORTUNITY FOR A PROPER DISCUSSION AT POLITICAL LEVEL WHICH WILL OCCUR WHEN YOU MEET MR SHULTZ ON 5 JULY. HE WOULD SAY THAT WE WOULD FIND IT HARD TO UNDERSTAND IF THE AMERICANS TOOK ANY IRREVOCABLE STEPS BEFORE THEN. THIS WOULD AT LEAST SERVE TO KEEP THE AMERICANS TALKING, AS WE HAVE SUCCESSFULLY DONE SO FAR.

FCO ADVANCE:
FCO: EVANS, ADAMS, GRAY, CHASE, AUST
DTI: ROBERTS, BECKETT, SUNDERLAND
DTP: KNIGHTON, FORTNAM
LAW OFFICERS DEPT: GARDINER

WRIGHT

HPO

cDTransport

10 DOWNING STREET

THE PRIME MINISTER

29 June 1983

Dear Sir Adam.

Thank you for your letter of 13 June and for your kind words on the result of the Election.

As you will now know, the Government have concluded that it is necessary to respond to the US Government's unilateral application of US anti-trust laws to matters covered by the UK/US Air Services Agreement (Bermuda 2). The powers under Sections 1 and 2 of the Protection of Trading Interests Act 1980 have therefore been exercised to safeguard United Kingdom trading interests affected by the application of these US laws.

Thank you, once again, for your letter.

Yours sincerely

Margaret Thatcher

Sir Adam Thomson, C.B.E.

JC

IMMEDIATE

DESKBY 290730Z

Prime Minister (2)

Sir O Wright's assessment of the Laker talks. Tom King / Geoffrey Howe will report orally to Cabinet tomorrow.

MCS 29/6

U.S. ANTI TRUST

ADVANCE COPIES 23

ACTION AGAINST BRITISH AIRLINES

MR ADAMS

~~SIR I SINCLAIR~~ Mr Olsen / Mr Freeland } Legal advisers

MR AUST

HD/MAED

HD/NAD

RESIDENT CLERK

MR FORTNAM - IAT 3/D/TRANSPORT (1, VICTORIA STREET

MR GARDINER - ATTORNEY GENERAL'S OFFICE

PS

PS / LADY YOUNG

PS / PUS

MR EVANS

D.O.

PS / SofS

MR LAZARUS

MR KNIGHTON } D/TRANSPORT

PS / SofS

MR ROBERTS

MR SUNDERLAND

MR BECKETT

D.O. } DTI.

MR COLES, No 10

GR 750

C O N F I D E N T I A L

DESKBY 290730Z

FM WASHINGTON 290200Z JUN 83

TO IMMEDIATE F C O

TELEGRAM NUMBER 1802 OF 28 JUNE

Read in full.

LAKER: THE NEXT STEPS.

1. WE ARE NOW AT THE CRITICAL POINT IN THIS ROUND. WE CAN HAVE NO DOUBT ABOUT THE AMERICANS' ANGER: THEY ALL BELIEVE THAT WE ARE ATTEMPTING AN UNWARRANTABLE INVASION OF THEIR SOVEREIGNTY, AND THAT BY OUR ACTIONS WE HAVE OVERTHROWN THE LONDON AGREEMENT NEGOTIATED LAST MONTH. IN THIS MOOD, THE LOGIC OF OUR ARGUMENTS TO THE CONTRARY IS NOT ENOUGH TO DISSUADE THEM. IT IS HOWEVER ALSO CLEAR THAT EVEN NOW THEY WOULD PREFER TO AVOID A BLAZING ROW WITH UNFORESEEABLE CONSEQUENCES. THEY ARE TALKING COOLLY AND CONSTRUCTIVELY TO OUR DELEGATION AND THEY HAVE INDEED SO FAR BEEN UNCHARACTERISTICALLY DISCREET WITH THEIR OWN PRESS, TO WHOM THEY HAVE SAID NOTHING. ALL THIS IS ENCOURAGING. BUT THEY HAVE STILL NOT GRASPED HOW DIFFICULT IT IS FOR US TO ACCOMMODATE THEM BECAUSE OF THE WAY THAT OVER THE YEARS AND IN THE PRESENT CASE THEY HAVE THEMSELVES REGULARLY ATTEMPTED TO INVADE OUR SOVEREIGNTY. AND I FEAR THAT IF WE CANNOT DEMONSTRATE CONVINCINGLY AND SOON THAT WE ARE PREPARED TO GO A SIGNIFICANT DISTANCE TO MEET THEIR MOST IMPORTANT CONCERNS THEY WILL EXPLODE, WITH THE LIKELIHOOD OF A NO-HOLDS-BARRED PURSUIT OF OUR AIRLINES TO FOLLOW IN SHORT ORDER.

2. THERE IS NO TIDY SOLUTION. WE CLEARLY CANNOT COMPROMISE ON OUR PRINCIPLES ANY MORE THAN THEY CAN ON THEIRS. IT IS THEREFORE IN THE INTERESTS OF BOTH PARTIES TO PUT ON ONE SIDE FOR THE TIME BEING THE QUESTIONS OF PRINCIPLE AND CONCENTRATE ON PRACTICAL SOLUTIONS

THE INTERESTS OF BOTH PARTIES TO PUT ON ONE SIDE FOR THE TIME BEING THE QUESTIONS OF PRINCIPLE AND CONCENTRATE ON PRACTICAL SOLUTIONS TO THE PRACTICAL PROBLEMS. I AM SURE THAT THE AMERICANS WILL NOT ACCEPT BROAD ASSURANCES THAT IN PRACTICE OUR MEASURES WILL NOT HAVE THE EFFECTS TO WHICH THEY TAKE THE MOST PARTICULAR EXCEPTION. THEY WILL WANT SOMETHING IN WRITING, IN PUBLIC, AND WITH LEGAL EFFECT. ON THE OTHER HAND, ANY SOLUTION MUST BE CONSISTENT WITH THE JUSTIFIABLE CONCERN OF YOU AND YOUR COLLEAGUES NOT TO REVOKE OR AMEND THE ORDER AND DIRECTIONS SO RECENTLY MADE, NOT TO WEAKEN OUR POSITION OVER BERMUDA 2 AGAINST A POSSIBLE ARBITRATION, NOT TO DAMAGE THE LONDON NON-PAPER AND NOT TO DIMINISH THE AIRLINES' CHANCE OF A SUCCESSFUL OUTCOME IN THE UK LEGAL PROCEEDINGS (ON WHICH SO MUCH DEPENDS FOR THEM). THE LONDON TEAM HAVE ALREADY MADE RECOMMENDATIONS WITH WHICH I AGREE (MY TELNO 1783). THESE SEEK TO PROVIDE A PRAGMATIC WAY OF DEALING WITH MOST OF THE DIFFICULTIES WHICH THE AMERICANS PROFESS OUR ACTIONS HAVE CREATED FOR THEM.

3. I UNDERSTAND THAT YOU AND YOUR COLLEAGUES WILL BE CONSIDERING THE NEXT STEP ON 29 JUNE. I STRONGLY RECOMMEND THAT THE LONDON TEAM SHOULD BE GIVEN AUTHORITY TO DISCUSS SOME PRACTICAL PROPOSALS WITH THE AMERICANS. I DO NOT SUGGEST THAT THE AMERICANS SHOULD BE INVITED TO JOIN US IN DRAFTING ANY PUBLIC DOCUMENT WE MIGHT ISSUE. BUT THERE IS CLEARLY NO POINT IN PUBLISHING A DOCUMENT INTENDED TO BRING THE AMERICANS ALONGSIDE IF IT DOES NOT FULFILL THAT PURPOSE.

4. IN THEIR NOTE OF 25 JUNE (MY TELNO 1766) THE AMERICANS SET A DEADLINE OF 1 JULY. IF WE WERE IN SERIOUS NEGOTIATION WITH THEM, THEY COULD DOUBTLESS BE INDUCED TO LET THIS SLIP. BUT WE WILL HAVE TO MAKE THEM AN INTERESTING OFFER BY THURSDAY MORNING AT THE LATEST.

5. ASSUMING WE NEGOTIATE THESE RAPIDS SUCCESSFULLY, THERE IS A REASONABLE CHANCE THAT THE LONDON AGREEMENT CAN BE OPERATED AS WE INTENDED. THE AMERICANS WILL ALSO HAVE LEARNED A SHARP LESSON ABOUT THE LENGTHS TO WHICH WE WILL GO TO DEFEND OURSELVES AND OUR COMPANIES AGAINST THE UNWARRANTED DEMANDS WITH WHICH AMERICAN LAW HAS FOR SO LONG CONFRONTED US. THAT SHOULD REINFORCE OUR ARGUMENT THAT WE NEED TO NEGOTIATE SOME MORE PERMANENT ARRANGEMENTS TO MINIMISE THE LIKELIHOOD THAT OUR PRESENT TROUBLES WILL RECUR IN THE FUTURE.

6. YOUR DECISION TO SEND THE LONDON TEAM WAS ESSENTIAL TO GET THE AMERICANS TO TALK. TO CLINCH THE DEAL, THE TEAM NOW NEED TO MAKE A SERIOUS OFFER AND NEGOTIATE IT FLEXIBLY. I HOPE YOU CAN GIVE THEM THAT AUTHORITY.

FCO ADVANCE: PS/SOFS, PS/BARONESS YOUNG, PS/PUS, EVANS, ADAMS
AUST LEGAL ADVISOR,
D/TRANSPORT - PS/SOFS, LAZARUS, KNIGHTON, FORTNAM
DTI - PS/SOFS, ROBERTS, SUNDERLAND, BECKETT
LAW OFFICES DEPT - GARDINER
NO 10 - COTES

WRIGHT

10 DOWNING STREET

(3)

Prime Minister

The legal advice is that your reply to Sir Adam Thomson should be short and to the point, since the Government's decisions on the matter were uninfluenced by Sir A Thomson's representations (a position the Laker liquidator might seek to contradict).

MCS 28/6

Prime Minister

I expect that Mr King will report on progress at Cabinet tomorrow; in short

MR. COLES

No 10

Mr Nicholas.

AR 28. 6

GR 820

CONFIDENTIAL

CONFIDENTIAL
DESKBY 290730Z
FM WASHINGTON 290205Z JUN 83
TO IMMEDIATE FCO
TELEGRAM NUMBER 1803 OF 28 JUNE

LAKER: PTI ACT

1. IN AN INFORMAL MEETING WITH FIVE MEMBERS OF THE AMERICAN TEAM STEVENS, BRAITHWAITE AND AYLING MADE THE POINTS IN PARAGRAPHS 4(2) AND 4(3) OF YOUR TELNO 1065. THE QUESTION OF NARROWING THE SECTION 1 DIRECTION TO TARIFF MATTERS WAS NOT RAISED BY THE US TEAM. THE MEETING CONCENTRATED ON PRACTICAL MATTERS RATHER THAN ISSUES OF PRINCIPLE AND SOVEREIGNTY.

2. IN SUMMARIZING THE CONCERNS THEY HAVE WITH THE CONSEQUENCES OF THE PTI ORDER AND DIRECTIONS FOR THE GRAND JURY INVESTIGATION THE US TEAM LAID PARTICULAR EMPHASIS ON THE FOLLOWING REQUESTS:

(I) THAT WE SHOULD ISSUE A CONSENT WHICH WOULD INDICATE THAT THE ONLY CONDUCT FORBIDDEN WAS THE ACT OF TRANSMITTING COMMERCIAL INFORMATION FROM THE UK OR PROVIDING DOCUMENTS IN THE UK:

(II) THAT THE SECTION 1 DIRECTION SHOULD BE MODIFIED IN RELATION TO ENFORCEMENT ACTION BY THE DEPARTMENT OF JUSTICE SO AS TO APPLY ONLY TO ENFORCEMENT ACTION IN THE UK AND SHOULD PERMIT A PERSON IN THE UK TO RESPOND VOLUNTARILY TO A REQUEST FROM THE DEPARTMENT OF JUSTICE.

UNDERLYING THE FIRST REQUEST, WHICH RELATES TO THE CONCERN OF THE DEPARTMENT OF JUSTICE TO OBTAIN DOCUMENTS AND TO SUBPOENA WITNESSES IN THE UNITED STATES, ARE THEIR CONSIDERABLE POWERS OF COMPULSION. THEY MADE IT CLEAR THAT THEY WOULD EXERCISE THESE POWERS REGARDLESS OF THE PTI DIRECTIONS: FOR EXAMPLE TO OBTAIN ANY FURTHER BA PAPERS THEY MIGHT NEED LOCATED IN THE US. THESE POWERS WOULD ALSO PERMIT THEM TO COMPEL THE ATTENDANCE OF UK NATIONALS IN THE UNITED STATES AS WITNESSES, EG FORMER OFFICERS AND EMPLOYEES OF LAKER AIRWAYS.

3.THE PURPOSE OF THE SECOND REQUEST IS EXPRESSLY TO LIMIT THE EFFECT OF THE SECTION 1 DIRECTION TO ENFORCEMENT ACTION BY THE DEPARTMENT OF JUSTICE SO AS TO MAKE IT CLEAR THAT THE DIRECTION DOES NOT COMPEL VIOLATION OF THE SHERMAN ACT ITSELF, AND TO PERMIT INDIVIDUALS IN THE UK TO RESPOND TO REQUESTS MADE BY THE DEPARTMENT OF JUSTICE IF THEY SO WISH.

CONFIDENTIAL

/H. OUR

4. OUR WILLINGNESS TO GRANT FURTHER CONSENTS FOR US LOCATED DOCUMENTS AS SUGGESTED IN YOUR PARAGRAPH 4(2) WOULD BE MEANINGLESS BECAUSE OF THEIR POWERS WHILE REMAINING IN THEIR EYES A PROVOCATIVE INTRUSION ON OUR PART. WE CANVASSED THE POSSIBILITY OF AN ASSURANCE TO US AIRLINES IN THE UK ON THE LINES SUGGESTED IN YOUR PARAGRAPH 4(3) BUT THEY DOUBTED WHETHER US AIRLINES IN THE UK NEEDED SUCH AN ASSURANCE. THEY ARE NOT SEEKING POWERS OF INVESTIGATION IN THE UK BUT THEY DO WANT PEOPLE IN THE UK TO BE FREE TO RESPOND TO THEIR INVITATIONS, AND ONCE SUCH PEOPLE ARE ON US TERRITORY THE AMERICANS CONSIDER THEY HAVE A RIGHT TO SEEK COMMERCIAL INFORMATION FROM THEM.

5. THE US REQUESTS CONCENTRATE THROUGHOUT ON WHAT THEY NEED FOR THE GRAND JURY INVESTIGATION. ON LEG 1 THEY ACCEPT THAT WE DID NOT PROMISE ANY CO-OPERATION IN THE NON-PAPER, BUT EQUALLY THEY FEEL THAT WE ARE REPUDIATING THE SPIRIT OF THE NON-PAPER BY USING THE PTI ACT TO PUT NEW OBSTACLES IN THE WAY OF AN INVESTIGATION ABOUT WHICH THEY HAVE ALREADY GIVEN US ASSURANCES WHICH SHOULD GIVE US SOME DEGREE OF CONFIDENCE IN THE OUTCOME. IF WE INSIST ON TAKING NEW STEPS TO INTERFERE THEY WILL FEEL FREE TO ABANDON THEIR COMMITMENTS AND WITH IT THE NON-PAPER AS A WHOLE. THEY ARE NOT SEEKING A BLANK CHEQUE TO OBTAIN DOCUMENTS OR COMMERCIAL INFORMATION IN THE UK (YOUR PARA 5). THEY KNOW THIS WOULD BE UNACCEPTABLE. BUT THEY RESENT ANY NEW ATTEMPT ON OUR PART TO PREVENT THEM HAVING ACCESS TO DOCUMENTS OR COMMERCIAL INFORMATION IN THE US.

6. THE US REQUESTS WOULD LARGELY BE CATERED FOR IN THE CONSENT PROPOSALS WE HAVE ALREADY MADE, THOUGH IF THE AMERICANS DO NOT INSIST ON THE NARROWING OF THE SECTION 1 DIRECTION TO TARIFF QUESTIONS WE WOULD NOT NEED TO DEAL WITH THAT POINT. HOWEVER THEY MAY RETURN TO THE POINT SO WE STILL NEED TO BE READY TO DEAL WITH IT.

7. WE WOULD CLEARLY NEED TO DEAL WITH THE QUESTION YOU MENTION OF NOT PREJUDICING OUR POSITION UNDER BERMUDA 2. WE HAVE NOT DISCUSSED THIS WITH THE AMERICANS BUT ONE SOLUTION MIGHT BE TO REPLY TO THEIR NOTE BY REFERRING TO THE CONSULTATIONS AND RECORDING THAT THE CONSENT HAD BEEN GIVEN WITHOUT PREJUDICE TO THE POSITION OF HMG UNDER BERMUDA 2. THIS WOULD HAVE TO BE ON THE PRIOR UNDERSTANDING THAT THE NOTE COULD BE REFERRED TO IN PUBLIC AND WOULD NOT BE CHALLENGED.

/8. WE

8. WE HAVE KEPT MATTERS IN PLAY. WE HAVE CONFIRMED THAT THE JULY 1 DEADLINE IS NOT IMMOVABLE PROVIDED THAT WE ARE IN SERIOUS NEGOTIATION WITH THEM. BUT WE SHALL NEED TO RESPOND POSITIVELY TO THEIR CONCERNS TOMORROW IF WE ARE TO MAINTAIN THE DIALOGUE.

FCO PLEASE ADVANCE: EVANS, ADAMS, AUST LEGAL ADVISOR, CHASE (MAED) D/TRANSPORT FOR KNIGHTON, FORTNAM. DTI FOR ROBERTS, BECKETT AND SUNDERLAND. LAW OFFICERS DEPT FOR GARDINER.

WRIGHT

U S ANTI TRUST ACTION AGAINST BRITISH AIRLINES LIMITED

MAED
NAD
ERD
LEGAL ADVISERS
PS
PS/LADY YOUNG
PS/MR WHITNEY
PS/PUS
MR EVANS
MR GIFFARD
MR THOMAS
MR ADAMS

COPIES TO:

MR J M HEALEY OT2)
MR BECKETT SOL) DTI
MR GARDINER ATTORNEY GENERAL'S OFFICE
IAT/DEPT OF TRANSPORT (7)
MR W KNIGHTON DEPT OF TRANSPORT (MARSHAM ST)
LORD COCKFIELD CHANCELLOR OF THE DUCHY OF LANCASTER

CONFIDENTIAL

DEPARTMENT OF TRANSPORT
2 MARSHAM STREET LONDON SW1P 3EB

01-212 3434

Michael Scholar Esq
Private Secretary
10 Downing Street
Whitehall
LONDON SW1

28 June 1983

Dear Michael,

We spoke over the telephone this morning about the revised draft to Sir Adam Thomson's letter of 13 June to the Prime Minister.

The attached draft reflects our discussion. If, however, the Prime Minister wishes to length the reply, additional wording from the attached Press Notice has been cleared with lawyers and can therefore be used.

Yours,

Dinah

MISS DINAH NICHOLS
Private Secretary

CONFIDENTIAL

M type

DRAFT LETTER FOR THE PRIME MINISTER TO SEND TO SIR ADAM THOMSON CBE

Thank you for your letter of 13 June and for your ~~congratulations~~ kind words on the result of the Election.

As you will now know, the Government have concluded that it is necessary to respond to the US Government's unilateral application of US anti-trust laws to matters covered by the UK/US Air Services Agreement (Bermuda 2). The powers under Sections 1 and 2 of the Protection of Trading Interests Act 1980 have therefore been exercised to safeguard United Kingdom trading interests affected by the application of these US laws.

Thank you, once again, for ~~writing~~ your letter

Department of Transport

Press Notice No: 209 Date: 24 June 1983

ISSUED JOINTLY BY THE DEPARTMENT OF TRADE AND INDUSTRY AND THE DEPARTMENT OF TRANSPORT

USE OF THE PROTECTION OF TRADING INTERESTS ACT AGAINST US ANTITRUST LAWS

Cecil Parkinson, Secretary of State for Trade and Industry, and Tom King, Secretary of State for Transport, today announced that the powers under sections 1 and 2 of the Protection of Trading Interests Act 1980 have been exercised to safeguard United Kingdom trading interests affected by the application of United States' antitrust laws.

The British Government has made representations to the US Government about the unilateral application of its antitrust laws to aviation activities covered by our bilateral treaty - the UK/US Air Services Agreement (Bermuda 2). Mr King now considers that it is necessary to respond to this unilateral application of US law to matters covered by Bermuda 2 by reflecting HM Government's position in instruments made under the 1980 Act. This Act was expressly designed to provide protection from requirements, prohibitions and judgments imposed or given under the laws of countries outside the United Kingdom and affecting the trading or other interests of persons in the United Kingdom.

Mr Parkinson, whose Department is generally responsible for UK trading interests, is satisfied that the statutory powers should be exercised in these circumstances and has accordingly made an Order and Direction under the Act.

The Order under section 1 reflects the Government's view that the present attempts to apply US antitrust laws to activities of airlines designated under Bermuda 2 by HMG are damaging to or threaten to damage UK trading interests. The associated Direction under section 1 prohibits any person carrying on business in the

UK from complying with requirements imposed pursuant to these US [illegible]s. The Direction under section 2 of the Act has been made to ensure that certain commercial documents and commercial information are not made available for any proceedings in the US without the consent of the Secretary of State for Trade and Industry.

A consent has been given so that the section 1 Direction shall not apply to US airlines. The section 2 Direction applies to certain documents and information in the possession of any person in the UK including US airlines.

The Order and Directions, and the Consent, come into effect on Monday 27 June 1983.

Discussions between the two Governments are expected to continue with a view to resolving the underlying dispute and any jurisdictional issue which may arise.

NOTE TO EDITORS

1. The Protection of Trading Interests Act 1980 contains provisions enabling the Secretary of State to counter measures taken or proposed under the law of another country which would damage the trading interests of the UK. It also provides that the Secretary of State may prohibit compliance with certain requirements of a court or authority in another country seeking commercial documents or information located outside that country.

2. The last occasion the Protection of Trading Interests Act was used was in the summer of last year when Lord Cockfield, then Secretary of State for Trade issued Directions under the Act prohibiting a number of British companies from complying with the US embargo on contracts connected with the West Siberian gas pipeline project.

3. The American investigations involve a number of American and European airlines as well as British Airways and British Caledonian.

4. For general questions relating to the PTI Act contact DTI Press Office on 215 5678. For questions concerned specifically with the US antitrust aviation dispute contact Department of Transport Press Office on 212 0431.

Press Enquiries: 01-212 0431
Night Calls (6.00pm to 8.00am)
Weekends and Holidays: 01-212 7071

Public Enqurie: 01-212 3434
ask for Public Enquiry Unit

LEGAL PROCEDURE: Anti-trust

Case (Laker) March 81

CH/ I have requested another from D/JD

PL 29/6

27/6

This letter is out of date

Legal Procedure

10 DOWNING STREET

THE PRIME MINISTER

Dear Sir Adam.

Thank you for your letter of 13 June and for your congratulations on the result of the Election.

I have been following with close interest the aviation anti-trust cases in the United States which carry such risks for British Caledonian, and I am glad to know that you are pleased with the progress recently made in negotiations.

As your letter makes clear, the risks which remain are still very serious indeed, and the Attorney General has been consulted. I would like to assure you that the Government are taking full account of the points which you have raised; in particular careful consideration has been given to the use of the Protection of Trading Interests Act and an announcement is being made about that very soon.

