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TO IMMEDIATE FCO
TELEGRAM NUMBER 3204 OF 26 OCTOBER 1984

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MS

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 COURSE 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 ROWS 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.

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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 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.

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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 ADOPTING 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).

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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:

(D) 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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ED/NAD

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TO IMMEDIATE FCC
TELEGRAM NUMBER 3206 OF 26 OCTOBER 1984

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COMITY POINTS

- 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 APPROVAL 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 THEIR EMPLOYER A BRITISH DESIGNATED AIRLINE, AND FOR DOING IN THE UK WHAT

PS/S of S
MR LAZARUS, PUS } DEPT OF TRANSPORT
MR HOLMES
MR KNIGHTON
MR WARELING
~~MR [unclear] FORNAY~~

MR ROBERTS } DTI
MR AC HUTTON }
MR HEALEY OT2 }
MR BECKETT (Solicitors) }
MR AYLING " }
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MR COLES 10 DOWNING ST
MR GARDINER, ATTORNEY GENERAL'S OFFICE

IMMEDIATE

ADVANCE COPY

- 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 SUBSIDIARIES AND PARENTS)
 - THE FACT THAT UNILATERAL ENFORCEMENT OF ANTI-TRUST CANNOT ACHIEVE POLICY OF US LAW WITHOUT AGREEMENT OF UK: HMG COULD EXERCISE ITS SOVERIEGN POWER TO COMPTEL 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 AIRLINES
 - THE US INTEREST IS THE PROTECTION OF US CONSUMERS. THE INTEREST OF UK IS TO PROTECT UK AIRLINES AND UK CONSUMERS. IN PELATION 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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