Treaty Series No. 57 (1994)

Exchange of Notes

between the Government of the
United Kingdom of Great Britain and Northern Ireland
and the Government of the United States of America

concerning Airport User Charges, further amending the Agreement for Air Services, done at Bermuda on 23 July 1977

Washington, 11 March 1994

[The Exchange of Notes entered into force on 11 March 1994]

Presented to Parliament
by the Secretary of State for Foreign and Commonwealth Affairs
by Command of Her Majesty
December 1994

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EXCHANGE OF NOTES BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA CONCERNING AIRPORT USER CHARGES, FURTHER AMENDING THE AGREEMENT FOR AIR SERVICES, DONE AT BERMUDA ON 23 JULY 1977[1]

No. 1

Her Majesty's Ambassador at Washington
to the Secretary of State of the United States of America

British Embassy
Washington
11 March 1994

I have the honour to refer to the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning Air Services, with annexes and exchange of letters, done at Bermuda on 23 July 1977, as amended ("the Agreement"). I have the further honour to refer to (i) the US/UK Arbitration Concerning Heathrow Airport User Charges (the "Heathrow Arbitration"), initiated by the Government of the United States of America on 16 December 1988, and (ii) the request for arbitration made by the Government of the United Kingdom in its Embassy's Note No. 87 of 13 October 1993 (the "UK Arbitration"), both of which were submitted under Article 17 of the Agreement.

I have the further honour to refer to recent discussions between representatives of our two governments that were initiated to enable our governments to terminate the Heathrow Arbitration and the UK Arbitration and to fully and finally settle the matters that gave rise to those proceedings. As a result of these discussions, I hereby propose that our Governments agree upon the following terms and conditions for termination and settlement:

(a) Article 1(o) and Article 10 of the Agreement shall be deleted and the texts set out in Attachment 1 hereto shall be substituted therefor.

(b) The Memorandum of Understanding between the two Governments on airport user charges, signed at Washington on 6 April 1983, will cease to have effect.

(c) On 11 March 1994, the Government of the United Kingdom shall pay to the Government of the United States of America and the Government of the United States of America shall accept the sum of United States $29,500,000.00 (twenty-nine million, five hundred thousand United States dollars).

(d) On 11 March 1994, representatives of the Governments of the United States of America and the United Kingdom shall discontinue the Heathrow Arbitration by filing with the Heathrow Arbitral Tribunal a joint notification to that effect pursuant to Rule 24(1) of the Tribunal's Rules of Procedure. The Governments of the United States of America and the United Kingdom shall regard as fully and finally settled all claims of the Government of the United States of America relating to user charges imposed at Heathrow Airport in the period up to and including 31 March 1994. The effect of this final settlement is that the United States Government shall no longer pursue any claims against the Government of the United Kingdom relating to the user charges imposed at Heathrow Airport in the period up to and including 31 March 1994, and shall regard those claims as permanently extinguished.

(e) The Government of the United Kingdom hereby irrevocably withdraws the request made in its Embassy's Note No. 87 of 13 October 1993 that the dispute concerning the compliance by the Government of the United States of America with its obligations under Article 10 of the Agreement should be referred to arbitration under Article 17 of the Agreement. The Governments of the United Kingdom and the United States of America shall regard as fully and finally settled all

[1] Treaty Series No. 76 (1977) Cmnd 7016.

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claims of the Government of the United Kingdom relating to United States Government compliance with Article 10 of the Agreement in the period up to and including 31 March 1994. The effect of this final settlement is that the Government of the United Kingdom shall no longer pursue any claims against the Government of the United States of America relating to United States Government compliance with Article 10 of the Agreement in the period up to and including 31 March 1994, and shall regard those claims as permanently extinguished.

