

**OFFICE OF THE CONTRACTOR GENERAL OF JAMAICA**

**Special Report of Investigation**

**Conducted into the Sale/Divestment of Air Jamaica Ltd.'s London Heathrow Slots  
to Virgin Atlantic Airways Ltd.**

**Ministry of Finance & the Public Service**

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# OFFICE OF THE CONTRACTOR GENERAL OF JAMAICA

## Special Report of Investigation

Conducted into the Circumstances Surrounding the Divestment of Air Jamaica Ltd.'s  
Heathrow Slots to Virgin Atlantic Airways Ltd.

**Ministry of Finance & the Public Service**

### **EXECUTIVE SUMMARY**

The Investigation into the divestment of the Air Jamaica Ltd. Heathrow slots to Virgin Atlantic, was initiated by the Office of the Contractor General (OCG) on 2008 April 23.

On 2008 April 8, under cover of a letter of even date, Senator the Hon. Don Wehby, the Minister without portfolio in the Ministry of Finance and the Public Service (MOFPS), provided the Contractor General with a brief on the facts which surrounded the sale of Air Jamaica Ltd.'s slots at the London Heathrow Airport.

In his letter to the Contractor General, Minister Wehby stated that *“In keeping with the need for transparency and accountability in the disposal of public assets I am referring the matter to your offices such that any appropriate review and action may be taken.”*<sup>1</sup>

The brief that was provided by Minister Don Wehby, which was dated 2008 April 7, was prepared by the then Air Jamaica Ltd. Chairman and Chief Executive Officer, Ms. Shirley Williams.

Outlined in Ms. Williams' brief were particulars regarding (a) the consultations which were undertaken in the divestment process; (b) the due diligence exercise that was carried out; (c) expressions of concern for the price at which the Heathrow slots were sold; and (d) the bidding process that was utilised in the execution of the sale of the Air Jamaica Ltd. Heathrow slots (hereinafter referred to as the “AJLHS”).

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<sup>1</sup> Minister Don Wehby. Letter to the OCG. 2008 April 8

The allegations which were contained in the brief raised a number of concerns for the OCG, particularly having regard to the provisions which are contained in Section 4 (1) of the Contractor General Act (1983). Some of these allegations alluded to impropriety, a lack of transparency in the divestment of State assets, a breach of the Government Procurement Guidelines, mismanagement and a breach of applicable Government administrative and accounting procedures.

Section 4 (1) of the Contractor General Act requires, *inter alia*, that Government of Jamaica contracts must be awarded “*impartially and on merit*” and that the circumstances of award must “*not involve impropriety or irregularity*”.

On 2008 April 23, in his closing speech of the Budget Debates, the Hon. Audley Shaw, the Minister of Finance and the Public Service, reiterated the concerns which had been raised by Minister Don Wehby and Ms. Shirley Williams regarding the sale of the AJLHS.

The OCG’s Special Investigation into the matter was initiated pursuant to the discretionary powers which are reserved to a Contractor General under Sections 15 (1) and 16 of the Contractor General Act.

The preliminary review of (a) Minister Wehby’s letter and the documentation which had been supplied to the OCG, and (b) Minister Shaw’s Budget presentation, were informed, *inter alia*, by the Contractor General Act, the Government Procurement Procedures Handbook (GPPH), the Financial Administration and Audit Act, the Public Bodies Management and Accountability Act, as well as the Corruption Prevention Act.

In general, these references guided the context within which the Investigation was conducted, the methodology which was utilized and the Findings and Conclusions which have been reached herein.

It is instructive to note that Section 18 (3) of the Contractor General Act stipulates that “For the purposes of an Investigation under this Act, a Contractor-General shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents”. (OCG Emphasis).

Further, Section 17 (1) of the Contractor-General Act empowers a Contractor General “to adopt whatever procedure he considers appropriate to the circumstances of a particular case and, subject to the provisions of (the) Act, to obtain information from such person and in such manner and make such enquiries as he thinks fit”. (OCG Emphasis).

The primary method of data collection and evidence gathering which was utilized throughout the Investigation was the issue, by the OCG, of written Requisitions/Questionnaires pursuant to the provisions of the Contractor General Act, the Voluntary Declarations Act and the Perjury Act.

**All Respondents, in turn, were required, under the pain of criminal prosecution, under the Contractor General Act and the Perjury Act, to provide sworn written answers, statements and declarations to all of the OCG’s Requisitions and to formally declare, before a Justice of the Peace, that the said answers, statements and declarations were “complete, accurate and truthful”. (See Specimen of OCG Form of Requisition in Appendix).**

A preliminary Requisition/Questionnaire, which was dated 2008 April 23, was sent by the Contractor General to Mr. Colin Bullock, the then Financial Secretary, in the MOFPS. However, Mr. Bullock demitted Office prior to the deadline of 2008 May 7, which was stipulated in the OCG’s Requisition/Questionnaire for the submission of his response to the said Requisition/Questionnaire.

Given the foregoing, the OCG formally directed an identical Requisition/Questionnaire, which was dated 2008 May 5, to Mr. Bullock’s successor, Ms. Darlene Morrison, the then Acting Financial Secretary, MOFPS.

Further Requisitions/Questionnaires were subsequently directed to Mr. Don Wehby, the Minister without portfolio in the MOFPS, key representatives of the Management of Air Jamaica Ltd., Dr. Omar Davies, the former Minister of Finance and Planning, Mr. O.K. Melhado, the former Chairman of the Air Jamaica Board of Directors, and Senator Noel Sloley, a former Member of the Board of Directors of Air Jamaica Ltd., all of whom were considered material to the Investigation.

The Requisitions/Questionnaires were issued pursuant to the powers which are reserved to a Contractor General under the Contractor General Act and, in particular, Sections 4, 15, 17, 18 and 29 thereof. The Requisitions were also issued pursuant to Sections 2 and 7 of the Voluntary Declarations Act and Section 8 of the Perjury Act.

**It is instructive to note that the OCG, in the conduct of its Investigation, prefers to secure sworn written statements and declarations from Respondents, under the pain of criminal prosecution. This ensures, *inter alia*, that there is no question as to what has been represented to the OCG. Nor will there be any doubt as to the integrity or credibility of the information which is furnished to the OCG and on which its consequential Findings, Conclusions, Referrals and Recommendations will be necessarily based.**

The OCG also directed formal invitations to supply information to the two airlines which were primarily involved in negotiations for the sale of the AJLHS: British Airways (BA) and Virgin Atlantic (VS). It must be noted that American Airlines (AA) was approached by Air Jamaica Ltd. (Air Jamaica). However, because of the price which AA offered, the criteria which were stipulated for the sale of the AJLHS by Air Jamaica, and the regulatory issues that were involved in the UK-Jamaica route rights, negotiations with AA were not actively pursued by Air Jamaica.

Having regard to the serious implications which were inherent in Minister Shaw's presentation to Parliament, it was believed that the BA and VS officials would have welcomed the opportunity to be heard.

Consequently, the OCG directed to the Chief Executive Officers of BA and VS, through the good offices of the Office of Bilateral Relations of the Ministry of Foreign Affairs of the Government of Jamaica, Letters of Invitation which were dated 2008 July 14.

However, only VS responded to the OCG's invitation to supply information to assist in its Investigation. By way of letter, which was dated 2008 August 14, VS wrote to the Contractor-General, advising the OCG as follows:

*“Background*

1. *JM independently approached Virgin in December 2006 to enquire whether Virgin would be interested in participating in a competitive bid to purchase one slot pair of Air Jamaica's slots at London Heathrow airport. Virgin understood that JM was selling its slots as a result of its decision to cease operations to London Heathrow.*
2. *As far as Virgin was aware, it was tendering for the slots in competition with other interested parties.*

*Financial value of the Slots*

3. *There are no published or standard values for slots nor is there any standard formula for assessing their value. The value of slots will be determined simply by market forces i.e. what interested parties are prepared to bid at the time the slots are offered for sale.*
4. *Heathrow slot values for long-haul use are driven largely by the value of the flights using them. Arrival slots before 0730 are needed for high-yielding flights arriving from the Far East, Africa, India and the Middle East, and enable connections from those points to points in the USA. Arrivals between 0600 and 1030 are suited to arrivals from the US East Coast, with a preference for arrivals before 0930. Arrivals after 0930 are less suited to the US East Coast but can be used for US West Coast arrivals. Generally, the earlier the arrival slot in the*

- morning, the higher the value. Slots which are daily and are at the same times every day are valued higher than slots which are not daily or are not lined up at the same times each day.*
- 5. In deciding what price to put forward in its initial bid to JM, Virgin looked at the value of the slots being offered to Virgin's operation. In addition, Virgin looked at the price paid in recent comparable slot sales. Earlier in 2006, British Airways had purchased BWIA's London Heathrow slots and entered into a codeshare cooperation with BWIA's successor, Caribbean Airways.*
  - 6. The price BA paid for the BWIA slots was publicly acknowledged as £5 million for one year-round daily slot-pair.*
  - 7. It was also publicly reported that BA had recently purchased two daily slot-pairs at Heathrow from Malev for about £7 million (i.e. £3.5 million per slot pair).*
  - 8. The BWIA slots purchased by BA were very desirable lined up daily slots with 0915 arrivals and 1115 departures in the winter and 0925 arrivals and 1125 departures in summer. These slots were lined up every day in season and differing by only 10 minutes from one season to another.*
  - 9. By contrast, the JM slots being offered for sale were a daily slot-pair but had arrivals no earlier than 1050 local time in the winter and 0955 in the summer, and differing by up to 3 hours 10 minutes from day to day in winter, and in summer by up to 5 hours 10 minutes and so were not well lined up. Virgin assessed that the much later arrival times, the large variation by season and very large spread of times by day of week made the slots worth significantly less than BWIA's slots. Also, the JM slots were not well suited to arrivals from the US East Coast-unlike the BWIA slots.*

10. *Virgin therefore submitted a first bid to JM reflecting that assessment to purchase the slots for £4.1 million. The bid included among other things a proposal to introduce flights on the Gatwick-Kingston route, and an offer to carry JM's code on relevant Virgin flights.*
11. *JM requested a revised bid in March 2007. Virgin submitted a new bid with a higher price for the slots £5.1 million. The bid value of £5.1m was higher than the value of the more desirable BWIA slots purchased by BA in 2006.*
12. *Towards the end of April 2007, Virgin was informed that it was the favoured bidder and was invited to negotiate final terms. Negotiations took place in Kingston on 1 and 2 May 2007, at which Virgin agreed further commitments including taking over existing ticketed bookings from JM at low prorates (which would help JM meet its commitments to its passengers), and Virgin operating two of JM's slot pairs a week before the end of the summer 2007 season in order to ensure that JM could start winding down its loss-making London operation.*
13. *At the heart of Virgin's bid for JM's Heathrow slots was its commitment to add a new route from London Gatwick to Kingston operated twice a week by 451-seat Boeing 747-400 aircraft in order to facilitate continued air services to the benefit of Jamaican travellers and the Jamaican tourism industry. Virgin has lived up to its commitment and in addition operated extra flights over the Christmas peak in 2007; it will also operate extra flights in December 2008 and January 2009 to benefit Jamaican ex-pats returning home and tourist visiting Jamaica over the Christmas holiday.*
14. *Due to timing of the JM slots, Virgin believes it is highly unlikely that any non-UK carrier, such as a US carrier, would have been prepared to add new scheduled services between Jamaica and London as Virgin did. In addition, JM's slots were not well-suited to adding new services from the US East Coast which have been*

*by far the majority of new flights for which US carriers have sought new slots at Heathrow.*"<sup>2</sup>

In addition, having regard to the serious implications which were inherent in the allegations that were made, *inter alia*, by Minister Shaw, it was believed that Mr. Michael Conway, the former CEO and President of Air Jamaica, would have welcomed the opportunity to be heard.

As such, the OCG directed a letter of invitation to supply information, which was dated 2008 August 13, via email, on the said date, to Mr. Conway. However, to date, no response has been received, by the OCG, from Mr. Conway.

The failure on the part of Mr. Conway to cooperate with the OCG's Special Investigation, has left, unanswered, critical questions in respect of (a) the sale of AJLHS, (b) the commercial arrangement which was struck between VS and Air Jamaica and (c) the then Executive Management's recommendation with regard to the offers and proposals which were received from VS and BA.

Several of these questions could only have been answered by Mr. Conway who was, at least, at the outset, the primary Air Jamaica negotiator with both BA and VS.

One of the key questions which arises is whether BA was afforded precisely the same opportunity as VS to respond to the precise six (6) areas of improvement which were suggested in a letter which was despatched by Dr. Davies to VS, on 2007 April 17. It was subsequent to this letter that VS' improved offer was approved "*in principle*", by Dr. Davies, on 2007 April 23, in circumstances which, when viewed in their entirety, the OCG has found to be highly irregular and improper and, indeed, unlawful.

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<sup>2</sup> Virgin Atlantic. Letter to the OCG. 2008 August 14

In an email to the former Air Jamaica Board Chairman, Mr. O.K. Melhado, which was dated 2008 September 20, the former President & CEO of Air Jamaica, Mr. Michael Conway, stated that he had discussed in detail each of the referenced six (6) areas of suggested improvement with the BA representative.

However, the OCG has seen evidence which would suggest that only three (3) of the six (6) areas were discussed with BA. More importantly, the OCG has seen no documentary evidence or proof to conclusively conclude that all six (6) areas of improvement were presented to BA for its consideration and response.

In point of fact, on 2007 April 27, four (4) days after Dr. Davies had written to VS and approved, on 2007 April 23, its proposal “*in principle*”, and four days after Dr. Davies had written to BA on 2007 April 23 to advise it that he had approved the VS offer, Mr. Willie Walsh, the CEO of BA, wrote to Dr. Davies, stating, *inter alia*, that:

- i. “ *In advancing the discussion over cooperation on the London route, we put forward a competitive and comprehensive proposal, ranging from the purchase of the London slot, to providing access to our extensive European and Global network.*
- ii. *The feedback we received throughout this process was positive, and we were not left with any impression there were any significant outstanding concerns.*
- iii. *I fully understand that this decision must be made in the best interests of the people of Jamaica. **However, I do not believe that British Airways has been given the opportunity to respond to any perceived shortcomings in our proposal, nor to extending the discussion as to what further support is required.**”<sup>3</sup> (OCG Emphasis).*

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<sup>3</sup> Willie Walsh. Letter to the Hon. Dr. Omar Davies. 2007 April 27

With respect thereto, and pursuant to the core tenets, *inter alia*, of Section 4 (1) of the Contractor General Act, the OCG was particularly interested in finding out (a) whether the acceptance of the VS offer was fair, transparent, impartial and based upon merit; and (b) whether the approval process was free from irregularity and impropriety.

In this regard, the OCG's Investigation sought to ascertain whether the referenced information was indeed communicated to BA by either Air Jamaica or Dr. Davies and, if so, when was this done and the medium of communication that was utilized.

The OCG was also interested in finding out from Mr. Conway, why, as far as he was aware, his recommendation for the BA offer to be accepted was not acted upon by Dr. Omar Davies, who had, instead, accepted the VS proposal and, whether his (Mr. Conway's) final recommendation, which was dated 2007 April 19, was made after VS had improved its offer.

### **Summary of Primary Findings and Conclusions**

The Findings of the OCG have revealed that the agreement between VS and Air Jamaica was a broad commercial arrangement which incorporated several elements, one of which was the sale of the London Heathrow slots (AJLHS). The agreement was initiated by the signing of a Memorandum of Understanding (MOU) on 2007 May 10.

It must be noted that Air Jamaica had signed the agreement on 2007 May 7, while VS signed same on 2007 May 10. Consequently, the MOU was fully executed by both parties on 2007 May 10.

However, the OCG's Investigation has revealed that the Executive Management of Air Jamaica, at all material times, had fully supported and recommended the acceptance of the proposal which came from BA. The then CEO and President of Air Jamaica, Mr. Michael Conway, had prepared two evaluation reports of the BA and VS proposals – one which was dated 2007 April 17 and the other, 2007 April 19.

It is instructive to note that, in both reports, Mr. Conway recommended that the BA offer should be accepted. For the avoidance of doubt, in the ‘*Final Position Paper*’, which was dated 2007 April 19, Mr. Conway, unequivocally stated thus:

*“While there are differences between the two bids as noted above, it is the view of the Management that none are so compelling as to readily rule out one over the other. Accordingly, we can take a high degree of comfort that we have in all likelihood pretty much extracted what exists to be gotten, which has been facilitated by MOF in the last phase of the deliberations.*

*JM management is more comfortable with the BA commitments with regard to transition and their longevity in the Jamaica market. There is, in the considered opinion of our Management and the Chairman of the Sales and Marketing Board Committee a significant plus to Jamaica’s Tourism by bringing BA into MBJ.*

*It is the recommendation of the Management of JM that we go with BA and move to execute an Agreement with that carrier.”<sup>4</sup> (OCG Emphasis).*

In an effort to justify the foregoing recommendation, Mr. Michael Conway requested that Mr. Paul Pennicook, the then Senior Vice President-Sales & Marketing for Air Jamaica, prepare a justification report.

The OCG found that Mr. Paul Pennicook, on 2007 April 24, prepared a justification report in support of the BA recommendation.

In the referenced justification report, Mr. Pennicook stated that “...BA would be in a much better position to offer increased service to Kingston either via the USA with Air Jamaica or even to add an additional frequency into Kingston....BA has a vastly superior European network for connections than does Virgin. This would suggest that an

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<sup>4</sup> Michael Conway. Final Position Paper. 2007 April 19

**agreement with BA is the better option in as far as tourism growth strategy is concerned.**”<sup>5</sup> (OCG Emphasis).

Quite surprisingly, however, the OCG found that while the Executive Management of Air Jamaica was working on the referenced justification paper, the then Minister of Finance and Planning, Dr. Omar Davies, had unlawfully and improperly inserted himself into the process and had already accepted “*in principle*” the VS offer on 2007 April 23.

The letter from Dr. Davies, which was directed to VS on 2007 April 23, stated thus: “*Whilst it is an extremely difficult decision to make, having assessed the two offers **I have decided to approve, in principle, the offer made by Virgin Atlantic.***”<sup>6</sup> (OCG Emphasis).