Sir Adam Thomson, C.B.E.

Legal Proceedings referred to Cabinet 26/6

CONFIDENTIAL

Department of Transport,
2 Marsham Street,
London, SW1.

PA

26 June 1983

MLS 27/6

Dear Michael,

US Anti-Trust Actions Against British Airlines

The Prime Minister asked for an account of recent developments in the aviation anti-trust cases, leading up to the strongly expressed US objections to the use of the Protection of Trading Interests (PTI) Act recorded in Brian Fall's letter of 24 June. A note on this cleared with FCO officials is enclosed; they will submit it to Sir Geoffrey Howe.

My Secretary of State suggests that the following points are important in this.

(a) British Caledonian (BCAL) are in grave danger from the treble damage suit brought by the Laker liquidator in the United States. So are British Airways, with the risk of substantial penalties; and even if they were ultimately successful in their defence, the possible long duration of the proceedings could effectively prevent privatisation during this period. The only possibility that has been suggested that could prevent this suit proceeding would be if the Court of Appeal, now on Monday 4 July, reverse Mr. Justice Parker's judgement and enjoin the liquidator not to proceed with his suit. The Attorney General considered such a reversal improbable without the timely use of the PTI Act. It was unanimously agreed at the meeting called by the Foreign Secretary with Mr. King, Mr. Channon and the Attorney General that the Act should therefore be used, to express in English law our Government's position in the dispute with the US Government over the application of US anti-trust law to airline tariffs covered by the Bermuda 2 Agreement.

(b) We should have had trouble with the Americans whenever the PTI Act was used, because they want us not to use the Act, and not to resist actions by them, which we consider contrary to our aviation treaty. We could not agree to this. And a consideration against delay in the use of the Act was the need for this action to be taken a reasonable period before the Court of Appeal hearing if we were to avoid criticism that we were prejudicing the rights of the parties.

(c) The American negotiators in the Departments of State and Justice had four weeks (23/24 May) notice of the likelihood that we should need to use the Act. They had a week's notice (16 June) of the nature of the measures, including in particular the application to UK airlines in the US (considered by the lawyers essential to the measures' effectiveness in relation to the issues in the

/ Court of Appeal

Court of Appeal). In consequence of views they then expressed it was decided that the S.1 Direction should not apply to US airlines. The Americans have been repeatedly assured that we should not let the use of the Act affect any of the commitments which we made under the "non-paper" (though it could hinder their investigations in the respects where we have given no commitment). The prohibitions we have imposed under the PTI Act are not absolute: the Secretary of State may give consent to relaxations. (This is a point the Americans continually disregard.)

(d) The timing of the making of the Order was derived from the timing of the Court of Appeal hearing on 4 July, as noted above. The coincidence of timing with Vice President Bush's visit was clearly unfortunate and my Secretary of State has asked for a full report on how he was not advised of this visit prior to the making of the Order. When the US request, through Sir Oliver Wright, for a delay in the announcement of the measures because of the Bush visit was received on Thursday 23 June the Order had already been made. The legal advice was clear that the only way in which it could be cancelled, amended or delayed was by an additional Order, with both Orders required to be laid before Parliament. This would clearly have caused other difficulties. It was then agreed that the laying of the Order and the announcement should be deferred until late on Friday after the Vice President's discussions with Ministers; and that the Foreign Secretary would, as advised by Sir Oliver Wright, personally explain our reasons for this action to the Vice President before publication. It was also agreed that in the background briefing it would be made clear that the action was not intended as an escalation of the dispute and should not be interpreted as meaning that consultations had broken down. This low key presentation was well reflected in yesterday's British press.

As agreed with the Foreign Secretary it has been arranged for a team of officials to travel to Washington today for talks tomorrow. Their talks will cover the points being raised in Washington telnos 1765 and 1766 and their first task will be to try to clear up the persistent misunderstandings about our action, and to seek to defuse the issue by repeating our assurances that we stand by the non-paper attempts to find a resolution of these serious differences. My Secretary of State will of course continue to keep in the closest touch with the discussions, in which there is a real clash of interests between American and British positions and in which essential British interests, not least of British Caledonian, are most certainly at serious risk.

I am sending copies of this letter and enclosure to Brian Fall (FCO), Jonathan Spencer (Department of Trade and Industry) and Henry Steel (Attorney General's Office).

Yours,

Dinah

MISS D.A. NICHOLS

Michael Scholar, Esq.,
10 Downing Street.

PRINCIPAL RECENT DEVELOPMENTS IN THE AVIATION ANTI-TRUST CASES

Monday 13 June

Sir Adam Thomson wrote to the Prime Minister. He expressed satisfaction with the negotiations with the US Government over the Grand Jury Investigation. He was concerned about the threat posed by the Laker liquidator's US treble-damage action and asked that, to assist BCAL's attempt in the Court of Appeal to have this stopped, the Government should use the Protection of Trading Interests (PTI) Act and that the Attorney General should appear in the Court of Appeal in support of BCAL and British Airways. These proposals reflected knowledge of what was already being considered by Departments.

Thursday 16 June

The Secretary of State for Transport wrote to the Secretary of State for Trade and Industry proposing that the PTI Act should be used on 20 June, for several reasons, but essentially as the only course likely to lead the Court of Appeal (then expected to sit on 27 June) to check the US treble-damage action, which otherwise threatened severe financial damage to BCAL and British Airways. He warned of the risk of criticism in the US. The proposal was copied to the Prime Minister, the Foreign Secretary and the Attorney General.

Friday 17 June

Mr. Parkinson and the Attorney General conveyed their agreement to Mr. King's proposal. However, initial adverse reaction by the US officials to the prospect of the use of the Act was then received, together with Sir Oliver Wright's comment that if action was taken there could be a risk of losing the "non-paper" embodying understandings between the American and British Governments about the handling of the dispute over the Grand Jury Investigation, and other progress made.

On Sir Geoffrey Howe's instructions, this advice was reviewed in the FCO by Mr. Rifkind with officials of the Departments concerned. Mr. Rifkind decided, subject to any further comments of Sir Oliver Wright, to recommend to the Foreign Secretary that the Act should be used. It was noted that it was desirable to sign the Order on 20 June

/ in order

in order to avoid any claim of the parties on 27 June that they had not had sufficient time to consider the implications of the Order.

Monday 20 June

A meeting of Ministers chaired by the Foreign Secretary, and including the Secretary of State for Transport, the Minister for Trade and the Attorney General, decided that the PTI Act should be used for the reasons proposed by Mr. King. The meeting decided that the US Government should be told of this decision as soon as possible and that action should be taken as soon as possible thereafter and not later than Wednesday 22 June (based on the Court of Appeal hearing on 27 June). The meeting were informed of the possibility of the Court hearing being postponed by a week to 4 July.

Tuesday 21 June

The hearing was in fact postponed and this information conveyed to officials in the Departments concerned. The Foreign Secretary was not informed by his officials until the evening of 23 June. In view of the postponement the effective date of the Order was replanned for Monday 27 June, to restore the 7 days' notice desired earlier for legal reasons. It was planned that the Order should be made and laid on Thursday 23 June to allow a brief interval before the effective date. Our Embassy in Washington were instructed to give prior warning to US officials on Wednesday 22 June.

Thursday 23 June

Sir Oliver Wright reported by telegrams received on Thursday morning the State Department's reaction and request that the announcement of our action should be delayed, to give time for reactions to cool in Washington and because of Vice President Bush's visit. Later in the morning the US Ambassador in London called on Department of Transport and FCO officials with the further request that the issuance of the Order should be delayed. The Order had however already been signed (before the telegrams were received) preparatory to laying that morning. However action on laying was suspended immediately. Legal advice, however, was that the Order must be laid and could only be cancelled, amended or delayed by a further Order which would also need to be laid, with evident difficulties. Unless such an amending Order were made, it would be necessary to lay the original Order not later than the rising of the House on Friday so that this would be done

/ before the

before the effective date of Monday 27 June. Postponement of that effective date would also reduce once again the 7 days interval desired for legal reasons before the Court of Appeal hearing. The balance of considerations pointed to the decision that the laying of the Order and the announcement should be as late as practicable on Friday 24 June and that the Foreign Secretary should be advised to explain personally the reasons for the measures to the Vice President.

These developments and the proposals for handling them were reported in a letter from the Private Secretary of the Secretary of State for Transport to the Private Secretaries to the Prime Minister, the Foreign and Commonwealth Secretary, the Secretary of State for Trade and Industry and the Attorney General.

Friday 24 June

Sir Geoffrey Howe explained our intended action to Vice President Bush on Friday morning, but the latter did not appear to be briefed. It is understood that this was not raised by Mr. Bush at his subsequent meeting with the Prime Minister. Sir Geoffrey Howe sent a personal message to Mr. Shultz early on Friday afternoon giving a full explanation of why we had to take the action. However the US Ambassador called on the Foreign Secretary later that afternoon to convey the strongly worded instruction apparently intended for delivery by Mr. Bush but received too late from Washington. The details were conveyed to No. 10 and other Ministers.

The Order was laid just before the House rose. In non-attributable briefing accompanying the later press announcement, it was emphasised that the action did not represent an escalation of the dispute nor did it mean that consultations with the US Government had broken down.

The Foreign Secretary and the Secretary of State for Transport agreed that a team of officials should travel to Washington for talks on Monday 27 June aimed at defusing the American reactions.

* * * * * * *

Extent of Warning to the US about Possible Use of the PTI Act

23/24 May

The US negotiators were told during the negotiations on the "non-paper" that we might need to use the PTI Act as part of our response to the US private treble-damage action. They took this calmly and acknowledged that they had no influence over the US Court action.

12 June

Stevens (D/Transport) again warned Scocozza (State Department negotiator) that we would need to use the PTI Act. Scocozza was not surprised or concerned.

15 June

Seiden (Justice) raised the question of possible use of an Order under the PTI Act and sought and received an assurance that HMG did not intend to use a PTI Order inconsistently with commitments in the non-paper.

16 June

The British Embassy, Washington, warned Seiden (Justice) and Small (State) that the PTI Act would have to be used and explained in some detail what this would entail. Seiden said that he did not want to be drawn into negotiations about the texts (which he was not shown) but warned that any instructions to airlines which interfered with anti-trust processes in the US would be regarded as most provocative in Congress; repercussions might lead to the non-paper being revealed.

22 June

The Embassy called again on Seiden and Scocozza, on instructions, to hand over final texts and explain that the Order had to be made on 23 June (the timing being dictated by the approach of the Court of Appeal hearing in the UK). Seiden and Scocozza reacted much as before. In a separate telephone call Burt (State) said it was particularly unfortunate that we should act on the eve of Vice President Bush's visit to London and requested that we delay announcement of our action.

DEPARTMENT OF TRANSPORT
26 June 1983

U.S. A[illegible] TRUST

ADVANCE COPIES

ACTION AGAINST BRITISH AIRLINES

PS (6)

MR ADAMS

~~SIR I SINCLAIR~~ Legal advisers: Freeland

MR AUST

HD/MAED

HD/NAD

PRESIDENT CLERK

MR FORTNAM - IAT 3/D TRANSPORT (1, VICTORIA STREET)

MR GARDINER - ATTORNEY GENERAL'S OFFICE

MR KNIGHTON
MR STEVENS } TRANSPORT

MR BECKETT
MR STEVENS } DTI

~~MR COLES~~ NO 10, DOWNING ST.

CONFIDENTIAL
DESKBY 250900Z
FM WASHINGTON 250455Z JUN 83
TO IMMEDIATE FCO
TELEGRAM NUMBER 1766 OF 25 JUNE 1983

IMMEDIATE
ADVANCE COPY

MIPT. LAKER: PTI ACT.

SENT 25 JUN 1983

TEXT OF US NOTE.
BEGINS:

THE DEPARTMENT OF STATE NOTES THAT ON JUNE 24, 1983, THE UNITED KINGDOM SECRETARY OF STATE FOR TRADE PROMULGATED AN ORDER UNDER THE PROTECTION OF TRADING INTERESTS ACT (PTIA) AS WELL AS GENERAL DIRECTIONS TO AIR CARRIERS COMPELLING THEM TO TAKE CERTAIN STEPS IN COMPLYING WITH THAT ORDER.

THE ORDER AND DIRECTIVES CONSTITUTE A VIOLATION OF THE SOVEREIGNTY OF THE UNITED STATES AND A DISMAYING PUBLIC CHALLENGE TO UNITED STATES LAW. THEY APPEAR TO VIOLATE THE BILATERAL AVIATION AGREEMENT IN FORCE BETWEEN THE UNITED STATES AND THE UNITED KINGDOM (BERMUDA II) AND THE UNDERSTANDINGS EMBODIED IN THE NON-PAPER REACHED BETWEEN THE TWO GOVERNMENTS CONCERNING THE MANAGEMENT OF THE CURRENT UNITED STATES INVESTIGATION INTO ALLEGED VIOLATIONS OF OUR CRIMINAL LAW. THE ORDER AND DIRECTIVES, AND THE MANNER IN WHICH THEY WERE PROMULGATED, INTENSIFY PRE-EXISTING DIFFERENCES WHICH THE

UNITED STATES HAD UNDERSTOOD BOTH SIDES PREFERRED TO MITIGATE AND MANAGE THROUGH PRACTICAL COOPERATION. THEY APPEAR TO EXTEND THOSE DIFFERENCES TO A RANGE OF PROBLEMS WELL BEYOND THE TARIFFS AND INTO AREAS IN WHICH ACTUAL ANTITRUST PROBLEMS HAD NOT HERETOFORE EXISTED. THEY CREATE NEW AND, IN THE VIEW OF THE UNITED STATES, GRATUITOUS CONFLICTING REQUIREMENTS FOR THE PERSONS AND COMPANIES AFFECTED. MOREOVER, THEY SO DIRECTLY CHALLENGE THE SOVEREIGN RIGHT OF THE UNITED STATES TO ENFORCE ITS LAWS AND CARRY OUT CRIMINAL INVESTIGATIONS AND SO INTERFERE WITH THE CONDUCT OF THE PRESENT CRIMINAL INVESTIGATION CONTEMPLATED IN THE NON-PAPER AS TO CONSTITUTE AN IMPLICIT REPUDIATION THEREOF BY HER MAJESTY'S GOVERNMENT. THE DEPARTMENT PROTESTS THESE PROVOCATIVE ACTIONS.

THE DEPARTMENT MUST EMPHASIZE THAT IT IS UNACCEPTABLE FOR ANOTHER GOVERNMENT TO ISSUE A PUBLIC DIRECTIVE HAVING THE FORCE OF LAW REQUIRING PERSONS DOING BUSINESS IN THE UNITED STATES NEITHER TO COMPLY NOR PERMIT COMPLIANCE WITH THE LAWS OF THE UNITED STATES REGARDING THAT BUSINESS. THE GOVERNMENT OF THE UNITED STATES CAN NEITHER TOLERATE VIOLATIONS OF UNITED STATES ANTITRUST LAWS NOR FOREGO THEIR VIGOROUS ENFORCEMENT. THE PROVISIONS OF THE INTERNATIONAL AGREEMENTS BETWEEN THE UNITED STATES AND THE UNITED KINGDOM DO NOT IN ANY MANNER JUSTIFY SUCH AN INFRINGEMENT OF THE SOVEREIGNTY OF THE U.S. TO THE CONTRARY, UNDER BERMUDA II, THE OPERATING AUTHORITY GRANTED TO AIR CARRIERS SERVING THE U.S.-U.K. MARKET IS EXPRESSLY CONDITIONED ON COMPLIANCE WITH THE LAWS OF BOTH PARTIES AND MAY BE REVOKED FOR NONCOMPLIANCE. THE PTIA ORDER AND DIRECTIVES APPEAR TO MANDATE VIOLATION OF THE LEGAL REQUIREMENTS UPON WHICH THE OPERATING AUTHORITY IS PREMISED AND THEREFORE TO PLACE THAT AUTHORITY IN QUESTION. THEY MAY ALSO PLACE CARRIERS AND THEIR ASSETS IN THIS COUNTRY IN LEGAL JEOPARDY. THE CARRIERS MIGHT WELL HAVE PREFERRED TO RESPECT AND COMPLY WITH THE ANTITRUST LAWS OF THE UNITED STATES AND THE LAWFUL ORDERS OF UNITED STATES COURTS IN THE JURISDICTION OF WHICH THEY ARE PRESENT AND DOING BUSINESS. IT IS REGRETTABLE THAT THE UNITED KINGDOM SHOULD BE CREATING SUCH UNNECESSARY CONFLICTING REQUIREMENTS AND JEOPARDY.

MOREOVER, THE DEPARTMENT MUST EXPRESS DISMAY AT THE REFUSAL OF HER MAJESTY'S GOVERNMENT TO DELAY THIS SERIOUS AND POTENTIALLY DISRUPTIVE ACTION AND CONDUCT GENUINE PRIOR CONSULTATIONS WITH THE UNITED STATES. THAT REFUSAL PUTS INTO QUESTION THE WISDOM OF THE REPEATED DELAYS, CONSULTATIONS AND ADJUSTMENT MADE BY THE UNITED STATES IN THE ANTITRUST

ADJUSTMENT MADE BY THE UNITED STATES IN THE ANTITRUST INVESTIGATION TO DATE. IT IS DIFFICULT TO IMAGINE HOW THE UNITED KINGDOM COULD ENVISAGE ANTITRUST COOPERATION CONTINUING UNAFFECTED.

THE UNITED STATES BELIEVES THAT THE DAMAGE WHICH HER MAJESTY'S GOVERNMENT'S ACTION IS LIKELY TO CAUSE CAN BE LARGELY AVOIDED THROUGH PROMPT RECISSION OR SUBSTANTIAL MODIFICATION OF THE ORDER AND DIRECTIVES AND THROUGH ADDITIONAL STEPS TO DEAL WITH THE PROBLEMS THEY HAVE CREATED FOR THE PRESENT CRIMINAL INVESTIGATION. THE DEPARTMENT HOPES THAT THESE ACTIONS WOULD SUBSTANTIALLY REDUCE THE IMPEDIMENTS TO REACHING PROSPECTIVE ARRANGEMENTS FOR AVOIDING PROBLEMS IN THE AVIATION RELATED ANTITRUST AREA. THIS HOPE IS BASED NOT ONLY ON THE TRADITIONAL CLOSE U.S.-U.K. RELATIONS AND ABILITY TO SOLVE PROBLEMS COOPERATIVELY AND PRAGMATICALLY, BUT ALSO UPON THE CONVICITION THAT A LARGE MEASURE OF AGREEMENT IS RECORDED IN BERMUDA II ON THE COMPETITION POLICY TO GOVERN NORTH ATLANTIC AVIATION. THIS HAS BEEN LARGELY OBSCURED BY DIFFERENCES ON HOW TO HANDLE ALLEGED CONDUCT WHICH VIOLATES NOT ONLY UNITED STATES ANTITRUST LAWS BUT ALSO THE TERMS OF OUR AGREEMENT.

IN THIS LIGHT, THE DEPARTMENT WELCOMES THE DECISION OF HER MAJESTY'S GOVERNMENT TO DISPATCH A DELEGATION TO WASHINGTON. WHILE HER MAJESTY'S GOVERNMENT'S ACTIONS IMPLICITLY REPUDIATE THE RECENT NON-PAPER, THE DEPARTMENT OF JUSTICE IS PREPARED TO DELAY SETTING THOSE PROCEDURES ASIDE UNTIL JULY 1, IF HER MAJESTY'S GOVERNMENT WILL PROVIDE AN ASSURANCE THAT IT WILL USE ITS BEST EFFORTS TO PREVENT FURTHER PREJUDICE TO THE INVESTIGATIONS BY THE CONTINUING DELAYS. IN PARTICULAR, THE DEPARTMENT OF JUSTICE WILL REQUIRE AN ASSURANCE THAT THE UNITED KINGDOM WILL FACILITATE THE RETURN OF ANY DOCUMENTS REMOVED FROM THE UNITED STATES DURING THE PERIODS IN WHICH SUBPOENAS HAVE BEEN DELAYED, SUSPENDED, OR REVOKED AS A RESULT OF THE U.S.-U.K. CONSULTATIONS AND NON-PAPER. THE DEPARTMENT OF JUSTICE IS PREPARED TO CONTINUE THE NON-PAPER ARRANGEMENT IF THE ORDER AND DIRECTIVES ARE RESCINDED OR ADEQUATELY MODIFIED AND IF THE ATTENDANT PROBLEMS ARE RESOLVED BY JULY 1.

ENDS

RESIDENT CLERK PLEASE ALERT: FCO: PS/S OF S, FREELAND (LEGAL ADVISER), ADAMS, GRAY(MAED)
D/TRANSPORT:KNIGHTON,STEVENS
DTI: BECKETT, AYLING
10 DOWNING ST: COLES

RESIDENT CLERK PLEASE ALERT: FCO: PS/S OF S, FREELAND (LEGAL ADVISER), ADAMS, GRAY(NAED)
D/TRANSPORT:KNIGHTON,STEVENS
DTI: BECKETT, AYLING
10 DOWNING ST: COLES

WRIGHT

NNNN

.S. ANTI TRUST

ADVANCE COPIES #20

CTION AGAINST BRITISH AIRLINES

PS 6

MR ADAMS

~~MR I SINCLAIR~~

MR AUST

HD/MAED

HD/NAD

RESIDENT CLERK

Legal advisers: Freeland

MR FORTNAM - IAT 3/D/TRANSPORT (1, VICTOR STREET)

MR GARDINER - ATTORNEY GENERAL'S OFFICE

MR KNIGHTON, MR STEVENS } D/TRANSPORT

MR BECKETT, MR AYLING } DTI

MR COLES NO10. DOWNING ST.

CONFIDENTIAL
DESKBY 250900Z
FM WASHINGTON 250450Z
TO IMMEDIATE F C O
TELNO 1765 OF 25 JUNE 1983.

IMMEDIATE

ADVANCE COPY

LAKER: PTI ACT

SEIDEN HAS GIVEN MAYNARD AN ADVANCE COPY OF A STRONG WORDED NOTE WHICH THE STATE DEPARTMENT IS DUE TO HAND TO THE EMBASSY TOMORROW (TEXT IN MIFT). THIS ARGUES THAT THE PTI ORDER DIRECTLY CHALLENGES "THE SOVEREIGN RIGHT OF THE UNITED STATES TO ENFORCE ITS LAWS": HINTS AT POSSIBLE ADVERSE CONSEQUENCES TO BRITISH CARRIERS AND THEIR ASSETS IN THIS COUNTRY: AND SAYS THAT THE DAMAGE CAN ONLY BE AVOIDED IF THE ORDER IS WITHDRAWN OR SUBSTANTIALLY MODIFIED, AND THE ATTENDANT PROBLEMS RESOLVED BY 1 JULY. IT CONCLUDES BY WELCOMING HMG'S DECISION TO SEND A NEGOTIATING TEAM TO WASHINGTON.

2. YOUR MESSAGE TO SHULTZ AND THE QUICK OFFER OF TALKS HAVE THUS SUCCEEDED IN KEEPING THE AMERICANS TALKING. THE NEGOTIATING TEAM ARE DOUBTLESS CONSIDERING OUR OBJECTIVES FOR NEXT WEEK'S TALKS. IT OCCURS TO US THAT AN IMMEDIATE AIM SHOULD BE TO GET THE AMERICANS TO POSTPONE THEIR DEADLINE TO BEYOND 4 JULY. THE OUTCOME IN THE COURT OF APPEAL MIGHT THEN ENABLE US TO MODIFY THE ORDER TO MEET SOME OF THEIR PREOCCUPATIONS WITHOUT COMPROMISING ON OUR BASIC PRINCIPLES.