(f) In relation to the charges imposed upon U.S. airlines at Heathrow Airport in the future:

(i) the current differential between the peak and off-peak international passenger charges shall be phased out in four substantially proportionate instalments over the period 1 April 1995 to 1 April 1998, so that this differential is entirely eliminated as from 1 April 1998;

(ii) a peak international passenger charge shall not be re-introduced before 1 April 2003 or, provided that the planning permission for Heathrow Airport's Terminal 5 is granted before 1 April 2003 and construction has begun before that date, the date on which the first phase of Terminal 5 is opened for commercial use, whichever is the later;

(iii) there is no current intention to re-introduce a peak international passenger charge after the date established in sub-paragraph (ii) above, and in any event the present policy is to introduce changes to the pricing structure at Heathrow Airport on a gradual basis after consultation with users;

(iv) there shall be no change in the relative levels of landing, passenger and parking charges at Heathrow Airport, whilst peak international passenger charge is being phased out in accordance with sub-paragraph (i) above;

(v) there is no current intention to change the relative levels referred to in sub-paragraph (iv) above, after the peak international passenger charge is phased out;

(vi) the level of charges for parking shall not be increased relative to the level of total user charges, at least until the date established in sub-paragraph (ii) above;

(vii) a weight-related element in peak period landing charges shall not be re-introduced, and that part of off-peak landing charges attributable to aircraft weight shall not be raised relative to the overall level of off-peak landing charges, at least until the date set out in sub-paragraph (ii) above;

(viii) there is no current intention to depart at any time in the future from the principle that no distinction shall be made as to sources of revenue, including duty-free sales and other commercial revenues, in computing revenues that contribute to the rate of return on assets at Heathrow Airport; and

(ix) there shall be made available to U.S. airlines designated under the Agreement (or any successor air services agreement) and operating to Heathrow Airport at least the information set out at Attachment 2 hereto.

(g) The Government of the United Kingdom shall issue such directions as may be necessary under section 30(3) of the Airports Act 1986 (or any successor law or regulation) to require that, in relation to the user charges imposed at Heathrow Airport, BAA plc (or any successor operator of Heathrow Airport) shall carry out the commitments set out at (i), (ii), (iv), (vi), (vii), and (ix) of paragraph (f) above.

(h) The Government of the United Kingdom shall institute a system whereby the United Kingdom Civil Aviation Authority ("CAA") shall report annually, before 31 December, to the United Kingdom's Department of Transport on the user charges imposed and financial performance at each of BAA's South-East airports. The Department of Transport shall, for each of the three years 1994–96 inclusive, and to the extent possible given the confidential nature of some of the information likely to be given to CAA by BAA plc, report on those matters to the United States Government.

(i) The Government of the United Kingdom shall, where necessary to comply with its obligations under Article 10 of the Agreement, as set out in Attachment 1 hereto, use its powers under the Airports Act 1986 or any successor law or regulation.

(j) In relation to user charges at United States airports imposed upon United Kingdom airlines operating under the Agreement (or any successor air services agreement):

(i) The Government of the United Kingdom notes that the Government of the United States of America operates a system whereby airport sponsors in the United States must give certain assurances if they receive grants from the Federal Government. Before giving approval for an airport sponsor to use funds from the Airport and Airway Trust Fund for the purposes of airport or airway development, the United States Secretary of Transportation must obtain specific written assurances from the airport sponsor. These assurances include the obligation to make the airport available for public use on fair and reasonable terms and without unjust discrimination.

(ii) The Government of the United Kingdom notes that any such assurances remain in force for the useful life of the approved project, regardless of whether the airport operator thereafter receives further grants from the Federal Government, and that all airports to which United Kingdom designated airlines currently operate scheduled services under the Agreement are currently subject to such assurances.

(iii) The Government of the United Kingdom notes that, on 10 December 1993, the United States Secretary of Transportation wrote, *inter alia*, to the Chairman of the Airports Council International—North America (copy at Attachment 3) setting out the policy of his Department to take a more active role in the airport-airline relationship, where needed. This letter provided for the Department, *inter alia*,:

— to offer its good offices to facilitate resolution of a dispute that airports and airlines, despite all reasonable efforts, have been unable to resolve between themselves;

— where reasonable grounds are shown, to commence an investigation in response to a complaint, and if warranted by the facts following the investigation of a complaint, to suspend payment of existing or future grants to the airport concerned and/or to issue cease and desist orders and obtain the assistance of the United States District Court to enforce such orders;

— to reserve its authority to begin proceedings without waiting for a formal complaint if an airport rate increase appears unreasonable. These proceedings may range from conducting informal inquiries and issuing information requests to instituting formal investigations, including compelling testimony and issuing document subpoenas.

