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Dear Geoffrey

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CHANNEL FIXED LINK: COMPENSATION BETWEEN GOVERNMENTS/
COMPENSATION FOR CLOSURE ON GROUNDS OF DEFENCE AND NATIONAL
SECURITY

Negotiations are currently taking place between officials to draft an Anglo/French Treaty on the Channel Fixed Link, the objective being to have a Treaty ready for signature shortly after a decision on the Link is taken by the two Governments in the New Year. I shall be writing to colleagues shortly with a general report on these negotiations, and indicating a number of matters arising from the Treaty on which decisions need to be taken. But there is one matter, that of compensation in the event of Government action to terminate concession, on which we need urgently to give officials instructions so that they can respond to French initiatives in the Treaty negotiations.

A paper by officials describing the problems is annexed. Briefly there are two issues, as follows. First, the "Invitation to Promoters" of a Channel Fixed Link published on 2 April indicated that compensation would be available to promoters in the event of "political" cancellation by either Government. No mention was made of compensation for losses sustained by one Government (as opposed to the promoter) as a consequence of cancellation by the other Government. Such compensation has now been proposed by the French. It would be subject to arbitration and would cover, for example, administration costs and the costs of frontier controls and infrastructure, though the French would prefer the provision to be more widely-drawn. The second point relates to the payment of compensation if either Government either cancels the project or interrupts operation of the Link for reasons of defence or national security. The "Invitation to Promoters" warned that compensation would not be payable in such circumstances. The French now suggest that, both in case of closure and interruption, compensation should be payable comparable to that which would be payable according to normal practice in the case of requisition of civilian property for military purposes.

Officials propose that we agree the principle behind both French proposals. In the case of compensation between Governments I am particularly conscious of the suggestion that it carries a Government financial commitment to the project. But I am equally aware that unless compensation for a breach of the Treaty is explicitly ruled out in the Treaty itself (which the French have made clear they will not accept), we would, in any case, be liable for compensation of this kind under international law. I believe, therefore, that it is in our interests to include this provision in the Treaty specifically in order to limit its application. This will be a matter of negotiation with the French, but at this stage all we need to accept is the principle.

So far as interruption for defence reasons is concerned, the officials' paper recommends that this be treated on a basis comparable to the requisitioning of other civilian facilities for defence purposes. I believe this to be right. On compensation for permanent closure for defence reasons, the officials' paper makes no recommendations. I am personally of the view that the dividing line between a political cancellation and a cancellation for security reasons is dangerously thin and we cannot, in equity, envisage paying no compensation whatever: we can be sure that such a position would have a most damaging effect on the financing of the project. I would see some merit in regarding a "defence" cancellation in the same way as a "political" cancellation, thus recognising that a cancellation for true reasons of national defence is in fact much less likely than an attempt to use defence arguments as a cloak for a political cancellation. But I should welcome colleagues' views.

Our officials are to meet their French colleagues for further discussion of the Treaty on 5 November. It would be helpful to have comments in sufficient time for us to instruct them for their negotiations.

I am copying this letter to the Prime Minister, members of E(A), the Secretary of State for Defence and to Sir Robert Armstrong.

Yours ever

Nicholas

NICHOLAS RIDLEY

CHANNEL FIXED LINK TREATY: PAPER BY OFFICIALS

COMPENSATION BETWEEN GOVERNMENTS/COMPENSATION FOR CLOSURE ON GROUNDS OF DEFENCE OR NATIONAL SECURITY

1. The "Invitation to Promoters" of a Channel Fixed Link, published on 2 April, spelt out the undertaking or the "political guarantee" which the two Governments would give, once the legislation was enacted and the Anglo/French Treaty ratified, against termination by either Government of the promoters' rights under the concession agreement to construct and operate a Link. It was acknowledged that breach of this undertaking would entitle promoters to financial compensation on terms to be set out in the Concession Agreement and that the Treaty would lay down the conditions for the allocation of responsibility for payment of the compensation as between the States.

