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LAW OFFICERS' DEPARTMENT
ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

H.STEEL,CMG OBE
LEGAL SECRETARY

T J Flesher Esq
Private Secretary to Prime Minister
The Prime Minister's Office
10 Downing Street
London SW1

3 July, 1985

Dear Tim,

1.The Solicitor General has told me that, when he saw the Prime Minister on another matter a few days ago, she expressed dismay to him that, when the Nationalisation Case (Aircraft and Shipbuilding Industries) was before the Human Rights Commission in Strasbourg, the United Kingdom had argued that it was legitimate to nationalise without paying any compensation at all and that the Commission had ruled against us on this. The Prime Minister said this should never have been argued and that in future the Law Officers should ensure that politically unattractive defences were not advanced, however sound they might be.

2. Although the applicants in this case have consistently, and especially in the press, represented the UK's argument before the Commission as being that it was legitimate to nationalise without paying any compensation at all, that is a misrepresentation: we have never advanced such an argument. What in fact happened is that the applicants rested their own case before the Commission on the argument that the reference in Article 1 of the First Protocol to the Convention to "the general principles of international law" imported, for their benefit, the relevant rules of international law (which, in summary, require prompt, adequate and effective compensation). We for our part, basing ourselves on legal principles, on the clear intention of the draftsmen of the Convention (as evidenced by the travaux preparatoires) and on decisions by the Commission in earlier cases, contended that the "general principles of international law" could not operate as between an applicant and his own State. Whatever obligations there were on a State to pay compensation to its own nationals, we argued, they did not flow from this

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particular provision of the Convention. We of course never argued that it was legitimate or acceptable for a State to nationalise without paying compensation: on the contrary, we went out of our way to avoid expressing or endorsing any proposition of that kind.

3. In their Report, the Commission unequivocally and unanimously upheld our argument about the inapplicability of "the general principles of international law" to a case between a State and its own nationals. They did, however, conclude - though this was not an argument that had been put forward on behalf of the applicants - that an obligation to pay compensation where property is nationalised is "inherent in Article 1 in so far as the payment of compensation may be necessary to preserve the appropriate relationship of proportionality between the interference with the individual's rights and the 'public interest'". Against the background of that conclusion, they further concluded that the sovereign Governments and legislatures of Contracting Parties to the Convention had to be accorded a "margin of appreciation" as to the machinery which they adopted for determining compensation in accordance with that obligation and that the machinery chosen by the 1977 Act was within that legitimate margin of appreciation. When we came to frame the line of argument which we should pursue when the case went to the Court, we decided that our best course was, as it were, to fall in behind this interpretation of the Convention, since it would allow us both to accept that there was a duty under Article 1 of the First Protocol to pay compensation (but without conceding the argument which the applicants had relied on) and at the same time to defend the legitimacy, in terms of the Convention, of Ministers' previous refusal to pay additional compensation to the applicants. You will remember that Ministers had collectively decided even before the Strasbourg proceedings began (and had subsequently re-affirmed that decision) that such additional compensation should not be paid: see, for example, the minute of 2 July 1980 from the Secretary of State for Industry to the Prime Minister.

4. That is the position as regards the arguments which we actually put forward. I shall now try to summarise what was done as regards getting Ministerial authority for those arguments.