(iv) The Government of the United Kingdom notes that, as part of the policy enunciated in the letter at Attachment 3, the existing administrative regulations governing investigation and enforcement of airport compliance are to be reviewed. In this review, the Government of the United Kingdom expects the Government of the United States of America to have regard to its international obligations in determining whether it is necessary to propose any revisions to streamline that process and enhance its effectiveness.

(v) The Government of the United Kingdom notes that airports in the United States are required to give an assurance that all revenues generated by the airport are used for the purposes allowed in Section 511(a)(12) of the Airport and Airway Improvement Act of 1982, as amended. The Government of the United Kingdom expects the Government of the United States of America to have regard to its international obligations in any review of this requirement.

(vi) The Government of the United Kingdom notes the undertaking of the Government of the United States of America regarding United States Government encouragement of airport-airline consultations set forth in Attachment 4.

(vii) The Government of the United States of America believes its current system enables it to discharge its obligations to the Government of the United Kingdom under Article 10. The United States Government recognizes that, under Article 10(4), this or another system must be in effect to safeguard users from charges that do not meet the criteria of Article 10.

(k) The Government of the United States of America shall give a report to the Government of the United Kingdom on each occasion on which any material change is made in the policies described in paragraphs (i), (ii), (iii), and (v) of paragraph (j) above within three years of the date of this Note.

(l) The mechanisms provided for in Articles 16 and 17 of the Agreement (or the consultations and arbitration provisions in any successor air services agreement between our Governments) shall apply to any dispute concerning the implementation, interpretation or application of, or compliance with, the provisions of the agreement between the Government of the United States of America and the Government of the United Kingdom brought into force by this Note and Your Excellency's affirmative Note in reply.

If the foregoing is acceptable to the Government of the United States of America, I have the honour to propose that this Note and Your Excellency's Note in reply confirming its acceptability shall constitute an agreement between the Government of the United Kingdom and the Government of the United States of America, which shall enter into force on the date of Your Excellency's Note in reply.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

ROBIN RENWICK

[Attachment 1]

ARTICLE 1

Definitions

(o) "User charge" means a charge imposed by a competent charging authority on airlines for airport or air navigation property or facilities, including related services and facilities.

ARTICLE 10

User Charges

1. User charges shall be just and reasonable, as defined in paragraphs (2) and (3) of this Article, and equitably apportioned among categories of users.

2. User charges shall not be unjustly discriminatory. In particular and without limiting the generality of the preceding sentence, neither Contracting Party shall impose or permit to be imposed on the designated airlines of the other Contracting Party user charges higher than those imposed on the first Contracting Party's designated airlines operating similar international air services at the same airport.

3. The user charges referred to in paragraph (1) are just and reasonable only if they do not exceed by more than a reasonable margin, over a reasonable period of time, the full cost to the competent charging authorities of providing the appropriate airport, air navigation, and aviation security facilities and services at the airport or within the airport system. Such full costs may include a reasonable return on assets, after depreciation. In the provision of facilities and services, the competent charging authorities shall have regard to such factors as efficiency, economy, environmental impact and safety of operation.

4. The Contracting Parties recognize the benefits of reducing undue intervention and detailed supervision of the setting and monitoring of user charges at individual airports. The Contracting Parties shall each maintain a system to safeguard users from charges that do not meet the criteria of this Article. The system shall include a process for resolving complaints which the Contracting Parties in principle expect to be used in the first instance.

5. A Contracting Party shall not be held to be in breach of a provision of this Article unless: (i) it fails to undertake a review of the charging practice that is the subject of a complaint by the other Contracting Party within a reasonable time; or (ii) following such a review, it fails to take all steps within its power to remedy any charge or practice that is inconsistent with this Article.