[illegible] AMERICAN OFFICIALS

3. IN ADDITION, IT IS CLEAR FROM OUR TALKS WITH AMERICAN OFFICIALS THAT THEY NEED A COMPREHENSIVE EXPLANATION OF WHY WE HAD NO ALTERNATIVE BUT TO MAKE AN ORDER. WE HAVE OF COURSE ALREADY DONE THIS IN GENERAL TERMS. BUT THE AMERICANS WANT THE DETAILED LEGAL ARGUMENTS TOO. GENERAL REFERENCES TO THE NEED TO SUPPORT OUR VIEWS ON BERMUDA 2 WILL NOT BE SUFFICIENT. THE AMERICANS STILL CANNOT UNDERSTAND, FOR EXAMPLE, WHY WE HAD TO CITE THE JUSTICE DEPARTMENT AND GRAND JURY IN THE SECTION 2 DIRECTION.

4. WE ALSO NEED TO EXPLAIN, IN DETAIL, WHY THE ORDER AND DIRECTIONS WILL NOT IN PRACTICE INTERFERE WITH THE GRAND JURY INVESTIGATION. WHATEVER OUR INTERPRETATION, THE AMERICANS GENUINELY BELIEVE THAT THE NON-PAPER PERMITS THE GRAND JURY TO PROCEED WITH THE LEG 1 INVESTIGATION WITHOUT ANY HINDRANCE. THE DEAL ON LEG 1 CONCERNS ONLY THE OUTCOME. IF IN FACT THE ORDER AND DIRECTIONS DO IMPOSE SOME RESTRICTIONS WE MUST BE READY TO DISCUSS THESE OPENLY WITH THE AMERICANS AND SEE IF THERE ARE ACCEPTABLE WAYS OF OVERCOMING THEM (SEE PARA 1(B) OF MY TELNO 1752). HERE TOO THE AMERICANS WILL BE AS CONCERNED WITH THE LEGAL DETAILS AS WITH OUR POLICY EXPLANATIONS.

RESIDENT CLERK PLEASE ALERT:
FCO: PS/S OF S, FREELAND (LEGAL ADVISER), ADAMS, GRAY (MAED).
D/TRANSPORT: KNIGHTON, STEVENS.
DTI: BECKETT, AYLING
10 DOWNING ST: COLES.

WRIGHT

NNNN

ZZ WASHINGTON
GRS 513
CONFIDENTIAL
FM FCO 241400Z JUN 83
TO FLASH WASHINGTON
TELEGRAM NUMBER 1038 OF 24 JUNE 1983
PLEASE DELIVER AT THE LEVEL YOU THINK APPROPRIATE THE
FOLLOWING MESSAGE FROM ME TO SHULTZ:

1. OLIVER WRIGHT HAS TOLD ME OF YOUR OFFICIALS' REACTION TO THE NEWS THAT WE INTENDED TO MAKE AN ORDER AND DIRECTIONS UNDER THE PTI ACT YESTERDAY. I HAVE ALSO SEEN A REPORT OF AMBASSADOR LOUIS' CALL ON OFFICIALS IN OUR DEPARTMENT OF TRANSPORT YESTERDAY.

2. AS I TOLD GEORGE BUSH WHEN WE MET THIS MORNING, THE ORDER AND DIRECTIONS WERE SIGNED EARLY ON 23 JUNE AND THEY MUST BE LAID BEFORE PARLIAMENT AND PUBLISHED MORE GENERALLY BEFORE THEY COME INTO EFFECT ON 27 JUNE. THE DOCUMENTS ARE BEING LAID IN PARLIAMENT THIS AFTERNOON, FRIDAY, AND TEXTS WILL BE DISTRIBUTED LATER TODAY.

3. AS FOR THE SUBSTANCE OF THE MATTER, YOU WILL, I AM SURE, ACCEPT THAT WE ARE BOUND TO DEFEND OUR BROAD INTERESTS AND THOSE OF OUR AIRLINES WHEN WE THINK THEY ARE SUBJECT TO UNFAIR ATTACK. THERE IS A DISPUTE BETWEEN US ON THE RELATIONSHIP BETWEEN OUR BILATERAL AIR SERVICES AGREEMENT (BERMUDA 2) AND DOMESTIC LAW, INCLUDING YOUR ANTI-TRUST LAW. ONE ASPECT OF THAT DISPUTE IS THE LAKER LIQUIDATOR'S CIVIL SUIT IN THE US COURTS. IN ORDER TO PROTECT OUR AIRLINES FROM THE POSSIBLY CRIPPLING EFFECTS OF THAT SUIT, OUR LAWYERS ADVISED US THAT IT WAS NECESSARY TO RESPOND TO THE UNILATERAL APPLICATION OF US LAW TO MATTERS COVERED BY BERMUDA 2 BY REFLECTING HMG'S POSITION IN INSTRUMENTS MADE UNDER THE PTI ACT. NOT TO HAVE TAKEN THIS STEP NOW WOULD HAVE LEFT US OPEN TO DOMESTIC CRITICISM THAT WE HAD NOT TAKEN THE NEXT LOGICAL STEP IN DEFENCE OF OUR INTERESTS AND THOSE OF OUR AIRLINES.

4. BUT OUR OBJECTIVE STILL REMAINS WHAT IT ALWAYS HAS BEEN - THE ACHIEVEMENT, IF AT ALL POSSIBLE, OF AN AMICABLE

SETTLEMENT OF THE DISPUTE BETWEEN US. WE SEE THE INFORMAL AGREEMENT (THE NON-PAPER) REACHED IN LONDON LAST MONTH AS A VALUABLE PROCEDURAL FRAMEWORK FOR ACHIEVING THAT SETTLEMENT. IT HAS OUR COMPLETE SUPPORT. I CAN ASSURE YOU THAT THE ACTION WE PROPOSE UNDER THE PTI ACT IS NOT INTENDED TO RESTRICT THE PROCEDURES ENVISAGED IN THE NON-PAPER. IF DOCUMENTS AND EVIDENCE ARE NEEDED FOR THE EFFECTIVE IMPLEMENTATION OF OUR OBLIGATIONS UNDERTHE NON-PAPER BOTH DIRECTIONS PROVIDE FOR MINISTERS TO GIVE CONSENT TO THEIR BEING MADE AVAILABLE. MOREOVER THE SUBPOENA ADDRESSED TO BRITISH AIRWAYS WITHIN THE TERMS OF THE NON-PAPER HAS ALREADY BEEN COMPLIED WITH. SO I HOPE WE SHALL BE ABLE TO CONTINUE DOWN THAT COOPERATIVE ROAD IN REACHING A SETTLEMENT.

5. IT IS, OF COURSE, UNDERSTANDABLE THAT BOTH SIDES SHOULD WISH TO DEFEND THEIR LAW AND THEIR POLICY. UNTIL WE CAN RESOLVE THE DIFFERENCES OF PRINCIPLE BETWEEN US, THE ONLY SENSIBLE COURSE IS FOR BOTH SIDES TO MANAGE THE DISPUTE WITH CARE TO PREVENT IT DEVELOPING IN UNFORESEEABLE DIRECTIONS WITH UNFORESEEABLE CONSEQUENCES. WITH MY ASSURANCE THAT WE ARE ACTING IN GOOD FAITH AND BELIEVE YOUR SIDE TO BE DOING SO TOO, I HOPE YOU WILL USE YOUR INFLUENCE AT THE PRESENT CRITICAL JUNCTURE, TO ENSURE CONTINUED COOPERATION BETWEEN US TO THIS DIFFICULT PROBLEM AND ANY JURISDICTIONAL ISSUES WHICH MAY ARISE.

HOWE

U S ANTI TRUST ACTION AGAINST BRITISH AIRLINES

LIMITED

MAED
NAD
ERD
LEGAL ADVISERS
PS
PS/LADY YOUNG
PS/MR WHITNEY
PS/PUS
MR EVANS
MR GIFFARD
MR THOMAS
MR ADAMS

COPIES TO

MR J M HEALEY OT2) DOT
MR AYLING)
MR BECKETT)

MR GARDINER
ATTORNEY GENERAL'S OFFICE

IAT/DOT

MR STEVENS) D/TRANSPORT
MR FORTNAM)
MR KNIGHTON)

A J COLES NO 10 DOWNING ST

Foreign and Commonwealth Office

London SW1A 2AH

PA MCS 27/6

24 June 1983

The P.M. discussed the situation on Friday evening with the Foreign Secretary and read the enclosure to this letter but not the letter itself. A.J.C. 27/6

Mr. Scholar to see.

Dear John,

US Anti-Trust Action against British Airlines

I understand that the Prime Minister will be seeing Vice President Bush again this evening. She will wish to know that the American Ambassador called on the Secretary of State this afternoon, on instructions, and left with him the attached paper. Mr Louis explained that it had been intended as speaking notes for use by Mr Bush in his calls this morning, but it did not arrive from Washington in time. The Ambassador took this as an indication that the message had been agreed at a very high level in Washington.

As you will see, the message is very dramatically worded. It is, however, based on very substantial misunderstandings of our position. It fails to recognise that we have used the PTI Act against anti-trust law only in a very narrow field, namely that of matters covered by Bermuda 2. Additionally, the message fails to recognise that the Order and Directions under the PTI Act, although they will in theory affect a wide range of people and documents, contain powers which allow Ministers to exempt people and documents from the application of the Order: as we have repeatedly told the Americans, this will allow us to honour our obligations under the informal agreement (the Non-Paper) reached with the Americans last month for the handling of criminal cases against British Airlines in the Laker dispute. Finally, the message appears to overlook our argument, again put many times to the Americans, that since the Non-Paper is a confidential arrangement between governments (and the American Administration is even more concerned than we that it should remain so) it would be difficult and potentially dangerous to use the PTI Act in any way which indicated that our dispute with the Americans now only concerned the civil suit in the American court.

/There

There are other points raised in the message which we would dispute, but I think these have been adequately covered in the brief prepared for the Prime Minister's meeting with Mr Bush this morning.

In short, there seems to be a large part of misunderstanding in all this, but also an important core of disagreement between us and the Americans. The Embassy are already in contact with American officials in an attempt to put them straight on points such as those covered above, but Sir G Howe believes that we must do more to show that we are taking the message very seriously. We are therefore discussing with the Department of Transport the idea of sending a delegation of officials to Washington on Monday. Their first job would be to clear up the misunderstandings and then to carry forward the consultations already foreseen in the Non-Paper to which we remain committed.

I am sending copies of this letter to Dinah Nichols (Department of Transport) and Jonathan Spencer (Department of Trade and Industry).

Yours ever,

(B J P Fall)
Private Secretary

A J Coles Esq
10 Downing Street

NORTH ATLANTIC AVIATION ANTITRUST CASE

In light of the painstaking effort and great care which went into working out the accommodation reflected in the non-paper understanding, between our two governments, we had anticipated that HMG would make every effort to act consistently with it.

Regrettably, with the issuance of the order under the Protection of Trading Interests Act (PTIA), which is quite provocative in its content and inconsistent with the letter and spirit of the non-paper, HMG seems to have abandoned the effort to limit the conflict and pushed matters, quite unnecessarily in our view, to a new level.

The action appears to put at risk aviation relations, as well as antitrust consultation and cooperation. The order appears to require that carriers and their personnel neither comply with nor permit compliance with our law barring conspiracies in restraint of trade, and to make it an offense under UK law for persons to cooperate with our efforts to investigate serious allegations of violations of that law. It is difficult to imagine how HMG could expect our relations to be unaffected by such an order.

It is particularly troubling to us that the Secretary of State for Trade proceeded to sign it without even considering our most limited, reasonable and modest request for a delay and consultation. This is even more disturbing since the Justice Department bent over backwards to accommodate HMG's repeated requests for delays and adjustments in its investigation.

We reiterate our request for a delay in issuing the order and an opportunity for consultation. Without such steps by HMG, and recall or substantial revision of the order, we can only register our disappointment and note that we will obviously have to review the implications of HMG's apparent implicit repudiation of accommodations reached to date, and the question of whether UK carriers can, despite the order, fulfill their obligation to comply with U.S. law, which is implicit in their authority to do business in the United States.

The PTIA order will almost certainly result in UK carriers being unable to respond to present U.S. subpoenas or new ones likely to be issued. That will almost automatically lead to contempt citations and potentially substantial and continuing fines--which can be levied against the airlines' assets in the U.S., including aircraft. Beyond that, there will be adverse Congressional reaction and other possible consequences neither government should want, such as suspension of operating authority for UK carriers violating U.S. law as a result of the PTIA order.

We question whether this disruption in bilateral relations is necessary now, or if some way can't be found to resume the more cooperative handling of the present antitrust cases.

6/24/83

cc N.O.

DEPARTMENT OF TRANSPORT
2 MARSHAM STREET LONDON SW1P 3EB

The Private Secretary to
The Rt Hon Cecil Parkinson MP
Secretary of State for Trade and Industry
Department of Trade and Industry
Ashdown House
123 Victoria Street
LONDON SW1

23 June 1983

Dear Jonathan,

AVIATION ANTI TRUST CASE: USE OF PTI ACT

As you will be aware, Sir Oliver Wright has recommended that we should give the Americans a little more time to digest our decision to use the PTI Act before they have to react to it in public; and in particular that Vice President Bush should if possible not be faced with a fait accompli when he meets the Foreign Secretary and Prime Minister in London tomorrow.

Mr King considers that there can be no question of going back on account of American pressure on the decision which Ministers have taken, and in any event the Order and Directions have been made; but if a short delay in publicising the matter would improve the chances of our action being accepted in the United States, the Secretary of State is willing to agree to a short delay. I understand that now that the Order has been made it must be laid in Parliament before it comes into effect on Monday, 27 June. Since it takes effect immediately after midnight on Sunday it must be laid before Parliament this week; but this can be delayed until as late as possible before the House rises tomorrow.

The Directions must also be published and brought to the attention of the parties within the same timescale.

The parties could be informed late on Friday, and (unless there is any need to deal with a leak) the press release could be held back until late Friday evening or Saturday morning so that the story does not break in public until after the talks with Vice President Bush have taken place.

Unless I hear to the contrary by 10 am tomorrow morning from you or the others to whom this letter is copied, we shall work to this timetable.

I am copying this to the Private Secretaries to the Prime Minister and the Foreign and Commonwealth Secretary, and to the Attorney General's office.

Yours,

Dinah

MISS D A NICHOLS
Private Secretary

Foreign and Commonwealth Office

London SW1A 2AH

23 June 1983

Dear John,

US Anti-Trust Action against British Airlines

As you will have seen from Dinah Nichols's letter of 23 June to Jonathan Rees, the Secretary of State for Transport has recommended, in the light of advice from Sir O Wright, that we should not be deflected from issuing an Order and Directions under the PTI Act, but that we should delay action until tomorrow evening. We have therefore prepared a revised brief on the above issue for the Prime Minister's meeting with Mr Bush tomorrow. In the time available it has not been seen by the Secretary of State: a copy is being submitted to him tonight.

Yours ever

for (R B Bone)
Private Secretary

A J Coles Esq
10 Downing Street

VISIT OF VICE PRESIDENT BUSH: 23/25 JUNE 1983

US Department of Justice Anti-Trust Action Against UK Airlines

Objectives

1. To impress upon Mr. Bush:

(a) the serious nature of our current civil aviation dispute;

(b) our earnest wish for an amicable settlement and our commitment to the non-paper as a means of achieving it;

(c) our readiness still to go to arbitration if all else fails;

(d) why we had to use the PTI Act now;

(e) that the Order and Directions under the PTI Act had been signed but publication delayed until the end of this week to allow clarification of any American queries.

2. To urge Mr. Bush to see that our position is clearly understood in Washington.

POINTS TO MAKE

General Dispute

1. This is a matter of serious concern to HMG, as it calls into question Bermuda 2 and could adversely affect the future of our airlines. We are naturally bound to defend our broad interests and those of our airlines.

/Non-Paper

Non-Paper

2. Welcome the London agreement on arrangements for dealing with the dispute (the non-paper) which we see as a major step forward. Convinced that with continued goodwill on both sides these arrangements should lead to a mutually satisfactory settlement.

PTI Act: Why use it?

3. BA and BCal face civil suit in the US brought by Laker liquidator. This could seriously damage both companies (up to $1 billion in triple damages). In our view US anti-trust law is superseded by Bermuda 2 in matters covered by the latter. By using the PTI Act as proposed we aim to make our position manifest in UK law.

4. There is considerable political hostility in the UK to US claims of jurisdiction in what is seen as essentially a British affair. It would attract criticism in view of the Government's known position if there was any failure on the part of the Government to take the next logical and necessary step of using the PTI Act.

PTI Act: Why now?

5. On 4 July the Court of Appeal is due to hear BA and BCal's application for an injunction restraining the Laker liquidator from pursuing his civil suit in the US courts. Our lawyers believe that we must give all parties to the court hearing at least one week's warning of the PTI Act.

PTI Act: Why apply to UK located documents?

6. Because Laker liquidator has asked Civil Aviation Authority for documents to use in the US court.

/PTI Act: Why so broad?

PTI Act: Why so broad?

7. To restrict the action to Laker would have been discriminatory; not to have mentioned Bermuda 2 would have omitted basic principle of our policy; and to restrict the action to the UK would not have affected Laker's suit in the US civil court.

8. Just as the DOJ have explained their investigation into our airlines was an inevitable consequence of American law and policy, so our resort to the PTI Act is similarly inevitable and equally rooted in our own laws and policy.

PTI Act: Extra-Territoriality in reverse?/Ordering UK firms to violate US law?

9. No. Because we believe that Bermuda 2 excludes the application of US anti-trust to matters regulated under the agreement. NB. The Order and Directions do not apply to US airlines in the US.

PTI Act: Why no notice to the US Government?

10. Department of State and Department of Justice officials were told of our intentions four weeks ago during negotiations of the non-paper. On 16 June British Embassy officials discussed in great detail with US officials our intentions in respect of the PTI Act, i.e. to strengthen the British airlines' position in the civil suits by safeguarding in UK domestic law British rights under Bermuda 2. They were assured that this was not meant to undermine in any way the understandings set out in the non-paper to which we remain firmly committed. Further explanations were given to US officials on 22 June, and copies of the texts handed over.

/11.

11. The Order and Directions were signed early on the morning of 23 June and thereby became law. Nevertheless, in response to your Ambassador's démarche yesterday we have delayed publication until this evening. This should have allowed time to answer any questions your officials may have and to convince them that we are not seeking to escalate the situation or to renege on the non-paper but we cannot delay publication beyond this evening if the Order is to go into effect on 27 June.

Conclusion

12. In our mutual interest that this dispute should not escalate out of control, both sides need to continue to manage the dispute with care. Hope Mr. Bush will use his influence to ensure this.

US Department of Justice Anti-Trust Action Against UK Airlines

Background

1. A one billion dollar civil (treble damage) action has been brought by the Laker liquidator in the US District Court against British and other airlines; and a criminal Grand Jury investigation has been launched by the Department of Justice (DOJ) as a possible preliminary to criminal indictments and proceedings. An adverse result to either of these would almost certainly encourage further civil treble damage suits.

2. HMG have opposed the DOJ action as an unacceptable unilateral exercise of US domestic law (for which there is no equivalent in English law) against activities jointly regulated under our bilateral air services agreement (Bermuda 2).

3. In the face of UK determination to take the dispute to international arbitration the US delegation moderated their stance and agreed to a 'non-paper' setting out procedures which should help defuse the dispute at governmental level by encouraging the Department of Justice to handle the criminal indictments in a relatively benign manner. The UK has suspended its moves to take the dispute to arbitration and the DOJ have modified the scope of their subpoenas requiring the UK airlines to produce documents.

4. During the discussions, American officials were told that in order to strengthen the British airlines' position in the civil suit, HMG would invoke the PTI Act. The Embassy in Washington advised that Congress, the US Courts and public opinion

/might

might see our action as a challenge to American law and that any resultant row might risk sinking the non-paper arrangements.

5. Ministers concluded however that use of the PTI Act was unavoidable because to take no action would have laid HMG open to the charge that they had neglected to use the one legislative instrument available to protect British airlines against US civil suits and to strengthen HMG's own legal position on Bermuda 2. The Embassy in Washington explained our position in advance to American officials and emphasised that the non-paper should not be affected by this action. Following the strong reaction of DOJ officials, the Embassy advised that the issuing of the Order and Directions be delayed until after Mr. Bush's visit. And on 23 June, the American Ambassador, acting on instructions, asked for a delay in issuing the Order and Directions.

6. In the meantime, however, the Minister of Trade had signed the Order and Directions on 23 June, to take effect on 27 June. Laying before Parliament and notification to interested parties cannot be delayed beyond Friday evening and Saturday morning respectively: but this should go some way to meet the American request for time to give calmer counsels a chance to prevail in Washington.

FOREIGN AND COMMONWEALTH OFFICE

23 June 1983

Legal Proc.
Mar 83
Grand Jury Investigation

SCNO

DEPARTMENT OF TRANSPORT
2 MARSHAM STREET LONDON SW1P 3EB
01-212 3434

Michael Scholar Esq
Private Secretary
10 Downing Street
LONDON
SW1

23 June 1983

Dear Michael,

I attach a revised draft reply to Adam Thomson's letter of 13 June to the Prime Minister which I hope accords with our discussion yesterday evening.

You will see that the draft promises an announcement about the use of the Protection of Trading Interests Act 'very soon'. It is in fact likely that the Secretary of State for Trade and Industry will make the necessary Order under the Act, as foreshadowed in the earlier correspondence, within the next day or so.

Yours,

Dinah

MISS D A NICHOLS
Private Secretary

Pl type for PM

DRAFT LETTER FROM THE PRIME MINISTER TO SIR ADAM THOMSON

Thank you for your letter of 13 June and for your congratulations on the result of the Election.

I have been following with close interest the aviation anti-trust cases in the United States which carry such risks for British Caledonian, and I am glad to know that you are pleased with the progress recently made in negotiations.

As your letter makes clear, the risks which remain are still very serious indeed, and the Attorney General has been consulted. I would like to assure you that the Government are taking full account of the points which you have raised; in particular careful consideration has been given to the use of the Protection of Trading Interests Act and an announcement is being made about that very soon.

Legal Procedure CC NO

Please bf
24/6
Asked Transport for a fuller draft.
MCS 22/6

DEPARTMENT OF TRANSPORT
2 MARSHAM STREET LONDON SW1P 3EB

Michael Scholar Esq
Private Secretary
10 Downing Street
LONDON SW1

21 June 1983

Dear Michael,

You asked for a draft reply to Adam Thomson's letter of 13 June to the Prime Minister by 20 June, but I waited until today, since it was not clear until Ministers had met yesterday evening whether we would in fact be making the Order and Directions under the Protection of Trading Interests Act which Sir Adam Thomson is requesting in his letter.

Since we will be taking action on the lines urged by Sir Adam, a relatively short reply will suffice. We should, however, avoid giving the impression (which in any case is not true) that we are acting at his request, since it would be quite wrong for it to appear that Government and airlines were working together to bring pressure to bear upon the Courts either in this country or in the United States.

I understand that the Prime Minister needs no further background on this case, since Lord Cockfield reported the outcome of the recent negotiations in his minute dated 26 May and you have also had copies of the correspondence between Ministers recommending the use of the PTI Act in the present situation.

Yours,
Dinah

MISS DINAH NICHOLS
Private Secretary

DRAFT LETTER FROM PRIME MINISTER TO SIR ADAM THOMSON

Thank you for your letter of 13 June and for your congratulations on the result of the recent Election.