To further compound his unauthorized and unlawful usurpation of the negotiation, evaluation, due-diligence and approval processes of the BA and VS proposals, the then Minister, Dr. Omar Davies, on the same date, viz. 2007 April 23, wrote to BA informing it of **his** approval of the VS offer. The letter stated that “*I regret to inform you that **I have decided that the agreement on the route should be made with Virgin Atlantic.***”<sup>7</sup> (OCG Emphasis).

In addition, Dr. Omar Davies, again on the said date, 2007 April 23, directed a letter to the then Board Chairman of Air Jamaica, Mr. O.K. Melhado, stating that “*I have assessed the issues and I have closely examined the comparative matrix prepared by your senior management. **In the final analysis it is a “judgement call.”***”<sup>8</sup> (OCG Emphasis).

Dr Davies, in his letter to Mr. Melhado, further stated that “**I have decided** that the proposal put forward by Virgin Atlantic will be more beneficial to Jamaica and Air Jamaica in the long run and I have so indicted to both Mr Branson and Mr Walsh the CEO of British Airways. **However, I should add that having been asked to request**

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<sup>5</sup> Paul Pennicook. Air Jamaica Ltd. Agreement: British Airways vs. Virgin Atlantic for the London Route. 2007 April 24

<sup>6</sup> Dr. Omar Davies. Letter to Virgin Atlantic. 2007 April 23

<sup>7</sup> Omar Davies. Letter to British Airways. 2007 April 23

<sup>8</sup> Dr. Omar Davies. Letter to O.K. Melhado. 2007 April 23

**Virgin, improvements in six (6) specific areas, to which I received positive response, I would feel somewhat compromised to subsequently rule against that company. To do so would raise questions as to whether my intervention, requesting improved responses had been in good faith.**<sup>9</sup> (OCG Emphasis).

Notwithstanding the Minister's use of the term '*in principle*', to describe his approval of the VS offer, the OCG found that a 2007 April 25 letter, which was written by Mr. Conway to VS, confirmed that Dr. Davies had in point of fact fully committed Air Jamaica and the Government of Jamaica to the VS proposal.

Mr. Conway, in the referenced letter to VS, stated that "**The management of Air Jamaica is very much looking forward to welcoming you to Jamaica next week to document the Agreement,** including those matters set forth in Minister Davies' letter to Sir Richard dated April 17th. I trust we will be able to fast track this process in order that we can make the appropriate announcements to our respective customers and ensure that we accomplish an effective transition."<sup>10</sup>

The implications of Minister Davies' letter of 2007 April 23 to VS and of Mr. Conway's subsequent letter of 2007 April 25, and the presumed intent that was conveyed therein to create a legally binding arrangement, is further evidenced by the fact that an MOU, regarding Air Jamaica's acceptance of the VS proposal, was entered into by both parties, effective as at 2007 May 10. Subsequently, on 2007 July 24, the 'Slot Exchange- London Heathrow Airport & London Gatwick Airport' Agreement was signed by Air Jamaica Holdings Ltd. and VS.

In the circumstances, there can be no doubt that the language that Dr. Davies had used in his written communications to VS and BA on 2007 April 23, was such that there was no question that his decision was anything but one which had been made "*in principle*".

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<sup>9</sup> Dr. Omar Davies. Letter to O.K. Melhado. 2007 April 23

<sup>10</sup> Michael Conway. Letter to VS. 2007 April 25

It is also instructive to recall that the then Minister of Finance and Planning, Dr. Davies, had previously written to VS, on 2007 April 17, outlining six (6) suggested areas for improvement for the VS proposal, following his alleged receipt of a telephone call from Sir Richard Branson, the Chairman of VS.

In his sworn response to the OCG's Requisition, which was dated 2008 July 21, Dr. Davies, informed the OCG that "*Toward the end of the process of evaluation of the two proposals by the Board and management of Air Jamaica, **I received a telephone call from the Chairman of Virgin Atlantic, Sir Richard Branson, in which he expressed concern that the Board/senior management intended to accept the proposal from BA but that he wished me to know that he would be willing to improve his offer.** I indicated to Sir Richard that, as per my policy, I had not been involved in assessing the proposals and I would need to be briefed before having any further discussions with him.*"<sup>11</sup> (OCG Emphasis).

Based upon the sworn testimony of Dr. Davies, it would appear that Sir Richard had been well informed about the evaluation process of both the BA and VS proposals up to the time of his alleged telephone call to Dr. Davies, as well as the subsequent recommendation of the then Management of Air Jamaica to accept the BA proposal.

If Dr. Davies' assertions are true, as he has sworn them to be, then the entire AJLHS proposal evaluation and approval process would have been compromised under law.

Very significantly, on 2007 May 2, approximately eight (8) days after the then Minister had informed VS of the acceptance of its offer '*in principle*, the then Board Chairman of the Air Jamaica, Mr. O.K. Melhado, wrote to Dr. Davies, informing him, *inter alia*, that:

**"In order to facilitate the final decision we have summarized for you an updated comparison between VS and BA. As you know, officials from Virgin met with the company Monday and Tuesday for the purpose of putting together an MOU on our agreement with VS.....Both carriers made strong offers,**

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<sup>11</sup> Dr. Omar Davies. Response to OCG Requisition. 2008 July 21

*however, VS has offered more for the slots, have given very attractive pro rate fares, agreed to an evergreen commitment on triangular fares over the USA, (that is, they will extend prorates as new gateways are opened in the USA), a major defrayment on the passengers handed over in October and a five year contract. As a whole, these in our judgement are of greater value than the agreement by BA to cut over one month earlier. Other aspects of the offers are fairly similar.”<sup>12</sup> (OCG Emphasis)*

Attached to the referenced letter was an ‘*Updated Summary*’, comparing both the BA and VS offers. A review of the ‘*Updated Summary*’ revealed the following:

1. Five (5) of the ten (10) criteria of evaluation of the original analysis – that was contained in the ‘*Final Position Paper*’ which was previously prepared by Mr. Conway on 2007 April 19, and in which the proposal from BA was recommended for selection – were not used in the evaluation that was contained in the ‘*Updated Summary*’. It is instructive to note that the analysis of these five (5) criteria had favoured the BA proposal over the VS proposal.
2. Four (4) new evaluation criteria were added, all of which favoured VS. The new criteria were reflected in the analysis which listed the VS proposal as stronger.

In the Meeting Minutes of the Air Jamaica Board, which was dated 2007 May 2, the following was stated: “*The Chairman noted that apart from the difference in slot prices (VS \$10.2M and BA \$9.4M), the other significant differences relate to VS’s new offer for earlier take-over of the slots and assuming approximately 50% of the exposure relative to passengers who are already confirmed and ticketed on Air Jamaica on flights subsequent to the proposed take-over date. This translates to a value of approximately \$250,000.00 of over \$500,000.00 worth of ticket sales. It was agreed that Mr. Conway would provide a written summary of the preceding report for the Board. **The Chairman advised the Board that during the negotiations both carriers communicated with the Minister of***

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<sup>12</sup> O.K. Melhado. Letter to the Hon. Minister Omar Davies. 2007 May 2

**Finance & Planning. The Minister evaluated both proposals and has indicated that he proposed, subject to having the support of the Air Jamaica's Board and management, to seek Cabinet approval for the VS offer.** There was general consensus that the reported terms of the VS offer appeared to be the better of the two (2); however, the Board requested full documentation of both offers, including justification for any recommendation, so that the Cabinet could have the benefit of full documentation on which to make its decision.”<sup>13</sup> (OCG Emphasis).

It is evident from the contents of the 2007 May 2 Board Meeting Minutes, that the entire Board was not then informed of the fact that Dr. Davies had already accepted the VS offer more than a week before on 2007 April 23 and had, on that same date, formally advised Mr. Melhado, in writing, of his decision.

In point of fact, both BA and VS were informed of the Minister Davies' decision from as early as 2007 April 23. Indeed, BA was able to formulate and despatch a written reply, by way of a letter which was dated 2007 April 27, to Dr. Davies, voicing its dissatisfaction with his decision.

Also of critical interest, is that, notwithstanding the foregoing, the 2007 May 2 Air Jamaica Board Meeting Minutes do not indicate that the Board was informed of BA's dissatisfaction with Dr. Davies' decision. Further, and of significant import, is that the Minutes do not reflect the fact that BA had stated, to Dr. Davies, its willingness to further negotiate the terms of its proposal – the very proposal which was earlier rejected, in writing, by Dr. Davies on 2007 April 23 when he had exceeded his Ministerial authority.

Additionally, it is instructive to note that the Meeting Minutes of the Air Jamaica Board of Directors, which was dated 2007 May 29, states that **“The Chairman advised the Board that subsequent to the May 02, 2007 meeting of the Board of Directors at which the proposed plans for the discontinuation of the UK/Jamaica route were discussed, the Minister of Finance & Planning formally advised British Airways (BA) and Virgin**

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<sup>13</sup> Minutes of the Air Jamaica Ltd. Board of Directors. 2007 May 2

*Atlantic Airways (VS) of the decision to accept the offer of the latter.* A Cabinet Submission reflecting the decision was tabled before the Cabinet in the Minister's absence; however, Cabinet deferred action on the Submission by one week to await the return of the Minister."<sup>14</sup> (OCG Emphasis).

Based upon the foregoing, the OCG has concluded that the then Air Jamaica Board Chairman, Mr. Melhado, was unquestionably disingenuous in his report to the Air Jamaica Board of Directors since the referenced 2007 April 23 letters from Dr. Davies, to both VS and BS, had preceded the May 2 Air Jamaica Board Meeting by more than 1 week.

The Findings of the OCG have also revealed evidence of breaches of the Contractor General Act, the Financial Administration and Audit Act and the Public Bodies Management and Accountability Act in the negotiation, evaluation, due diligence and approval processes of the commercial arrangements with VS which involved the divestment of the AJLHS.

These breaches are attributable primarily to what the evidence has disclosed is an unwarranted, improper, unauthorized and unlawful Ministerial intervention, on the part of the then Minister of Finance and Planning, Dr. the Hon. Omar Davies, in the above referenced processes. These processes are reserved, by law, for execution by the Government's administrative arm and its Accounting and Accountable Officers and, in the case of Air Jamaica, also by its Board of Directors, prior to formal endorsement and approval by, at least, the Cabinet of the Government of Jamaica.

The OCG has also concluded that the Board of Directors of Air Jamaica, its Accounting Officer and/or one or more of its Accountable Officers, and/or the former MOFP, have failed, at least partly, in the discharge of the responsibilities which have been respectively imposed upon them by the Public Bodies Management and Accountability Act and the Financial Administration and Audit Act.

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<sup>14</sup> Air Jamaica Ltd. Minutes of the Board of Directors. 2007 May 29

The OCG has found that there is sufficient evidence which is contained herein and, more particularly and importantly, in the sworn statements that were furnished to the OCG by the relevant Respondents, to suggest that the then Air Jamaica Board of Directors and/or one or more of its Members, were negligent in the exercise of those duties that are imposed upon them, in particular, by Section 17(1) (a) and (b) and Section 6 of the Public Bodies Management and Accountability Act.

The former Chairman of the Air Jamaica Board of Directors, Mr. O.K. Melhado, and those members of the former Board of the airline:

- (1) who had knowledge of the recommendations of the Executive Management of the airline in favour of the BA proposal;
- (2) who knowingly supported or who were involved in penning the 2007 May 2 letter to the then Minister of Finance and Planning, Dr. Omar Davies;
- (3) who knowingly supported or who assisted in the preparation of the ‘*Updated Summary*’, which was attached to the referenced 2007 May 2 letter;
- (4) who, in their divestment of the State’s assets, failed to exercise due care, skill and diligence, *inter alia*, in researching the European Union-United States Open Skies Agreement (EU-US OSA) and its likely impact on (i) the assets that were to be divested, and (ii) the commercial arrangements which were being proposed regarding same;
- (5) who knowingly supported the decision of the then Minister, Dr. Davies, *inter alia*, to approve the proposed commercial arrangements with VS, despite the several recommendations and justifications which had been advanced by the airline’s Accountable Officer and its Executive Management for entering a commercial arrangement with BA;

...can be deemed to have (a) acted negligently in the discharge of their responsibilities as Air Jamaica Directors and/or (b) abused their authorities and offices as Directors of Air Jamaica and/or (c) breached their respective duties of trust to the airline and/or (d) breached their respective fiduciary or statutory duties to the airline.

Based upon the documentary evidence which has been disclosed to it, the OCG has had no difficulty coming to the conclusion that the processes of evaluation, selection and approval of the VS proposal, in respect of the sale of the AJLHS, lacked transparency, fairness, and impartiality.

Further, as a result of its Finding, *inter alia*, that there was a lack of an acceptable and clearly defined objective selection methodology by which the VS proposal was approved, the OCG has concluded that the acceptance of the VS proposal was not based on merit and was improper and irregular and, consequently, was unlawful.

### **Summary Overview of Specific Findings**

In addition to the foregoing, the OCG's Investigation has also made the following determinations and/or uncovered the information which is summarized below:

1. The London/Jamaica route was deemed to be one of the loss making routes for Air Jamaica and the discontinuation of the said route was projected to save the airline US\$25 Million per annum. The losses that were being incurred on the London route were attributable to (a) the competition on the route; and (b) escalating fuel prices.
2. Based upon the analysis which was carried out by the Executive Management of Air Jamaica, the London/Jamaica route was oversupplied and the airline's overhead operational costs did not allow it to compete efficiently with the two other major players in the market, *viz.* VS and BA.

As a result, the Executive Management of Air Jamaica prepared a Business Plan for the financial years 2007-2009. The Plan was presented to the Cabinet on 2007 January 29. The plan proposed, *inter alia*, that the London route should be terminated as at 2007 July 1.

3. Other objectives of the Business Plan were (a) to preserve service on the said route; (b) to increase scope through codeshare behind the gateway; (c) to realise value for the AJLHS; and (d) to remove the A340 aircraft from the fleet.
4. A codeshare agreement with either BA or VS would allow Air Jamaica to maintain a presence on the London/Jamaica route by the display of its code on designated BA or VS flights. This presence would not incur a cost to Air Jamaica since BA/VS would be the operating carrier, providing the requisite equipment, crew and ground handling services.

Furthermore, Air Jamaica would also have an opportunity to earn revenue from the codeshare agreement as it could act as a marketing carrier and sell tickets for the referenced flights on the Jamaica/London route.

5. A slot as defined by the IATA Scheduling Guidelines, refers to “... *the scheduled time of arrival or departure available for allocation by, or as allocated by a coordinator for an aircraft movement on a specific date at a coordinated airport. For scheduling purposes, the slot is the scheduled time of arrival or departure at the terminal, not the time of landing or takeoff from the runway.*”<sup>15</sup>
6. The allegations which were inherent in Minister Shaw’s presentation to Parliament on 2008 April 23, alluded to the sale of seven (7) slots by Air Jamaica to VS. On the other hand, according to the former Board Chairman of Air Jamaica, Mr. O.K. Melhado, Air Jamaica held the rights to one (1) pair of slots.

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<sup>15</sup> IATA Scheduling Guidelines. Section 5.3-Definition of Slots. 2008 July

VS also informed the OCG that it had purchased 728 slots from Air Jamaica. This figure was calculated by VS on the basis that in a full IATA year there are 52 weeks. Consequently, it argued, a daily slot-pair over a full year would comprise a total of 728 slots (i.e. 52x7x2 slots). In 2006/07, the winter season had 22 weeks (total: 308 slots); and the 2007 summer had 30 weeks (total: 420 slots).

In the premises, the OCG found that Air Jamaica had sold to VS one (1) slot pair, which gave VS the right to land and take-off once, seven (7) days every week, thus equating to a total of 728 'slots' annually.

7. The EU-US OSA ended decades of strict regulation for transatlantic flights and now allows European and American airlines to fly from any EU destination to any US destination, and vice versa. The OSA agreement, which was signed on 2007 April 30, came into effect on 2008 March 30, and effectively removed the exclusive rights that were previously held by only four airlines, BA, VS, AA and United Airways, to fly from London Heathrow to the United States.

However, despite the liberalization of transatlantic routes in the aviation industry, as a result of the EU-US OSA, access to Heathrow is still a challenge because an estimated 98.5% of all of the Heathrow slots are already taken and those that remain have been deemed to be unsuitable for transatlantic flights.

As a result, the demand for Heathrow slots far outweighs the supply for same. Consequently, the secondary trading of slots has increased and, airlines, when exchanging slots, will now, almost invariably, also attach a price to the slots that are being traded.

8. The practice of slot trading is largely a UK phenomenon. It is not allowed in some countries and the only recognised system for slot allocation is that which is contained in the IATA Worldwide Scheduling Guidelines. The Guidelines speak

only to the *exchange* of slots. According to the IATA Worldwide Scheduling Guidelines, slots cannot be sold. They must be exchanged.

9. There are two accepted ways for exchanging slots. Firstly, the two airlines which are interested in swapping slots can simply inform the slot coordinator who will, in turn, confirm the swop. Secondly, one airline may exchange the desired slots for off-peak or undesirable slots that are held by the other airline. This exchange must then be confirmed by the airport coordinator.

The OCG found that the Air Jamaica/VS transaction appeared to have followed the second afore-stated option, since Air Jamaica exchanged the AJLHS for off-peak VS slots.

10. It is instructive to note that, as a result of the increased demand for Heathrow slots, the value for same has also escalated with prime slots being estimated to value in the region of £20 million. For example, in 2007 December, Alitalia Airlines sold three (3) slot-pairs for £67million, which equates to £22.3 million per slot-pair.
11. The primary determining factors for the value of slots are (a) the arrival and departure times of the slots; and (b) the level of demand at the airport in question. In the case of Heathrow, the demand for slots far outweighs supply.
12. In determining the market value of slots, the OCG found that in several of the cases of slot exchanges that were examined, the airline acquiring the slots not only paid a price, but also entered into some form of commercial arrangement with the carrier which was disposing of the slots. In the case of Air Jamaica, VS entered into a commercial arrangement with Air Jamaica and paid £5.1 million for the AJLHS.