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5. As you may know, this issue of whether the Convention imposes a duty to pay compensation to a State's own nationals (and, if so, on what basis) is also central to another case that was dealt with by the Commission at the same time as the Nationalisation Case and is now also due to go to the Court. This is the Duke of Westminster's Case, which concerns the Leasehold Reform Acts 1967 and 1974 (i.e. partly Labour Government legislation and partly Conservative Government legislation). The Duke of Westminster's Case was in fact the first to confront us and, when it did, the Attorney General was careful to ensure that the politically sensitive issues (which, even at that stage, we could see that it would raise) were fully understood by Ministers. See, for example, the minutes of the 'H' Committee meeting on 10 February 1981 (H(81)4th meeting). Once, however, the Nationalisation Case got under way, the two cases were treated as one, so far as the central issue of law was concerned. At all stages, the officials of all Departments concerned (i.e. DOE, DTI, FCO and the Law Officers' Department) were acutely aware of the political sensitivity of some of the arguments that might have to be deployed - not only on the general question of the obligation to pay compensation but also on the particular question of whether the compensation actually paid was "fair" or "adequate". We were fully alert to the need to ensure that our respective Ministers knew what the proposed line, or the alternative possible lines, might be and to obtain their authority for the line which we eventually adopted. We in the Law Officers' Department kept the Attorney General in the picture and I know that similar steps were taken in the other Departments. For example, we have on our files a copy of a very full submission which DTI officials made to their Secretary of State on 10 March 1982 to obtain his approval for the proposed contents of our written Observations in the Nationalisation Case. There was a further submission to DTI Ministers in April 1982 to obtain approval for the final version of those Observations. We ourselves sought and obtained the Attorney General's approval at that time. So far as the Duke of Westminster's Case was concerned, the written Observations had previously been carefully scrutinised and approved in draft not only by the Attorney General but also by the then Secretary of State (Mr. Heseltine) and there was correspondence between the two of them before the draft was finally settled.

6. After the written Observations had been submitted to the Commission and during the course of preparations for the oral hearing - which was to be a single hearing covering both cases - officials of all Departments again paid particular regard to the need to ensure Ministerial awareness of, and to obtain Ministerial authority for,

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the arguments that it was proposed to deploy. The Attorney General, for his part, took special care to obtain his colleagues' approval for the line which would be advanced by the Counsel whom he had chosen. For example, our files show that there was correspondence on this matter early in January 1983, relating to the Duke of Westminster's Case, between the Attorney General and Mr.Stanley (then Minister of Housing). This was also copied to the Secretary of State for Wales and Scotland. More important, on 20 January 1983 the Attorney General wrote to the Secretary of State for Trade and Industry, explaining clearly and in detail to him and to the other recipients of the letter the arguments which would, with their approval, be advanced at the oral hearing which was to take place shortly. That letter was copied to the Prime Minister, the Secretary of State for the Environment and the Minister of Housing, the Secretaries of State for Wales and Scotland, the Chancellor of the Exchequer, the Foreign and Commonwealth Secretary and Sir Robert Armstrong. As the letter itself says, the Attorney General had, before writing it, called in our leading Counsel (Mr. Donald Nicholls, now Mr. Justice Nicholls), and satisfied himself that he understood the need to put out arguments on the politically sensitive points exactly in the way that we wished.

7. For completeness, though this is not what the Prime Minister was primarily adverting to, I should say that exactly the same processes of consultation between Departments and of consultation of Ministers by Departmental officials were carried out in preparation for the proceedings before the Court, both at the stage of written pleadings and before the oral hearing. As an example, I draw your attention to the Attorney General's letter of 20 July 1984 to the Secretary of State for Trade and Industry. This was copied to the Prime Minister, the Secretary of State for the Environment, the Chancellor of the Exchequer, the Foreign and Commonwealth Secretary and Sir Robert Armstrong. (The Duke of Westminster's case was, by then, being treated separately and so the letter did not have to go to the other recipients of the letter of 20 January 1983.)

8. I hope that this will reassure you, and enable you to reassure the Prime Minister, that we did not run the particular argument which the applicants have (mischievously, I think), attributed to us and which had, understandably, dismayed her. I also hope that the Prime Minister will be reassured that the Attorney General has indeed been alert at all times to the need to avoid politically

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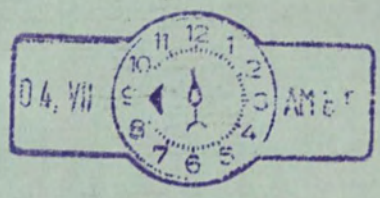
unattractive arguments and has been kept fully in the picture for that purpose. Finally, I hope that I have demonstrated that the other Ministers concerned have at all times been consulted about the line of argument that it was proposed to use and have given their approval for it.

9. I am copying this letter to John Ballard (DOE), John Mogg (DTI) and Len Appleyard (FCO).

Yours ever,

H STEEL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