I have been following with close interest the progress of the aviation anti-trust cases in the United States which carry such risks for British Caledonian, and I am glad to know that you are pleased with the progress recently made in negotiations. No one underestimates the risks which remain, and I would like to assure you that the Government are taking account of the points which you have raised in your letter.

LEGAL PROC: US Grand Jury
March 83

Legal Procedure

DEPARTMENT OF TRADE AND INDUSTRY

Room 11.01 Ashdown House 123 Victoria Street SW1E 6RB

Telex 8813148
Telegrams Advantage London SW1
Telephone Direct Line 01-212 3301
Switchboard 01-212 7676

JU846

14 June 1983

CONFIDENTIAL

Prime Minister (2)

The Rt Hon Tom King MP
Secretary of State for Transport
Department of Transport
2 Marsham Street
London SW1

MCS 17/6

17/6

Dear Tom,

US ANTI TRUST ACTION AGAINST BRITISH AIRLINES - USE OF THE PROTECTION OF TRADING INTERESTS (PTI) ACT

Thank you for your letter of 16 June.

2 I accept that the over-riding need is to do what we can to protect British Airways and British Caledonian from the effects of private anti-trust suits launched in the United States against conduct which we believe is covered by the Bermuda II Agreement. I therefore agree that the Order under Section 1(1) and the Directions under Section 1(3) of the PTI Act should be made at once.

3 The possible reaction to the Order and the Directions in the United States, to which you very fairly draw attention, remains a matter of some concern to me. I am therefore glad to know that everyting possible will be done to contain this risk, and I take it that officials of this Department and the FCO will be involved in this aspect of the work.

4 I am copying this letter to recipients of yours.

Yours ever,

Cecil

With the compliments of

the Attorney-General

AJC
875

Attorney General's Chambers,
Law Officers' Department,
Royal Courts of Justice,
Strand. W.C.2A 2LL

01 405 7641 Extn. 3201

2 Mrs

CONFIDENTIAL

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn

Prime Minister 2

17 June, 1983

MCS 17/6

Dear Tom.

MT

17/6

US ANTI TRUST ACTION AGAINST BRITISH AIRLINES

I agree with the proposal in your letter of 16 June to Cecil Parkinson that an Order under section 1 and Directions under section 1(3) and section 2 of the Protection of Trading Interests Act 1980 be made.

Although such an Order and Directions would not be free from risk of challenge, there are respectable arguments for saying that they are within the powers granted to the Secretary of State by the Act.

As you say, it is not possible to predict whether an Order and Directions will lead to BA and BCAL being successful in the Court of Appeal; but there is a reasonable case for believing that an Order and Directions could assist their case and could significantly affect the Court's decision whether to allow the appeal.

I am copying this to Geoffrey Howe, Cecil Parkinson and to the Prime Minister.

Yours ever, Michael.

The Rt Hon Tom King MP
Secretary of State for Transport
Department of Transport
2 Marsham Street
London SW1P 3EB

CONFIDENTIAL

Legal Proc,
Mar '83, US Grand Jury

DEPARTMENT OF TRANSPORT
2 MARSHAM STREET LONDON SW1P 3EB

01-212 3434

(2)

Prime Minister

We will be letting you have a draft reply to Adam Thomson's letter which also sought the Attorney-General's involvement.

MCS 16/5

Rt Hon Cecil Parkinson MP
Secretary of State for Trade and Industry
1-19 Victoria Street
LONDON
SW1H OET

16 June 1983

Dear Cecil

US ANTI TRUST ACTION AGAINST BRITISH AIRLINES - USE OF THE PROTECTION OF TRADING INTERESTS (PTI) ACT

I am advised that an Order under Section 1 and Directions under Section 1(3) and Section 2 of the PTI Act are needed to assist our airlines against the application of US anti trust laws, and generally to preserve the position of HMG in relation to the application of such laws to matters covered by our Bermuda II bilateral air services agreement. Inter-connected disputes in this matter have been developing over recent months.

We now need to establish clearly the position in English law, reflecting the policy stance taken by the Government by legislating through the PTI Act. This will be relevant to our further conduct of the dispute with the Americans and to our efforts to negotiate satisfactory future arrangements to prevent such disputes recurring. We need clearly to establish that cases involving fare fixing under our air services agreement will not be exposed to unilateral legal action of this kind in the United States Courts. The immediate reasons for doing it now are that it has become necessary

1. in order to strengthen the position of British Airways and British Caledonian Airways in seeking a decision of the English Court to prevent the Laker liquidator pursuing anti trust remedies against them in the United States; Mr Justice Parker in the High Court has recently ruled in favour of the Laker liquidator and action under the PTI Act is necessary now if there is to be any chance of the Court of Appeal reversing his decision when they hear the appeal of the airlines on Monday 27 June.

LEGAL PROC. US civil hty Mar 83

2. in order to prevent documents located in the United States being made available to the United States Courts; the Laker liquidator is pressing for the release of certain documents from the Civil Aviation Authority.

Clearly there is some risk that the action I propose might excite criticism in the United States, where what may be seen as interference with the operation of their anti trust laws is bound to be controversial. We shall take all the steps we can to contain this risk by careful presentation, concentrating on the general principle involved rather than on the facts of the particular case. There can be no guarantee that the action I propose will be effective in leading the Court of Appeal to halt the liquidator's action in the United States; but the serious financial risks to which British Airways and British Caledonian are exposed confirm me in my view that we should take this course.

For reasons connected with the time-table for hearings in the Court of Appeal the Order and Directions should be made by 20 June, and I shall therefore be grateful to have confirmation by midday on Friday at the latest that my colleagues agree that I should make the Order and Directions.

I am sorry to have to ask you for a quick response on this matter, but I believe that your officials and those of the Foreign Secretary and Attorney General to whom I am copying this letter are familiar with the background.

I am also copying this to the Prime Minister in view of her interest in this matter.

TOM KING

2F

Legal Procedure.

FILE

Reg

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10 DOWNING STREET

From the Private Secretary

15 June, 1983

I attach a copy of a letter the Prime Minister has received from Sir Adam Thomson, Chairman of British Caledonian.

6/7

I would be grateful if you could let me have a draft reply, after consulting as necessary with the Department of Trade and Industry and the Attorney General's Office, for the Prime Minister's signature, on the points raised by Sir Adam. Please could I have this by close of play on Monday, 20 June.

I am sending a copy of this letter and its enclosure to Jonathan Spencer (Department of Trade and Industry) and to Henry Steel(Attorney General's Office).

M. C. SCHOLAR

Ms D. Nichols,
Department of Transport

British Caledonian

Caledonian House
Crawley West Sussex
RH10 2XA England

Telephone: Gatwick (0293) 27890
Cables: Scotair Gatwick Telex: 87161

Sir Adam Thomson, C.B.E.
Chairman

13th June 1983

The Rt. Hon. Margaret Thatcher, MP,
Prime Minister,
10 Downing Street,
London SW1.

Dear Prime Minister,

Let me first offer my heartiest congratulations on your magnificent and well-deserved triumph. It is particularly gratifying to know that you now stand equipped to bring to completion your efforts for Britain's revitalization.

As you know, much progress has been made in containing the threat to British aviation and trade interests posed by the U.S. Grand Jury investigation, though the understanding with the Americans is fragile and not free of risk, your negotiators are to be commended for their excellent efforts in the recent negotiations.

Of immediate concern to us is the continuing threat to British interests posed by the 1,000 million dollar treble damage civil antitrust suit brought by Laker's liquidator in defence of whose unmeritorious claims British Caledonian already have spent some £400,000 and whose prosecution over the next several years jeopardizes our survival. We believe that this suit, as formulated by Laker's liquidator against British Caledonian and British Airways, is quite contrary to British public policy. Moreover, its continuance particularly as to discovery demands could well undermine the understanding just reached with the Americans. The applications of British Airways and ourselves to enjoin the Laker suit will be considered by the Court of Appeal commencing 27th June, and our advisers tell me that two actions by the Government are required to ensure that vital British interests are not seriously injured.

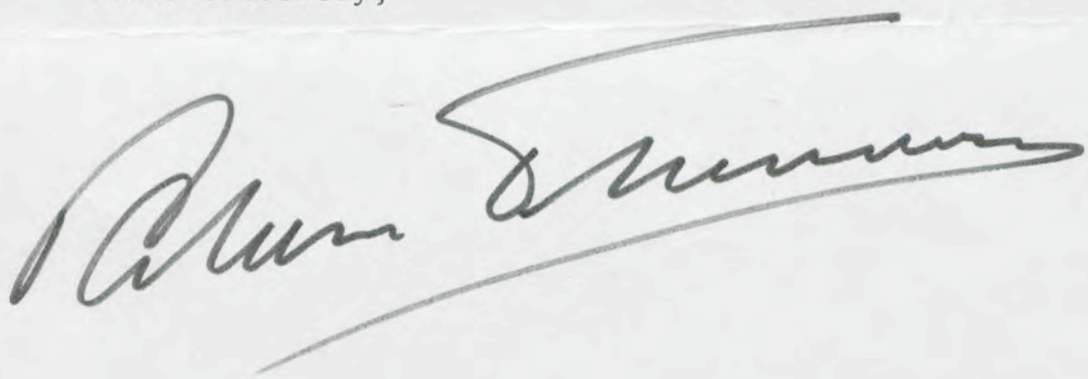
.../...

1. As Mr. Justice Parker has pointedly noted, HMG's view that the Laker action contravenes British public policy by threatening essential trading interest can be accorded judicial recognition if it is expressed in an appropriate order issued under Section 1 of the Protection of Trading Interests Act. We understand that DoT officials have agreed a draft of an order which meets this requirement, and we urge that it be issued at the earliest opportunity and be vigorously supported by the Attorney General.

2. The focus of HMG's concern as expressed to Mr. Justic Parker has been Laker's challenge to various alleged airline pricing actions involving principally British Airways and other of Laker's former route competitors, but we think it clear that the liquidator's ill-founded attack on British Caledonian's alleged interference with Laker's financial restructure should cause the Government equal concern. This challenge to matters and decisions occurring in Great Britain in which HMG was intimately involved, constitutes a broad and intolerable assertion of extra-territorial jurisdiction by the American Courts. Moreover, Laker's liquidator asserts a single antitrust conspiracy in which the alleged pricing actions and financial plan interference are treated as two wholly interrelated aspects. Unless the liquidator is restrained from pursuing both of these intertwined strands of the alleged antitrust conspiracy, British Caledonian will continue to be deeply enmeshed in and subject to liability respecting Laker's pricing claim.

For these reasons we believe it is essential that the Attorney General make it known to the Court of Appeal that HMG views the totality of Laker's antitrust conspiracy claims, as directed at British Airways and British Caledonian to be an impermissible interference with and contrary to British public policy and the Nation's trading interests. We would appreciate your assistance in ensuring that a strong position is taken to that effect and that it is forcefully presented to the Court.

Yours sincerely,



CONFIDENTIAL

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10 DOWNING STREET

From the Private Secretary

27 May 1983

United States Airline Anti-Trust Investigation

The Prime Minister has noted the contents of Lord Cockfield's minute of 26 May in which he reports, inter alia, that there is now some real flexibility in the American position on this matter.

A. J. COLES

John Rhodes, Esq.,
Department of Trade.

CONFIDENTIAL

Foreign and Commonwealth Office

London SW1A 2AH

26 May 1983

Mr. Geary

copies to all briefing folders please.

A.J.C. 27/5

Dear John,

US-Anti-Trust Action against British Airlines

I enclose a brief on the US anti-trust action against British airlines for the Prime Minister's bilateral meeting with President Reagan at Williamsburg which was referred to in the bilateral steering brief. The brief has been prepared in conjunction with the DOT.

This is a contingency brief only. In the light of the progress made towards agreeing procedures for reaching a reasonable settlement, we do not ourselves consider it essential to raise the subject. As you know, the People's Express flights have now been authorised. Given, in addition, that further action on arbitration and on the issuing of directions under the PTI Act by the Department of Trade has been suspended for the time being, and given too that the Department of Justice has extended the subpoena deadline, we doubt whether this controversy will now affect the Summit.

Yours ever

Roger Bone

(R B Bone)
Private Secretary

A J Coles Esq
10 Downing Street

POINTS TO MAKE (Defensive)

1. Following my personal message, you can be in no doubt about the importance we attach to this issue in the UK.

2. Welcome proposed arrangements under consideration to defuse situation.

3. Need for both sides to take a moderate approach to avoid further serious confrontation.

4. Hope that President will discourage the Department of Justice from taking any precipitate action with regard to the Grand Jury investigation pending the implementation of the proposed arrangements.

5. If our current efforts fail to achieve a reasonable settlement we remain ready to take the dispute to international arbitration.

BACKGROUND

6. Our immediate concern has been the subpoena deadline of 31 May requiring British Caledonian Airways and British Airways to disclose documents held in the United States. Unfortunately BCal hold documents there which relate to past discussions on pricing and other matters with other airlines (both British and American). These discussions are not illegal in the United Kingdom, in fact we encourage inter-airline tariff discussions; but they are illegal under US anti-trust law. The consequences of both the Department of Justice proceedings and the civil suits (which carry the possibility of treble damages) would be extremely serious.

PMVZ(83)16 COPY NO

26 May 1983

WILLIAMSBURG ECONOMIC SUMMIT

28 - 30 MAY 1983

BILATERAL MEETINGS

Brief by Foreign and Commonwealth Office

PRESIDENT REAGAN (UNITED STATES)

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES

OBJECTIVES

To prevent the Department of Justice anti-trust investigation from inflicting severe damage on our airlines; to safeguard our principles on extraterritoriality and the sanctity of bilateral agreements; and to defuse a controversy which could disrupt UK/US relations. It is not essential to raise this subject with the President, but if Mr Reagan initiates discussion the Prime Minister should underline the importance we attach to finding a satisfactory solution to this highly contentious issue and her satisfaction at progress to date.

Legal Proceedings: US Grand Jury March '83

negotiation of satisfactory procedures to avoid similar disputes in the future). If, however, in the event the process envisaged in the non-paper breaks down, we shall once again have to consider whether to initiate arbitration in order to give grounds for British Caledonian to apply in the US Courts for a stay of application of the subpoenas. With the extension of the subpoena deadline, the suspension of further action on arbitration and on the issuing of directions under the PTI Act, this controversy will not affect the Summit.

10. Following separate consultations earlier this week it was agreed that the People Express application for cheap flights from Newark to Gatwick should be approved following assurances from the Department of Justice which meet our concern over the possibility that a price-fixing conspiracy might be inferred from any moves by British airlines to respond to People Express's low fares.

FOREIGN AND COMMONWEALTH OFFICE

26 May 1983

7. The impact of the Prime Minister's message to President Reagan and the prospect of international arbitration under Bermuda 2 clearly induced a more amenable attitude on the part of the US Administration. The threat of arbitration was designed to force the Americans to recognise that in some instances anti-trust law must take second place to bilateral treaties such as Bermuda II.

8. As a result of the more flexible attitude shown by the US delegation at the second round of consultations in London on 23/24 May, a ''non-paper'' was agreed ad referendum which without prejudice to either side's position would limit the potential damage to British airlines not least by giving little encouragement to private suits. The Department of Justice agreed to extend until 3 June the deadline on the subpoenas for the production of documents to the Grand Jury. This relieved the pressure on British Caledonian and in consequence Lord Cockfield believes that there is now no immediate need to initiate arbitration or proceedings under the PTI Act.

9. The initial reaction on both sides to the non-paper is favourable. We therefore expect the Department of Justice to extend the subpoenas further until 20 June, in order to allow time for the processes envisaged in the non-paper to be implemented (investigation and further consultation on the current allegations, and

Prime Minister

(1).

CONFIDENTIAL

See paragraph 4: there is now a real chance of avoiding the anti-trust proceedings which could be so damaging to British Airlines.

A.J.C. 26/5.

PRIME MINISTER

UNITED STATES AIRLINE ANTI-TRUST INVESTIGATION

1 Although you wrote to President Reagan on 29 March emphasising our concern at the then imminent Department of Justice anti-trust investigation, you got an unhelpful reply on 6 April and the investigation was launched immediately afterwards. We responded by calling for consultations under our Bermuda 2 aviation agreement and when a first round of talks within that framework had no more effect on the progress of the investigation than the two previous rounds (not under Bermuda 2) before it started, we decided with the Attorney General's consent to make clear to the Americans our intention of taking the dispute to international arbitration, as we are entitled to do under Bermuda 2. I told you of this decision in my minute of 5 May.

2 The proposed investigation is highly objectionable. This is not essentially on account of extraterritorial implications (the air services concerned do after all enter the United States) but because the matters to be investigated are largely covered by our bilateral air services agreement. They should not therefore be regulated by the unilateral application of United States law, especially since the anti-trust law concerned is a highly contentious instrument. Any anti-trust indictment could provide fertile ground for civil damage suits in the United States courts on a scale which could be sufficient to put British Caledonian out of business and, at the least, delay the privatisation of British Airways. Representations were made to the Americans at every level to bring home to them how serious our objections were, on both legal and political grounds.

CONFIDENTIAL

3 Matters were brought to a head at consultations in London this week because the subpoenas requiring the production of documents for the Grand Jury investigation were falling due. Sir Adam Thomson came to see me about it on Monday 23 May. He then said - in contrast to his earlier attitude - that he was ready to co-operate with the United States authorities as this was a safer bet for him than continuing to resist. We understand that both Swissair and Lufthansa have also agreed to co-operate with the United States authorities.

4 I am pleased to be able to report now that the representations you made and the threat of arbitration have at last induced some real flexibility in the American position. They cannot abandon their claim to use the anti-trust laws but they have proved willing to work out with our officials arrangements for handling the cases now on hand. This would very substantially reduce the risk of serious damage to our airlines and lead to a serious discussion of future arrangements designed to prevent a recurrence. The United States Department of Justice has immediately extended the subpoenas to 3 June. Further extensions will be arranged if the package negotiated this week looks acceptable on closer examination both here and in Washington. Meanwhile, it is clearly understood that if a negotiated settlement breaks down either now or later we can still resort to arbitration. Equally, the Americans could re-engage their full legal processes.

5 In parallel with these negotiations, which have been mainly concerned with the actions of the United States Federal Government in the Grand Jury investigation, I shall also be considering with the Attorney General and Foreign Secretary the question of significantly improving the prospects of our airlines in securing from the Court of Appeal a permanent injunction preventing the Laker liquidator from proceeding with the private

treble damage suits in the United States courts. This could result in an order under the Protection of Trading Intersts Act (PTI Act). Mr Justice Parker, in rejecting the case of our airlines, clearly implied that a different view of the case could well be taken by the courts if the PTI Act powers were used. I would not however do this before Williamsburg, to avoid the risk of the subject being raised then.

6 If the matter is raised with you by President Reagan - and it is not now something you would wish to raise yourself - you could impress upon him the importance of avoiding conflicts of this sort, welcome the progress which has been made towards resolving this one, and invite him to ensure that the progress is maintained.

7 I am copying this minute to the Chancellor of the Exchequer, the Foreign Secretary, the Attorney General and to Sir Robert Armstrong.

A.C.

LORD COCKFIELD

Department of Trade
1 Victoria Street
London, SW1H OET

26 May 1983

Legal Procedure & Grand Jury Investigation

Mark B

file BOE

bc: Nick Owen

10 DOWNING STREET

From the Private Secretary

6 May 1983

The United States Airline
anti-trust investigation

The Prime Minister has noted without comment your Secretary of State's minute of 5 May about the United States Airline anti-trust investigation.

I am sending copies of this letter to Brian Fall (Foreign and Commonwealth Office) and Henry Steel (Attorney General's Office).

M. C. SCHOLAR

John Rhodes, Esq.,
Department of Trade

NO

cc RJ

2

Prime Minister

To note what is proposed.

MCS 5/5

PRIME MINISTER

UNITED STATES AIRLINE ANTI-TRUST INVESTIGATION

You sent a message to President Reagan on 29 March emphasising our concern at the then imminent Department of Justice anti-trust investigation, involving British airlines, following the Laker collapse. Following the President's unforthcoming reply of 6 April, it was decided to pursue our case by consultations under our bilateral aviation agreement, Bermuda 2. The following reports on these consultations, and my conclusion - shared by the Foreign Secretary and Attorney General - that we should be prepared to exercise our right under the agreement to international arbitration. We could well reach this point towards the end of this month.

Consultations under Bermuda 2 took place on 26/27 April in Washington. They were unsatisfactory. The US Administration would not accept our contention that its anti-trust laws could not be unilaterally applied within the field bilaterally regulated under the Bermuda 2 agreement which governs our air services. Nor would they accept that our oral presentation of the case was sufficient to demonstrate that a dispute existed which could not be resolved by consultation.

The consultation fully confirmed our view, based on the two previous rounds of consultations in March, that the issue is one which must be resolved as quickly as possible. First because of the quite unacceptable Grand Jury investigation which has already been launched. Secondly, if the United States position is allowed to stand, it will always be open to the US Department of Justice to infer from what our airlines do, eg to match competitively the fares of others, that there has been some agreement among them which merits anti-trust investigation. We have strenuously to resist both aspects.

As foreshadowed in the letter which my Private Secretary sent to yours on 7 April, it looks increasingly as if we shall have to go to international arbitration to get the matter resolved. Both the Foreign Secretary and the Attorney General have agreed that we should do so.

It is possible that the Americans will never agree that the consultative process has been exhausted. They are probably very reluctant indeed to expose any aspect of the extra-territorial operation of their anti-trust laws to an international tribunal which might well prove hostile to such pretentions. We would not wish to expose ourselves at arbitration to the argument that we have not first made reasonable efforts to resolve the disputes through consultation. But once we are satisfied that we would not be exposed to this risk, we do not have to wait for American agreement.

We have a right to take a dispute to arbitration and we shall not hesitate to use it. We are therefore preparing a brief summary of the dispute which we shall send to them under cover of a Diplomatic Note offering them a chance to resume discussions within a short time, or if they fail to do so, leaving us free to proceed to arbitration. Forcing the Americans to arbitration will not necessarily stop them from continuing with the Grand Jury investigation; but we think that the signs are that it may well force them to reconsider their position.

I am copying this minute to the Foreign Secretary and the Attorney General.

A.C.

LORD COCKFIELD

DEPARTMENT OF TRADE

5 MAY 1983

file

CONFIDENTIAL

da

legal proceedings

10 DOWNING STREET

From the Private Secretary

8 April 1983

United States Airline Antitrust Investigation

Thank you for your letter of 7 April.

The Prime Minister was very grateful for this advice, and appreciates the efforts made to get it to her as quickly as possible.

She has decided not to reply to President Reagan's message at this stage. She notes that there may be a case for a message from her to the President after the Department of Justice have completed their fact-finding, but before they make a final decision on whether to seek indictments.

I am copying this to Roger Bone (FCO) and to Henry Steel (Law Officers' Department).

W. F. S. RICKETT

John Whitlock, Esq.,
Department of Trade.

CONFIDENTIAL

DEPARTMENT OF TRADE 1 VICTORIA STREET LONDON SW1H 0ET Telephone 01-215 7877

Prime Minister
In the light of this advice, especially the last paragraph, do you wish to send the attached reply to President Reagan's message?

LM 7/4

CONFIDENTIAL

From the Secretary of State

Willie Rickett Esq
Private Secretary to the Prime Minister
10 Downing Street
London
SW1

Thank you
We will NOT reply to the President yet

7 April 1983

Dear Willie,

UNITED STATES AIRLINE ANTITRUST INVESTIGATION

The Prime Minister asked for urgent advice on the situation following President Reagan's message refusing to halt the Department of Justice (DoJ) antitrust investigation into allegations of airline fare fixing etc.