13. The OCG, in reviewing (a) the files of Air Jamaica and (b) the information which was supplied in response to its Requisitions, found that there was no reference to the EU-US OSA. It appears that an analysis of the EU-US OSA was not undertaken by Air Jamaica to determine the likely impact it would have had on (i) the price of the AJLHS; (ii) other likely purchasers for the slots; and (iii) the extent and scope of a codeshare agreement.
  
14. The OCG found that, in its negotiations with BA and VS for the sale of the AJLHS, Air Jamaica did not treat the slots as a separate and distinct asset. Instead, the sale of the AJLHS formed a mere component within the broader Air Jamaica objective of terminating the London/Jamaica route, in an effort to cauterize the airline's operating financial losses. This, the OCG has found to be troubling, particularly in light of recent reports which indicate that *Deloitte & Touche* has proposed that an airline should include its slots as an asset item in its balance sheet.<sup>16</sup>
  
15. The OCG found that Air Jamaica did not undertake a thorough analysis of the secondary slot-trading market at Heathrow, especially given the impending EU-US OSA and its likely impact upon the market. To the contrary, the airline's Management relied extensively upon an analysis of the value of the BWIA slots which were sold in 2006 for £5 million and, having done so, it secured £5.1 million from VS for the AJLHS.

In the absence of the referenced analysis, the OCG is therefore unable to definitively state that Air Jamaica could have achieved more for its slots. However, based upon the wealth of information which has been reviewed by the OCG, the fact is that the demand for Heathrow slots has increased and this has been attributed largely to the EU-US OSA. Further, this demand at Heathrow far exceeds the supply.

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<sup>16</sup> Flightglobal.com. *BMI values its Heathrow slot portfolio at £770 million*. 2008 June 3. <http://www.flightglobal.com/articles/2008/06/03/224338/bmi-values-its-heathrow-slot-portfolio-at-770-million.html>

16. Air Jamaica approached three (3) airlines regarding the sale of the AJLHS. They were BA, VS and AA. AA offered Air Jamaica US\$6 million and a pair of Gatwick slots. BA offered the national airline a commercial arrangement and US\$9.4 million, while VS offered a commercial arrangement and US\$10.2 million.
17. The AA deal was not actively pursued primarily because of the price which was offered for the slots as well as the fact that Air Jamaica needed to ensure the replacement of flights on the London/Jamaica route. Hence, negotiations were actively pursued with BA and VS. These airlines were not restricted by the UK-Jamaica bilateral agreement in relation to route rights.
18. Neither BA nor VS intended to use the AJLHS to fly to Jamaica. In fact, in the MOU which was dated 2007 May 10, between VS and Air Jamaica, the flights which were being added to Jamaica were coming from the London-Gatwick Airport.
19. No formal Request for Proposal (RFP) was prepared by Air Jamaica outlining to prospective bidders the criteria which would be utilized for the selection of the winning bid, and/or the areas which were to be considered in deciding the airline with which Air Jamaica would enter into a commercial arrangement, *inter alia*, for the divestment of the AJLHS.
20. However, in its evaluation of the bids, Air Jamaica had clear criteria by which both the VS and BA offers were initially compared, prior to the intervention into the process by the then Minister of Finance and Planning, Dr. Omar Davies. The 2007 April 19 evaluation report, which was entitled '*Final Position Paper*', and which was prepared by the former President & CEO of Air Jamaica, Mr. Michael Conway, included the following areas of consideration:

- i. Slot Purchase
- ii. Full Slot takeover
- iii. Passenger Handoff
- iv. Prorates and Gateways
- v. Frequent Flier Programs
- vi. Tenure
- vii. Tourism Consideration
- viii. Commitment to Jamaica
- ix. Ability to Perform
- x. Diaspora Issues

21. It is instructive to note that BA had approached Air Jamaica from as early as 2006 November. The Meeting Minutes of the Air Jamaica Board of Directors which was dated 2007 January 10, highlighted the fact that BA had expressed an early interest in the AJLHS.

22. The method of selection of the carriers to negotiate the divestment of the AJLHS, which was utilised by Air Jamaica, was akin to the limited tender methodology.

23. The OCG has seen no evidence to suggest that any information regarding the transaction was made available to the Accounting Officer of the airline for his evaluation or approval and/or that his prior approval was granted. The then Accounting Officer of Air Jamaica was the then Financial Secretary, Mr. Colin Bullock.

It must be noted, however, that after receiving Cabinet approval for its Business Plan, the Air Jamaica Board of Directors had instructed the President & CEO of the airline, Mr. Michael Conway, to approach BA and VS in an effort to execute the objectives of the Business Plan and to close the London/Jamaica route.

24. The evaluation of the proposals from BA and VS and the preliminary negotiations were handled primarily by Mr. Conway and by the airline's former Board Chairman, Mr. O.K. Melhado. The Board was informed about the progress of the preliminary negotiations and evaluations on a regular basis. The involvement of other members of the Air Jamaica Executive Management team was limited to what the President & CEO required.
25. The then Minister of Finance and Planning, Dr. Omar Davies, became involved in the negotiations in early 2007 April when, according to the Minister, Sir Richard Branson of VS telephoned him with the objective of making improvements to the VS proposal. In the final stages of the BA/VS proposal negotiation and evaluation processes, Dr. Davies was responsible for making the decision as to which of the two proposals would be accepted and, in so doing, he approved the VS proposal and committed the Government of Jamaica, on 2007 April 23, to what was to become a binding contract to divest the AJLHS to VS.
26. The General Counsel and/or Legal Department of Air Jamaica did not participate in (a) the evaluation of the BA/VS proposals; (b) the drafting of the MOU between VS and Air Jamaica nor (c) the settlement of the final sale agreement for the AJLHS.
27. Below is a synopsis of the chronological sequence of material events which surrounded the sale of the AJLHS to VS.
- **On or about 2007 April 12-13** – Sir Richard Branson allegedly made contact with the then Minister of Finance and Planning, Dr. Omar Davies, and allegedly expressed the view that Air Jamaica was inclined to and was going to accept BA's offer in consequence of which he allegedly expressed a willingness to improve VS' offer.

- **On 2007 April 17** – the following activities occur:
  - i. Mr. Michael Conway, the then President and CEO of Air Jamaica, prepares a ‘*Position Paper*’ recommending the acceptance of the BA proposal.
  - ii. After consultation with Mr. Michael Conway and Mr. O.K. Melhado, Dr. Davies writes to VS, outlining six (6) suggested areas for the improvement of the VS proposal.
  
- **On 2007 April 19** – the following activities occur:
  - i. BA sends a letter to the then Minister, Dr. Omar Davies, outlining the value of the BA proposal. It is instructive to note that BA did not make any improvements to its proposal to reflect the six (6) suggested areas for improvement which were offered to VS.
  - ii. Mr. Michael Conway prepares an evaluation matrix comparing both the VS and BA proposals, and recommends the BA proposal for acceptance by Air Jamaica and the Government of Jamaica. The words ‘*Final Position Paper*’ are hand-written on the report.
  - iii. A fax cover sheet, addressed to Dr. Davies, with the report prepared by Mr. Michael Conway, recommending the BA proposal attached, is recorded.
  
- **On 2007 April 23** – the following activities occur:
  - i. Dr. Davies writes to VS and informs it that its proposal has been approved “*in principle.*”
  - ii. Dr. Davies writes to BA informing it that “***I have decided that the agreement on the route should be made with Virgin Atlantic***”.
  - iii. Dr. Davies writes to the Air Jamaica Board Chairman, Mr. O.K. Melhado, and informs him that he has decided to approve the VS proposal.

- **On 2007 April 24** – the following activity occurs:
  - i. Mr. Paul Pennicook, the Senior Vice President, Sales and Marketing for Air Jamaica, prepares a justification report to support the airline’s recommendation to accept the BA proposal. This was done at the request of Mr. Michael Conway, following the preparation of his 2007 April 19 ‘*Final Position Paper*’, in which is embodied his evaluation matrix, comparing both the VS and BA proposals.
  
- **On 2007 April 25** – the following activity occurs:
  - i. Mr. Conway writes to VS and states that “***It was good to talk with you as always, especially now that a decision has been reached as to the way forward....The management of Air Jamaica is very much looking forward to welcoming you to Jamaica next week to document the Agreement,*** including those matters set forth in Minister Davies’ letter to Sir Richard dated April 17th.”<sup>17</sup>
  
- **On 2007 April 27** – the following activity occurs:
  - i. BA writes to Dr. Davies to express its dissatisfaction with his decision. BA also expresses its concern about not being afforded the opportunity to respond to any shortcomings in its proposal.
  
- **On 2007 May 2** – the following activity occurs:
  - i. Mr. O.K. Melhado writes to Dr. Davies attaching an ‘*Updated Summary*’ of the proposals from BA and VS. This was being supplied in an effort to ‘*facilitate the final decision*’, which, notably, had already been made and effected on 2007 April 23.

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<sup>17</sup> Michael Conway. Letter to VS. 2007 April 25

- **On 2007 May 10** – the following activity occurs:
  - i. VS and Air Jamaica sign the MOU.
  
- **On 2007 May 28** – the following activity occurs:
  - i. Cabinet approves Air Jamaica’s acceptance of the VS offer for the divestment of the AJLHS and its entry into the over-arching and governing commercial arrangement.
  
- **On 2007 July 24** – the following activity occurs:
  - i. VS and Air Jamaica Holdings Ltd. sign the *‘Slot Exchange- London Heathrow Airport & London Gatwick Airport’* Agreement.

28. The *‘Updated Summary’* which was sent by Mr. Melhado to Dr. Davies on 2007 May 2, reflected a more favourable VS proposal. However, and of critical importance, is the fact that it excluded five (5) of the original evaluation criteria which were embodied in the 2007 April 19 *‘Final Position Paper’* that Mr. Conway had prepared. The excluded criteria were as follows:

- i. Full Slot Takeover
- ii. Frequent Flier Programs
- iii. Commitment to Jamaica
- iv. Ability to perform
- v. Diaspora Issues

Of critical note is that all of these five (5) criteria had assessed the BA proposal as the stronger one.

On the other hand, four (4) new evaluation criteria were included in the ‘*Updated Summary.*’ These were as follows;

- i. LGW Slot Option
- ii. Leadership Commitment
- iii. South American Routes
- iv. Singapore Airways

The OCG found that an evaluation of the proposals, regarding the additional criteria which were contained in the ‘*Updated Summary,*’ were too subjective and, as such, skewed the evaluation in favour of VS. Indeed, and not surprisingly, all of them were assessed in favour of the VS proposal.

Additionally, the integrity, propriety and credibility of the ‘*Updated Summary*’ document is called into question because it was prepared on 2007 May 2 *after* Minister Davies had approved the VS offer on 2007 April 23.

Accordingly, by all indications, the prior 2007 April 19 evaluation, which had conclusively favoured the acceptance of the BA proposal, may have been deliberately altered to reflect and justify an improper, unauthorized and unlawful Ministerial decision which had already been communicated to all of the parties and which had given the *nod* to VS.

In the circumstances, the OCG has had absolutely no difficulty in concluding that VS was given an unfair, questionable and highly suspect advantage in the matter of the sale of the AJLHS.

This Finding is compounded by the fact that the pace of the negotiations for the finalization of the transaction was accelerated after the then Minister of Finance and Planning, Dr. Omar Davies, intervened in the BA/VS proposal evaluation, negotiation and approval processes.

The Minister, by his own admission, gave what appears to be a questionable commitment for an early response to be made to the enquiry which was allegedly received from Sir Richard Branson as to how the VS proposal could be improved in the face of the perception that the Executive Management of Air Jamaica was ready to accept the BA proposal.

In the final analysis, the then Hon. Minister of Finance and Planning, Dr. Omar Davies, took it upon himself to usurp the authority of the State's Accounting and Accountable Officers for the national airline, the airline's Board of Directors and, above all, the very Cabinet itself, by unlawfully binding the Government and People of Jamaica to the sale of the AJLHS on 2007 April 23.

### **Referrals**

The OCG, in the conduct of its Investigation, is required to be guided by Section 21 of the Contractor General Act.

**Section 21 of the Contractor-General Act** provides as follows:

**“If a Contractor-General finds, during the course of his Investigations or on the conclusion thereof that there is evidence of a breach of duty or misconduct or criminal offence on the part of an officer or member of a public body, he shall refer the matter to the person or persons competent to take such disciplinary or other proceeding as may be appropriate against that officer or member and in all such cases shall lay a special report before Parliament.”**<sup>18</sup> (OCG Emphasis).

1. Pursuant to the mandatory statutory obligations which are imposed upon a Contractor-General by Section 21 of the Contractor General Act, the OCG is hereby formally referring a copy of this Report to the Attorney General on the basis that there is evidence which is recorded herein which would suggest that

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<sup>18</sup> Contractor-General Act. 1983

there was, *inter alia*, a clear and unambiguous breach of duty specifically on the part of (a) Mr. O.K. Melhado, the former Chairman of the Air Jamaica Board of Directors and (b) the former Board of Directors of the Air Jamaica and/or one or more of the Members of the Board, all in contravention, *inter alia*, of Sections 6 and 17(1) of the provisions of the Public Bodies Management and Accountability Act.

The matter is being referred to the Attorney General particularly, *inter alia*, in light of the provisions that are contained in Sections 6, 17 and 25 of the Public Bodies Management and Accountability Act.

Additionally, the matter is being referred to the Attorney General for consideration as to what actions, if any, may be pursued against any of the offending former Members of Air Jamaica Board of Directors, having regard to all of the circumstances of the case.

**Section 6 of the Public Bodies Management and Accountability Act** provides as follows:

*“6. Every board shall-*

*(a) take such steps as are necessary-*

*(i) for the efficient and effective management of the Public Body;*

*(ii) to ensure the accountability of all persons who manage the resources of the Public Body;*

*(b) develop adequate information, control, evaluation and reporting systems within the body;*

*(c) develop specific and measurable objectives and performance targets for that body”.*

**Section 17 of the Public Bodies Management and Accountability Act** provides as follows:

*17- (1) “Every director and officer of a Public Body shall, in the exercise of his powers and the performance of his duties-*

- (a) act honestly and in good faith in the best interests of the Public Body; and*
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances including, but not limited to the general knowledge, skill and experience of the director or officer.*

**Section 25 of the Public Bodies Management and Accountability Act** provides as follows:

*25. (1) If the Court is satisfied on an application by the Attorney-General that any person has contravened any of the provisions of-*

- (a) section 4 (acquisition of shares and payment of dividends);*
- (b) section 5 (exercise of borrowing powers);*
- (c) section 6 (corporate governance);*
- (d) section 14 (general duties of auditors);*
- (e) section 15 (failure to furnish information to auditor);*
- (f) section 20 (levels of emoluments);*
- (g) section 21 (restriction on formation of new companies),*

*the Court may exercise any of the powers referred to in subsection (2).*

*(2) The Court may-*

- (a) order the person concerned to pay to the Crown such pecuniary penalty not exceeding one million dollars; or*
- (b) grant an injunction restraining that person from engaging in conduct described in subsection (1).*

*(3) In exercising its powers under this section the Court shall have regard to-*

- (a) the nature and extent of the default;*
- (b) the nature and extent of any loss suffered by any person as a result of the default;*
- (c) the circumstances of the default;*

*(d) any previous determination against the person concerned.*

*(4) If in the opinion of the Attorney General there is a contravention of section 7, 8 or 9, he may make an application to the Court and the provisions of subsections (1), (2) and (3) shall apply in relation thereto*

2. Pursuant to the mandatory statutory obligations which are imposed upon a Contractor-General by Section 21 of Contractor General Act, the OCG is hereby formally referring a copy of this Investigation Report to the Director of Public Prosecutions (DPP) for such further investigation and/or action that the DPP may deem appropriate, on the basis, *inter alia*, that there is *prima facie* evidence that is contained herein and, more particularly and importantly, in the sworn statements that were furnished to the OCG by the relevant Respondents, which would suggest that Dr. Omar Davies, Mr. O.K. Melhado and Senator Noel Sloley attempted to mislead a Contractor General, in contravention of Section 29 (a) of the Contractor General Act, and/or knowingly and wilfully made a false statement to a Contractor General, in a material particular, contrary to Section 8 of the Perjury Act.

Of particular note is that in his sworn statement of 2008 July 21, given in response to the OCG's Requisition, Dr. Davies testified, *inter alia*, that "*The final recommendation* was that the offer from Virgin Atlantic be accepted."

In their joint and sworn response to the OCG's Requisition, which was dated 2008 July 15, Sloley/Melhado also stated that "...*The Board supported the selection of VS.*"

To the contrary, however, the evidence has disclosed that Dr. Davies, on his own volition and without any prior notice given to, or approval received from, the then Executive Management or Board of Directors of Air Jamaica, on 2007 April 23, wrote to VS approving its proposal. *After* he had done so, he then wrote to BA and to the then Air Jamaica Board Chairman, Mr. O.K. Melhado and informed

them of his decision to approve the VS proposal contrary to the 2007 April 19 written and “Final” recommendations of the then President, CEO and Accountable Officer of Air Jamaica, Mr. Michael Conway.

Indeed, the evidence before the OCG has disclosed that on 2007 April 23 when Dr. Davies communicated his decision to the foregoing parties to accept the VS proposal, the only Air Jamaica recommendations that were in existence, regarding the BA/VS proposals, were the written recommendations of 2007 April 17 and 19 in favour of BA which had been made by Air Jamaica’s then Accountable Officer, President and CEO, Mr. Michael Conway.

The OCG has found that the VS offer was accepted based upon the sole discretion and decision of the former Minister of Finance and Planning, who stated that it was a ‘judgment call,’ and, having asked VS for offer improvements, which were granted, had expressed the concern that “I would feel somewhat compromised to subsequently rule against that company. *To do so would raise questions as to whether my intervention, requesting improved responses had been in good faith.*”<sup>19</sup> (OCG Emphasis).

