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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

CONFIDENTIAL

CONFIDENTIAL

2514 - 1

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

CONFIDENTIAL

2514 - 1

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 BRITISH 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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NAD
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ERD
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.

-3-

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PS
 PS/LADY YOUNG
 PS/PUS
 SIR C TICKELL
 MR ~~WESS~~ 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 ~~FORBES-FORTNUM~~
 MR ~~STEVENS~~
 MR ROBERTS
 MR ~~SUNDERLAND~~
 MR HEALEY
 MR BECKETT (Solicitors)
 MR ~~AYLING~~
 POWELL
 MR ~~COOPER~~ 10 DOWNING ST
 MR GARDINER, ATTORNEY GENERAL'S OFFICE

DEPT OF TRANSPORT
 DTI

OO FCO (DESKBY 140900Z)

GR 380
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 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

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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.

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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.