President Reagan's message means that we face a longer tussle in this matter, which can be expected to develop in several overlapping ways.

First, the DoJ investigation can be expected to take broadly the following course. There will be wide-ranging requests to the airlines (in our case British Caledonian and British Airways) for disclosure of documents under several heads. These will relate to the allegations of collusive fare fixing to the detriment of Laker and of collusive pressure on McDonnell Douglas not to take part in the Laker rescue package; and also more widely to allegations of fare fixing in earlier periods by North Atlantic airlines, including Laker himself. The DoJ are asking the airlines whether they will produce voluntarily the documents in the United States; if the airlines refuse (as they seem minded to do) subpoenas will be issued. We expect that these will comprehend documents located outside the United States as well as those inside, but that in respect of documents outside the United States the subpoenas will be stayed and will not be activated without further notice to us. We believe that there will be parallel demands to United States airlines (Pan Am and TWA and possibly others) and to third country airlines (Lufthansa and Swissair at least, though we have heard that they propose to provide documents within the United States voluntarily).

Later, in the light of what the DoJ consider they have uncovered with this fact-finding, but before they make a final decision on whether to seek indictments, we can expect a further opportunity for consultation. This stage, which is unlikely to be reached for some months, can be of some importance, because United States law provides in certain circumstanes for the interests of other

CONFIDENTIAL

countries to weigh on the questions of liability under United States law and of remedies; the DoJ will listen to our representations on these matters and we are starting to consider the points which might be made. At that stage there may be a case for a message by the Prime Minister to give political weight to our representations.

The second sphere of action will develop from our request for formal consultations under the Bermuda Agreement. This covers in principle the allegations against all our airlines of fare fixing (though not the allegation, against British Caledonian, of collusive pressure on McDonnell Douglas). The issue here will be whether the United States have the right to apply their antitrust law unilaterally to fare fixing allegations. We are pressing for consultations as soon as possible - though the third and fourth paragraphs of President Reagan's message suggest a possible United States intent to evade such consultations. We can foresee that consultations will result in disagreement on the legal issue. Subject to the view of the Attorney General, after the issues have been more fully exposed and referred to him, we contemplate proceeding to arbitration. Our present assessment is that strictly on the legal considerations our chances at arbitration are not better than 50:50. However, in practice United States unilateral action in matters of this kind is sufficiently disliked around the world for us to have a useful chance. Moreover, the United States will be very reluctant to see the issue of applicability of their antitrust laws put to arbitration in this context, and we may hope that our determination to press ahead with this will itself introduce a disturbing element into their calculations.

The third sphere of action is the civil suit in the United Kingdom. Here I need only recall that Mr Justice Parker has said he will hear the Attorney General before he gives substantive judgement, which is likely to be in a few weeks time.

Against this background, the questions arise of the use of the PTI Act and whether the Prime Minister should be advised to reply to President Reagan.

As regards the PTI Act, it would be feasible to give a Direction now that documents and commercial information should not be produced from the United Kingdom (such Directions could extend to United States airlines and also to Laker). The argument in favour of such an early use of the Act would be that it would demonstrate our disagreement with the way the United States are acting in advance of the further consultations we are requesting. There would however be no immediate effect, given that the DoJ subpoenas will not in the first instance apply to documents in the United Kingdom. The alternative argument, however, is that,

From the Secretary of State

while we should make all preparations for use of the Act, and convey to the United States government that we shall use it against discovery attempts on documents in the United Kingdom, we should deliberately show the restraint we are urging on the United States by acting (firmly) in response to United States actions, rather than in anticipation of them. The matter was discussed with Lord Cockfield in a contingent way before he went abroad and he felt that the second course was preferable.

The advice of officials following the latest developments, with which Mr Sproat and the Attorney General agree, is that Directions should not be given now, but that we should review the matter when the subpoenas have issued. And I understand from you that the Prime Minister has accepted this advice.

We understand that the Prime Minister would like advice on whether a reply to President Reagan could be helpful. We do not believe that there is any prospect of such a message changing the President's decision not to halt the DoJ investigation. At the later stage before indictments are considered, there could, as noted above, be a case for a further message, and the Prime Minister will wish to consider whether a further message now would use up too much political capital. Subject to this, some useful points could be made now, especially to convey our clear intention to pursue formal consultations under the Bermuda Agreement. A draft is attached which has been agreed with officials in other Departments, but which has not yet been seen by the Foreign Secretary.

Copies go to Roger Bone (FCO) and to Henry Steel (Attorney General's Office).

Yours sincerely

John Whitlock

JOHN WHITLOCK
Private Secretary

DRAFT MESSAGE FOR SIGNATURE BY THE PRIME MINISTER

ADDRESSED TO PRESIDENT REAGAN

Thank you for your message of 6 April about the antitrust investigation of alleged airline price fixing. You will not be surprised that it came as a considerable disappointment to me that you do not feel able to defer the investigation. As I pointed out in my message, this investigation prejudges the very question on which we are in disagreement.

It is clear to me that the formal consultations between our Governments under the Bermuda 2 Treaty need to be pressed forward all the more urgently, in a genuine effort to resolve this disagreement, [redacted] (In passing, I might say that I do not understand your comment that it is alleged that the airlines fixed and raised airfares without the approval of our aeronautical authorities: all the fares operated by our airlines over the North Atlantic, however arrived at, are required to be approved by the authorities of both Governments under Bermuda 2 and were in fact approved).

Meanwhile, you will understand that since your Department of Justice are continuing with their investigation, we shall have to use our powers as necessary to protect our interests.

/Like you

Like you, I shall be keeping in close touch with developments in this case and I must repeat the concern I expressed in my earlier message about the harm which could ensue from it.

Clear copies to
J Whitlock Trade
J Holmes FCO
Mrs Pell AGLG

Wednesday 6th April 1983

SUBJECT
cc MASTER
OPS

Please mark Lord Lofthed and the AG to deal with this immediately MT.

TPM

TOO WTE24
DE WTE £2204 0961623
O 061656Z APR 83
FM THE WHITE HOUSE
TO CABINET OFFICE
ZEM
C O N F I D E N T I A L VIA CABINET OFFICE CHANNELS WHO2204
APRIL 6, 1983

DEAR MARGARET:

YOUR MESSAGE OF MARCH 29, REGARDING THE ANTITRUST INVESTIGATION OF AIRLINE PRICE-FIXING, REACHED ME JUST AS I LEFT WASHINGTON FOR A FEW DAYS IN CALIFORNIA. I WANTED, HOWEVER, TO RESPOND AS SOON AS POSSIBLE, AS YOU ASKED.

AFTER CHECKING WITH MY OFFICIALS, I AM AFRAID THAT WE CANNOT DEFER ANY LONGER THE ANTITRUST INVESTIGATION BY OUR JUSTICE DEPARTMENT OF BRITISH AND OTHER AIR CARRIERS. THERE ARE SUBSTANTIAL ALLEGATIONS INVOLVED, INCLUDING FIXING AND RAISING AIR FARES WITHOUT THE APPROVAL OF OUR AERONAUTICAL AUTHORITIES, AND IT IS MY CLEAR OBLIGATION TO SEE THAT OUR ANTITRUST LAWS ARE ENFORCED.

WE HAVE REVIEWED WHETHER THIS MATTER SHOULD BE HANDLED UNDER OUR BILATERAL AVIATION AGREEMENT, AND HAVE CONCLUDED THAT THE AGREEMENT DOES NOT PROVIDE AN EXCEPTION TO OUR ANTITRUST LAWS. WE THEREFORE FEEL THAT WE CAN DEFER THE INVESTIGATION NO LONGER, AND WILL ISSUE SUBPOENAS UNLESS THE CARRIERS AGREE TO PROVIDE THE REQUIRED INFORMATION VOLUNTARILY.

THE CONTINUANCE OF THE JUSTICE DEPARTMENT INVESTIGATION DOES NOT PRECLUDE FURTHER ROUNDS OF CONSULTATIONS BETWEEN OUR OFFICIALS ON THIS ISSUE, ALTHOUGH THE CORRECT FORMAT WILL HAVE TO BE WORKED OUT. I HAVE ASKED GEORGE SHULTZ TO BE IN TOUCH WITH FRANCIS PYM TO MAKE THE NECESSARY ARRANGEMENTS.

YOU KNOW HOW HIGHLY I VALUE OUR PERSONAL RELATIONSHIP AND THE UNIQUE COOPERATION BETWEEN OUR COUNTRIES ON IMPORTANT MATTERS. HOWEVER IN THIS CASE I FEEL THAT I DO NOT HAVE THE LATITUDE TO RESPOND TO YOUR CONCERNS. I WOULD EMPHASIZE THAT AT THIS POINT THE JUSTICE DEPARTMENT IS ONLY INVESTIGATING ALLEGATIONS, BUT IT IS MY RESPONSIBILITY THAT THE INVESTIGATIONS PROCEED. KNOWING YOUR PERSONAL INTEREST, I WILL STAY ABREAST OF DEVELOPMENTS IN THIS CASE.

SINCERELY,

RON

PRIME MINISTER'S
PERSONAL MESSAGE
SERIAL No. T45/83

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WONFO 022/07

[LIMITED]

IMMEDIATE

ADVANCE COPY

No 10 (DUTY OFFICER)

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GR 500
CONFIDENTIAL
DESKBY 070800Z
FM WASHINGTON 070100Z APR 83
TO IMMEDIATE FCO
TELEGRAM NUMBER 886 OF 6 APRIL 1983

YOUR TELEGRAM 571: ANTITRUST INVESTIGATION INTO AIRLINE PRICE FIXING: PRESIDENT REAGAN'S MESSAGE

THE PRESIDENT'S MESSAGE TO THE PRIME MINISTER IS DISAPPOINTING BUT NOT, GIVEN AMERICAN PASSION FOR ANTI-TRUST AND THE STRENGTH OF THE CASE THEY BELIEVE THEY HAVE AGAINST THE AIRLINES, SURPRISING REAGAN HAS HAD THE CHOICE OF APPEARING TO INTERFERE WITH THE COURSE OF JUSTICE OR LETTING THE LAW TAKE ITS COURSE, COME WHAT MAY, AND HAS CHOSEN THE LATTER. BUT THESE THINGS TAKE TIME SO WE CAN NOW THINK THROUGH THE VARIOUS COURSES OF ACTION OPEN TO US TO MINIMISE THE INEVITABLE DAMAGE.

2. THE NEXT AND IMMEDIATE STEP IS FOR THE DEPARTMENT OF JUSTICE TO ISSUE SUBPOENAS. THE BRITISH AIRWAYS AND BRITISH CALEDONIAN LAWYERS TELL US THAT THE JUSTICE DEPARTMENT TOLD THEM LATE THIS AFTERNOON THAT THE SUBPOENAS WOULD BE ISSUED ON THE AFTERNOON OF 7 APRIL (IE AT ABOUT 2100Z), UNLESS THE AIRLINES FIRST SIGNIFIED THEIR WILLINGNESS TO PROVIDE THE REQUIRED INFORMATION VOLUNTARILY. THE STATE DEPARTMENT ASSURE US THAT (AS WE HAD BEEN PREVIOUSLY NOTIFIED) THE SUBPOENAS WILL REFER TO DOCUMENTS LOCATED IN THE UNITED STATES ONLY.

3. SUBSEQUENTLY AND IN SLOWER TIME THE STATE DEPARTMENT WILL SUBMIT A REPLY FROM SHULTZ TO YOUR OWN MESSAGE, TOGETHER WITH A RESPONSE TO THE NOTE I PUT IN ON 29 MARCH REQUESTING CONSULTATIONS UNDER THE AIR SERVICES AGREEMENT. SINCE THE THIRD PARAGRAPH OF THE PRESIDENT'S MESSAGE WAS SOMEWHAT AMBIGUOUS, WE EMPHASIZED TO THE STATE DEPARTMENT THAT THE CONSULTATIONS FOR WHICH WE HAD ASKED WERE THOSE FORMALLY PROVIDED FOR UNDER THE AGREEMENT, NOT SOME OTHER AD HOC ARRANGEMENT: AND THAT WE THEREFORE ASSUMED THAT THE STATE DEPARTMENT (NOT THE JUSTICE DEPARTMENT) WOULD BE IN THE LEAD.

4. ASSUMING THAT THE AMERICANS ARE INDEED INTENDING TO GO ONLY FOR DOCUMENTS LOCATED IN THE UNITED STATES AT THIS STAGE, IT IS DIFFICULT TO SEE WHAT PREVENTIVE ACTION WE COULD TAKE AGAINST THE ISSUE OF SUBPOENAS TOMORROW. THE BRITISH CALEDONIAN LAWYER, HOWEVER, SEEMED INTERESTED IN ANY GUIDANCE WE MIGHT HAVE ON THE JUSTICE DEPARTMENT'S SUGGESTION THAT HIS CLIENT SHOULD PRODUCE THE DOCUMENTS VOLUNTARILY. YOU MAY WISH TO GIVE BOTH AIRLINES RAPID ADVICE. WE UNDERSTAND THAT THE WEST GERMAN AND SWISS AUTHORITIES HAVE TOLD THE AMERICANS THAT LUFTHANSA AND SWISSAIR ARE PREPARED TO COOPERATE, ALTHOUGH, OF COURSE, THE CASE AGAINST THEM IS LESS THAN AGAINST PANAM, TWA AND OUR TWO AIRLINES.

5. I WILL TELEGRAPH FURTHER ABOUT WHAT THE OPTIONS, AS SEEN FROM WASHINGTON, SEEM TO BE. NONE OF THEM LOOK VERY ATTRACTIVE. BUT WE ARE NOT PLAYING A LOVE HAND. THE POTENTIAL CONSEQUENCES FOR PANAM AND TWA ARE NO LESS SERIOUS THAN FOR OUR AIRLINES AND THIS SHOULD BE A SOMEWHAT MODERATING FACTOR.

ADVANCE COPIES: FCO: PS/PUS, SINCLAIR, ADAMS, DEPARTMENT OF TRADE: KNIGHTON, BECKETT, HEALEY.

WRIGHT

NNNN

ZZ WASHINGTON

GRS 386
CONFIDENTIAL
FM F C O 061900Z APR 83
TO FLASH WASHINGTON,
TELEGRAM NUMBER 571 OF 6 APRIL 1983.
ANTI-TRUST INVESTIGATION INTO AIRLINE PRICE-FIXING.
1. PRESIDENT REAGAN HAS TODAY REPLIED TO THE PRIME MINISTER'S MESSAGE OF 29 MARCH (TEXT BELOW). GRATEFUL FOR YOUR INITIAL COMMENTS AS SOON AS POSSIBLE, EITHER BY TELEGRAM OR BY TELEPHONE TO THE RESIDENT CLERK. IN PARTICULAR, HOW SOON ARE THE AMERICANS LIKELY TO TAKE ACTION? OUGHT WE TO TAKE PREVENTATIVE ACTION OURSELVES (IF ANY IS POSSIBLE) TONIGHT IF THE AMERICANS NOW PROPOSE TO MOVE VERY FAST?
2. TEXT OF THE PRESIDENT'S REPLY IS AS FOLLOWS:
BEGINS:
DEAR MARGARET:

YOUR MESSAGE OF MARCH 29, REGARDING THE ANTITRUST INVESTIGATION OF AIRLINE PRICE-FIXING, REACHED ME JUST AS I LEFT WASHINGTON FOR A FEW DAYS IN CALIFORNIA. I WANTED, HOWEVER, TO RESPOND AS SOON AS POSSIBLE, AS YOU ASKED.

AFTER CHECKING WITH MY OFFICIALS, I AM AFRAID THAT WE CANNOT DEFER ANY LONGER THE ANTITRUST INVESTIGATION BY OUR JUSTICE DEPARTMENT OF BRITISH AND OTHER AIR CARRIERS. THERE ARE SUBSTANTIAL ALLEGATIONS INVOLVED, INCLUDING FIXING AND RAISING AIR FARES WITHOUT THE APPROVAL OF OUR AERONAUTICAL AUTHORITIES, AND IT IS MY CLEAR OBLIGATION TO SEE THAT OUR ANTITRUST LAWS ARE ENFORCED.

WE HAVE REVIEWED WHETHER THIS MATTER SHOULD BE HANDLED UNDER OUR BILATERAL AVIATION AGREEMENT, AND HAVE CONCLUDED THAT THE AGREEMENT DOES NOT PROVIDE AN EXCEPTION TO OUR ANTITRUST LAWS. WE THEREFORE FEEL THAT WE CAN DEFER THE INVESTIGATION NO LONGER, AND WILL ISSUE SUBPOENAS UNLESS THE CARRIERS AGREE TO PROVIDE THE REQUIRED INFORMATION VOLUNTARILY.

THE CONTINUANCE OF THE JUSTICE DEPARTMENT INVESTIGATION DOES NOT PRECLUDE FURTHER ROUNDS OF CONSULTATIONS BETWEEN OUR OFFICIALS ON

THIS ISSUE, ALTHOUGH THE CORRECT FORMAT WILL HAVE TO BE WORKED OUT. I HAVE ASKED GEORGE SHULTZ TO BE IN TOUCH WITH FRANCIS PYM TO MAKE THE NECESSARY ARRANGEMENTS.

YOU KNOW HOW HIGHLY I VALUE OUR PERSONAL RELATIONSHIP AND THE UNIQUE COOPERATION BETWEEN OUR COUNTRIES ON IMPORTANT MATTERS. HOWEVER IN THIS CASE I FEEL THAT I DO NOT HAVE THE LATITUDE TO RESPOND TO YOUR CONCERNS. I WOULD EMPHASIZE THAT AT THIS POINT THE JUSTICE DEPARTMENT IS ONLY INVESTIGATING ALLEGATIONS, BUT IT IS MY RESPONSIBILITY THAT THE INVESTIGATIONS PROCEED. KNOWING YOUR PERSONA INTEREST, I WILL STAY ABREAST OF DEVELOPMENTS IN THIS CASE.

SINCERELY,

RON.

ENDS

PYM

[COPIES SENT TO NO 10 DOWNING STREET]
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NNNN

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PS	
PS/MR RIFKIND	
PS/PUS	
SIR J BULLARD	
MR EVANS,	
MR ADAMS	

Sec VC
Legal
Proc

5 April 1983

The Prime Minister has noted the contents of the Attorney General's minute of 31 March about the Laker case.

A C

Henry Steel, Esq., CMG, OBE
Law Officers' Department

010

(2)

Prime Minister

A.J.C. 31/3.

PRIME MINISTER

BRITISH AIRWAYS AND BRITISH CALEDONIAN -v- LAKER

1. On Tuesday afternoon Mr. Justice Parker, who has been hearing applications in the Laker case, discharged the interim injunction that was restraining the Laker liquidator from taking further steps in the American proceedings.

2. BA and BCAL appealed yesterday to Lord Donaldson M.R. for the interim injunction to be restored. I attended by Counsel so as to be able to assist the Court and to inform Lord Donaldson of the latest developments, principally the request to the USA for formal consultations under the Air Services Agreement. Lord Donaldson reversed the Judge's Decision and restored the interim injunction. This is a good result as the injunction provides some limited protection for the airlines against developments in the USA.

3. I had earlier written to Mr. Justice Parker who has now said that he would hear the Crown state its position before he gives his substantive judgment. The way is therefore now open for me to submit observations at the further hearing before ~~Judge~~ Mr Justice Parker which is likely to be in a few weeks time.

4. I am copying this minute to Francis Pym and Arthur Cockfield.

MH

31st March, 1983

Legal Procedure
Mar '83 US Grand
Jury Investigation

cc D/T K

10 DOWNING STREET

THE PRIME MINISTER

31 March 1983

IN CONFIDENCE

Dear Sir Adam,

Thank you for your letter of 28 March.

You will be glad to know that following your meeting with Arthur Cockfield I sent yesterday an urgent personal message to President Reagan. We have also called for formal consultations under the Bermuda 2 Agreement. We shall have to see whether this will hold up, or at least narrow, the Grand Jury Investigation, so that the US Government interest can as far as possible be resolved inter-governmentally.

Lord Cockfield and the Attorney General are also actively considering what further steps should be taken in the light of developments in the civil actions.

Yours sincerely

Margaret Thatcher

Sir Adam Thomson, C.B.E.

DEPARTMENT OF TRADE 1 VICTORIA STREET LONDON SW1H 0ET Telephone 01-215 7877

From the Secretary of State

CONFIDENTIAL

John Coles Esq
Private Secretary to the Prime Minister
10 Downing Street
London
SW1

30 March 1983

Dear John

THE LAKER SUIT

Parallel with the Grand Jury investigation about which the Prime Minister has written to the President, there is a civil action taken by the Laker liquidator in the United States Courts against BCal, BA and others. The reason why the liquidator is proceeding in the American Courts is that (1) United States lawyers will act on a "splitting of the spoils" basis - something which used to be a criminal offence in this country - and (2) they can claim triple damages.

2 It is very important that we should not be seen to intervene in a way which would unfairly prejudice Laker's creditors who include large numbers of people who had booked and paid for tickets and are not covered by an indemnity scheme. Nevertheless, it is highly objectionable that the liquidator should be proceeding in the American Courts on what is essentially a British matter simply because the American system permits procedures repugnant in this country and contrary to public policy.

3 The threat of triple damages poses a serious threat to our own airlines and particularly BCal. The airlines are taking proceedings in our own Courts for an injunction preventing the Laker liquidator from proceeding further in the United States Courts. Sir Adam Thomson has, as you know, written to the Prime Minister asking that the Attorney General should intervene.

4 The Attorney General has indeed offered to intervene and the Judge has indicated that he would wish to hear arguments from the Government before final judgement (the case ended yesterday with a reserved judgement). The Attorney General would elaborate on the public policy arguments and state HMG's view about the relevance to the proceedings of the Bermuda 2 Air Services Agreement.

From the Secretary of State

CONFIDENTIAL

5 There was a further development yesterday. Mr Justice Parker had given a temporary injunction against the liquidator pending the hearing. Although he has reserved judgement, he has nevertheless now discharged the injunction. This means that the liquidator is free to pursue the United States civil action against our airlines forthwith (including discovery of documents). But the Judge has suspended his order until 4 pm today, giving the airlines time to appeal. We understand that the airlines indicated that they would go to the Court of Appeal if the Attorney General was also present to explain the latest inter-governmental developments, ie our request for consultations under Bermuda 2. The Attorney General has indicated that he would wish to be represented in the Court of Appeal and Lord Cockfield very much welcomes this.

6 Lord Cockfield, who has throughout supported the intervention of the Attorney General, is strongly of the view that any allegations by Laker should be pursued not in the United States Courts, but in the English Courts, where any genuine mischief suffered by Laker has a proper and just remedy from which any appropriate damages could be recovered for the benefit of Laker's creditors. Such remedies and damages would necessarily not be as extensive as anti-trust remedies and treble damages available under United States law. There is the further point that if more documents are produced in the civil litigation they would then be available in the Federal case if the United States Department of Justice proceeds down that road despite the Prime Minister's letter to the President.

7 Lord Cockfield feels therefore that any documents located in the United Kingdom, which are required either in the civil or criminal proceedings in the United States, should be protected by means of the Protection of Trading Interests Act from production in the United States Courts.