Accordingly, the OCG feels that there is sufficient *prima facie* evidence which is stated herein and, more particularly and importantly, in the sworn statements that were furnished to the OCG by the relevant Respondents, which would warrant that the matter be referred to the referenced authority for further investigation and such consequential action, if any, as the said authority may deem appropriate.

**Section 29 of the Contractor General Act** provides, *inter alia*, as follows:

“Every person who –

(a) *wilfully makes any false statement to mislead or misleads or attempts to mislead a Contractor- General or any other person in the execution of his functions under this Act; or*

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<sup>19</sup> Omar Davies. Letter to O. K. Melhado. 2007 April 23

*(b) without lawful justification or excuse –*

*(i) obstructs, hinders or resists a Contractor-General or any other person in the execution of his functions under this Act; or*

*(ii) fails to comply with any lawful requirement of a Contractor- General or any other person under this Act, ....*

*shall be guilty of an offence ...”.*

**Section 8 of the Perjury Act** provides, *inter alia*, as follows: “*Every person who knowingly and willfully makes (otherwise than on oath) a statement false in a material particular and the statement is made-*

*(a) in a voluntary declaration; or ....*

*(b) in any oral declaration or oral answer which he is required to make by, under, or in pursuance of any enactment for the time being in force,*

*shall be guilty of a misdemeanour, and liable on conviction on indictment thereof to imprisonment with hard labour for any term not exceeding two years, or to a fine, or to both such imprisonment and fine”.*

### **Recommendations**

Section 20 (1) of the Contractor-General Act mandates that “*after conducting an Investigation under this Act, a Contractor-General shall, in writing, inform the principal officer of the public body concerned and the Minister having responsibility therefor of the result of that Investigation **and make such Recommendations as he considers necessary in respect of the matter which was investigated.**” (OCG’s Emphasis).*

In light of the foregoing, and having regard to the Findings and Conclusions that are detailed herein, the OCG now makes the following Recommendations:

1. The OCG recommends that the Parliament of Jamaica should convene a Special Public Hearing at which, at a minimum, the following former or present Public Officers should be called upon to account for the role which they played in the

agreement which was reached for Air Jamaica and the Government of Jamaica to divest the AJLHS to VS, namely, Dr. Omar Davies, the former Minister of Finance and Planning; and Mr. O.K. Melhado, the former Chairman of the Air Jamaica Board of Directors.

2. The OCG recommends that appropriate mechanisms should be immediately established to ensure that members of the Executive and the Political Directorate of Government are prohibited from committing the Government and State of Jamaica to binding contracts, contrary to applicable laws and Government accounting and procurement regulations and procedures.

The OCG laments the fact that the foregoing Recommendation is identical to a Recommendation which was previously made in the OCG's **4M Energy Saving and Light Bulb Distribution Investigation Report**. That Report was tabled in the House of Representatives and in the Senate in February 2008. Regrettably, however, to date, no discernable action has been taken by the Government or by the State to give effect to the Recommendation.

There must be a strengthening of the relevant due diligence systems to ensure that members of the Political Directorate cannot and do not usurp or bring undue influence to bear upon the lawful authority of the administrative arm of Government and, in particular, upon the authority of the Accounting and Accountable Officers of Government, thereby inflicting damage to the principles of good public sector accounting, management and governance.

3. There is little doubt that the Jamaica/London route was becoming increasingly unprofitable for the national airline, Air Jamaica. However, where there is a likely opportunity to maximise the potential gains from the sale of a State asset, due care and diligence must be exercised in an objective, open and transparent manner by the divesting entity to ensure that this is done.

Accordingly, it is the recommendation of the OCG that when Public Bodies are divesting State assets, a thorough analysis of the value of the asset and of all of the factors which are likely to impact the possible proceeds of its sale, should be undertaken so as to ensure the realization of maximum gains.

4. The OCG recommends that Air Jamaica and every Public Body, when divesting States assets, and/or entering into asset divestment contracts or commercial arrangements, must adhere to the operational procedures which are stipulated in the relevant Government Procurement Procedures, the Financial Administration and Audit Act, the Public Bodies Management Act and the Contractor General Act.
5. The OCG also recommends that Public Bodies, when entering into legally binding agreements, must seek legal advice from the appropriate State or Public Body authority and have all contracts properly vetted to ensure that the interests of the Jamaican People, on whose behalf they act, are effectively secured.

Where the entity has its own general counsel and/or legal department, the procurement procedures for the entity must dictate that any contract and/or legal document that is to be executed by the entity should be reviewed by the entity's general counsel and/or legal department.

In the case of Air Jamaica, the prior review of all corporate commercial agreements and/or contracts by the company's general counsel, must be made mandatory.

6. It is recommended that an immediate review of the evaluation and approval processes for commercial agreements, by Air Jamaica and by the Ministry of Finance and the Public Service, be undertaken by the Public Administration and Appropriations Committee of the House of Representatives and by the Auditor General.

This review should be conducted to ensure that adequate procedures, systems, checks and balances are not only implemented by these Public Bodies, but are aggressively enforced to secure a radically improved level of compliance with the relevant Government approved procedures, regulations and laws.

Particular attention must be paid to the requirements of the Financial Administration and Audit Act, the Public Bodies Management and Accountability Act, the Contractor General Act and the Government's Procurement Procedures.

7. Finally, and in keeping with the tenor of similar Recommendations which it has previously made, the OCG again respectfully recommends that all appointees to the Board of Directors of all Public Bodies are fully made aware of their responsibilities and obligations under the provisions that are contained, *inter alia*, in the Public Bodies Management and Accountability Act.

## **INTRODUCTION**

On 2008 April 23, the OCG, acting on behalf of the Contractor-General, and pursuant to Sections 15 (1) and 16 of the Contractor General Act, initiated an Investigation into the circumstances which surrounded the sale of the AJLHS.

On 2008 April 8, under cover of a letter of even date, Senator the Hon. Don Wehby, the Minister without portfolio in the Ministry of Finance and the Public Service (MOFPS), provided the Contractor-General with a brief which outlined particulars regarding (a) the consultations which were undertaken in the divestment process; (b) the due diligence exercise which was carried out; (c) expression of concern for the price at which the Heathrow slots were sold; and (d) the bidding process that was utilised in the execution of the sale of the AJLHS.

Subsequently, on 2008 April 23, in his closing speech of the Budget Debates, the Minister of Finance and the Public Service, the Hon. Audley Shaw, raised several concerns regarding the sale of the AJLHS.

In his assertions to parliament, Minister Shaw sated that *“Air Jamaica. operated...seven slots at Heathrow Airport. These slots allowed Air Jamaica to fly daily into and out of Heathrow. During the winter period all seven slots are considered prime slots- which is defined as arrival and departure between 7:00 and 3:00 p.m. During the summer months four of our departure schedules were marginally out of the prime spot period but overall the seven slots were considered to be prime slots. On March 10, 2007, Air Jamaica sold these prime slots to Virgin Atlantic for an amazing price of ten million United States dollars....the Government of Jamaica and the then Board of Air Jamaica should have known of the high demand for these slots given the pending open Skies Agreement which was going to free up travelling across the Atlantic.”*<sup>20</sup>

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<sup>20</sup> Parliament of Jamaica. Hansard. 2008 April 23. Minister Shaw’s Closing Speech

Below is a synopsis of the concerns which were raised by Minister Audley Shaw:

1. *“....the Open Skies Agreement has been in the making for many years. Any person in the industry should have known of the consequences of the Agreement. The primary objective of the Agreement is to open Heathrow for other aircraft from the USA to other carriers, including Continental and Delta, who previously only had access to Gatwick. Why did the then Air Jamaica Board and the then Minister of Finance not know this? And if they did, why did they sell off these prime slots so cheaply?”*
2. *The process was not subject to public tender. It appears that only two companies had been courted- British Airways and Virgin. But, Mr. Speaker, the interesting point which should be noted by this House, is that these two airlines were already allowed to operate between USA and Heathrow. So their concept of the value of the slots would have been different from the airlines which would benefit from the open Sky Agreement, such as Continental or Delta.*
3. *Parliament’s consent on a fundamental issue as this was never sought.*
4. *It appears that legal officers of Air Jamaica and other senior government technocrats had no input in the negotiations and in the drafting of the Sale Agreement.”<sup>21</sup>*

The concerns and allegations which were contained in Minister Shaw’s report to Parliament, in relation to the sale of the AJLHS, inferred, *inter alia*, (a) impropriety; (b) a lack of transparency; (c) a breach of the Government’s procurement guidelines; (d) mismanagement; and (e) a breach of applicable administrative and accounting procedures.

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<sup>21</sup> Parliament of Jamaica. Hansard. 2008 April 23. Minister Shaw’s Closing Speech

These allegations and inferences, amongst others, raised several concerns for the OCG, especially in light of the perceived absence of the adherence to the Government contract award principles which are enshrined in Section 4 (1) of the Contractor General Act.

Section 4 (1) of the Act requires, *inter alia*, that Government of Jamaica contracts must be awarded “*impartially and on merit*” and that the circumstances of award must “*not involve impropriety or irregularity*”.

At the commencement of its Investigation on 2008 April 23, the OCG undertook a review of the allegations which were contained in Minister Shaw’s statement to Parliament. This was done in an effort to inform the direction of the Investigation as well as to determine the most efficacious method by which to proceed.

The Terms of Reference of the OCG’s Investigation into the sale of the AJLHS were primarily developed in accordance with the provisions which are contained in Section 4 (1) and Section 15 (1) (a) to (d) of the Contractor General Act.

Additionally, the OCG was guided by the recognition of the very important responsibilities which are imposed upon Public Officials and Officers by the GPPH, the Financial Administration and Audit Act, the Public Bodies Management and Accountability Act and the Corruption Prevention Act.

The OCG was also guided by Section 21 of the Contractor-General Act, which mandates that a Contractor-General shall consider whether he has found, in the course of his Investigation, or upon the conclusion thereof, evidence of a breach of duty, misconduct or criminal offence on the part of an officer or member of a Public Body and, if so, to refer same to the appropriate authority.

The Findings of the OCG's Investigation into the sale of the AJLHS are premised primarily upon an analysis of the sworn statements and the documents which were provided by the Respondents who were requisitioned by the OCG during the course of the Investigation.

## **TERMS OF REFERENCE**

The primary aim of the Investigation was to ascertain whether there was compliance with the provisions of the GPPH, the Contractor-General Act, the Public Bodies Management and Accountability Act, and the Financial Administration and Audit Act, by Air Jamaica in the sale of the AJLHS.

### ***Specific Objectives***

1. Identify the procurement process which was employed by Air Jamaica and the former Ministry of Finance and Planning and/or by anyone acting on their behalf, in the negotiation and settlement of the Codeshare Agreement and the Slot Sale/Slot Exchange arrangements for Air Jamaica's Heathrow Slots;
2. Determine whether there were any breaches of the Government's Procurement Procedures or applicable laws on the part of Air Jamaica and/or on the part of the former Ministry of Finance and Planning or on the part of anyone acting on their behalf, in the execution of any aspect of the Codeshare Agreement or the Slot Sale/Slot Exchange arrangements for Air Jamaica's Heathrow Slots;
3. Determine what attempts, if any, were taken by Air Jamaica and/or the former Ministry of Finance and Planning, to ensure that a fair market value was realized for the Heathrow Slots.
4. Determine the methodology which was employed by Air Jamaica and/or the former Ministry of Finance and Planning in arriving at the value and sale price of the Heathrow Slots;
5. Determine whether the contract that was entered into with Virgin Atlantic Airways was awarded fairly and on merit;

6. Determine whether the process which led to the award of the contract to Virgin Atlantic Airways was fair, impartial and transparent and devoid of irregularity or impropriety.
  
7. Determine whether there was any *prima facie* evidence that would suggest impropriety on the part of any individual or entity which contributed to the award (or non-award) of the contract to any of the bidders which had submitted proposals to Air Jamaica.

## **BACKGROUND**

On 2008 April 8, the Contractor-General received a letter from Senator the Hon. Don Wehby, the Minister without portfolio in the Ministry of Finance and the Public Service, enclosing a brief from the then Air Jamaica Board Chairman and CEO, Ms. Shirley Williams.

The information that was contained in Minister Wehby's letter, along with the brief, alluded, *inter alia*, to the lack of accountability and transparency in the process which led to the divestment of certain public assets, namely the AJLHS.

In his letter to the Contractor-General, Minister Wehby stated that *"In keeping with the need for transparency and accountability in the disposal of public assets I am referring the matter to your offices such that any appropriate review and action may be taken."*<sup>22</sup>

In addition to the information that was contained in Minister Wehby's letter, Minister Audley Shaw, in his Closing Budget Speech, on 2008 April 23, in Parliament, reiterated the concerns and allegations which were forwarded in the brief that was prepared by the Air Jamaica Board Chairman, Ms. Shirley Williams.

Minister Shaw's presentation to Parliament, that day, highlighted numerous allegations surrounding the sale of the AJLHS, the agreed price of the slots and the propriety of the actions which were taken by senior Public Officials with regard to the divestment of there referenced State assets. Included in the allegations were the following assertions:

1. *"....the Open Skies Agreement has been in the making for many years. Any person in the industry should have known of the consequences of the Agreement.... Why did the then Air Jamaica Board and the then Minister of Finance not know this? And if they did, why did they sell off these prime slots so cheaply?"*

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<sup>22</sup> Minister Don Wehby. Letter to the OCG. 2008 April 8

2. *The process was not subject to public tender. It appears that only two companies had been courted- British Airways and Virgin.*
3. *Parliament's consent on a fundamental issue as this was never sought.*
4. *It appears that legal officers of Air Jamaica and other senior government technocrats had no input in the negotiations and in the drafting of the Sale Agreement.*"<sup>23</sup>

Mr. Shaw's presentation, on 2008 April 23, also alluded to the likelihood that the sale of the said State assets was not conducted in compliance with the Government Procurement Guidelines, and that the Government had, therefore, asked the Contractor-General to investigate the matter.

On 2008 April 23, the Contractor-General formally convened an Investigation into the sale of the AJLHS.

Letters were directed that same day by the Contractor-General to the Prime Minister, the Hon. Bruce Golding, the Minister of Finance and the Public Service, the Hon. Audley Shaw, the then Financial Secretary in the Ministry of Finance and the Public Service, Mr. Colin Bullock, the Executive Chair, Air Jamaica Ltd., Ms. Shirley Williams, the Attorney General and Minister of Justice, Senator the Hon. Dorothy Lightbourne, the then Cabinet Secretary, Dr. The Hon. Carlton Davis, OJ, and the Opposition Spokesperson on Finance and former Minister in the former Ministry of Finance and Planning, Dr. Omar Davies, to formally advise them of the commencement of the OCG's Investigation into the sale of the AJLHS.

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<sup>23</sup> Parliament of Jamaica. Hansard. 2008 April 23. Minister Shaw's Closing Speech

## METHODOLOGY

The OCG, in the conduct of its Investigations, has developed standard procedures for evidence gathering. These procedures have been developed and adopted pursuant to the powers which are conferred upon a Contractor-General by the 1983 Contractor-General Act.

It is instructive to note that Section 17 (1) of the Contractor-General Act empowers a Contractor-General “to adopt whatever procedure he considers appropriate to the circumstances of a particular case and, subject to the provisions of (the) Act, to obtain information from such person and in such manner and make such enquiries as he thinks fit.” (OCG Emphasis).

The Terms of Reference of the OCG’s Investigation into the sale of the AJLHS, were primarily developed in accordance with those of the mandates of the Contractor-General which are stipulated in Section 4 (1) and Section 15 (1) (a) to (d) of the Contractor-General Act.

The Terms of Reference of the Investigation, and the development of the written Requisitions/Questionnaires that were utilized throughout the course of the Investigation, were guided by the OCG’s recognition of the far-reaching responsibilities and requirements that are imposed upon Public Officials and Public Officers by the GPPH, the Financial Administration and Audit Act, the Public Bodies Management and Accountability Act, the Contractor General Act and the Corruption Prevention Act.

In addition, the OCG was guided by Section 21 of the Contractor-General Act which provides that “If a Contractor-General finds, during the course of his Investigations or on the conclusion thereof that there is evidence of a breach of duty or misconduct or criminal offence on the part of an officer or member of a public body, he shall refer the matter to the person or persons competent to take such disciplinary or other proceeding

**as may be appropriate against that officer or member and in all such cases shall lay a special report before Parliament.**” (OCG Emphasis).

A preliminary set of Requisitions/Questionnaires, which was dated 2008 April 23, was sent by the Contractor-General to the Financial Secretary, Mr. Colin Bullock. However, subsequent to the OCG’s Requisitions/Questionnaires being sent to Mr. Bullock, he demitted Office and the OCG redirected the said Requisitions/Questionnaires, on 2008 May 5, to Mr. Bullock’s successor, the then Acting Financial Secretary, Ms. Darlene Morrison.

Further Requisitions/Questionnaires were subsequently directed to other Public Officials, who were considered material to the Investigation.

Where it was deemed necessary, Follow-up Requisitions were directed to a number of Respondents in an effort to clarify certain issues which were identified in their initial declarations and responses. These Follow-up Requisitions were also designed, *inter alia*, to clarify any discrepancy in the information which was supplied by the Respondents.

The Requisitions/Questions which were utilised by the OCG included specific questions that were designed to elucidate critical information from Respondents on the matters which were being investigated.

However, in an effort to not limit and/or exclude the disclosure of information which was germane to the Investigation but which might not have been specifically requisitioned by the OCG, the OCG asked all Respondents the following question:

*“Are you aware of any additional information which you believe could prove useful to this Investigation or is there any further statement in regard to the Investigation which you are desirous of placing on record? If yes, please provide full particulars of same.”*

**Very importantly, the form of written Requisition, which was utilised by the OCG, also required each Respondent to provide, under the pain of criminal prosecution, complete, accurate and truthful written answers to a specified list of written questions and to make a formal declaration attesting to the veracity of same before a Justice of the Peace.**

The Requisitions were issued pursuant to the powers that are reserved to the Contractor-General under the Contractor-General Act and, in particular, Sections 4, 15, 17, 18 and 29 thereof. The Requisitions were also issued pursuant to Sections 2 and 7 of the Voluntary Declarations Act and Section 8 of the Perjury Act.