6. Each Contracting Party shall encourage consultations in the first instance directly between the competent charging authorities in its territory and airlines using the services and facilities, or through the airlines representative organizations if the airlines agree. Each Contracting Party shall encourage them to exchange such information as may be necessary to permit an accurate review of the reasonableness of the charges in accordance with the principles set out in this Article. Each Contracting Party shall encourage the competent charging authorities to provide users with reasonable notice of any proposals for changes in user charges to enable users to express their views before changes are made.

[Attachment 2]

1. FINANCIAL INFORMATION

(a) Full statutory accounts for BAA plc and Heathrow Airport Limited and each other South East airport, including a profit and loss statement, balance sheet and cash flow, identifying the main components of income and expenditure, categories of assets and sources and uses of funds. These accounts will also contain notes setting out the accounting policies adopted, and explaining individual entries where appropriate.

(b) Detailed analysis of income and expenditure for each South East airport from the management accounts, itemizing the results by the following categories:

Income	*Expenditure*
Landing charges	Wages and salaries
Passenger charges	Social Security costs
Aircraft parking charges	Pension costs
Retail outlets	Other staff costs
Catering	Property related costs
Car hire	Maintenance and Equipment
Public car parks	General expenses
Other concessions	Intra-Group charges
Rents	Depreciation
Services	Corporate office costs

This analysis also includes staff numbers, historical cost accounts (in addition to the modified historical cost accounts), a separate analysis of security costs and a listing of monthly charges in Retail prices.

2. TRAFFIC INFORMATION

(a) Details of annual numbers of terminal passengers and air transport movements, for domestic and international services separately.

(b) Details of hourly, monthly and annual passenger flows, arriving and departing, by terminal. Terminal capacities, busy hour rates and other reference hour rates.

(c) Details of hourly, monthly and annual aircraft movements, separately for aircraft landings and take-offs.

(d) Details of aircraft parking patterns by time of day and season, separately for pier and remote stands, and separated by aircraft size category.

(e) If requested, further, more detailed traffic and capacity information can be provided on specified areas, time periods, or markets from BAA's traffic data base

3. SERVICE QUALITY INFORMATION

Regular information on the service quality performance of individual airports in a number of key areas, such as mechanical equipment availability, and passenger satisfaction with facilities.

4. PLANNING AND FORECASTING INFORMATION

(a) An annual airport strategy setting out traffic forecasts, major capital projects and capital expenditure, and particular areas requiring strategic action.

(b) Data on those elements of the traffic mix significantly affecting the airport charges yield per passenger for the most recent relevant accounting period, together with a forecast of the yield for the current year and the following year at Heathrow and the South East airports system. In addition, any assumptions as to changes in the traffic mix used in generating such forecasts. This information to be extended to future years if desired.

(c) Details of the forecast capital and operating costs associated with any increases or decreases in security standards required or allowed by the United Kingdom Department of Transport.

(d) If desired, a commentary on key factors expected to affect commercial revenues and operating costs in the current and following years.

(e) A paper each year, setting out and explaining for consultation, the reasoning behind any proposals for changes in the level or structure of airport charges at Heathrow Airport.

(f) A paper each year, setting out and explaining the reasoning behind any decision by BAA, following consultations, to change the level or structure of airport charges at Heathrow Airport.

(g) Material provided for public inquiries into major airport developments, including analyses of demand and capacity and expenditure estimates.

5. ADDITIONAL INFORMATION

Special material for specific and general user charges studies agreed with airlines. Recent examples include detailed analysis of traffic in individual hours in individual terminals, and disaggregated cost forecasts for major capital projects.

[Attachment 3]

The Secretary of Transportation
Washington, D.C. 20590
December 10, 1993

Mr George F. Doughty
Chairman
Airport Council International
1220 19th Street NW
Suite 200
Washington D.C. 20036

Dear Mr. Doughty:

As you know, the air transportation industry has experienced unprecedented economic turbulence in recent years. Our Nation's air carriers have suffered literally billions of dollars in losses, while airport sponsors across the country struggle to meet the challenges of maintaining and developing their facilities now and for the future. These financial stresses have the unfortunate potential to create an environment in which air carriers and sponsors assume antagonistic positions in their dealings with each other.