8 The timing of any use of the PTI Act powers to block the release of documents to the United States needs careful consideration: Lord Cockfield has decided to delay use of the powers if at all possible until the response to the Prime Minister's personal message to the President is known to avoid risk of prejudice to that approach. But it might be necessary to act earlier if the President's response were delayed. The risk is increased if the injunction is not continued in the Court of Appeal. We would then have a few days to play with as compliance with an American subpoena would take a little time. But Lord Cockfield is ready to use his powers if at any time the point is reached where documents in the United Kingdom would have to be produced.

From the Secretary of State

CONFIDENTIAL

.... 9 I enclose a draft reply to Sir Adam Thomson's letter of 28 March to the Prime Minister.

10 I am copying this to Roger Bone (FCO) and to Henry Steel (Law Officers' Department).

Yours sincerely
John Whitlock

JOHN WHITLOCK
Private Secretary

CONFIDENTIAL

SUBJECT

cc master ops

PRIME MINISTER'S
PERSONAL MESSAGE
SERIAL No. T 42/83

OO WHITE HOUSE

GRS 250(A)

CONFIDENTIAL
FM CABINET OFFICE 291105Z MAR 83
TO IMMEDIATE WHITE HOUSE
TELEGRAM NUMBER MISC 100 DATED 29 MAR 83

FROM THE PRIME MINISTER
TO PRESIDENT REAGAN

DEAR RON,
1. I WANT TO TAKE UP WITH YOU PERSONALLY AND URGENTLY MY DEEP CONCERN AT THE PROPOSED ANTITRUST INVESTIGATION BY YOUR DEPARTMENT OF JUSTICE INTO ALLEGATIONS, FOLLOWING THE LAKER COLLAPSE, AGAINST BRITISH AND OTHER AIRLINES OPERATING ACROSS THE NORTH ATLANTIC. THIS IS DUE TO START ON WEDNESDAY OR THURSDAY OF THIS WEEK. IT COULD WELL HAVE THE MOST SERIOUS CONSEQUENCES FOR BRITISH AIRLINES.

2. AVIATION HAS ALWAYS BEEN HANDLED ON A BASIS OF CLOSE COOPERATION BETWEEN GOVERNMENTS AND OUR RELATIONS IN THIS FIELD HAVE BEEN GOVERNED BY OUR BILATERAL AVIATION AGREEMENT WHICH IS OF LONG STANDING. MY PEOPLE HAVE THEREFORE PRESSED FOR THIS LATEST MATTER TO BE TACKLED ON AN AGREED BASIS. SO FAR THIS HAS UNFORTUNATELY NOT BEEN ACCEPTED. WE BELIEVE THAT THE RIGHT COURSE IS FOR FORMAL CONSULTATIONS TO TAKE PLACE AS PROVIDED BY OUR AVIATION AGREEMENT AND OUR AMBASSADOR HAS INFORMED THE STATE DEPARTMENT OF THIS. WE WOULD EXPECT THAT MEANWHILE THE DEPARTMENT OF JUSTICE INVESTIGATION WILL BE DEFERRED, SO AS NOT TO PREJUDGE THE CONSULTATIONS.

3. I URGE YOU TO ACCEPT THAT THE MATTER SHOULD BE HANDLED THIS WAY. OTHERWISE OUR AVIATION RELATIONSHIP WILL BE DAMAGED AND THE HARM COULD GO WIDER. THIS MATTER IS URGENT WHICH IS WHY I AM CONTACTING YOU IMMEDIATELY. I AM MOST DISTURBED ABOUT IT AND DO HOPE YOU WILL FEEL ABLE TO TAKE IT UP PERSONALLY AND VERY QUICKLY.

WITH BEST WISHES
YOURS EVER
MARGARET.

NNNN

CONFIDENTIAL.

Z0901 291105Z MAR
MISC 100

DRAFT MESSAGE FOR THE PRIME MINISTER TO SEND TO PRESIDENT REAGAN

Dear Ron,

1. I want to take up with you personally and urgently my deep concern at the proposed antitrust investigation by your Department of Justice into allegations, following the Laker collapse, against British and other airlines operating across the North Atlantic. This is due to start on Wednesday or Thursday of this week. It could well have the most serious consequences for British airlines.

2. Aviation has always been handled on a basis of close cooperation between Governments and our relations in this field have been governed by our bilateral aviation agreement which is of long standing. My people have therefore pressed for this latest matter to be tackled on an agreed basis. So far this has unfortunately not been accepted. We believe that the right course is for formal consultations to take place as provided by our aviation agreement and our Ambassador has informed the State Department of this. We would expect that meanwhile the Department of Justice investigation will be deferred, so as not to prejudge the consultations.

3. I urge you to accept that the matter should be handled this way. Otherwise our aviation relationship will be damaged and the harm could go wider. This matter is urgent which is why I am contacting you immediately. I am most disturbed about it and do hope you will feel able to take it up personally and very quickly.

With best wishes

Yours ever

Margaret.

End

DEPARTMENT OF TRADE 1 VICTORIA STREET LONDON SW1H 0ET Telephone 01-215 7877

From the Secretary of State

CONFIDENTIAL

John Coles Esq
Private Secretary
10 Downing Street
London
SW1

28 March 1983

See final text of message despatched.
A & C. 29/3.

Dear John,

Lord Cockfield saw Sir Adam Thomson this afternoon. Sir Adam handed over his letter of today's date to the Prime Minister and restated his view that only the personal intervention of the Prime Minister can prevent the launching of a Grand Jury Investigation by the United Stated Department of Justice (DoJ) with wide ranging subpoenas, the DoJ having informed us at the end of last week that they intend to proceed notwithstanding our arguments (my letter of 18 March refers).

Lord Cockfield's view is that on the merits and importance of the issue, there is a case for the Prime Minister to intervene, given that the personal messages from Mr Pym to Mr Shultz and Lord Cockfield to Mrs Dole have failed to deflect the DoJ from its course.

The present process involves a number of separate steps before indictments are issued

> First the Grand Jury is empanelled (on Wednesday) and subpoenas issued (on Thursday)
>
> Next there will be negotiations aimed at narrowing the scope of the subpoenas
>
> Then there will be a fact finding stage before a decision is made whether to seek indictments.

There could be intervention at any of these stages. An early intervention might be rejected on the ground that processes at this stage are simply fact finding : and until the facts are found and established it would be premature for the President to intervene.

Aginst this, the further the process is allowed to roll forward, the more difficult it will be to stop it.

There is another consideration, namely the President must be offered a reputable and convincing escape route. This does in fact exist in the bilateral Air Services Agreement (Bermuda 2) which provides for consultations between Governments in the event of disagreement. If the President is to be persuaded to take this alternative route it would be easier to do so at the outset rather than attempt to

From the Secretary of State

swop horses later on when vested rights in a Department of Justice investigation will have built up.

Accordingly Lord Cockfield recommends that the Prime Minister should intervene now. [illegible] There have been some indications over the last few days that the DoJ officials concerned have not found it easy to carry the day so far : the Prime Minister's intervention at this stage, directly involving the White House for the first time, might be a decisive move.

Sir Oliver Wright is seeing the State Department tomorrow and is being instructed to hand over a Note asking for formal consultations under the Bermuda 2 Air Services Agreement, and urging that the DoJ should not prejudge those consultations by proceeding with its investigation before our arguments about the Treaty obligations of the United States have been properly considered. (This could be a first step towards an arbitration of the issue of the applicability of United States antitrust law in this field, though no decision on that is called for at this stage).

It is against this background that the attached message has been drafted for the consideration of the Prime Minister.

I am copying this to Roger Bone (FCO) and to Henry Steel (Attorney General's Office).

Yours sincerely,

JOHN RHODES
Private Secretary

allegations, following the Laker collapse, against British and other airlines operating across the North Atlantic

DRAFT MESSAGE FOR THE PRIME MINISTER TO SEND TO:

President Reagan

1. I want to ~~share~~ take up with you personally and urgently my ~~serious~~ deep concern at the proposed antitrust investigation by your Department of Justice into ~~North Atlantic airlines matters~~. This is due to start on Wednesday or Thursday of this week. It could well have the most serious consequences for British airlines.

2. Aviation has always been handled ~~as a matter~~ on a basis of close cooperation between Governments and our relations in this field have been ~~regulated~~ governed by our bilateral aviation agreement which is of long standing. My people have to be pressed for ~~any concerns of yours in relating to this area~~ the latest ~~problem~~ matter to be tackled on ~~a mutual and~~ an agreed basis. So far this has unfortunately not been accepted. We believe that the right course is for formal consultations to take place as provided by our aviation agreement and our Ambassador has informed the State Department of this. We would expect that meanwhile the Department of Justice investigation will be deferred, so as not to prejudge the consultations.

3. I urge you to accept that the matter should be handled this way. Otherwise our aviation relationship will be damaged and the harm could go wider. This matter is urgent which is why I am ~~also fear that public memories of earlier differences over the application of your laws will be re-awakened. This could well harm our wider relations.~~ contacting you immediately. I am most disturbed about it and do hope you will feel able to take it up personally and very quickly.

END

DEPARTMENT OF TRADE 1 VICTORIA STREET LONDON SW1H 0ET Telephone 01-215 7877

Prime Minister

Agree that message to President Reagan?

MCS 28/3

CONFIDENTIAL

From the Secretary of State

John Coles Esq
Private Secretary to the Prime Minister
10 Downing Street
London, SW1

28 March 1983

Dear John,

Further amended. See final text. AR 29/3.

Lord Cockfield saw Sir Adam Thomson this afternoon. Sir Adam handed over his letter of today's date to the Prime Minister and restated his view that only the personal intervention of the Prime Minister can prevent the launching of a Grand Jury Investigation by the United States Department of Justice (DoJ) with wide ranging subpoenas, the DoJ having informed us at the end of last week that they intend to proceed notwithstanding our arguments (my letter of 18 March refers).

2 Lord Cockfield's view is that on the merits and importance of the issue, there is a case for the Prime Minister to intervene, given that the personal messages from Mr Pym to Mr Shultz and Lord Cockfield to Mrs Dole have failed to deflect the DoJ from its course. There are several stages at which such an intervention might be made: either now before the Grand Jury is empanelled (on Wednesday) and subpoenas issued (on Thursday); or in the coming days if our airlines with our support fail to narrow the breadth of the subpoenas; or after the fact finding stage, before the DoJ make their decision on whether to seek indictments.

3 An intervention at this stage may be turned aside by the President, on the ground that the United States processes are at this stage simply fact-finding. However, the importance of the implications for our airlines and the risk of a DoJ fishing expedition widening the issues under contention, weigh in favour of making an intervention now, provided that a message offers to the President an appropriate and proper way to resolve the present international dispute, and that the possibility of an effective intervention later is not therefore prejudiced. There have been some indications over the last few days that the DoJ officials concerned have not found it easy to carry the day so far: the Prime Minister's intervention at this stage, directly involving the White House for the first time, might be a decisive move. There would, of course, be an expenditure of goodwill, but given what is at stake, Lord Cockfield recommends on balance an intervention by the Prime Minister now.

CONFIDENTIAL

From the Secretary of State

4 Sir Oliver Wright is seeing the State Department tomorrow and is being instructed to hand over a Note asking for formal consultations under the Bermuda 2 Air Services Agreement, and urging that the DoJ should not prejudge those consultations by proceeding with its investigation before our arguments about the Treaty obligations of the United States have been properly considered. (This could be a first step towards an arbitration of the issue of the applicability of United States antitrust law in this field, though no decision on that is called for at this stage.)

5 It is against this background that the attached message has been drafted for the consideration of the Prime Minister.

6 I am copying this to Roger Bone (FCO) and to Henry Steel (Attorney General's Office).

Yours sincerely,

JOHN RHODES
Private Secretary

CONFIDENTIAL

DRAFT MESSAGE FOR THE PRIME MINISTER TO SEND TO:

President Reagan

Is this clear enough?

1 I want to ~~share~~ take up with you personally my serious concern at the proposed antitrust investigation by your Department of Justice into North Atlantic airlines matters. This is due to start on Wednesday or Thursday of this week.

2 Aviation has always been handled as a matter of close co-operation, regulated as it is under our bilateral aviation agreement. My people have pressed for any concerns of yours in this area to be tackled on an agreed basis. So far this has ~~not un~~fortunately been accepted. Our Ambassador has now told the State Department that we invoke the procedure under the Bermuda 2 aviation Agreement for formal consultations; and that we expect that meanwhile the Department of Justice investigation will be deferred, so as not to prejudge the consultations.

3 I urge you to accept that the matter should be handled this way. Otherwise our aviation relationship will be damaged, and the harm may go wider. ~~I also fear that public memories of earlier differences over the application of your laws will be re-awakened. This could well harm our wider relations.~~ This matter is urgent. which is why I am contacting you ~~today~~ immediately.

END

CONFIDENTIAL

File

Legal Procedure.

10 DOWNING STREET

From the Private Secretary

28 March 1983

BRITISH CALEDONIAN

I attach a copy of a further letter from Sir Adam Thomson, Chairman of British Caledonian, to the Prime Minister.

I should be grateful if you would let me have a draft reply for the Prime Minister's signature by close of play on Wednesday, 30 March.

B/F

M. C. SCHOLAR

John Rhodes, Esq.,
Department of Trade.

File

10 DOWNING STREET

From the Private Secretary

28 March 1983

I am writing on behalf of the Prime Minister to thank you for your further letter of 28 March which is receiving attention. A reply will be sent to you as soon as possible.

M. C. SCHOLAR

Sir Adam Thomson, C.B.E.

Prime Minister 2

As you know, David Wolfson attended a meeting between Lord Cockfield and Sir A. Thomson. They may well now suggest a message from you to President Reagan.

British Caledonian

Caledonian House
Crawley West Sussex
RH10 2XA England

Telephone: Gatwick (0293) 27890
Cables: Scotair Gatwick Telex: 87161

Sir Adam Thomson, C.B.E.
Chairman

28th March, 1983.

The Rt. Hon. Margaret Thatcher, MP, 28/3
Prime Minister,
10 Downing Street,
London SW1.

Dear Prime Minister,

I appreciated your understanding letter of the 23 March. As you must know the negotiations with the Americans unfortunately have been wholly unsuccessful and the Grand Jury investigation will commence on Thursday with the issuance of sweeping subpoenae.

It remains our judgement that only your personal intervention with President Reagan can possibly forestall what amounts to a broad inquiry into Britain's regulation of its air transport industry and specific HMG decisions as to the activities of its flag carriers and the relationships among them. Not only is B.CAL's survival placed in jeopardy but this effort by the Americans constitutes a more fundamental intrusion upon Britain's sovereignty than the Uranium Investigation, the North Atlantic Shipping Investigation (which did not involve HMG's regulation of prices) and the recent Soviet Pipeline embargo.

Even though the hour is late we urge that a maximum effort be made to forestall, or at least sharply limit, the action of the Justice Department. If the line is not held here, we wonder where it can be held.

Yours sincerely,

Adam Thomson

LEGAL PROCEDURE

re Grand Jury
March '83

CONFIDENTIAL

FILE B/c N. OWEN

RW

10 DOWNING STREET

From the Private Secretary

23 March, 1983

BRITISH CALEDONIAN

As you will have seen, the Prime Minister has written to Sir Adam Thomson on the lines you suggested; and she has noted the efforts which are being made in support of British Caledonian, as set out in your letter of 18 March to Willie Rickett.

The Prime Minister has further commented that British Caledonian are in a very serious situation; and that we must do everything possible to help.

I am sending a copy of this letter to Roger Bone (FCO), and to Henry Steel (Attorney General's Office).

M. C. SCHOLAR

NK

J. Rhodes, Esq.,
Department of Trade

CONFIDENTIAL

FILE

RM

cc: FCO
DoT
LOD

10 DOWNING STREET

THE PRIME MINISTER

23 March, 1983

Dear Sir Adam.

Thank you for your letter of 15 March. I share your concern about the potentially serious damage to your interests, and indeed Government interests, posed by current and possible future action under United States anti-trust laws.

Francis Pym has sent a personal message of concern to Mr. Shultz; and your legal advisers will doubtless have told you that the Attorney General has written to the judge here offering to give assistance to the Court if required.

Arthur Cockfield in particular is keeping a close watch on the position as it develops. We are doing all we can to help.

Yours sincerely

Margaret Thatcher

Sir Adam Thomson, CBE.,

10 DOWNING STREET

3

Prime Minister

There is an account of what we are trying to do to help at Flag A.

MCS 22/3

It is very pressing for Cab. We must do everything possible

AT.

DEPARTMENT OF TRADE 1 VICTORIA STREET LONDON SW1H 0ET Telephone 01-215 7877

NOT GR'S

From the Secretary of State

CONFIDENTIAL

COMMERCIAL - IN CONFIDENCE

Willie Rickett Esq
Private Secretary to the Prime Minister
10 Downing Street
London, SW1

18 March 1983

Dear Willie,

1 Sir Adam Thomson's letter of 15 March to the Prime Minister follows up his earlier visit to Mr Whitelaw, as a result of which I wrote to Michael Scholar on 8 March and circulated a relevant background note (which you may now feel should be shown to the Prime Minister).

2 The second round of consultations with the United States government mentioned in my letter of 8 March took place in Washington on 15 and 16 March. The United States government will consider the points put to them and will let us know their conclusions, probably about the middle of next week. If they are minded to proceed with the Grand Jury Investigation, we shall get a week's notice before they take the first formal steps by issuing subpoenas. The Department of Justice (DoJ), with its concern for United States law enforcement, is still running the show at the United States end, and we are proceeding on the assumption that as things stand the Department of Justice will be telling us that they intend to proceed with the fact-finding stage of the Grand Jury investigation in relation to all or most of the allegations before them. There will be further opportunity for us to express our interests if, after the fact-finding stage, the DoJ are minded to proceed with indictments. But the initiation of Grand Jury proceedings would itself be demanding and could also encourage further civil suits against the airlines.

3 If the DoJ cannot be deflected, there are major implications for our airlines and for Government policy. Sir Adam Thomson's concern is both natural and justified. The massive penal damages which could at worst arise from a combination of criminal and civil treble damage proceedings in the United States could destroy British Caledonian Airways (BCal), who are already faced with heavy legal costs in the civil action. BCal have firmly assured the Prime Minister in paragraph 2(c) of Sir Adam's letter, that they have engaged in no conspiracy; and we agree with his comment (paragraph 2(d)) that United States anti-trust suits are in themselves a serious and worrying matter almost irrespective of

From the Secretary of State

CONFIDENTIAL

COMMERCIAL - IN CONFIDENCE

the innocence or guilt of the defendents. As regards British Airways, the threat of such damages if legal action dragged on could make it virtually impossible to privatise British Airways within a reasonable timescale.

4 Our strategy with the Department of Justice has been to put it to them that since as regards BCal they only appear to be concerned with one specific allegation (that described in paragraph 1(b) of our background note), and since this is already an issue in civil litigation in the courts of both countries, the matter should be resolved by that litigation without Department of Justice intervention. The Department of Justice concern with BA is not with the 1(b) allegation, but with wide-ranging allegations relating to fare fixing (paragraph 1(a) of the background note). Here our position is that airline pricing matters should be dealt with under our bilateral Treaty (paragraph 3 of the background note) and that it is wrong for the United States to act unilaterally in applying their standards of competition law to a jointly regulated industry.

5 We therefore consider that we should do all we properly can to support BCal (and BA). There is a possible presentational difficulty that the Government might be accused of taking sides against the interests of Laker's creditors. The answer is that if anything wrong has been done, there is just and proper remedy available in the English courts; our objection is to proceedings in the United States.

6 Against this background the Prime Minister has two specific requests from Sir Adam Thomson. We agree that a high level representation should be made forthwith to the United States government. Sir Oliver Wright, who has been taking a close personal interest in developments, has recommended this (see Washington Telegrams 664 and 665). He considers that the first step should be a personal message from Mr Pym to Mr Shultz, following up an earlier conversation between them. Sir Oliver's suggested text seems to us, subject to minor points, to strike exactly the right note. Although Sir Adam suggests that the Prime Minister should intervene with the President now, we feel that this approach should be held in reserve, not least because there are delicacies in intervening in what the United States see as a matter of enforcement of their domestic law. (Moreover, the Prime Minister is already sending another message to the President on agricultural problems.) The recommendation of Trade and FCO officials (which Mr Sproat endorses) is therefore that, subject to the view of the Prime Minister and Mr Pym, the immediate intervention

Mr Pym and Lord Cockfield agree. MCS

should be made by Mr Pym on the lines recommended by Sir Oliver Wright (this will need to be done on Monday 21 March). When Lord Cockfield returns from an overseas visit on Monday, we shall ask him to consider a similar message to the new United States Secretary for Transportation.

7 As regards a possible intervention by the Attorney General in the High Court in support of BCal's requested injunction, we understand that this has been considered earlier today and that the Attorney General has informed the Prime Minister of his view that the best way to assist is to write to the Judge offering to intervene if that would be helpful to the Court.

8 On the basis that the Prime Minister accepts the view that our airlines need our full support, I attach a draft reply to Sir Adam Thomson.

9 I am copying this to Roger Bone (FCO) and to Henry Steel (Attorney General's Office).

Yours sincerely,

JOHN RHODES
Private Secretary

pl type

DRAFT LETTER FOR THE PRIME MINISTER TO SEND TO:

Sir Adam Thomson CBE
Chairman
British Caledonian
Caledonian House
Crawley
Sussex
RH10 2XA

Thank you for your letter of 15 March. I share your concern about the potentially serious damage to your interests, and indeed Government interests, posed by current and possible future action under United States anti-trust laws.

We and

Francis Pym ~~will be sending~~ has sent a personal message of concern to Mr Shultz; and your legal advisers will doubtless have told you that the Attorney General has written to the judge here offering to give assistance to the Court if required.

Arthur Cockfield in particular is keeping a close watch on the position as it develops. We are doing all we can to help.

END

a)4

GR 320

CONFIDENTIAL

CONFIDENTIAL

DESKBY 171700Z

FM WASHINGTON 171547Z

TO IMMEDIATE FCO

TELEGRAM NUMBER 665 OF 17 MARCH 1983

MIPT

BRITISH AIRLINES: US ANTITRUST ACTION: DRAFT MESSAGE TO MR SHULTZ

MESSAGE BEGINS

WHEN WE MET IN CALIFORNIA I MENTIONED MY CONCERN ABOUT THE INVESTIGATION WHICH THE US DEPARTMENT OF JUSTICE WERE PROPOSING TO LAUNCH INTO THE ACTIVITIES OF BRITISH AND OTHER AIRLINES WHICH ALLEGEDLY HELPED BRING ABOUT THE BANKRUPTCY OF LAKER AIRWAYS.

WINCE THEN OUR OFFICIALS HAVE HAD TWO ROUNDS OF TALKS, AT WHICH OUR PEOPLE ARGUED STRONGLY THAT THE RIGHT WAY TO SORT OUT ANY PROBLEMS WAS THROUGH THE MACHINERY OF OUR BILATERAL AVIATION AGREEMENT (QUOTE BERMUDA II UNQUOTE).

I WAS DISAPPOINTED TO LEARN THAT OUR ARGUMENTS HAVE NOT YET BEEN ACCEPTED.