It is instructive to note that **Section 18 (2) of the Contractor-General Act** provides that, “*Subject as aforesaid, a Contractor-General may summon before him and examine on oath* -

- a. *any person who has made representations to him; or*
- b. *any officer, member or employee of a public body or any other person who, in the opinion of the, Contractor-General is able to furnish information relating to the Investigation,*

**and such examination shall be deemed to be a judicial proceeding within the meaning of section 4 of the Perjury Act.**” (OCG Emphasis).

Further, **Section 18 (3) of the Contractor-General Act** provides that, “**For the purposes of an Investigation under this Act, a Contractor-General shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents**”. (OCG Emphasis).

**Section 2 (1) of the Voluntary Declarations Act** provides that, “*In any case when by any statute made or to be made, any oath or affidavit might, but for the passing of this Act, be required to be taken or made by any person or persons on the doing of any act,*

*matter, or thing, or for the purpose of verifying any book, entry, or return, or for any other purpose **whatsoever, it shall be lawful to substitute a declaration in lieu thereof before any Justice; and every such Justice is hereby empowered to take and subscribe the same.***” (OCG Emphasis).

**Section 7 of the Voluntary Declarations Act** provides that, “*In all cases when a declaration in lieu of an oath or affidavit shall have been substituted by this Act, or by virtue of any power or authority hereby given, or when a declaration is directed or authorized to be made and subscribed under the authority of this Act, or of any power hereby given, although the same be not substituted in lieu of an oath, heretofore legally taken, such declaration, unless otherwise directed under the powers hereby given, shall be in the form prescribed in the Schedule.*”

**Section 8 of the Perjury Act** provides, *inter alia*, that, “*Every person who knowingly and willfully makes (otherwise than on oath) a statement false in a material particular and the statement is made-*

*(a) in a voluntary declaration; or ....*

*(c) in any oral declaration or oral answer which he is required to make by, under, or in pursuance of any enactment for the time being in force,*

*shall be guilty of a misdemeanour, and liable on conviction on indictment thereof to imprisonment with hard labour for any term not exceeding two years, or to a fine, or to both such imprisonment and fine”.*

The material import of the foregoing, *inter alia*, is that the sworn and written evidence that is provided to a Contractor General, in response to his Statutory Requisitions, during the course of his Investigations, is (a) provided in accordance with certain specified provisions of the Statutory Laws of Jamaica, and (b) provided in such a manner that if any part thereof is materially false, the person who has provided same would have, ***prima facie***, committed the offence of Perjury under Section 8 of the Perjury Act and, as will be seen, would have also, ***prima facie***, committed a criminal offence under Section 29 (a) of the Contractor General Act.

The OCG considers the above-referenced evidence-gathering procedures to be necessary in order to secure, *inter alia*, the integrity and evidentiary cogency of the information which is to be elicited from Respondents. The implications of the subject requirements also serve to place significant gravity upon the responses as well as upon the supporting documents which are required to be provided by Respondents.

**It is instructive to note that the OCG, in the conduct of its Investigation, prefers to secure sworn written statements and declarations from Respondents, under the pain of criminal prosecution. This ensures, *inter alia*, that there is no question as to what has been represented to the OCG. Nor will there be any doubt as to the integrity or credibility of the information which is furnished to the OCG and on which its consequential Findings, Conclusions, Referrals and Recommendations will be necessarily based.**

The OCG also went to great lengths to ensure that Respondents were adequately and clearly warned or cautioned that should they mislead, resist, obstruct or hinder a Contractor-General in the execution of his functions or fail to provide a complete, accurate and truthful response to any of the Requisitions or questions which were set out in its Requisition, they would become liable, *inter alia*, to criminal prosecution under Section 29 of the Contractor-General Act.

**Section 29 of the Contractor-General Act** provides as follows:

*“Every person who -*

*(a) willfully makes any false statement to mislead or misleads or attempts to mislead a Contractor-General or any other person in the execution of his functions under this Act; or*

*(b) without lawful justification or excuse -*

- i. obstructs, hinders or resists a Contractor-General or any other person in the execution of his functions under this Act; or*
- ii. fails to comply with any lawful requirement of a Contractor General or any other person under this Act; or*

*(c) deals with documents, information or things mentioned in section 24 (1) in a manner inconsistent with his duty under that subsection, shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding twelve months or to both such fine and imprisonment.”*

Further, in addition to the **sworn** written answers which the Respondents were required to provide, the OCG also requested that in respect of the assertions and/or information which were to be provided, Respondents should submit documentary evidence to substantiate the statements that were made.

Requisitions/Questionnaires were directed by the OCG to the Public Officers/Officials who are listed below. In addition, comprehensive reviews of certain relevant information were undertaken by the OCG to assist it in its Investigation. Details of these are also summarized below.

1. The following Public Officials were required to provide sworn written responses to formal Requisitions which were directed to them by the OCG:
  - a. Senator the Hon. Don Wehby, the Minister without portfolio responsibility in the Ministry of Finance and the Public Service;
  - b. Ms. Darlene Morrison, the then Acting Financial Secretary, & Accounting Officer for Air Jamaica;
  - c. Dr. Omar Davies, the Former Minister of Finance and Planning;
  - d. Mr. O.K Melhado, Former Board Chairman of Air Jamaica;
  - e. Senator Noel Sloley; Former Director, Air Jamaica;
  - f. Mrs. Shirley Williams, the then Chairman and Chief Executive Officer, Air Jamaica;
  - g. Ms. Nerine Small, General Counsel, Air Jamaica;
  - h. Mr. Paul Pennicook, the then Senior Vice President, Sales & Marketing, Air Jamaica;

- i. Mr. Thomas Hill, Chief Revenue Officer, Air Jamaica;
  - j. Ms. Susan Rosen, Senior Director, Customer Service, Air Jamaica;
  - k. Mr. George deMercado, Senior Director Sales, North America & Europe, Air Jamaica;
  - l. Mr. William Rogers, the then Acting President & Chief Executive Officer, Air Jamaica;
  - m. Ms. Merl Dundas, Company Secretary, Air Jamaica;
2. Follow up Requisitions/Questionnaires, requesting clarification on certain issues, were directed by the OCG to the following Public Officials:
  - a. Mr. Paul Pennicook, the then Senior Vice President-Sales & Marketing, Air Jamaica;
  - b. Ms. Nerine Small, General Counsel, Air Jamaica;
  - c. Senator Noel Sloley; Former Director, Air Jamaica;
  - d. Dr. Omar Davies, former Minister, former Ministry of Finance and Planning;
  - e. Mr. O.K Melhado, Former Board Chairman of Air Jamaica;
3. A detailed review of the **sworn** certified statements, supporting documents and the records which were provided by the Respondents to the OCG's Requisitions, was undertaken.
4. An examination and analysis of the files which relate to the AJLHS, in the custody of Air Jamaica, was undertaken on 2008 September 23. The files which were reviewed were those of the former President & CEO of the airline, Mr. Michael Conway, and Air Jamaica's General Counsel, Ms. Nerine Small.
5. The OCG also extended a formal invitation to supply information with regard to the Investigation, to the below-named individuals:

- a. The Hon. Mike Henry, the Minister of Transport and Works, who previously held portfolio responsibility, in the present Administration, for the national airline, Air Jamaica;
- b. Mr. Michael Conway, the former President & CEO of Air Jamaica;

It is instructive to note that neither Mr. Conway, nor Mr. Henry, responded to the OCG's formal invitation to supply information.

6. The OCG also extended a formal invitation to supply information with regard to the Investigation, to the below-named companies:
  - a. Virgin Atlantic Airways Limited (VS)
  - b. British Airways (BA)

The OCG's Letters of Invitation, which were dated 2008 July 14, were directed to the Chief Executive Officers of BA and VS, through the Office of Bilateral Relations in the Ministry of Foreign Affairs of the Government of Jamaica.

Only VS, through its Legal Counsel, responded to the OCG's Letter of Invitation.

7. A follow up letter, requesting clarification on certain issues, was also directed by the OCG to VS.
8. Due to the highly specialised nature of matters regarding the aviation industry, the OCG, for the purpose of a comparative and comprehensive analysis of the facts in its Investigation, also relied on information that was gleaned from various web-based sources, such as aviation magazines.

## **FINDINGS**

### ***The Virgin Atlantic Airways (VS) & Air Jamaica Ltd. Commercial Agreement***

By way of a letter, which was dated 2008 August 14, VS wrote to the Contractor-General, advising the OCG as follows:

#### *“Background*

1. *JM independently approached Virgin in December 2006 to enquire whether Virgin would be interested in participating in a competitive bid to purchase one slot pair of Air Jamaica’s slots at London Heathrow airport. Virgin understood that JM was selling its slots as a result of its decision to cease operations to London Heathrow. (OCG Emphasis).*
2. *As far as Virgin was aware, it was tendering for the slots in competition with other interested parties.*

#### *Financial value of the Slots*

3. *There are no published or standard values for slots nor is there any standard formula for assessing their value. The value of slots will be determined simply by market forces i.e. what interested parties are prepared to bid at the time the slots are offered for sale.*
4. *Heathrow slot values for long-haul use are driven largely by the value of the flights using them. Arrival slots before 0730 are needed for high-yielding flights arriving from the Far East, Africa, India and the Middle East, and enable connections from those points to points in the USA. Arrivals between 0600 and 1030 are suited to arrivals from the US East Coast, with a preference for arrivals before 0930. Arrivals after 0930 are less suited to the US East Coast but can be*

- used for US West Coast arrivals. Generally, the earlier the arrival slot in the morning, the higher the value. Slots which are daily and are at the same times every day are valued higher than slots which are not daily or are not lined up at the same times each day.*
- 5. In deciding what price to put forward in its initial bid to JM, Virgin looked at the value of the slots being offered to Virgin's operation. In addition, Virgin looked at the price paid in recent comparable slot sales. Earlier in 2006, British Airways had purchased BWIA's London Heathrow slots and entered into a codeshare cooperation with BWIA's successor, Caribbean Airways.*
  - 6. The price BA paid for the BWIA slots was publicly acknowledged as £5 million for one year-round daily slot-pair.*
  - 7. It was also publicly reported that BA had recently purchased two daily slot-pairs at Heathrow from Malev for about £7 million (i.e. £3.5 million per slot pair).*
  - 8. The BWIA slots purchased by BA were very desirable lined up daily slots with 0915 arrivals and 1115 departures in the winter and 0925 arrivals and 1125 departures in summer. These slots were lined up every day in season and differing by only 10 minutes from one season to another.*
  - 9. By contrast, the JM slots being offered for sale were a daily slot-pair but had arrivals no earlier than 1050 local time in the winter and 0955 in the summer, and differing by up to 3 hours 10 minutes from day to day in winter, and in summer by up to 5 hours 10 minutes and so were not well lined up. Virgin assessed that the much later arrival times, the large variation by season and very large spread of times by day of week made the slots worth significantly less than BWIA's slots. Also, the JM slots were not well suited to arrivals from the US East Coast-unlike the BWIA slots.*

10. *Virgin therefore submitted a first bid to JM reflecting that assessment to purchase the slots for £4.1 million. The bid included among other things a proposal to introduce flights on the Gatwick-Kingston route, and an offer to carry JM's code on relevant Virgin flights.*
11. *JM requested a revised bid in March 2007. Virgin submitted a new bid with a higher price for the slots £5.1 million. The bid value of £5.1m was higher than the value of the more desirable BWIA slots purchased by BA in 2006.*
12. *Towards the end of April 2007, Virgin was informed that it was the favoured bidder and was invited to negotiate final terms. Negotiations took place in Kingston on 1 and 2 May 2007, at which Virgin agreed further commitments including taking over existing ticketed bookings from JM at low prorates (which would help JM meet its commitments to its passengers), and Virgin operating two of JM's slot pairs a week before the end of the summer 2007 season in order to ensure that JM could start winding down its loss-making London operation.*
13. *At the heart of Virgin's bid for JM's Heathrow slots was its commitment to add a new route from London Gatwick to Kingston operated twice a week by 451-seat Boeing 747-400 aircraft in order to facilitate continued air services to the benefit of Jamaican travellers and the Jamaican tourism industry. Virgin has lived up to its commitment and in addition operated extra flights over the Christmas peak in 2007; it will also operate extra flights in December 2008 and January 2009 to benefit Jamaican ex-pats returning home and tourist visiting Jamaica over the Christmas holiday.*
14. *Due to timing of the JM slots, Virgin believes it is highly unlikely that any non-UK carrier, such as a US carrier, would have been prepared to add new scheduled services between Jamaica and London as Virgin did. In addition, JM's slots were not well-suited to adding new services from the US East Coast which have been*

*by far the majority of new flights for which US carriers have sought new slots at Heathrow.*<sup>24</sup>

The Findings of the OCG's Investigation have revealed that the arrangement which was reached between Air Jamaica and VS involved a broad commercial agreement that incorporated several elements, one of which was the sale/exchange of Air Jamaica's London Heathrow slots.

This transaction was initiated on 2007 May 10, when Air Jamaica and VS executed a Memorandum of Understanding (MOU) which summarised the areas of cooperation that were intended to form the commercial arrangement between the two airlines.

The objective of the MOU was to extend and deepen cooperation between VS and Air Jamaica, with a view of enhancing service delivery between Jamaica and the United Kingdom (UK).

The MOU outlined the understanding of both parties with regard to the intended commercial cooperation, and covered the following areas:

- i. New Virgin Service to Kingston, beginning 2007 October 28, from London Gatwick Airport;
- ii. Code Share Agreement, this would be negotiated and covered in a separate agreement, which was signed on 2007 October 28;
- iii. Special Pro-rate Agreement;
- iv. Manchester-Jamaica passengers;
- v. Frequent Flyer Programme and promotions;
- vi. Interline e-ticket and through check-in;
- vii. London Heathrow slots;
- viii. London Gatwick slots;
- ix. Transition period;

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<sup>24</sup> Virgin Atlantic. Letter to the OCG. 2008 August 14

- x. Cargo;
- xi. Air Jamaica Ltd. London staff;
- xii. Senior Staff Travel;
- xiii. VIPs;
- xiv. Agreement duration;
- xv. Governing Law and Validity;

Of note, is that the MOU stated that “ *Subject to contract, Air Jamaica will exchange with Virgin its daily arrival and departure slots at London Heathrow airport for both Summer and Winter seasons.....This slot exchange will be the subject of a separate legally-binding agreement between Air Jamaica and Virgin of which this is intended only as a summary.*”<sup>25</sup>

Further, the proviso (*Rider*) of the MOU stated thus: “*This MOU is a summary only and is not an exhaustive discussion of the issues arising from the proposed arrangements.*”<sup>26</sup>

The Findings of the OCG have revealed that aspects of the MOU formed a legal binding contract between both parties in some respects. However, some areas, such as the codeshare agreement and the slot exchange, were subject, *inter alia*, to the signing of subsequent agreements.

On 2007 July 24, VS and Air Jamaica signed the ‘*Slot Exchange – London Heathrow Airport & London Gatwick Airport,*’ while, on 2007 October 28, both parties signed the codeshare agreement.

Under the terms of the referenced slot exchange agreement, VS and Air Jamaica Holdings Ltd. agreed to exchange certain winter and summer slots at London Heathrow Airport. The agreement also stipulated that in the event that VS terminated operations on

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<sup>25</sup> Air Jamaica Ltd./Virgin Atlantic. Memorandum of Understanding .2007 May 10

<sup>26</sup> Air Jamaica Ltd./Virgin Atlantic. Memorandum of Understanding .2007 May 10

the London/Jamaica route, prior to the agreed timeline, then VS would exchange a slot-pair at London – Gatwick Airport.

The OCG's Investigation also found that the legal enforceability of the MOU was questioned after there was a change in Government and in the composition of the Air Jamaica Board. Consequently, legal opinions on this point were sought from two eminent Attorneys-at-Law, Dr. the Hon. Lloyd Barnett, OJ and Professor Stephen Vascianne.

According to the opinion of Professor Stephen Vascianne, the MOU was subject to the exclusive jurisdiction of the English Courts. This was a clear indication that some of the provisions that were set out in the MOU were intended to be legally binding.

Further, Professor Stephen Vascianne in analysing Dr. Lloyd Barnett's legal opinion of the VS/Air Jamaica MOU, which was dated 2007 October 5, stated that "*.....I believe the Government of Jamaica should not proceed on the assumption that none of the terms of the Memorandum of Understanding can be found by a court to be binding: the Memorandum is a summary only but each of its provisions needs [sic] to be read to see whether it could create binding obligations.*"<sup>27</sup>

### ***Rationale for Exiting the London Route & Sale of the Heathrow Slots***

The Minutes of the Meeting of the Air Jamaica Board of Directors which was dated 2006 November 28, recorded certain deliberations which pertained to the unprofitability of several of Air Jamaica's routes. Among the loss-making routes that were discussed, was the London/Jamaica route. The discontinuation of the said route was projected to save the airline approximately \$25 Million per annum.

As a result, the Management of Air Jamaica prepared a Business Plan for the financial years 2007-2009, in which it proposed that the London route be terminated as at 2007 July 1.

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<sup>27</sup> Stephen Vasciannie. Internal Memo- Air Jamaica Ltd./Virgin Slot Agreement

On 2007 January 29, Air Jamaica presented to the Cabinet, the Business Plan which included a strategy to substantially reduce the cash losses of the airline. This strategy proposed exiting the London route as a result of the heavy losses that were being incurred by the airline thereon. These losses were attributed, in the main, to an increase in the competition on the route and escalating fuel prices.

In the presentation of the Business Plan that was made to the Cabinet on 2007 January 29, the route rationalisation that was contained in the plan noted that, in closing the London route, Air Jamaica would seek to enter into a codeshare agreement with either VS or BA to service the said route.

The primary objectives that were listed in the Business Plan were (1) to preserve service; (2) to increase scope through codeshare behind the gateway; (3) to realise the value of the AJLHS; and (4) to remove the A340 aircraft from the fleet.