As underscored by several recent controversies, including the impasse involving the major carriers serving Los Angeles International Airport and the dispute involving Kent County, Michigan, these tensions are of particular concern in the negotiation and establishment of fair and reasonable charges for the use of airport facilities. In difficult times, heated rhetoric and brinkmanship can all too easily substitute for the process of cooperation and compromise that has historically characterized the relations between carriers and the airports they serve.

The importance of this industry to our economy, and the potential impact of airport-airline relations on the traveling and shipping public require the Department of Transportation, in my view, to encourage and help foster an environment of rationality and thoughtful accommodation. Airport sponsors and the carriers serving them must ultimately find ways to continue to work together productively. This Department will make every effort to encourage air carriers and airport sponsors to step back from inflexible negotiation tactics and rhetorical excess in their dealings with each other. These kinds of tactics—including threats to deny airport access—disserve the public interest and undermine the confidence of the traveling public.

The public depends on airlines and airport sponsors to work together responsibly. In most cases, they have. The local parties have a direct financial interest in achieving agreement on fees, and are clearly best suited to resolve their differences promptly and directly, in light of local considerations and future needs. The public interest is best served when these disputes are amicably resolved between the parties at the earliest possible stage. This is always the preferred approach. However, the Department will, where needed, take a more active role in the airport-airline relationship. Normally, our role will be to assist parties unable to resolve fee disputes locally to conclude their own agreements successfully. On the other hand, where a true impasse threatens significant disruption of the national air transportation system, the Department will not hesitate to use its existing broad legal authority to review the legality of proposed airport rates and to take all necessary investigatory and enforcement actions in aid of that authority.

The key elements of our approach are as follows:

First, where airport sponsors and air carriers have been unable, despite all reasonable efforts, to resolve fee disputes between them, the Department and the Federal Aviation Administration will offer their good offices to facilitate the parties' reaching a successful outcome in a timely manner. Prompt resolution of these disputes is always desirable since extensive delay can lead to uncertainty for the public and a hardening of the parties' positions.

Second, where unsuccessful negotiations between the parties give rise to a well-grounded complaint that airport rates and charges violate an airport sponsor's federal grant obligations, the Department will, when appropriate, exercise its broad statutory authority to investigate and review the legality of those rates and charges. The Department and, by delegation, the Federal Aviation Administration, will also take all necessary actions in aid of their authority under the Airport and Airway Improvement Act of 1982 and the Federal Aviation Act of 1958.

Specifically, where reasonable grounds are shown, we will be prepared to commence an informal or formal investigation in response to a complaint under 14 CFR Part 13 and, as provided by existing law, may:

- Require an airport sponsor who is a federal grant recipient to conduct an independent audit of its financial and other books and records, or require it to submit these records to an audit conducted by the Department;
- Require such federal grant recipients promptly to make available for inspection their relevant books and financial records;
- Issue subpoenas for evidence and testimony; and
- Hold an evidentiary hearing.

If warranted by the facts, the Department is authorized to suspend approval of new grants, and payment of funds under existing grants, pending final determination of whether an airport sponsor has violated its federal grant assurances—including its commitment to provide access to its airport on fair and reasonable terms without unjust discrimination. The Department may also order termination of an airport sponsor's eligibility to receive federal grants, subject to the sponsor's right to a hearing and appellate judicial review. In appropriate circumstances, the Department can issue cease and desist orders and obtain the assistance of the United States District Court to enforce such orders.

At my direction, Departmental and FAA legal counsel are reviewing the relevant Part 13 administrative regulations governing investigation and enforcement of airport compliance, and will propose any revisions needed to streamline that process and enhance

its effectiveness. At the same time, we reaffirm that the Department's powers will normally be exercised only as a last resort—that is, only after the parties have clearly exhausted all reasonable efforts to resolve their disputes.