2. The terms on which promoters are compensated will have to be negotiated in due course but on the allocation of responsibility, Anglo/French Treaty negotiations are particularly well advanced. These and other matters will shortly be submitted for Ministers' approval in the context of a report on progress with the Treaty. There are, however, two related issues, not covered by the Invitation to Promoters on which officials need the views of Ministers as a matter of urgency in order to respond to French pressure in the Treaty negotiations.

Compensation between Governments

3. The first of these is the question of compensation between Governments as a consequence of breach of the political undertaking by either of them. The French have put forcefully the line that if one of the Governments were to terminate the Concession for political reasons not only would the Concessionaires be injured but there would be the probability of injury to the other Government in respect of the other Government's outlay incidental to the Link and in respect of the economic benefits the Link might have brought. In their view the Treaty should recognise this liability, and they have made it clear that their insistence is based on firm collective Ministerial instructions.

4. There is, in practice, no doubt that the two Governments will incur costs in facilitating a scheme, notwithstanding that it is to be a private sector project without public money or Government financial guarantees. On both sides there will be administrative costs in promoting the necessary legislation (as well, of course, as those currently being incurred in preparation

of the Treaty). There will also be incidental additional costs such as those arising from the decisions to offer juxtaposed frontier controls in the country of departure (E(A)85 13th Meeting, 17 July). The most significant costs, however, are likely to arise on infrastructure and here there may well be an imbalance. So far as rail is concerned the only UK investment would be by British Rail, not the Government, and BR could expect - by virtue of their contracts with the concessionaires - to be beneficiaries of any compensation paid to the concessionaires. The position is broadly similar on the French side though it is possible that the Government itself will incur direct expenditure on land acquisition for a TGV line. The position on roads is more ambiguous in that we have made it clear that the major road improvements associated with a Link would be needed anyway to cope with the projected increase in cross-Channel traffic. We could not therefore argue that abortive Government expenditure had been incurred in respect of these schemes. While the French position is broadly comparable we cannot rule out the possibility of specific infrastructure improvements on the French side.

5. It is prima facie reasonable that where Governments undertake to one another to pursue a particular course - to permit the construction of a Fixed Link - they should each be under an obligation to compensate the other party for the consequences of not performing that undertaking. Indeed unless specific provision were made to exclude liability between Governments, the Treaty would naturally be construed as creating obligations between the Governments and thereby automatically bringing the normal financial consequences of breach, even if this were not acknowledged explicitly. In these circumstances it might be desirable to recognise the obligations and, by so doing, to limit them. The French are very mindful of the 1975 decision of the British Government not to proceed with the Channel project (although the decision was taken before the Treaty was ratified). They see provision in the Treaty for compensation between Governments as a measure which will help to bind future Governments on both sides to their commitments to the Link and reduce the chances of a political cancellation by either party. There is much in this argument. It could also be said that it was in the interests of the British Government to ensure that there is the possibility of obtaining compensation if the French were unilaterally to terminate the Concession. Termination might occur at a time when the ferry services would have considerably decreased their business leaving the United Kingdom with less access to continental Europe than exists at present.

6. Against this, however, there is the important presentational problem of acknowledging on the face of the Treaty a contingent financial liability by the Governments to a project which has

been clearly stated to be a private sector project. There is the problem of the imbalance between the two Governments' expenditure outlined in paragraph 4 above: and any such provision for compensation between Governments could lead, in the event of termination, to extended acrimonious argument over the detailed claims. Finally there is the problem of scope and definition. It is clearly in the Government's interest that any definition should seek as far as possible to limit the obligation to direct expenditure by the Governments in relation to the Link, and thus to limit the freedom of the arbitration which would decide on any award. In other words we should be covering only expenditure such as direct infrastructure costs. This would, of course, ignore the major economic costs of cancellation and would risk heightening French suspensions about our long-term intentions.