As is evidenced by its Meeting Minutes which are dated 2007 January 10, the Air Jamaica Board of Directors, in its deliberations of the referenced Business Plan, stated that *“The closure of the London route is expected to result in annual savings of approximately \$25M. The Company is in discussions with British Airways (BA) and Virgin Atlantic (VS) about the routes and expressions of interest have been received in respect of the 2 X A340 aircraft. Disposal of the slots at Heathrow Airport would have to form a part of the plans for closure of the route.”*<sup>28</sup>

The OCG, in reviewing the Meeting Minutes of the Board of Directors of Air Jamaica, also found that the performance of the airline’s routes was a recurring discussion topic in several of the Meetings. In the Board Meeting Minutes which was dated 2007 February 15, a report on the performance of several of the airline’s routes, including the London route, was presented by Mr. Hill, the Chief Revenue Officer for the airline.

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<sup>28</sup>Air Jamaica Ltd. Limited. Minutes of the Board of Directors. 2007 January 10

The Minutes stated that *“London: This route continues to under-perform. Mr. Hill noted that although yield exceeded Budget, the load factor was 57% versus Budget of 72% and the route recorded a net loss of approximately (\$3M). The Chairman noted that discussions are in progress with British Airways (BA) and Virgin Atlantic (VS) regarding the future of this route as the Company cannot continue to absorb its losses.”*<sup>29</sup>

Sloley/Melhado, in their sworn written testimony to the OCG, which was dated 2008 July 15, and which was provided in direct response to the OCG’s formal Requisitions to them, stated, *inter alia*, that *“However, by far the largest item on the cost side was the discontinuance of the London route, which had incurred an operating loss in 2006 of US\$27 million”*.<sup>30</sup>

Melhado and Sloley further stated that *“The outlook regarding London was informed by the following:*

- *Over the previous five years, the cost of fuel had increased nearly three times per air seat mile, and from 21% to 53% of revenue per air seat mile. Put another way, the fuel bill for the London route in 2006 was US\$32million, or more than 50% of the gross revenue earned on the route.*
- *The London route’s actual operating loss for 2006 was \$27 million (exclusive of any apportionment of overhead costs).*
- *While the volatility of fuel prices represented a clear threat for further losses on the route, there were also a variety of operational and competitive reasons which precluded any meaningful improvement to the current trend. Among them were the increased inventory of competing scheduled seats (Virgin Atlantic entered the London/Jamaica service mid-2006) and the aggressive position of charter operators. Charter seats had risen from 26,910 in 2001 to 108,511 in 2007. These*

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<sup>29</sup> Air Jamaica Ltd. Limited. Minutes of the Board of Directors. 2007 February 15

<sup>30</sup> Melhado/Sloley. Response to OCG Requisition. 2008 July 15

*additional seats included the provision for sale of 20% as "air only", that had a further negative impact on fares ("air only" refers to seats that can be sold without being tied to an accommodation package, and so represent discounted seats sold in direct competition with scheduled carriers such as Air Jamaica Ltd.).*

- *Without any prospects for meaningful improvements in yields and load factors, there remained the stark reality that the two wide body A340 aircraft were being maintained to fly a daily route with a load factor of, at best, 65-70%. Assuming that they also flew 4 round trips weekly to JFK (which is not an economic use of an A340), these two aircraft were being utilized about 140 hours per week on the trans-Atlantic flights and 32 hours on the New York run. From this it is [sic] can be derived that 80% of the time of the two planes were being utilized to fly one round trip per day to LHR or, a real load factor of about 40% per plane. The dedication of two expensive long haul aircraft at this level of real utilization was an uneconomic, loss- making proposition.*
- *It was increasingly difficult to provide a high level, reliable on-time service with just two aircraft, due to maintenance issues (including the required heavy-duty checks every eighteen months that removed one plane from the fleet for a number of weeks each year). Resulting delays and cancellations were costly due to the increased penalties imposed by the EU for late or cancelled flights.*
- *Finally, although not quantified, if the LHR route were [sic] discontinued and two A340s were disposed of, there would be a huge reduction in the maintenance workload, and this would enable more attention to be paid to the maintenance of Air Jamaica's remaining fleet, resulting in an improvement in the overall quality and timeliness of these functions that would in turn enhance the reliability and marketability of the airline.*

*Given these imperatives, the matter of the slots at LHR unavoidably became a central consideration. This is because LHR landing rights held by airlines require use of these slots a minimum of 80% of the time, or in Air Jamaica's case a minimum of 292 days for the year. The term used in the industry is "use it or lose it". The need to discontinue the financial hemorrhage of the London route therefore entailed, as an inevitable corollary, the sale of Air Jamaica's slots, as the slots comprised an asset that would be lost once Air Jamaica ceased to fly to LHR."*<sup>31</sup>

Based upon the foregoing, the OCG found that the Executive Management of Air Jamaica had undertaken an analysis of the termination of the London route and had initiated negotiations to enter into a profitable commercial arrangement with BA and VS, the two competing carriers on the said route.

In a '*Position Paper*' that was prepared by the airline's former President & CEO, Mr. Michael Conway, and which was dated 2007 April 17, the following points were highlighted:

- (a) the rationale for ending the London route;
- (b) the competitive landscape;
- (c) the operational factors;
- (d) the disposition of two A340 aircrafts;
- (e) the BA and Virgin proposal; and
- (f) the estimated financial impact of the decision to exit the London route.

Below is a synopsis, *inter alia*, of the contents of the Conway '*Position Paper*', which was dated 2007 April 17:

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<sup>31</sup> Melhado/Sloley. Response to OCG Requisition. 2008 July 15

**“Summary**

**(a) *The rationale for ending the London route:***

- i. *“The actual loss for 2006 was \$27M; the goal is to save half in 2007 and the full amount in 2008. With the code share agreement there will also be the opportunity to earn revenue from sales on the selected carrier.*
- ii. *Extensive discussions/negotiations have taken place over the past four months with BA and Virgin with a view to entering into a code share agreement that would protect Jamaica’s tourism and national interests on this route and realize the value of the LHR slots.*
- iii. *In addition, several major international carriers, including American Airlines and Singapore Airlines, were contacted with regard to a possible lease of the slots; no carrier expressed any interest in this regard, as was the case with BA and Virgin.*

**(b) *The Competitive Landscape:***

- i. *Significant overcapacity currently exists in the market:*
- ii. *The overcapacity situation has caused a major drop in fares, with no signs of abating. For example, Virgin recently announced a fare as low as \$384.00. JM’s average fare in the market is \$473.00, and at that level, JM’s breakeven load factor is 106%. At JM’s current load factor of 52%, the average fare required to breakeven would be \$959.00.*
- iii. *Both BA and Virgin enjoy the benefit of substantial connecting traffic from their respective networks into their hub complexes at LGW and marginal additional overheads for operating this route.*

- iv. *Historically, JM derived 35% of its total traffic on the Route from Virgin Holidays, which now stays with Virgin.*

**(c) The Operational Factors**

- i. *JM operates the Route with two A340-300's (4-engine aircraft with 278 seats); BA uses a B777 (2-engine aircraft with 280 seats); and Virgin uses a B747-400(4-engine aircraft with 451 seats).*
- ii. *JM has neither consistent nor attractive slots at LHR:*

	<i>Local Time Slots</i>	
<i>Mon</i>	<i>1245</i>	<i>1425</i>
<i>Tues</i>	<i>1400</i>	<i>1550</i>
<i>Wed</i>	<i>1050</i>	<i>1240</i>
<i>Thurs</i>	<i>1050</i>	<i>1240</i>
<i>Fri</i>	<i>1200</i>	<i>1405</i>
<i>Sat</i>	<i>1050</i>	<i>1240</i>
<i>Sun</i>	<i>1050</i>	<i>1240</i>

- iii. *JM's slot configuration, the use/lose criteria for maintaining slots, and the prohibitive EU rules with respect to cancellations, mandates that JM utilizes two A340's to service the Route, notwithstanding that only daily service is offered.*
- iv. *The London Route constitutes an 'Airline within an Airline'. Operational issues when encountered on London require top priority, oftentimes to the detriment of JM's entire system.*

- v. *The A340-300 has a range of 7,400nm vs. a requirement of 4,072nm for London/Jamaica. At JM's current monthly lease cost of \$637,000 per aircraft, the A340-300 can only be used effectively on very long-haul business routes with high yields, which is how other operators of this aircraft normally deploy this type of equipment.*
- vi. *Lastly, even if a more appropriate and affordable 2-engine aircraft were to be used on the Route, such as A330 or B767ER (none of which are available), the operational cost savings would not be anywhere near sufficient to overcome the aforementioned economic issues.*

**(d) *The Disposition of A340's***

*Critical in the recommendation to exit the London Route is a satisfactory disposition of the two A340 aircraft from the fleet. As noted earlier, JM has no effective and efficient use for these aircraft over the remaining lease period-leases go to the first half of 2012. In this regard,:*

- i. *BA expressed no interest (do not operate the A340).*
- ii. *Virgin, which initially had interest in the aircraft, has since declined due to the cost and downtime that would be required to modify the aircraft to their unique specs.*
- iii. *In coordination with ILFC, the owner of the aircraft, two candidates were identified and meaningful discussions have ensued- Turkish Airlines and Aerolineas Argentinas (both operate A340's).*

**(e) The BA and Virgin Proposals**

- i. *The offers for the slot purchase from BA is \$9.4 million and from VS \$9.6 million. Both carriers are ready to assume full utilization of the slots beginning with the winter season of 2007 (starts Oct. 27<sup>th</sup>).*
- ii. *BA has increased their slot offer from a starting point of \$7.0 million, and VS has moved from their starting position of full utilization of the slots beginning with winter 2008 season.*
- iii. *BA has offered a guarantee of a daily slot pair at LGW at a cost of \$1.8M should they exit the Jamaica market prior to contract completion. (We will seek to get this agreement to include a failure to renew their agreement with JM).*
- iv. *Both will add additional service of at least 2 x per week to the Jamaican city not currently served (BA to MBJ and Virgin to KIN). The BA offer represents 560 seats configured for 4 classes; and, the VS is for 900 seats in a 3 class configuration.*
- v. *Both will offer Frequent Flier earn/burn reciprocity.*
- vi. *Both will offer code-share and SPA's (Special Prorate Agreements) from their respective gateway cities in North America.*
- vii. *Marketing agreements go for 3-years in both cases, but we believe the "winner" will agree to go longer to get the deal, as well as the possibility of common-rating the fares out of Manchester with those out of London.*

**(f) Estimated Financial Impact of Decision to Exit the London Route**

*i. Transition Year 2007:*

*Proceeds from the sale of slots* \$9.4

*Return condition costs of A340's  
after application of deposits &  
maintenance reserves* (7.4)

*Severance and other costs with  
respect to closing of London operation* (2.0)

Wash

*ii. Steady State beginning 2008*

*Elimination of projected losses from operating the Route:*

*\$28.0 million per year (\$2.3 per month)*

*\$91.0 on an NPV basis over a 5-year period (using a rate of 9%)”<sup>32</sup>*

In light of the foregoing, the OCG found that Air Jamaica was primarily concerned with cutting the operational costs which were associated with its London route.

The analysis that was undertaken by the then Executive Management of Air Jamaica, revealed that the London/Jamaica route was oversupplied and that the airline's overhead operational cost did not allow it to compete efficiently with the other two major players in the market, VS and BA.

Air Jamaica, prior to the entry of VS on the London/Jamaica route, had reportedly received 35% of its total traffic on this route from Virgin Holidays. With the entry of VS into the Jamaican market, this traffic was naturally redirected to VS.

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<sup>32</sup> Michael Conway. London Route- Position Paper. 2007 April 17.

Based upon Mr. Conway's analysis, with an oversupply on the London/Jamaica route, supply far outstripped demand and there was a drastic decline in airfares. For example, Air Jamaica's average air fare was US\$473.00, whilst the then recently announced VS fare was US\$384.00, thus resulting in a negative competitive difference of US\$89.00, per seat, for Air Jamaica.

On the operational side, Air Jamaica was utilising two A340 aircraft on the route. However, according to Mr. Conway, Air Jamaica was not effectively utilising these aircrafts as the London/Jamaica route was no longer a high yield route for the airline as a result of (a) the oversupply in the market which cut the price of tickets; and (b) the low traffic which was being experienced on the Air Jamaica London flights.

Further, according to Mr. Conway, Air Jamaica was netting low returns on the London/Jamaica route, while still maintaining two A340 aircraft, which attracted a monthly lease of US\$667,000 per aircraft.

The low returns, when considered with the high operational costs of the A340s, resulted in Air Jamaica operating at a loss which, in 2006, equated to \$27 million. In this respect, termination of the London/Jamaica route was seen as the most viable option by the Executive Management of the airline.

The OCG also found that Air Jamaica's termination of the London/Jamaica route would have resulted in a shortfall in the number of passengers coming to the Jamaica on the said route.

As such, Air Jamaica's then Executive Management felt that this action would have had a negative impact upon Jamaica's tourism. In an effort to minimise this impact, the then Executive Management of the airline proposed that a codeshare agreement with either BA or VS would be more beneficial to the airline and to Jamaica in the long run.

A codeshare agreement is defined as a ‘cooperative service’ agreement between two or more carriers. The Wikipedia Encyclopaedia defines a codeshare agreement as “...*a practice where a flight operated by an airline is jointly marketed as a flight for one or more airlines. Most major airlines today have code sharing partnerships with other airlines and code sharing is a key feature of major airline alliances.*”<sup>33</sup>

The ‘code’ is usually the International Air Transport Association (IATA) airline designator code and flight number – which is the identifier used in flight schedules. In the case of Air Jamaica., the IATA code is JM.

The reasons which have been posited by Wikipedia for airlines entering a codeshare agreement, and presenting a common flight number, include:

- *“Connecting flights - This provides clearer routing for the customer, allowing a customer to book travel from point A to C through point B under one carrier's code, instead of a customer booking from point A to B under one code, and from point B to C under another code. This is not only a superficial addition as cooperating airlines also strive to synchronize their schedules and coordinate luggage handling, which makes transfers between connecting flights less time-consuming.*
- *Flights from both airlines that fly the same route - This provides an apparent increase in the frequency of service on the route by one airline*
- *Perceived service to unserved markets - This provides a method for carriers who do not operate their own aircraft on a given route to gain exposure in the market through display of their flight numbers.*”<sup>34</sup>

Based upon the analysis of the then Executive Management of Air Jamaica, a code share agreement with either BA or VS would allow Air Jamaica to still maintain a presence on the London/Jamaica route by the display of its code on the designated flights. This

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<sup>33</sup> Wikipedia Encyclopedia. Code Share Agreement. 2007 October 4.  
[http://en.wikipedia.org/wiki/Codeshare\\_agreement](http://en.wikipedia.org/wiki/Codeshare_agreement)

<sup>34</sup> Wikipedia Encyclopedia. Code Share Agreement. 2007 October 4.  
[http://en.wikipedia.org/wiki/Codeshare\\_agreement](http://en.wikipedia.org/wiki/Codeshare_agreement)

presence would, however, not incur any cost to Air Jamaica as BA/VS would be the operating carrier, providing the requisite equipment, the crew and ground handling services.

Air Jamaica would also have an opportunity to earn revenue from the codeshare agreement, as it could act as the marketing carrier and sell tickets for the flights on the Jamaica/London route.

In respect of the AJLHS, the then Executive Management of Air Jamaica realized that in terminating the London route, it would have to either lease or exchange its Heathrow slots.

Mr. Conway, in his *'Position Paper'*, which was dated 2007 April 17, asserted that several international airlines, including Singapore Airlines and American Airlines, were contacted regarding the leasing of the slots. However, these airlines, he stated, did not express an interest in the foregoing regard.

Mr. Conway further asserted that because of the 'use it or lose it' principle which governs slot allocations, and which requires the utilisation of landing and take-off slots at least 80% of the time, a slot exchange was the best option for Air Jamaica. However, according to Mr. Conway, the AJLHS were not consistent, as they had varying arrival and departure times, which rendered them unattractive.

The OCG also found that due to the perceived unattractiveness of the AJLHS by the Executive Management of the airline, the sale/exchange of the AJLHS became a mere component in the broader objective of securing a commercial arrangement with either BA and/or VS.

In this regard, the OCG found that the proposals that were received by Air Jamaica from both VS and BA were consistently compared using several criteria. According to the *'Position Paper'*, which was prepared by Mr. Conway on 2007 April 17, the areas of consideration were as follows:

- i. Slot Price.
- ii. Exchange of Gatwick slot – In the event the chosen airline (i.e. BA/VS), withdrew service from Jamaica, this would guarantee that Air Jamaica would be able to resume flights on the London/Jamaica route.
- iii. Additional flights to Jamaica – This would ensure that the shortfall in the number of seats to the island, which would result from Air Jamaica departure on the route, would be minimised by VS/BA increasing the number of flights to Jamaica.
- iv. Frequent flyer earn/burn reciprocity – This would allow Air Jamaica and BA/VS passengers access to each other’s frequent flyer programmes.
- v. The codeshare agreement which, as discussed before, would ensure the continued presence of Air Jamaica on the London/Jamaica Route and earn additional revenue for the airline without the associated cost of actually flying the route.
- vi. Common rating of fares for flights out of Manchester with those from London. This was considered important especially having regard to the members of the Jamaican Diaspora who frequently fly from Manchester.
- vii. Tenure of the agreement – Air Jamaica wanted to ensure that the chosen carrier would commit to flying to Jamaica for a designated period.

The OCG found that based upon the ‘*Position Paper*’, which was dated 2007 April 17, the Executive Management of Air Jamaica had recommended that the BA offer should be accepted. The BA proposal included a payment of US\$9.4 million for the AJLHS, while VS, at the time, had offered US\$9.6 million.

In the final analysis of the estimated financial impact of the decision to exit the London Route, Mr. Conway used the term '*wash*' to describe the final financial position for Air Jamaica.

The inference that is raised is that provided that Air Jamaica was to accept the \$9.4 million which was being offered by BA, while terminating the London Route, it would in essence 'break even'. Mr. Conway had estimated that the cost that was associated with the closure of the London route was US\$9.4 million – US\$7.4 million for the A340 aircraft and US\$2 million for other costs and severance of staff.

