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DD 111900Z WASHINGTON

GRS 523

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DESKBY 111900Z
FM FCO 111800Z OCT 84
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 MIPT 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

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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 PREFER 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.

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DD WASHINGTON 111900Z
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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 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 (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

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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

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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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