I DO NOT WANT TO GO OVER THEM AGAIN. BUT I FEEL BOUND TO SAY THAT I SEE A REAL RISK OF UNDERMINING THE BASIS OF TRUST WHICH HAS HITHERTO ENABLED US TO MANAGE OUR AVIATION RELATIONSHIP SUCCESSFULLY DESPINE OUR PHILOSOPHIC DIFFERENCES. MOREOVER, THE LEGAL PROCEEDINGS COULD - IN THE WORST CASE AND IF HMG DO NOT TAKE REMEDIAL ACTION - LEAD TO THE BANKRUPTCEY OF OUR MAJOR PRIVATE AIRLINE AND DAMAGE TO OUR STATE AIRLINE WHICH MIGHT EFFECTIVELY PREVENT ITS PRIVATISATION AN OBJECTIVE TO WHICH HMG IS PUBLICLY COMMITTED. I DO NOT NEED TO UNDERLINE THE POLITICAL IMPACT THIS WOULD HAVE IN BRITAIN AND IN CONSIQUENCE ON ANGLO AMERICAN RELATIONS. IT IS BECAUSE SEE POTENTIALLY VERY SERIOUS TROUBLES AHEAD IF THE JUSTICE DEPARTMENT PROCEED WITH THE ACTION, THAT I AM ASKING YOU TO SEE IF YOU CAN INTERVENE BEFORE IT IS TOO LATE.

FCO PASS ADVANCE TO KNIGHTON (DOT)

(ADVANCED AS REQUESTED)

WRIGHT

LIMITED
MAED
NAD
MR THOMAS
MR ADAMS
SIR I. SINCLAIR
MR EVANS

COPIES TO:
MR FORTNAM
MR HEALEY
MR KNIGHTON } (AT, D.O.T.
MR AUST, LEGAL ADVISERS

COPIES SENT TO
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DESKBY 171700Z
FM WASHINGTON 171545Z
TO IMMEDIATE F C O
TELNO 664 OF 17 MARCH 1983.

YOUR TELNO 413

BRITISH AIRLINES: US ANTI-TRUST ACTION

1. IT IS CLEAR TO ME, FROM THE ACCOUNTS I HAVE HEARD FROM OUR PEOPLE WHO TOOK PART IN THIS WEEK'S TALKS, THAT THE JUSTICE DEPARTMENT OFFICIALS THINK THEY ARE ON TO A WINNER AND THAT THE OFFICIAL IN CHARGE SEES AN OPPORTUNITY TO MAKE HIS REPUTATION. I MAY BE DOING SEIDEN AN INJUSTICE, BUT AMBITION WOULD SEEM TO COMBINE WITH DUTY IN ENCOURAGING HIM TO LET THE LAW TAKE ITS COURSE THOUGH THE HEAVENS FALL. DESPITE YOUR INTERVENTION WITH SHULTZ ON THE WEST COAST AND MINE WITH WALLIS EARLIER THIS WEEK, THE STATE DEPARTMENT HAS BEEN UNABLE OR PERHAPS UNWILLING TO CONVINCE THE JUSTICE DEPARTMENT THAT THE ISSUE SHOULD BE SORTED OUT UNDER THE BILATERAL AVIATION AGREEMENT.

2. KNIGHTON WILL HAVE A BETTER FEEL FOR THE NEGOTIATING SITUATION THAN I HAVE, BUT IT SEEMS TO ME THAT, IF ANYTHING, ATTITUDES HERE HAVE HARDENED. WE HAVE BEEN LISTENED TO WITH COURTESY BUT WE HAVE NOT CARRIED CONVICTION. IF THAT IS SO, THE GRAND JURY INVESTIGATION IS LIKELY TO BE LAUNCHED QUITE SOON. WE HAVE BEEN GIVEN A WEEK'S NOTICE. THE INVESTIGATION COULD THEREFORE BE SET IN TRAIN AS EARLY AS THE WEEK BEGINNING 28 MARCH.

3. THE QUESTION IS WHAT, IF ANYTHING, WE CAN DO ABOUT IT. AS I SEE IT, WE HAVE TWO DIFFICULTIES: ONE IS THAT WE HAVE A POOR CASE IN AMERICAN LAW: THE SECOND IS THERE IS LITTLE WE CAN OFFER THE AMERICANS IN EXCHANGE FOR THE ABANDONING THEIR ANTI-TRUST CASE, EXCEPT THE PROSPECT OF NOT ADDING ONE MORE ROW TO THOSE ALREADY IN PROSPECT (FARM SURPLUSES, EXPORT CONTROLS ETC). FURTHERMORE, ALTHOUGH WE CANNOT BE CERTAIN OF THE EVIDENCE THAT WILL BE ADDUCED TO THE JURY OR OF THE JURY'S REACTION, THE WORST CASE SCENARIO LOOKS PRETTY HORRIFIC. ANTI-TRUST IS AN AMERICAN RELIGION AND SHULTZ (AND EVEN THE PRESIDENT) MAY BE UNWILLING TO SEEM TO BE TRYING TO DIVERT THE CAUSE OF AMERICAN JUSTICE. THE FACT THAT WHAT THE BRITISH COMPANIES ARE ACCUSED OF DOING IS NOT A CRIMINAL OFFENCE UNDER BRITISH LAW CUTS NO ICE : BA AND BCAL ARE EXPECTED TO OBSERVE US LAW ON US TERRITORY.

[This is obviously garbled]. ?

4. I HAVE OF COURSE CONSIDERED WHETHER TO ADVISE CONSULTATION WITH THE OTHER US AIRLINES INVOLVED: BUT ON THE WHOLE I THINK THAT MIGHT BE COUNTER-PRODUCTIVE.

/5

CONFIDENTIAL

5. THE BEST SUGGESTION I CAN MAKE IS THAT YOU SHOULD CONSIDER ADDING A WRITTEN MESSAGE TO YOUR ORAL WARNINGS TO SHULTZ. PERHAPS LORD COCKFIELD SHOULD REINFORCE IT WITH ONE TO DOLE. AT THIS DISTANCE, I AM NOT SURE WHAT VIEW YOU AND YOUR COLLEAGUES TAKE OF THE PROSPECTS FOR THE CASE AND THEIR POLITICAL REPERCUSSIONS BOTH DOMESTICALLY AND ON THE ANGLO/AMERICAN RELATIONSHIP. QUITE CLEARLY WE ARE GOING TO GET NOWHERE ON THE OFFICIAL LEVEL. THE ONLY HOPE IS TO APPLY POLITICAL PRESSURE ON POLITICAL GROUNDS. IN THE BELIEF THAT AN OUNCE OF HELP IS WORTH A TON OF ADVICE, I HAVE TRIED MY HAND AT A COCKSHY DRAFT IN MY IFT. ON THE TIMING, THE QUICKER THE BETTER, IF POSSIBLE BEFORE THE DOT TAKE THEIR DECISION TO PROCEED. THIS MEANS A MESSAGE ON MONDAY 21 MARCH. IN ADDITION, MR PETER REES WILL BE IN WASHINGTON AT THE END OF NEXT WEEK ON OTHER BUSINESS AND WILL BE ABLE TO REINFORCE ANY MESSAGE YOU AND LORD COCKFIELD CHOOSE TO SEND.

FCO PLEASE ADVANCE TO KNIGHTON (DOT).

WRIGHT

ADVANCED AS REQUESTED

LIMITED
MAED
NAD
MR THOMAS
MR ADAMS
SIR IAN SINCLAIR
MR EVANS

COPIES TO
MR FORTNAM
MR HEALEY
MR KNIGHTON
} IAT DOT
MR AUST LEGAL ADVISER

DEPARTMENT OF TRADE 1 VICTORIA STREET LONDON SW1H 0ET Telephone 01-215 7877

cc PS/PUSS
PS/Secretary
Mr Beckett, Sols
Mr Sunderland, OT 2
Mr Blanks, CAP
Mr Healey, OT 2
Mr Bourke, OT 2
Mr Fortnam, IAT

From the Secretary of State

Michael Scholar Esq
Private Secretary to the Prime Minister
10 Downing Street
London, SW1

March 1983

Dear Michael,

UNITED STATES GRAND JURY INVESTIGATION OF NORTH ATLANTIC AIR TRANSPORTATION

1 Colin Walters copied to you his letter to me of 1 March referring to a meeting at which Sir Adam Thomson had expressed his concern to the Home Secretary about recent developments in the United States affecting British Caledonian.

2 You may like to know that the talks last week between the United States Justice Department and Department of Trade and FCO officials referred to by Sir Adam resulted in agreement to hold a further round of consultations in Washington on 15 March and that in the meantime no subpoena will be issued. In view of Sir Adam's concern, the Prime Minister will also be reassured to know that had the talks failed, contingency arrangements had been made for Lord Cockfield, who is taking a close interest in this matter, the Foreign Secretary and our Ambassador in Washington to intercede with the United States government.

3 The Attorney General will have noted that the note by British Caledonian which Sir Adam Thomson handed to the Home Secretary sought an intervention by the Government in the civil litigation in the High Court in which BCal have sought an order restraining Laker from proceeding with the prosecution of his civil antitrust suit in the United States. There is to be a hearing on 21 March. Such an intervention could, of course, only be by the Attorney General, who did intervene a few years ago in the antitrust litigation by Westinghouse against RTZ (the uranium case). However, since Sir Adam spoke to the Home Secretary, British Airways and BCal have obtained some further interim relief from the courts and for the moment they are not pressing the question of an intervention. The airlines have not so far established grounds on which the Attorney General could be asked to consider an intervention - this is not like the uranium case, a straightforward extraterritoriality matter. We shall, however, keep this aspect under review.

4 Although the United States Department of Justice have been headed off for the moment, the issue is indeed potentially serious, both as regards the implications for our airlines and United States/United Kingdom government relations, and it is too soon to predict the outcome.

From the Secretary of State

5 I enclose a background note, primarily for the Attorney General's use, but which you, Roger Bone and Colin Walters, to all of whom I am copying this, may also like to see - though I do not suggest you should trouble the Prime Minister with it at this stage. I am copying this also to James Nursaw (Attorney General's Office)

Yours sincerely,

JOHN RHODES
Private Secretary

GRAND JURY INVESTIGATION OF NORTH ATLANTIC AIRLINE OPERATIONS

The projected US Grand Jury investigation of North Atlantic airline operations has to be seen against the background of the private one billion dollar treble damage anti-trust suit launched a few months ago in the United States courts by the Laker liquidator, undoubtedly prompted by a US law firm which previously handled Laker's affairs in the US. The allegations in this suit are (a) conspiracy by Pan Am, Trans World Airways and British Airways to adopt pricing policies designed to drive Laker out of business and (b) collusive pressure by international airlines including British Caledonian, on McDonnell Douglas to withdraw from a financial rescue package and thereby precipitate Laker's downfall. Since this suit was launched there has been something of a tug of war between the US District Court of Washington DC and the English court, as to jurisdiction. The Midland Bank, who were threatened by the liquidator with being joined in the US case, have obtained an interim injunction preventing this pending trial of the issue in the UK; Mr Justice Parker in granting the injunction commented in scathing terms on the allegations in relation to the Midland Bank. The two British airlines have succeeded in obtaining temporary injunctions preventing the liquidator from proceeding further in the US Court: a hearing on whether these injunctions should be continued pending trial of the issue in the UK is set for 21 March. The airlines' case on the issue of jurisdiction is that the claim of the English court is superior and that pursuit of the claim in the English court would avoid offensive elements of US law, including the contingency fee system, the treble damages aspect, the discovery process and the inability of a successful defendant to recover his costs from an unsuccessful plaintiff. When the Midland Bank injunction

was obtained the Bank of England supported the case with an affidavit setting out certain public policy arguments; rather different public policy arguments may be valid in support of the airlines' case on the allegations relating to fares.

2 The decision of the US Department of Justice (DoJ) to launch a Grand Jury criminal antitrust investigation, appears to derive from the private suit. There is one new alleged mischief - namely a conspiracy by BA, Pan Am, TWA and Laker to fix fares in the period when Laker was successfully operating. Despite probing, the DoJ have been reserved about the nature of their information about these allegations and we have reached no view about their validity as regards the facts. (Note: We have agreed with the Department of Justice that the content (as distinct from the fact) of their consultations with us will be treated in the strictest confidence: any leakage, especially of the allegations, to the airlines would seriously damage our ability to influence the course of US action).

3 None of these allegations entails extraterritoriality: broadly speaking, the US has a claim to territorial jurisdiction. However, in our view airline pricing arrangements are governed by a bilateral treaty (the Bermuda 2 Air Services Agreement) and against that background there are strong arguments against the unilateral action, entailing possible criminal sanctions, proposed by the US Government. There are also wider arguments, which apply equally to the non-pricing allegation, relating to the appropriateness of the US Government narrowly pursuing

anti-trust cases, especially on the basis of criminal sanctions, without proper regard for international considerations.

4 There are therefore treaty and other grounds why the DoJ should not proceed in this way; two of the three allegations are in any event being pursued in private litigation. The implications for our airlines are wide ranging and grave not only in the Federal antitrust proceedings but also because of the way in which these could encourage further private treble damage suits; and in the political context (pipeline etc) there could be another serious case of US antitrust enforcement harming UK/US relations.

5 It has been made clear to the US that HMG is fully prepared to consider valid US concerns constructively on a bilateral inter-governmental basis. The further discussion will be pursued firmly, but the Department of Justice enjoys considerable independence on matters of antitrust enforcement and the outcome cannot be predicted at this early stage.

Department of Trade

Legal procedure

I thought he said the remark on Thursday evening.

Prime Minister

MCS 18/3

PRIME MINISTER

BRITISH CALEDONIAN - ANTI-TRUST ACTION BY LAKER LIQUIDATION

I have considered, with the assistance of experienced Counsel, the suggestion made in Sir Alan Thomson's letter to you of 15 March that I should intervene in the current proceedings in the English Courts, to support the grant of an injunction restraining the liquidator from continuing with the U.S. action. As you know, I am of course most anxious to assist British Caledonian. The question is finding the best way to do this. I have come to the view that an intervention, in the absence of a request from the Judge in this case and until we know the full facts, could well be counter-productive and might make matters worse rather than better for British Caledonian. I would not want any direct intervention to misfire. I am therefore writing to the Judge informing him that, until I have more information available to me about the details of the case, I have formed the view that it would not be appropriate to intervene but that should the Judge consider that he would be assisted by my participation on the questions of public policy and international relations which arise, I would be glad to assist. This course would ensure that our participation would not be counter-productive and would of course not exclude our participation in any appeal from an unfavourable ruling from the Judge.

I am copying that letter to British Caledonian and the other parties.

I am copying this minute to the Secretary of State for Trade.

18 March 1983

MH

FILE RM

cc. FCO

10 DOWNING STREET

From the Private Secretary 15 March, 1983

I enclose a copy of a letter the Prime Minister has received from Sir Adam Thomson, Chairman of British Caledonian.

I should be grateful if you could let me have a draft reply for the Prime Minister's signature by Friday, 25 March.

I am sending a copy of this letter and its enclosure to Henry Steel, (Law Officers' Department).

J. Whitlock, Esq.,
Department of Trade

10 DOWNING STREET

From the Private Secretary

15 March, 1983

I am writing on behalf of the Prime Minister to thank you for your letter of 15 March. This is receiving attention and a reply will be sent to you as soon as possible.

W. F. S. RICKETT

Sir Adam Thomson, CBE.,

Prime Minister
I have asked the Offices of Lord Cockfield and the Attorney General for a draft reply.
CDP
15/3

cc FCO

British Caledonian

Caledonian House
Crawley West Sussex
RH10 2XA England

Telephone: Gatwick (0293) 27890
Cables: Scotair Gatwick Telex: 87161

Sir Adam Thomson, C.B.E.
Chairman

STRICTLY PRIVATE & CONFIDENTIAL

15th March, 1983.

The A.G. spoke to me this evening (Wed.) He intends to write to you tomorrow. MCP

The Rt. Hon. Margaret Thatcher, MP,
Prime Minister,
10 Downing Street,
London SW1.

Dear Prime Minister,

1. I am writing to you personally because B.CAL's continued existence and vital aspects of Britain's sovereignty are threatened by the recent anti-trust actions in the United States arising out of the Laker collapse. I am convinced that firm Government action in this country can do much to avert these threats but only if immediate and effective action is taken.

2. I will try to summarise the current position.

   (a) Last November U.S. lawyers acting for Laker, and financed entirely by contingency fees, brought a huge anti-trust action against B.CAL and other airlines, alleging a conspiracy to drive Laker out of business and claiming one thousand million dollars in treble damages.

   (b) The U.S. complaint alleges that the airlines conspired to agree to artificially low prices to injure Laker and to sabotage the financial negotiations designed to rescue it early in 1982.

   (c) B.CAL utterly repudiates these allegations. It conspired with no-one, indeed it did not even fly any Laker U.S. route. But, most important for present purposes, its fares were approved by the Civil Aviation Authority within the framework of the Bermuda II Agreement: and in any event the fare levels of the scheduled airlines in competition with Laker were fully supported at the time by the Civil Aviation Authority and the Department of Trade. The financial negotiations for the rescue of Laker were conducted under the auspices of the Bank of England, and failed because the key lenders were not prepared to provide the open-ended guarantees which were required by the Civil Aviation Authority in the light of the sharp deterioration in Laker's financial position.

.../...

(d) However well founded B.CAL's defence, the civil action in the United States constitutes a great threat, because to defend it will require a vast expenditure of man hours and money - given Laker's sweeping extra-territorial discovery demands. Under the U.S. system B.CAL's costs cannot be recovered even if it is wholly successful. Since the case likely will be fought before a jury, there is always the chance, in addition, of an unfavourable result on the merits.

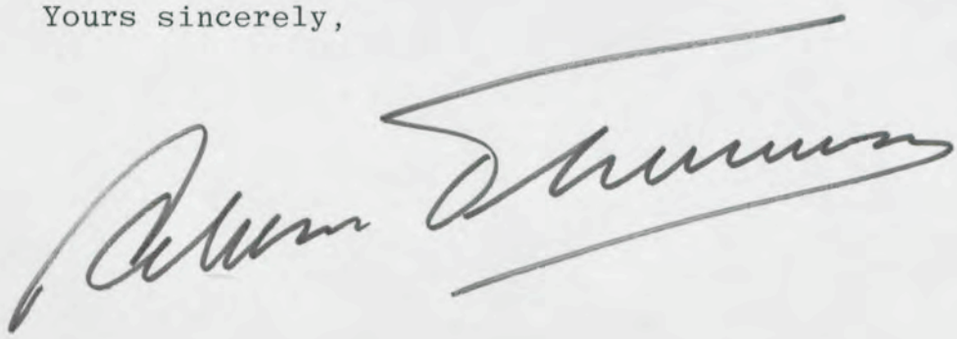
3. The most important recent development is that the Department of Justice has announced that it is to institute a Grand Jury investigation into these very same matters. This, if it goes ahead, will be a criminal investigation of the actions of British airlines conducted outside the United States and in relation to matters in which they were acting with the full approval of the British Government. It is not easy to imagine a more flagrant breach of British sovereignty. Moreover, a criminal proceeding or continuance of the civil action could also spark ruinous contingent fee treble damage suits by airline passengers.

4. What can be done? There are two areas in which the British Government can take effective action:-

(a) With regard to the Grand Jury investigation, officials of the Department of Trade have worked hard to have the matter placed in suspense pending further discussions in Washington this week. These diplomatic efforts are designed to persuade the U.S. authorities to halt the investigation insofar as it relates to British airlines. But if these negotiations fail and the investigation goes forward, it will be extremely difficult to stop it, even if the U.S. President intervenes. It is, therefore, absolutely essential for the highest levels of Government to be ready to intervene with the U.S. President if the negotiations in Washington this week are not successful.

(b) So far as the civil proceedings are concerned, B.CAL is applying to the English Court for an injunction to restrain Laker Airways and its Liquidator, which are subject to its jurisdiction, from continuing with the U.S. action. Midland Bank has already succeeded in obtaining a similar order to prevent it being joined, but the application has many novel aspects, has been condemned by the Judge in the U.S. action, and cannot be guaranteed to succeed. In the similar case a few years ago involving Westinghouse, the Attorney General intervened to support the position of RTZ, and B.CAL has asked the Department of Trade to invite the Attorney General to express HMG's interest in this matter and its position on the violation of British sovereignty to the English Court. I hope that you can support the intervention of the Attorney General in the current proceedings.

Yours sincerely,



DEPARTMENT OF TRADE 1 VICTORIA STREET LONDON SW1H 0ET Telephone 01-215 7877

Legal Procedure 2

Pre Murter:

You may like to be aware of this. The Department of Justice is proposing a Grand Jury investigation of North Atlantic Airline operations, following allegations by Laker of collusion amongst its competitors; in particular British Caledonian. This letter describes steps being taken to lead the Americans off.

TL 8/3

CONFIDENTIAL

From the Secretary of State

Michael Scholar Esq
Private Secretary to the Prime Minister
10 Downing Street
London, SW1

8 March 1983

Dear Michael,

UNITED STATES GRAND JURY INVESTIGATION OF NORTH ATLANTIC AIR TRANSPORTATION

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CONFIDENTIAL

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Yours sincerely,

JOHN RHODES
Private Secretary

GRAND JURY INVESTIGATION OF NORTH ATLANTIC AIRLINE OPERATIONS

The projected US Grand Jury investigation of North Atlantic airline operations has to be seen against the background of the private one billion dollar treble damage anti-trust suit launched a few months ago in the United States courts by the Laker liquidator, undoubtedly prompted by a US law firm which previously handled Laker's affairs in the US. The allegations in this suit are (a) conspiracy by Pan Am, Trans World Airways and British Airways to adopt pricing policies designed to drive Laker out of business and (b) collusive pressure by international airlines including British Caledonian, on McDonnell Douglas to withdraw from a financial rescue package and thereby precipitate Laker's downfall. Since this suit was launched there has been something of a tug of war between the US District Court of Washington DC and the English court as to jurisdiction. The Midland Bank, who were threatened by the liquidator with being joined in the US case, have obtained an interim injunction preventing this pending trial of the issue in the UK: Mr Justice Parker in granting the injunction commented in scathing terms on the allegations in relation to the Midland Bank. The two British airlines have succeeded in obtaining temporary injunctions preventing the liquidator from proceeding further in the US Court: a hearing on whether these injunctions should be continued pending trial of the issue in the UK is set for 21 March. The airlines' case on the issue of jurisdiction is that the claim of the English court is superior and that pursuit of the claim in the English court would avoid offensive elements of US law, including the contingency fee system, the treble damages aspect, the discovery process and the inability of a successful defendant to recover his costs from an unsuccessful plaintiff. When the Midland Bank injunction

was obtained the Bank of England supported the case with an affidavit setting out certain public policy arguments; rather different public policy arguments may be valid in support of the airlines' case on the allegations relating to fares.

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anti-trust cases, especially on the basis of criminal sanctions, without proper regard for international considerations.

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Department of Trade

GW

From: THE PRIVATE SECRETARY

HOME OFFICE
QUEEN ANNE'S GATE LONDON SW1H 9AT

1 March 1983

TR
3/3

Dear John

US GRAND JURY INVESTIGATION OF NORTH ATLANTIC AIR TRANSPORTATION

Sir Adam Thomson, Chairman of British Caledonian, called on the Home Secretary yesterday afternoon. He mentioned that Department of Trade Ministers had been unavailable to see him during the day.

Sir Adam explained the background to the Grand Jury investigation arising out of the charges raised by Laker Airways in the American Civil Courts. The consequences of the course of action being pursued by the Grand Jury for British Caledonian, other European airlines and European conglomerate companies in general were potentially very serious. It was therefore agreed between British Caledonian and the Department of Trade that everything possible should be done to transfer consideration of the Laker charges from the American courts to those in Britain.

Although British Caledonian had a high respect for the Department of Trade officials dealing with the matter, they were most concerned that if the talks being held with the US Justice Department today failed, little time would remain for the Secretary of State for Trade, the Attorney General or possibly even the Prime Minister to intercede with the US Government before the Grand Jury subpoena, expected to issue this coming Friday.