Mr. Conway projected that in 2008, the airline would have a "*steady state of beginning.*" This projection, he said, was premised upon the fact that having terminated the London route, which was costing the airline an estimated \$28 million per annum, and having secured a commercial arrangement, including the code share, the airline was expected to gain a future cash flow, over a five (5) year period, of \$91 million, calculated using a rate of 9%.

Having regard to the foregoing, the exit strategy for the London route, according to Melhado/Sloley, took into consideration the following:

1. *"The removal of daily flights from the London gateway would have a negative effect on Jamaica's tourism industry. The negotiation of a transaction which would ensure additional seats to partially replace these flights was therefore a very important objective.*
  
2. *Furthermore, the bilateral agreement in relation [sic] route rights between the UK and Jamaica puts regulatory constraints on the ability of new carriers to service the London/Jamaica route.*

3. *These factors, along with the objectives of obtaining favourable code share and ground handling agreements, made BA and VS the likely candidates for the sale of Air Jamaica's slot.*
4. *The two A340 leases run until 2012 (with monthly basic lease rates amounting to US\$1.3million) and it was therefore critical to dispose of them as quickly as possible in order to reduce the airline's losses. The market for the two A340 was weak as (a) they are relatively fuel inefficient when compared to their sister ship A330 and the Boeing 777 and 767, all twin engine long haul aircraft, and (b) both Boeing and Airbus had announced a new generation of more fuel efficient long haul aircraft, the B787 and the A380. However, delays in the production of the A380 had occurred, creating a window of opportunity for the disposal of the A340, and the Air Jamaica Board recognized that this opportunity should be exploited without delay.*
5. *It was clear that any agreement with BA or VS could and should include both-(a) a code-share arrangement that would allow Air Jamaica to have its code on selected VS flights, enabling Air Jamaica to take advantage of its established relationships in the market and thereby earn net revenues by selling tickets to passengers who would fly on the purchaser's aircraft, and (b) a commitment from the purchaser to provide additional flights to Jamaica to support our tourism industry.*
6. *The sale to BA or VS would also allow Jamaica to earn additional revenues from providing a new cross-island service which would utilize their passengers, since VS flew to Montego Bay while BA flew to Kingston.*
7. *The objective was therefore to achieve the best price for the slot pair, while also using the slot pair as leverage to achieve the other important national strategic goals- in particular, additional flights into Jamaica to support the tourism*

*industry, and code-share deal which would provide additional net revenues to Air Jamaica.*”<sup>35</sup>

### ***Air Jamaica Ltd. London Heathrow Slots (AJLHS)***

A slot, as defined by the IATA Scheduling Guidelines, refers to “... *the scheduled time of arrival or departure available for allocation by, or as allocated by, a coordinator for an aircraft movement on a specific date at a coordinated airport. For scheduling purposes, the slot is the scheduled time of arrival or departure at the terminal, not the time of landing or takeoff from the runway.*”<sup>36</sup>

The allegations that were inherent in Minister Shaw’s presentation to Parliament on 2008 April 23, alluded to the sale of seven (7) slots by Air Jamaica Ltd. to VS.

However, according to the former Chairman of Air Jamaica, Mr. O.K. Melhado and former Board Member, Senator Noel Sloley “.....*Air Jamaica held rights to **one (1)** pair of slots at London Heathrow Airport (“LHR”). A slot pair- strictly speaking-translates as 730 annual slots, two (one take-off and one landing) for each day throughout the year. When airlines buy slots they normally want to buy daily slots, i.e. a pair of slots on each day of the week throughout the year, and they pay for the slots together and not for each separate day or week. Therefore, a report of a sale ‘of a slot’ refers to the price paid for a daily pair of slots throughout the year. The assumption that there were seven (7) slots is both false and misleading....For it to be suggested that it is seven (7) slots, is a basic and fundamental distortion of the matter...*”<sup>37</sup>

The OCG found that the agreement between VS and Air Jamaica, which was dated 2007 July 24, made reference to a **series of summer and winter slots.**

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<sup>35</sup> Sloley/Melhado. Response to the OCG Requisition. 2008 July 15

<sup>36</sup> IATA Scheduling Guidelines. Section 5.3-Definition of Slots. 2008 July

<sup>37</sup> O.K. Melhado & Senator Noel Sloley. Responses to OCG Requisition. 2008 July 15

The agreement defined Slots as “...*the permission given by the Co-ordinator in accordance with the Regulation to use the full range of airport infrastructure necessary to operate an air service at London Gatwick Airport or London Heathrow Airport on a specific date and time for the purpose of landing or take-off as allocated by the Co-ordinator in accordance with the Regulation;*”<sup>38</sup>

The IATA Scheduling Guidelines states that “*A series of slots is defined as at least five slots, having been requested for the same time on the same day of the week regularly in the same scheduling period and allocated in that way or, if that is not possible, allocated at approximately the same time.*”<sup>39</sup>

In an effort to clarify the exact number of slots which were sold by Air Jamaica to VS, the OCG, by way of letter, which was dated 2008 September 19, sought clarification from VS, on the **exact number of slots** which were agreed upon and purchased by VS, in accordance with the agreement which was dated 2007 July 24.

On 2008 September 26, VS responded to the OCG’s letter, via email, and informed, *inter alia*, that:

*“A "slot-pair" comprises one arrival slot and one departure slot. Slots are held by IATA season, with winter usually being 21 weeks and summer 31 weeks. In a full IATA year, there are 52 weeks, so a daily slot-pair over a full year would comprise a total of 728 slots (i.e. 52x7x2 slots). In 2006/07, the winter season had 22 weeks (total: 308 slots); and summer 2007 had 30 weeks (420 slots). The total number of slots from the start of Winter 2006/07 to the end of Summer 2007 was thus 728 slots, conforming to a normal full year.*

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<sup>38</sup> Virgin Atlantic/Air Jamaica Ltd.. Slot Exchange- London Heathrow Airport & Gatwick Airport. 2007 July 24

<sup>39</sup> IATA Scheduling Guidelines. Section 5.3-Definition of Slots. 2008 July

VAA purchased a total of 728 slots from Air Jamaica. The full details of all slots purchased by Virgin Atlantic are listed in Attachment A of the agreement between Air Jamaica and Virgin Atlantic.<sup>40</sup>

Details of **Attachment A (Parts 1, 2 and 3)**, of the 2007 July 24, agreement, signed by VS and Air Jamaica Ltd., are as follows:<sup>41</sup>

London- Heathrow Airport. All timings are UTC. Day 1=Monday. Day 2= Tuesday. Day 3=Wednesday. Day 4=Thursday. Day 5=Friday. Day 6=Saturday. Day 7= Sunday

**Part 1**

**AIR JAMAICA WEDNESDAY AND SUNDAY SUMMER SLOTS**

**Scheduling Period- Summer 2007**

<i>Times</i>		<i>Days of week</i>	<i>Period</i>
<i>Arrivals</i>	<i>Departures</i>		
08:55	11:50	3	from 26 September to end of summer Scheduling Period
10:00	13:15	7	from 23 September to end of summer Scheduling Period

<sup>40</sup> Virgin Atlantic. Email to the OCG. 2007 September 26

<sup>41</sup> Virgin Atlantic/Air Jamaica Ltd.. "Slot Exchange- London Heathrow Airport & London-Gatwick Airport" 2007 July 24

**Part 2**

**AIR JAMAICA SUMMER SLOTS**

**Scheduling Period- Summer 2008**

<i>Times</i>		<i>Days of week</i>	<i>Period</i>
<i>Arrivals</i>	<i>Departures</i>		
12:55	14:15	1	whole of summer Scheduling Period
13:30	15:25	2	whole of summer Scheduling Period
08:55	11:50	3	from beginning of summer Scheduling Period to 17 September 2008
12:25	14:15	4	whole of summer Scheduling Period
12:20	14:15	5	whole of summer Scheduling Period
14:00	16:00	6	whole of summer Scheduling Period
10:00	13:15	7	from beginning of summer Scheduling Period to 14 September 2008

**Part 3**

**AIR JAMAICA WINTER SLOTS**

**Scheduling Period-Winter 2007**

<i>Times</i>		<i>Days of week</i>	<i>Period</i>
<i>Arrivals</i>	<i>Departures</i>		
12:45	14:25	1	whole of winter Scheduling Period
14:00	15:50	2	whole of winter Scheduling Period
10:50	12:40	3	whole of winter Scheduling Period
10:50	12:40	4	whole of winter Scheduling Period
12:00	14:05	5	whole of winter Scheduling Period
10:50	12:40	6	whole of winter Scheduling Period
10:50	12:40	7	whole of winter Scheduling Period

In the premises, the OCG has found that Air Jamaica sold one (1) slot pair to VS, which translates into 728 slots annually. According to the Slot Exchange Agreement which was entered into between VS and Air Jamaica, VS bought a series of summer slots which, for the year 2006/2007, equated to 420 slots, while the winter series of slots equated to 308 slots, for a grand total of 728 slots.

In addition, according to the Slot Exchange Agreement, which was dated 2007 July 24, VS paid Air Jamaica £5.1 million for its Heathrow slots.

However, it is instructive to note that the one (1) slot pair gives VS the right to one landing and take-off slot each day of the week. As such, it may be inferred that it was in this context that Minister Shaw, in his presentation to Parliament on 2008 April 23, alluded to seven (7) slots.

In addition, it is instructive to note that Minister Shaw, in his presentation to Parliament, stated that Air Jamaica had sold its slots to VS. However, the OCG notes that the agreement, with regard to the AJLHS, which was signed by VS and Air Jamaica on 2007 July 24, made no reference to the sale of slots by Air Jamaica to VS. Instead, the agreement referred to an *exchange* of slots.

In fact, the agreement titled, '*Slot Exchange-London Heathrow Airport & London Gatwick Airport*', refers to slots which are detailed in Attachment A and B. Attachment A, which was detailed above, highlights the AJLHS in question, while Attachment B, details the VS slots which were exchanged for the AJLHS.

Below are details of **Attachment B:**<sup>42</sup>

***VIRGIN ATLANTIC WEDNESDAY AND SUNDAY SUMMER SLOTS***

*London- Heathrow Airport. All timings are UTC. Day 3=Wednesday. Day 7= Sunday*

***Scheduling Period- Summer 2007***

<i>Times</i>		<i>Days of week</i>	<i>Period</i>
<i>Arrivals</i>	<i>Departures</i>		
22:00	22:05	3	<i>From September 26 to end of summer scheduling period</i>
22:00	22:05	7	<i>From September 23 to end of summer scheduling period</i>

In light of the foregoing, the OCG was interested in finding out how airlines acquire slots, and whether the agreement with VS was one for a sale or *exchange* of slots.

In a report that was prepared by the General Counsel of Air Jamaica, Ms. Nerine Small, she noted that “*James Cole, the Director of Co-ordination at Heathrow airport has advised that based on the requirements of the EEC Council Regulation No 95/93 of 18 January 1993 on Common Rules for the Allocation of Slots at Community Airports and the IATA Worldwide Scheduling Guidelines, Slots at the airport cannot be sold but only exchanged.*”<sup>43</sup>

According to the report, there are generally two accepted methods which can be utilised by airlines to effect slot swop or exchange. These were stated as:

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<sup>42</sup> Virgin Atlantic/Air Jamaica Ltd.. “*Slot Exchange- London Heathrow Airport & London-Gatwick Airport*” 2007 July 24

<sup>43</sup> Nerine Small. Legal Opinion Brief. 2007 October 19

- (i) *“two airlines which hold slots are each interested in acquiring the other party's Slots, in which case they can simply swop these slots by informing the slot coordinator who will then confirm the swop; or*
- (ii) *one airline wishes to acquire slots held by another airline. In this case the airline wishing to acquire the slots would obtain off-peak or undesirable slots (also known as "junk slots") which would then be exchanged for the desirable slots held by the other airline and this exchange would also then be confirmed by the slot coordinator.”*<sup>44</sup>

As such, the OCG found that based upon the ‘*Slot Exchange- London Heathrow Airport & London Gatwick Airport Agreement*’, which was dated on 2007 July 24, and the report, which was prepared by Ms. Nerine Small, VS and Air Jamaica had in fact initiated a slot exchange by virtue of which VS exchanged off-peak slots for the AJLHS.

### ***The European Union-United States Open Skies Agreement & Slot Value***

Minister Shaw, in his presentation to Parliament on 2008 April 23, stated that “...*the Open Skies Agreement has been in the making for many years. Any person in the industry should have known of the consequences of the Agreement. The primary objective of the Agreement is to open Heathrow for other aircraft from the USA to other carriers, including Continental and Delta, who previously only had access to Gatwick. Why did the then Air Jamaica Board and the then Minister of Finance not know this? And if they did, why did they sell off these prime slots so cheaply?....*”<sup>45</sup>

Based upon the aforementioned assertions of Minister Shaw, the OCG sought to determine the following:

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<sup>44</sup> Nerine Small. Legal Opinion Brief. 2007 October 19

<sup>45</sup> The Hon. Audley Shaw. Closing Budget Speech. 2008 April 23

- i. the value of the AJLHS, especially having regard to the fact that the IATA Scheduling Guidelines do not speak to the sale of slots, but rather recognises slot exchanges;
- ii. whether fair market value was achieved in the VS offer; and
- iii. whether, in the evaluation of the offer, an analysis was undertaken with regard to the likely impact of the EU-US Open Skies Agreement (EU-US OSA).

The EU-US OSA, which was signed on 2007 April 30, came into effect on 2008 March 30. The agreement stipulates the conditions for deregulating international air transport for passengers and cargo between the European Union (EU) and United States of America (US), and vice-versa.

Its primary objective was to minimize the incompatibilities which existed between the aviation rules and policy approaches in the EU and US. The principles which govern the EU-US OSA include:

- i. free access to capacity and routes;
- ii. prices determined by the market;
- iii. all US and EU airlines operate within the ambit of equal and fair conditions.

This agreement has ended decades of strict regulation of transatlantic flights and allows European airlines to fly between any point within the EU to any US destination, while allowing US airlines to fly from any US destination to any EU destination.

In an article which was entitled “*The EU-US ‘Open Skies’ Air Transport Agreement – guide*”, which appeared in *EU Business* on 2008 March 28, the rights to be derived from the OSA, by EU airlines, included, *inter alia*:

- i. “*The possibility to continue flights beyond the United States towards third countries (‘5th Freedom’)*).

- ii. *The possibility to operate **all-cargo flights between the United States and any third country**, without a requirement that the service starts or ends in the EU ('7th Freedom').*
- iii. *So-called '**7th Freedom rights**' for passenger flights between the US and a number of non-EU European countries, i.e. direct flights between the US and Croatia or Norway.*
- iv. *A number of access rights to the US '**Fly America**' programme for the transport of passengers and cargo financed by the US Federal Government.*
- v. *More freedom to enter into **commercial arrangements** with other airlines (code-sharing, wet-leasing etc.).*
- vi. *Rights in the area of **franchising and branding** of air services to enhance legal certainty in the commercial relations in between airlines.*
- vii. *Possibility of **antitrust immunity** for the development of airline alliances.*
- viii. *Rights for EU investors in the area of **ownership, investment and control** of US airlines; Rights in the area of inward foreign investment in EU airlines by non-EU European investors; Rights in the area of ownership, investment and control by EU investors of airlines in Africa and non-EU European countries.”<sup>46</sup>*

It is instructive to note that prior to the EU-US OSA coming into effect on 2008 March 30, that flights to countries such as the UK, Spain, Greece and Ireland, were restricted to a certain number of frequencies or certain airlines. For example, the restriction on the flights between the US and London Heathrow, only allowed four airlines, namely, BA, VS, United Airways and AA, to fly between the two destinations.

However, the EU-US OSA opened the aviation industry between the EU and the US. Consequently, other major players like Delta, Continental, and Northwest Airlines have begun to fly to Heathrow.

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<sup>46</sup> EU Business. “*The EU-US "Open Skies" Air Transport Agreement – Guide*”. 2008 March 28. <http://www.eubusiness.com/Transport/open-skies-guide/>

The EU Transport Commissioner, Mr. Jacques Barrot, in speaking on the EU-US OSA, was reported as stating that the agreement would see a savings of £8 Billion for passengers and 26 Million extra seats between the EU and America over the next 10 years.<sup>47</sup> Further, it was projected that the total number of flights between the EU and US in April to June 2008 would have increased by 8% when compared to the said period for 2007.<sup>48</sup>

Aviation business analysts have, however, noted that the increase in transatlantic services will be particularly geared towards the destinations which were restricted prior to the EU-US OSA coming into effect. For example, in the case of London-Heathrow, it was projected that flights would increase by as much as 20%.<sup>49</sup>

However, it must be noted that even with the EU-US OSA, access to Heathrow has remained a challenge as it was estimated that approximately 98.5% of all the Heathrow slots were already taken, while the remaining slots were deemed unsuitable for transatlantic flights.<sup>50</sup> For example, reports have stated that just over 40% of the Heathrow slots are owned by British Airways, while British Midland Airways Limited (BMI) holds 13%.<sup>51</sup>

According to the IATA International Standards which have been established for the allocation of landing and take-off slots, an airline acquires slots based upon 'grandfather rights'. Provided that the slots are utilised for 80% of the time, within a given season, the owning airline controls said slots. In essence, the OCG found that there is a 'use it or lose it' principle which presides over the allocation of slots in the aviation industry.

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<sup>47</sup> Timesonline. Open Skies, not open season. 2007 March 25.

<http://www.timesonline.co.uk/tol/travel/article1557485.ece>

<sup>48</sup> EU Business. "The EU-US "Open Skies" Air Transport Agreement – guide". 2008 March 28.

<http://www.eubusiness.com/Transport/open-skies-guide/>

<sup>49</sup> EU Business. "The EU-US "Open Skies" Air Transport Agreement – guide". 2008 March 28.

<http://www.eubusiness.com/Transport/open-skies-guide/>

<sup>50</sup> UK-Airport-news.info. Battle for Heathrow slots heats up this week. 2007 November 4. <http://www.uk-airport-news.info/heathrow-airport-news-041107b.htm>

<sup>51</sup> Timesonline. Open skies ends a closed shop. 2007 October 21.