Third, in those rare cases in which an airport rate increase appears unreasonable on its face, the Department reserves its authority to begin proceedings on its own, without waiting for a formal complaint. These proceedings may range from conducting informal inquiries and issuing information requests, to instituting formal investigations, including compelling testimony and issuing document subpoenas. While such cases should be rare, the Department will move vigorously to investigate plainly apparent compliance issues. Among the factors that may be considered in evaluating whether such intervention is appropriate in these circumstances are:

- — The amounts of fee increases and their relationship to the actual costs of operating and developing the airport;
- — The accumulation of substantial surplus airport revenues in relation to capital improvement plans and operating needs;
- — Evidence of improper discriminatory practices; and
- — Indications of use of airport revenues for purposes other than capital or operating costs of the airport, as specified by law. As the Department has made clear, diversion of airport revenue is prohibited by law and violates federal grant assurances.

While affirming the importance of responsible action by airport sponsors, it is also important to underscore that air carriers are not in a position to choose unilaterally to determine and pay only those rates they consider reasonable and justified by their views of airport needs. Moreover, tactical maneuvering in rate negotiations that unnecessarily prolongs disputes is no substitute for good faith efforts to resolve such disagreements expeditiously. Airports unquestionably have the right to charge and to collect reasonable fees. I fully understand the importance of ensuring that airport sponsors retain their authority at the local level over rate structures that appropriately support both immediate and longer-term airport needs, within the broad parameter of reasonableness.

The more engaged approach of the Department outlined here is intended to assist parties in negotiating and establishing airport rates and charges in a way that will continue to serve the traveling public and the national economy. The active involvement of the Department in the issue of airport charges should in no event displace the process of local negotiation of such rates in good faith between the affected parties.

Sincerely,

Federico Peña

[Attachment 4]

UNDERTAKING OF THE UNITED STATES GOVERNMENT

The owners or operators of major U.S. airports ("sponsors") receive federal grants for airport development projects. As a condition of receiving those grants, the sponsors have assured the Secretary of Transportation that the airports for which grants are given will be available for public use on fair and reasonable terms and without unjust discrimination. Further, U.S. law requires those sponsors to undertake reasonable consultations with affected parties using the airport in making a decision to undertake any airport development project for which federal funds are being used. Grant recipients are also required to permit the Secretary access to the sponsor's records to enforce the grant assurances.

U.S. policy is to recognize that the local parties (ie, the sponsors and their users), having a direct financial interest in achieving agreement on fees, are clearly best suited to resolve any differences promptly and directly, in light of local considerations and future needs. U.S. policy also recognizes that the books and records of sponsors are typically subject to numerous public audit requirements, often imposed by airport-airline

contracts. Moreover, as sponsors, U.S. airport records are subject to various federal and state laws requiring openness. The United States considers that these laws and contractual obligations offer abundant assurances that airport charges will be established in an open, public and transparent manner.

Nevertheless, at the request of the Government of the United Kingdom in the context of the discussions leading to termination and settlement, within 90 days of March 11, 1994, U.S. aeronautical authorities will communicate in writing to U.S. airports to which U.K. airlines currently operate to encourage them to consult with their airline users directly, and to provide users with reasonable notice of any proposals for changes in user charges to enable them to express their views before changes are made. U.S. aeronautical authorities will also encourage those airports to provide the information necessary to permit an accurate review of the reasonableness of the user charges imposed on airlines in accordance with the principles set out in Article 10 of the Agreement. At the request of the Government of the United Kingdom, the Government of the United States of America will also send such written encouragement to any additional U.S. airport to which U.K. airlines operate in the future.

No. 2

The Secretary of State of the United States of America
to Her Majesty's Ambassador at Washington

Department of State
Washington
11 March 1994

Excellency

I have the honor to acknowledge receipt of Your Excellency's note dated March 11, 1994, which reads as follows:

[As in No. 1]

I have the honor to inform Your Excellency that the foregoing proposals are acceptable to the Government of the United States of America, which therefore agrees that Your Excellency's note with its attachments, and this note in reply, shall constitute an agreement between our two Governments which shall enter into force on the date of this note in reply.

Accept, Excellency, the renewed assurances of my highest consideration.

For the Secretary of State:
CONRAD K. HARPER

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