7. In sum, therefore, unless it is explicitly ruled out in the Treaty, the principle of compensation between Governments for breach of a Treaty applies. The French, who have consulted their Ministers on this, will not agree to its exclusion and wish to have it made explicit. It is in our interests to agree to this and thereby to limit its application.

Compensation for Defence and National Security

8. The other issue to have arisen in connection with compensation in the course of Treaty negotiations is the question of defence and national security. The "Invitation to Promoters" makes clear that neither termination of the concession nor interruption of operation for these reasons constitutes a breach of the political guarantee. There is therefore no implied commitment to compensate promoters in either case. The point has been made by the French, however, and we need to consider it. To do so we should distinguish clearly between "closure", including cancellation during construction, and "interruption", although the French have made it clear that they would like to see compensation payable in both cases.

9. So far as interruption is concerned, we see no reason for it to be considered as a breach of the Concession agreement: both Governments would expect to be able to use the link on a temporary basis for defence purpose, for instance, as they would have to requisition ships. The French, in taking this view, have pointed out that they are obliged under national laws to provide compensation for requisitioning private property of any kind for defence reasons, and wish to apply this explicitly to a Link. There is no general United Kingdom legislation in force which provides for compensation in such circumstances although, in the event of war, such legislation would usually be enacted and

compensation would be paid. Nevertheless, to make the commitment explicit would be to give favourable treatment to the Fixed Link. Overall, in view of French insistence that the position should be formally in conformity with their law, officials consider that nothing would be lost by making explicit in the Treaty an obligation to give the Fixed Link comparable treatment to that applying to other undertakings in these fairly exceptional circumstances. No right of compensation to the other Government would however arise.

10. The position on permanent closure of the Link is less simple. There are three main options - to retain the right of permanent closure under the Concession agreement without compensation; to retain the right of closure but to accept an obligation to treat the Link on a basis similar to that accepted for interruption; or to acknowledge that closure for defence and security reasons is effectively a breach of the "political guarantee" (despite its being made clear in the Invitation to Promoters that it will not be so considered) and that the normal compensation provisions of the Concession apply.

11. Refusal to pay compensation is compatible with our strict national obligations; but it does not meet French obligations and failure to provide for compensation in the Treaty would be vigorously opposed by the French. It would also be a matter of the greatest concern to promoters - not least because "defence, and national security" is sufficiently difficult to define as to leave open a suspicion that it would provide a convenient "bolt-hole" for either Government wishing to cancel.

12. Acceptance of an obligation to treat the Link on a basis similar to that applying nationally to other transport undertakings would probably satisfy the French. It is difficult however to establish appropriate analogies (requisitioning being quite a different case) and this option could be perceived as hollow, even meaningless, by promoters. But it would permit a Government to act unilaterally on compensation in contrast to the possibly more expensive situation if compensation under the terms of the Concession were accepted. Acceptance of the 'national' approach would also remove definitional problems and uncertainties since closure for "defence and national security" reasons would no longer need to be defined. However it is difficult to deny that the effect on promoters would be the same as the effect of permanent closure for other reasons and they may argue that there is no obvious reason in equity why they should not be compensated on the same basis.

Conclusions

13. In sum, therefore, Ministers are asked:-

- (a) to agree to the principle of compensation between Governments for "political" termination subject to limiting its scope in negotiation;
- (b) to accept that compensation should be paid in the case of interruption of the Link for reasons of defence or national security on the basis normally applied to the requisitioning of civilian facilities;
- (c) to consider whether, in the case of permanent closure of the Link for reasons of defence or national security -
 - (i) no compensation should be paid;
 - (ii) compensation should be payable as in (b) above, it being clear that such closure does not constitute a breach of the political guarantee;
 - (iii) compensation should be payable under the terms of the Concession as for any other breach of the political guarantee.

Department of Transport
14 October 1985