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1092 - 1

DD 212130Z WASHINGTON
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DESKBY 212130Z
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

CONFIDENTIAL

1092 - 1

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 NECESSARY, 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 UNHELPPFUL 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

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3 .

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