... Sir Adam handed the Home Secretary the attached documents concerning the case. The Home Secretary thanked him for explaining the background, and undertook to draw the matter to the attention of Lord Cockfield and the Attorney General as a matter of urgency.

I am copying this note and enclosures for information to Michael Scholar (10 Downing Street) and Jim Nursaw (Attorney General's Office).

Yours sincerely

C J WALTERS

John Whitlock, Esq

U.S. Department of Justice

Washington, D.C. 20530

EMS:PBK
60-384-165

25 FEB 1983

BY HAND

British Caledonian Airways, Limited
c/o Leonard N. Bebchick, Esq.
Suite 1102
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Grand Jury Investigation of North Atlantic Air Transportation

Dear Mr. Bebchick:

The Department of Justice has recently received inquiries regarding a grand jury investigation into alleged price fixing and other joint efforts to eliminate competition in the air transportation of passengers over the North Atlantic. In light of these inquiries, this letter is to confirm that such an investigation has been authorized and that the Department presently intends to issue a grand jury subpoena to British Caledonian Airways, Limited. As a courtesy to the company, I have enclosed an advance copy of the schedule of documents that we presently intend to subpoena. This schedule of documents should apprise the company of the nature of our grand jury investigation and the documents which the Department presently regards as relevant to the investigation. The company is not obligated to produce documents responsive to this schedule, or commence a search for such documents, until a subpoena is issued.

If you have any questions about this matter, feel free to contact me at 724-6473.

Sincerely yours,

Peter B. Kenney, Jr.
Attorney
Transportation Section
Antitrust Division

Enclosure

SCHEDULE OF DOCUMENTS

I.

DEFINITIONS

1. "Company" means British Caledonian Airways, Limited, its predecessors, affiliates, subsidiaries, and parent organization, and all present and former agents, employees, officers and directors thereof.

2. "Documents" means the originals of all writings of every kind, including but not limited to letters, telegrams, telexes, memoranda, notes, reports, studies, speeches, calendar or diary entries, travel records and vouchers, minutes of meetings, conferences, and telephone or other conversations or communications, promotional materials, pamphlets, charts, lists, directives, records, and drafts. The term "documents" also includes tape recordings of meetings, conferences and telephone or other conversations or communications, as well as data processing machine printouts and tapes, or any other mechanical means of storing or recording information, which are in the possession, custody or control of the Company. The term "documents" also includes copies, reproductions or film impressions of any of the aforementioned writings or documents the originals of which are not in the possession, custody or control of the Company. The term "documents" also includes copies, reproductions or film impressions which are not identical duplicates of the originals because of markings of

any kind which appear on the copies, reproductions or film impressions but not on the original.

3. "North Atlantic market" means the market for scheduled airline passenger service between any point in the United Kingdom and any point in the United States.

4. "Contact" means any meeting, conference, discussion, conversation, or communication, whether in person, by phone or otherwise, between or among any persons.

5. "Laker" means Laker Airways Limited.

6. "Laker's debt" means any debt or monies owed, whether secured or unsecured, by Laker. Laker's debt includes, but is not limited to, loans financing the purchase of McDonnell Douglas and Airbus Industrie aircraft, and any lines of credit available or held in reserve for Laker.

7. "Fare adjustment" means any change in fare or any material change in capacity, scheduling, services or conditions applicable to any fare.

8. "Removal" means the destruction or mutilation of documents previously in the possession, custody, or control of the Company, and the taking and carrying away, whether authorized or not, of documents from the possession, custody, or control of the Company.

9. "Alteration" means the alteration, modification, censorship, or the changing in any other manner, of documents which are or were in the possession, custody, or control of the Company.

10. "Person" means any individual, individual proprietorship, partnership, corporation, unincorporated association or other entity.

11. "Relate to" means refer to, show, discuss, describe, reflect, identify, explain, contain or in any way pertain to, in whole or in part, directly or indirectly.

12. All uses of the conjunctive should be interpreted to include the disjunctive and vice versa. Words in the singular should be read to include the plural and vice versa.

II.

TIME PERIOD

This Subpoena requires production of documents prepared, sent, received, dated or in effect at any time between January 1, 1977 and the date of service of this Subpoena.

III.

CLAIM OF PRIVILEGE

If any documents called for herein are withheld by reason of the assertion of any legally recognized privilege, furnish a list of such materials in which each document withheld is identified separately. For each document withheld, furnish the date of its preparation, the persons preparing, signing, and receiving it, the persons to whom copies were furnished, a general description of the contents of each document, and a brief statement of the specific reasons justifying the assertion of privilege.

IV.

INSTRUCTIONS

1. This Subpoena requires production only of documents located in the United States at the time of service of this Subpoena. To the extent the Company possesses documents responsive to this Subpoena but located outside of the United States at the time of service of this Subpoena, these documents need not be produced.

2. Production of documents responsive to Part V, paragraphs 3, 4, 5 and 12 is suspended at this time, but the documents must be preserved during the pendency of the investigation and be available for prompt production if requested by the Department of Justice.

3. The Company may elect, pursuant to arrangements made with the Department, to submit summaries or lists containing the information that would be disclosed in the documents required to be produced by Part V, paragraph 2. Such summaries or lists shall be in lieu of the documents specified in this paragraph and must be prepared under the personal direction of an officer or supervisory employee of the Company, and must be certified in writing by such officer or supervisory employee to be complete and accurate. Documents providing the basis for any such summaries or lists must be preserved during the pendency of the investigation and be available for prompt production if requested by the Department.

4. If any portion of a document is responsive to this Subpoena, the entire document must be produced.

5. Each document made available in compliance with this Subpoena should be marked or assembled so as to indicate the location and identity of the particular file in which it was found, and the name of the individual who was custodian of such file. Alternatively, the Company may prepare separate lists indicating, for each document made available, the location and identity of the particular file in which it was found and the name of the individual who was custodian of such file.

6. Documents that in their original condition were stapled, clipped or otherwise fastened together shall be produced in such form.

7. Each page produced should be marked with the initial "J" and numbered consecutively.

8. The Company may elect to send documents responsive to this Subponea directly to the offices of the Department on or before the return date in lieu of personally producing the documents before the grand jury. If the Company elects to send documents directly to the Department, the officer(s) or director(s) responsible for complying with this Subpoena must execute the enclosed affidavit before a notary public. This affidavit must accompany the documents being sent. Documents should be mailed by registered mail to Peter B. Kenney, Jr., P.O. Box 481, Washington, D.C. 20044, or delivered prepaid to Mr. Kenney in Room 8115, Old Star Building, 414 Eleventh Street, N.W., Washington, D.C.

V.

DOCUMENTS TO BE PRODUCED

1. All documents which show the organization of the Company, including but not limited to organizational charts, employee directories, and company telephone directories.

2. Such documents as show the name, last known address (business and home), business telephone number(s) (direct, indirect or personal), home telephone number(s), positions, dates of service in each position, termination date (if any), and present business affiliation (if not with the Company) of:

(a) all officers and directors of the Company, with indication of all outside business affiliations of the officers and directors;

(b) each individual manager or supervisor within the Company whose duties include or included responsibility for:

(i) pricing, marketing, scheduling, or routing in the North Atlantic market;

(ii) contact with any person(s) employed by another airline regarding fares in the North Atlantic market;

(iii) approving, disapproving, or considering any purchase or lease of aircraft for use by the Company; or

(iv) contact with any person(s) employed by any manufacturer of aircraft or aircraft parts.

(c) all secretaries and executive assistants who worked under the immediate supervision of any of the persons named in response to subparagraphs (a) and (b) above.

3. All documents which show the transportation, hotel, entertainment and other expenses incurred on behalf of the Company by each person named in response to subparagraphs 2(a) and 2(b) above. (See Part IV, paragraph 2.)

4. All appointment records and books, reminders, note pads, telephone call books, calendars, diaries, day books, logs, visitors' registers, and similar documents made, kept and used in connection with Company business, by or for each person named in response to subparagraphs 2(a) and 2(b) above. (See Part IV, paragraph 2.)

5. All telephone records, toll records, telephone bills or receipts, and all other documents which relate to any telephone calls made or received by the Company. (See Part IV, paragraph 2.)

6. All documents which relate to Laker, including but not limited to documents which relate to:

(a) Laker's actual or proposed air transport routes, services and fares;

(b) competition between the Company and Laker;

(c) competition between any airline and Laker;

(d) the effect of Laker's actual or anticipated competition on the company or on any other

airline with regard to their air transport services, fares or profits;

(e) Laker's debt;

(f) the financial condition of Laker;

(g) the marketability, saleability or fair market value of any aircraft or aircraft part known, believed or suspected to be owned, leased or operated by Laker.

(h) any contact with any person(s) regarding Laker.

7. All documents (excluding invoices) which relate to purchases or leases, options to purchase or lease, proposals to purchase or lease, or orders to purchase or lease McDonnell Douglas or General Electric aircraft or aircraft parts which occurred or were pending at any time between June 1, 1981 and March 1, 1982.

8. All documents which relate to competition between or among any airlines in the North Atlantic market.

9. All documents which relate to any fare adjustment made by the Company or by any other airline in the North Atlantic market, including but not limited to documents which relate to:

(a) the reason for the fare adjustment;

(b) the anticipated and/or actual cost of service under the fare adjustment;

(c) the anticipated and/or actual revenue earned under the fare adjustment;

(d) the anticipated and/or actual profits earned under the fare adjustment;

(e) the anticipated and/or actual market share achieved under the fare adjustment;

(f) the anticipated and/or actual response of any airline to the fare adjustment;

(g) the anticipated and/or actual effect of the fare adjustment on the Company or on any other airline;

(h) instructions or notifications to tariff filing agents, travel agents, or advertisers regarding the fare adjustment; or

(i) contact between or among any airlines regarding the fare adjustment.

10. All documents which relate to meetings of the International Air Transport Association (IATA) which took place on or around the following dates: July 11-15, 1977; July 22, 1977; August 10-12, 1977 (Geneva, Switzerland); and October 1977 (Cannes, France).

11. All documents which relate to a meeting of the North Atlantic Traffic Conference of IATA which took place in Hollywood, Florida in late 1981 or early 1982.

12. All documents not otherwise made available in compliance with this Subpoena which were produced or which were requested to be produced in Laker Airways Limited v. Pan American World Airways, Inc., et al., Civil Action No. 82-3362 (D.D.C.) as of the date of service of this Subpoena. (See Part IV, paragraph 2.)

13. All documents which relate to:

(a) the method of filing documents in the possession, custody, or control of the Company, establishing or revising policies on the method of filing documents, or otherwise pertaining to the method of filing documents, including but not limited to any index of the Company's document filing system;

(b) the retention of documents in the possession, custody, or control of the Company, establishing or revising policies on document retention, or otherwise pertaining to the retention of documents;

(c) the removal of documents falling within the description of any paragraph of this Subpoena, including, but not limited to, the identity of the person or persons authorizing each such removal, the identity of the persons participating in the decision to effect each such removal, the means used to accomplish each such removal, and any other circumstances concerning each such removal; or

(d) the alteration of documents falling within the description of any paragraph of this Subpoena, including, but not limited to, the identity of the person or persons participating in the decision to effect each such alteration, the date

of each such alteration, the identity of the persons carrying out each such alteration, and any other circumstances concerning each such alteration.

14. All documents which, but for alteration, would have been produced pursuant to any paragraph of this Subpoena.

15. All documents which relate to the legality or appropriateness, under the antitrust laws of the United States, of the activities of the Company with respect to the subject matter of any of the documents requested in this schedule.

US GRAND JURY INVESTIGATION INTO LAKER CHARGES OF ALLEGED PRICE FIXING AND OTHER JOINT EFFORTS TO ELIMINATE COMPETITION

On Friday last, BCAL's Washington counsel "as a courtesy to the Company" was served with an advance Schedule of the documents to be supplied in response to a Grand Jury subpoena which, we are told, will be issued this coming Friday. The Justice Department confirms that a Grand Jury investigation has been authorised to enquire into alleged price fixing and other joint efforts to eliminate competition in North Atlantic passenger transportation, principally the charges raised by Laker in its civil antitrust action against BCAL, BA and others in the Federal Court in Washington where it seeks over one thousand million dollars in damages from any one or more of the defendants.

Discussions between the Justice Department and Department of Trade officials on this subject are to be held in London on Tuesday. It is unlikely that the Americans will back off, and any hope of success in that regard requires direct intervention from the White House acting upon the advice of the State Department. Once a Grand Jury commences an investigation, it is virtually impossible to order a halt.

The Schedule of documents requires the production of all materials which relate to Laker (on a worldwide basis) including but not limited to Laker's actual or proposed air transport routes and services, competition between any airline and Laker, and Laker's indebtedness, equipment financing and overdraft and credit facilities (Item V.6). The Schedule also seeks all documents which relate to competition between or among airlines in the US-UK scheduled passenger market

or which relate to any changes in fares, capacity, schedules or the like in that market (Items V.8 and V.9). As a final fillip, the Schedule seeks all documents not otherwise specified therein which have been requested to be produced in discovery demands issued by Laker in its civil antitrust suit (Item V.12)! All documents in existence since 1 January 1977 are sought to the extent that they are located in the United States; as shown below, the latter limitation is more apparent than real.

The Grand Jury investigation thus appears to be inspired by the broad and vague allegations of Laker's civil action which charges that (a) certain defendants (including BCAL) acted to cause Laker's lenders to withhold their support for Laker's financial restructure, and (b) all defendant carriers engaged in predatory pricing practices which drove Laker from the marketplace.

On the latter count, allegations are made specific only as to Pan American, TWA and British Airways. In the recent Midland decision Mr Justice Parker characterised Laker's charges as ones "which savour of either fiction or journalism rather than legal exposition".

We agree. While Mr Justice Parker at Laker's insistence has barred BCAL from making its evidence public, our (and Laker's) response reveals that its charges against BCAL are wholly without substance. Yet, we are confronted with the heavy cost, inconvenience, disruption and risk of a US style far-ranging criminal investigation.

The impending criminal investigation, particularly when coupled with Laker's civil proceeding, stands as the most sweeping and serious assertion of extra-territorial jurisdicsion even attempted by the US Government. As respects critical areas of British public policy, it not only enlarges upon but constitutes a more

fundamental intrusion upon British sovereignty than the Uranium Investigation, the North Atlantic Shipping Investigation or the recent Soviet Pipeline embargo. The United States here is convocating a court of criminal inquiry to review specific decisions of HMG respecting Laker and the relationships between BA/BCAL and Laker. The Americans seek to extend their criminal investigatory process into Britain's regulation of its flag carriers.

Laker's papers filed in its US civil lawsuit and the Schedule to the impending Grand Jury subpoena focus upon three events:

1 The effort to prevent the demise of Laker in which the Bank of England and particularly the Civil Aviation Authority played critical roles.

2 The introduction by British Airways and other carriers in September 1977 of Super Apex, Budget and Standby fares to meet the competitive entry of Laker's New York Skytrain service (Schedule, Item V.10), an action expressly approved by the CAA over Laker's protest. Indeed, the stated intention of the US Civil Aeronautic Board to reject these fares led HMG to despatch a strong diplomatic note (No 210) urging the Americans to allow them to come into effect. The result was that President Carter agreed with HMG and rejected the CAB recommendation. We are now faced with the spectacle of a US criminal Grand Jury undertaking effectively to review and second-guess the wisdom and legality of HMG's actions in this regard and British carrier actions consistent therewith.

3 In the Fall of 1981 the CAA permitted the London-New York carriers to match Laker's fare dollar for dollar. This decision was lauded by Mr Sproat as being in the public interest. Yet Laker challenges and the draft subpoena focuses upon this refusal (Item V.11) by the London-New

York carriers to permit Laker to continue to charge a differentially lower price. In particular, Laker in the civil suit adverts to the statements allegedly made by BCAL and BA at British carrier meetings convoked by a CAA official during IATA fare sessions in Hollywood, Florida. Again, determinations by this Government as to the propriety of pricing decisions between competing British carriers is to be reviewed by an American criminal Grand Jury.

Not only is the scope of the Grand Jury investigation worldwide as to Laker's activities, but its document dragnet is also effectively cast on a worldwide basis. While the Schedule, directed to documents located within America, makes a bow to the RTZ decision proscribing the use of British judicial processes to produce evidence for use by an American antitrust Grand Jury, the pendancy of the Laker civil proceeding in Washington provides an effective means for the Justice Department to reach British company documents wherever located.

Laker has already issued civil discovery demands upon BCAL and the other defendants for virtually all of the documents listed in the Schedule. When these documents (wherever located) are produced to Laker and the other parties to the civil suit, as they must be, they will upon being brought into the United States be caught up by the net of the Grand Jury subpoena being issued to numerous persons including all of the parties to the Laker civil suit. In short; the civil suit, unless restrained, will enable the Grand Jury to secure access to the documents called for which exist in the British files of BCAL and British Airways.

The Grand Jury investigation places BCAL in grave jeopardy if an indictment is returned, notwithstanding BCAL's ultimate vindication. The return of an

indictment will likely unleash a host of contingent fee treple action damage suits from classes of Laker's creditors and passengers who claim injury due to its demise.

WHAT MUST BE DONE

The Criminal Investigation

All possible steps must be taken forthwith to abort the Grand Jury investigation before it gets under way, at least as concerns the British airlines. No justification exists for permitting an American criminal investigation into allegations as to what one or more British carriers may or may not have done to a third British carrier (now in liquidation), particularly as to matters in which HMG played a significant oversight role in the exercise of its important public policy responsibilities for British civil aviation. Such a regrettable and unprecedented spectacle can be averted only by intervention at the highest levels of Government. We are advised that only President Regan can serve to forestall the scheduled commencment this week of the Grand Jury proceeding.

The Civil Suit

HMG should act to halt further action in Laker's civil antitrust suit which could serve to bankrupt BCAL and seriously injure British Airways and the British taxpayers. As noted above, the suit acts as a vehicle enabling the Americans effectively to bypass the barrier against Grand Jury subpoenae erected by the House of Lords in the RTZ decision. Moreover, the pendancy of the criminal proceeding deprives BCAL of its ability effectively to defend the Laker civil suit. For as long as the criminal proceeding is continuing, the British courts will decline to enforce BCAL's requests for subpoenae for the appearance of

British nationals to give evidence at the American trial. The testimony of CAA and Bank of England officials is essential for BCAL to establish that Laker's failure to secure finance was attributable to factors other than the alleged intervention actions of BCAL and other airlines.

BCAL has applied to the High Court for an order restraining Laker from proceeding with the prosecution of his civil antitrust suit; the matter is to be heard on or about 21 March. We contend that an action by one British carrier against another in respect of matters arising and largely occurring in Britain should be tried here. That is particularly the case where the action abroad offends British public policy in a number of vital concerns - a determination that the Laker suit does just that was made by Mr Justice Parker in the recent Midland decision. Among the objectionable features of the Laker civil suit are these:

a The award of punitive treble damages - an award over which the court or the plaintiff has no discretion.

b The retention of Laker's counsel on a contingent fee basis.

c The determination of the issues by a lay jury

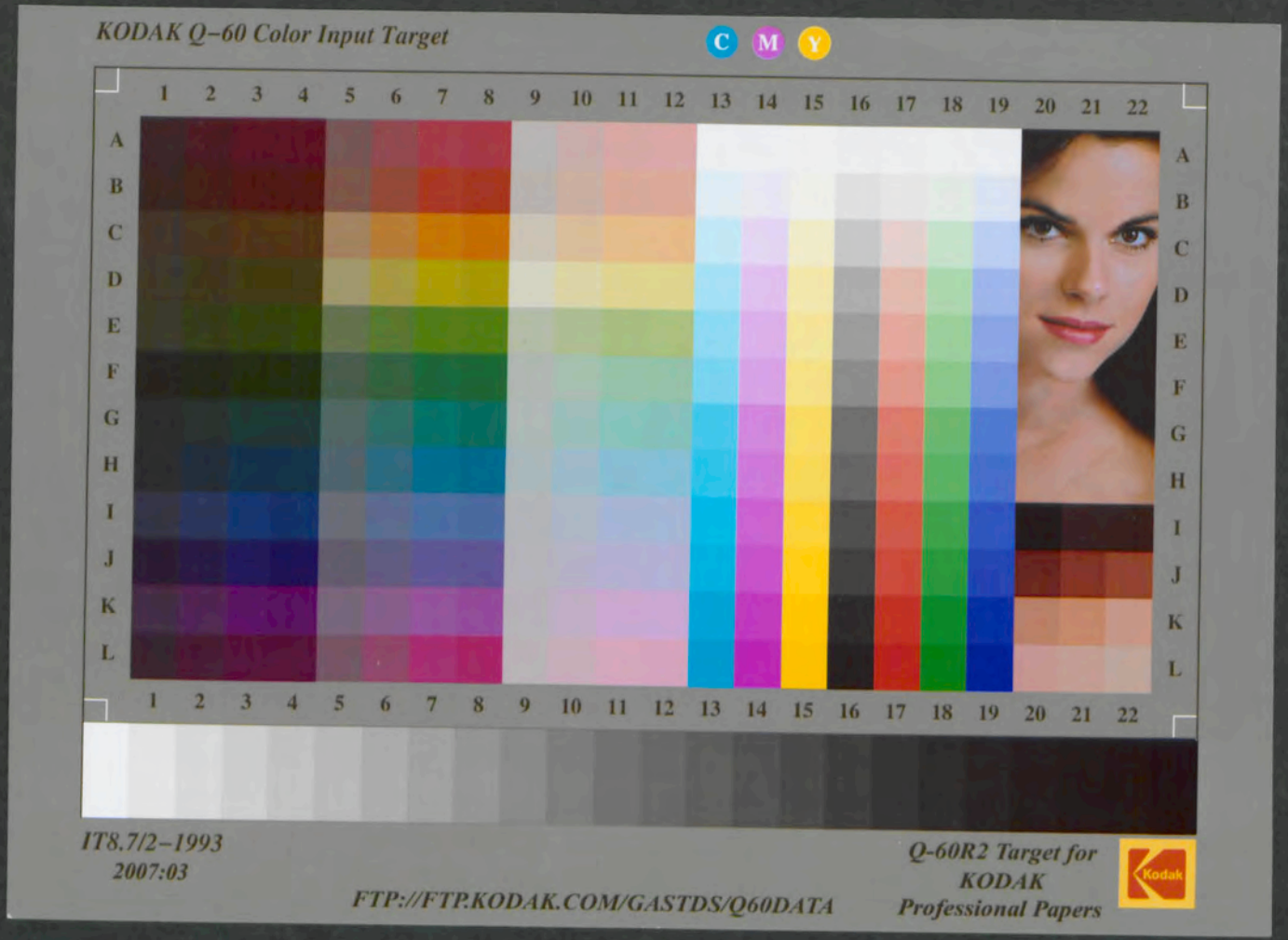
d The immunity of a losing plaintiff from liability for any of the defendant's costs; the converse is not true.

e Sweeping and burdensome discovery concededly conducted as a fishing expedition.

As respects the civil suit, we ask that HMG instruct the Attorney-General to

appear before the High Court in support of our application to restrain further proceedings in America. Laker's complaint charges that the alleged acts of the defendants (all of whom are present in England) constitute a violation of the Sherman Antitrust Act as well as an intentional tort. Laker has been careful to assert only that it may not bring a Sherman Act antitrust suit in England; it has not foreclosed a tort remedy here, and that is where it should be required to seek its day in court.

28 February 1983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