[http://business.timesonline.co.uk/tol/business/industry\\_sectors/transport/article2701536.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/transport/article2701536.ece)

Consequently, with the onset of the EU-US OSA, analysts have reported that the demand for Heathrow slots has escalated and, as a result of the increase in demand, prices of slots have increased. This is premised upon the fact that airlines could only take advantage of the EU-US OSA if they had secured slots at Heathrow and, in particular, the slots which were ideally suited for transatlantic flights.

The OCG has also found that, based upon the IATA Scheduling Guidelines, slots are not sold – they are exchanged. However, it is instructive to note that ‘slot trading’, where an airline, when exchanging slots, will also attach a price to the slot, occurs. This practice, it is reported, is largely a UK phenomenon.

However, the price of slots varies and analysts have stated that the price for *prime* slots, i.e. those best suited for transatlantic flights, may be in the region of up to £20 million.<sup>52</sup> In 2007 December, it was reported that Alitalia Airline had sold three (3) slot-pairs for a ‘record’ price of £67 million, with each valued at an estimated £22.3 million.

In a letter to the Telegraph Media Group, which was dated 2008 September 5, Sir Richard Branson, President of VS, in reference to Heathrow slots, stated that “*The rare slot that does emerge is usually at a time of day that does not work for transatlantic carriers or is snapped up for huge sums of money, as US carriers have discovered to their cost.*”<sup>53</sup>

Aviation Business Analysts have described slots as an airline’s most valuable asset. The OCG has found that the primary factors which determine the value of slots are (a) the arrival and departure times of the slots; and (b) the level of demand at the airport in question, as in the case of Heathrow.

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<sup>52</sup> Flightglobal.com. *Heathrow slot scramble begins*. 2007 May 21.

<http://www.flightglobal.com/articles/2007/05/21/214091/heathrow-slot-scramble-begins.html>

<sup>53</sup> Sir Richard Branson. *Sir Richard Branson: Why British Airways’ monopoly game must be stopped*. 2008 September 5

In fact, in a *Flightglobal* article entitled “*BMI values its Heathrow slot portfolio at £770 million*”, which was dated 2008 June 3, it was reported that Deloitte & Touche, a financial services firm, proposed that airlines should include slots as an asset in their balance sheets so as to enable the airlines to use them as security against borrowings. The report further stated that “...*Deloitte & Touche valued a peak-time Heathrow slot at around £25-30 million.*”<sup>54</sup>

In determining the average market value of slots, the OCG found that while the airlines paid a price for the slots acquired, in many of the cases some form of commercial arrangement was also included in the transaction. This, the OCG found, was the case in respect of the VS/Air Jamaica transaction.

The table below was extracted from a *Flightglobal* article which was entitled “*Slot Trading at Heathrow*”, and which was dated 2007 September 24. It is instructive to note that, in several of the cases of slot trades, which are included in the table, a commercial agreement was reached between the two airlines.

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<sup>54</sup> Flightglobal.com. *BMI values its Heathrow slot portfolio at £770 million*. 2008 June 3.  
<http://www.flightglobal.com/articles/2008/06/03/224338/bmi-values-its-heathrow-slot-portfolio-at-770-million.html>

SELECTED HEATHROW SLOT TRADES					
BUYER	SELLER	DATE	NUMBER OF SLOT PAIRS	TOTAL PRICE	NOTES
KLM	Air UK	1998	4 per day	\$25M	
BA	SN Brussels	July 2002	7 per day	\$62.5M	Code share signed as part of deal
BA	Swiss	Sep. 2003	8 per day	\$55.2M	As part of wider co-operation deal, since terminated
BA	United Airlines	Oct. 2003	2 per day	\$20M	Surplus slots sold when United in Chapter 11
Qantas	Flybe	Jan. 2004	2 per day	\$35.7M	Estimate
Virgin Atlantic	Flybe	Jan. 2004	4 per day	\$35.7M	Estimate
Virgin Atlantic	Air Jamaica Ltd.	May 2007	4 per week	\$10.2M	Virgin takes over Air Jamaica Ltd.'s Kingston-London route
SOURCE: Airline Business research. Note: Deals can include other commercial arrangements in addition to the slot sale. <sup>55</sup>					

The OCG, in analyzing the information which is captured in the foregoing table, has found that the average market value for a slot pair was between US\$6 to US\$8 million.

Notwithstanding this average market value, the OCG has also found that there was a wide variance in the prices of the slots. For example, in the case of Qantas/Flybe, two slots were sold for an estimated US\$35.7 million, which means that one slot pair sold for US\$17.85 million.

<sup>55</sup> Flightglobal. *Slot Trading at Heathrow*. 2007 September 24.  
<http://www.flightglobal.com/articles/2007/09/24/216996/slot-trading-at-heathrow.html>

However, it is instructive to note that the information, as presented, did not include the times of the respective slots, nor did it state whether the slots were deemed to be prime slots.

Further, it is also important to note that the period which is captured in the foregoing table, was 1998-2004. In this regard, the regulatory environment was significantly different from that of 2007, when the AJLHS were being divested, as between 1998-2004, when only four (4) airlines were allowed to make transatlantic flights from Heathrow.

Of import is that the EU-US OSA changed the regulatory environment in 2007, by opening up the aviation industry within the EU, and between the EU and US, hence increasing competition.

### ***European Union-United States Open Skies Agreement & its Impact on AJLHS***

Throughout the course of its Investigation, the OCG has reviewed several documents which were provided by the Executive Management of Air Jamaica and the MOFP. However, the OCG, in its review has seen no reference to the EU-US OSA and its likely impact upon the value of the AJLHS and/or the implications for the scope of a codeshare agreement.

In this regard, the OCG in its Requisitions/Questionnaires, which were dated 2008 July 7 and 8, and which were directed to the former Air Jamaica Board Chairman, Mr. O.K. Melhado, the former Air Jamaica Board Director, Mr. Noel Sloley and the then Minister of Finance and Planning, Dr. Omar Davies, asked the following question:

*“The Open Skies Agreement, was scheduled to come into effect on 2007 April 30. Please provide answers to the following questions and, and where possible, provide documentary evidence to substantiate your assertions/responses:*

- i. *Are you aware of the Open Skies Agreement, and its impact on the airline industry? If yes, please state the date and circumstances under which you became aware of the Open Skies Agreement.*
- ii. *Please provide full particulars of your knowledge of the referenced Agreement;*
- iii. *Detail the implications of the Open Skies Agreement on the value of the Heathrow slots sold by Air Jamaica...*

In their joint and sworn response to the OCG's Requisition, which was dated 2008 July 15, Sloley/Melhado stated that *"There had been discussions in the international media for some time on an Open Skies Agreement, and we are not sure of the precise date when we became aware of its implementation. Our understanding is that it was signed on April 30, 2007 to become effective on March 30, 2008."*<sup>56</sup>

Sloley/Melhado further stated that *"The factors that we were aware of in considering the impact of the Open Skies on the value of Air Jamaica's slot pair included the following:*

- (a) *The Open Skies Agreement removed the city-pair restrictions on flights from the USA to LHR; however, as noted earlier, this event does not directly correlate to an increase in value for all slots, including those held by Air Jamaica. Air Jamaica's late arrival times at LHR rendered these slots much less attractive to US carriers, since the departure times from the US carriers' eastern US hubs would be late at night and noncompetitive with the incumbent carriers already serving LHR.*

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<sup>56</sup> Sloley/Melhado. Response to OCG Requisition. 2008 July 15. Response to Question 13(1)

- (b) *There is also the unknown impact of additional flights on the overall yields to be expected on trans-Atlantic routes. Traditionally, these routes enjoyed very high yields because of the limited number of departures from the US. Absent an increase in demand for travel between the US and the UK (as is currently the case), additional flights will reduce yields and, by extension, negatively affect the value of individual slot pairs.*
- (c) *Expansion at LHR (Terminal 5 and additional runway) would also create a better balance between supply and demand, and reduce demand-driven upward price pressure on slots.*
- (d) *Our experience at Air Jamaica did not suggest that there would be a material increase in demand for our slot pair. None of the airlines with whom we were in contact with on the disposal of the A340 aircraft indicated any interest whatsoever in our slots... Similarly, AA did not revisit the issue with us after making its bid of US\$6 million.. All of these carriers would have been aware of the pending Open Skies Agreement.”<sup>57</sup>*

*Sloley/Melhado also stated that “Taking all these points together, while an increase in demand for prime slots would likely result from new entrants “buying their way in” and existing players expanding their base, the main beneficiaries would likely be the holders of desirable slot times. The extent of a material change for Air Jamaica’s slot pair was therefore very difficult to quantify with any certainty, and it would have been most imprudent to defer the Air Jamaica slot sale on the basis of a purely speculative potential change in slot values, at a time when the continuing operational/financial losses from the London route was costing Air Jamaica millions of US dollars every month.”*

The OCG considered the assertions of Mehado/Sloley, especially with respect to the fact that the expansion of Heathrow, in the form of its Terminal 5 Project, would have added runways and, as such, the value of the slots may have been consequently affected.

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<sup>57</sup> Sloley and Melhado. Response to OCG Requisition. 2008 July 15

However, it is interesting to note that Terminal 5, which opened its first phase in 2008 March, is a Project which is mostly funded by the British Airport Authority (BAA) and BA. Terminal 5 is being constructed as a result of the EU-US OSA, in respect of which it is projected that the number of passengers passing through Heathrow will increase by approximately 27 million a year.<sup>58</sup>

Further, the OCG found that phase two of the Terminal 5 Project is not expected to be completed until 2011.

Dr. Omar Davies, in his sworn response to the OCG's Requisition, which was dated 2008 July 21, stated that *"I am aware of the Open Skies Agreement but am not aware of its impact on the airline industry. I cannot recall the specific date on which I gained knowledge of the Open Skies Agreement but I came by that information by reading about it in the print media....I am not aware of any impact which that agreement would have had on the sale of Air Jamaica's pair of slots at Heathrow...."*<sup>59</sup>

### ***AJLHS Value***

In response to the OCG's Requisition, the General Counsel for Air Jamaica, Ms. Nerine Small stated that *"...in or about October 2007, the then President & C.E.O. of Air Jamaica Limited, advised me that the value arrived at was based on information gleaned as to the price at which BWIA sold its Heathrow slots."*<sup>60</sup>

This information was corroborated by the former Chairman of the airline, Mr. O.K. Melhado and former Board Director, Mr. Noel Sloley, in their joint and sworn response to the OCG's Requisition, which was dated 2008 July 15.

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<sup>58</sup> **Airport technology.com "London Heathrow Airport (LHA/EGLL) Terminal 5, United Kingdom"**  
<http://www.airport-technology.com/projects/heathrow5/>

<sup>59</sup> Dr. Omar Davies. Response to the OCG's Requisition. 2008 July 21

<sup>60</sup> Nerine Small. Response to OCG Requisition. 2008 July 23

Sloley /Melhado stated that *“The transaction was to a great extent unique; for example, slot values are seldom based on just the acquisition of the slot rights, but have ancillary conditions/benefits (as was the case with Air Jamaica). However, we took into account the BWIA slot sale that had preceded Air Jamaica’s...and other information gleaned on slot sales.”*<sup>61</sup>

In support of their assertions, Sloley/Melhado provided the OCG with the following table, which highlights the price of Heathrow slots traded prior to Air Jamaica’s decision to sell its slots. This information, regarding the value of slots, was what the Management of Air Jamaica had utilised in arriving at a value which it had deemed to be appropriate for the sale of the AJLHS.

<i>BA from British Midland (2007)</i>	<i>7 pairs</i>	<i>£30 million</i>	<i>£4.2M per pair</i>
<i>BA from BWIA (2006)</i>	<i>1 pair</i>	<i>£5 million</i>	<i>£5M per pair</i>
<i>Quantas from Flybe (2004)</i>	<i>2 pairs</i>	<i>£20 million</i>	<i>£10M per pair (Primetime take off and landing slots)</i>
<i>Virgin Atlantic from Flybe (2004)</i>	<i>4 pairs</i>	<i>£20 million</i>	<i>£5M per pair</i>
<i>British Airways from Swiss International Airlines (2004)</i>	<i>8 pairs</i>	<i>£22.4 million</i>	<i>£2.8M per pair</i>

In their response to the OCG’s Requisition, which was dated 2008 July 15, Sloley/Melhado further stated that *“The value of the slot pair was the amount that could be achieved by way of competitive bidding between BA, VS and AA. We were informed by the price that the companies were willing to pay for the slot pair, along with the other benefits negotiated for Air Jamaica and Jamaica’s tourism industry. In the case of AA, a*

<sup>61</sup> Sloley/Melhado. Response to OCG Requisition. 2008 July 15

*stand-alone offer of US\$6 million plus a slot pair at Gatwick (which was of no interest to Air Jamaica) was received.... and AA would not increase its offer.”<sup>62</sup>*

In his presentation to Parliament, on 2007 April 23, Minister Shaw raised concerns about whether Air Jamaica had achieved fair market value for its slots.

In raising the said concerns, Minister Shaw highlighted the Continental Airlines transaction, in respect of which it was reported that the airline had purchased four (4) pairs of slots for an estimated US\$209 million. This is equivalent to approx. US\$52 Million per pair.

However, according to Sloley/Melhado, it is difficult to use a particular transaction to identify a definitive value for slots. In comparing the Continental and Air Jamaica scenario, Melhado and Sloley argued that the times of the Continental slots were far more desirable than that of Air Jamaica’s, hence, they were able to get more for each slot pair.

In making their point, Sloley/Melhado stated that “*Firstly, Continental’s trans-Atlantic arrival times into LHR from New York and Newark are as follows:*

<i>FLT CO8220</i>	-	<i>7:10PM</i>
<i>FLT CO18</i>	-	<i>9:15PM</i>
<i>FLTCO8224</i>	-	<i>6:35AM</i>
<i>FLTCO28</i>	-	<i>6:45AM</i>
<i>FLTCO8246</i>	-	<i>7:50AM</i>
<i>FLTCO8222</i>	-	<i>9:05AM</i>
<i>FLTCO8230</i>	-	<i>9:30AM</i>

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<sup>62</sup> Sloley/Melhado. Response to OCG Requisition. 2008 July 15

*These times are typical of trans-Atlantic flight, and these slot times are the most sought after for trans-Atlantic flights because they enable arriving passengers to connect with most flights leaving LHR or to have a full day in London. If one examines for purposes of comparison the Air Jamaica slot times, it is apparent that Air Jamaica's slot times were well outside these preferred times and were also not at the same time each day (which has a direct, negative impact on the scheduling of the aircraft and crews, and is also inconvenient to passengers who need to make connecting flights). Air Jamaica's daily slot arrival times in LHR are shown in the following Table:"*<sup>63</sup>

	<i>Arrival Times</i>
<i>Mon</i>	<i>12:45</i>
<i>Tues</i>	<i>14:00</i>
<i>Wed</i>	<i>10:50</i>
<i>Thurs</i>	<i>10:50</i>
<i>Fri</i>	<i>12:00</i>
<i>Sat</i>	<i>10:50</i>
<i>Sun</i>	<i>10:50</i>

Melhado/Sloley further stated that “*Secondly, the negotiating value of one slot pair is significantly less than four. This is especially true with airlines that will not enter a gateway without a certain minimum number of daily flights. Therefore in the context of a new entrant taking advantage of the international "Open Skies Agreement", there would be the desirability of acquiring premium slot times and also a minimum number of slot positions. Thirdly, Air Jamaica's late arrival times at LHR rendered its slots much less attractive to US carriers, since the departure times from the eastern US hubs would be late at night and noncompetitive with the incumbent carriers already serving LHR. For these three reasons, the Continental transaction would have included a premium for the preferred times and number of slot pairs in that transaction, and is not a reliable guide for the value of the Air Jamaica slots.*”<sup>64</sup>

<sup>63</sup> Sloley/Melhado. Response to OCG Requisition. 2008 July 15

<sup>64</sup> Sloley/Melhado. Response to OCG Requisition. 2008 July 15

As noted earlier, the OCG found that the arrival and departure times of the slots is the primary determining factor for the value of slots. Further, the OCG has found that the average market value of Heathrow slots, for the period 1998-2004, was between US\$6 to US\$8 million.

In the case of Air Jamaica, its Management relied upon an analysis of what BWIA was able to get for its slots. The BWIA slots were described as being far more suitable than those of Air Jamaica to transatlantic flights.

The BWIA slot information was also used by VS in determining the amount it was willing to offer to Air Jamaica. In a letter which was dated 2008 August 14, VS wrote to the OCG and highlighted the financial value of slots. Below is a verbatim extract of the letter from VS:

*“Financial value of the Slots*

- i. There are no published or standard values for slots nor is there any standard formula for assessing their value. The value of slots will be determined simply by market forces i.e. what interested parties are prepared to bid at the time the slots are offered for sale.*
  
- ii. Heathrow slot values for long-haul use are driven largely by the value of the flights using them. Arrival slots before 0730 are needed for high-yielding flights arriving from the Far East, Africa, India and the Middle East, and enable connections from those points to points in the USA. Arrivals between 0600 and 1030 are suited to arrivals from the US East Coast, with a preference for arrivals before 0930. Arrivals after 0930 are less suited to the US East Coast but can be used for US West Coast arrivals. Generally, the earlier the arrival slot in the morning, the higher the value. Slots which are daily and are at the same times every day are valued higher than slots which are not daily or are not lined up at the same times each day.*

- iii. *In deciding what price to put forward in its initial bid to JM, Virgin looked at the value of the slots being offered to Virgin's operation. In addition, Virgin looked at the price paid in recent comparable slot sales. Earlier in 2006, British Airways had purchased BWIA's London Heathrow slots and entered into a codeshare cooperation with BWIA's successor, Caribbean Airways.*
- iv. *The price BA paid for the BWIA slots was publicly acknowledged as £5 million for one year-round daily slot-pair.*
- v. *It was also publicly reported that BA had recently purchased two daily slot-pairs at Heathrow from Malev for about £7 million (i.e. £3.5 million per slot pair).*
- vi. *The BWIA slots purchased by BA were very desirable lined up daily slots with 0915 arrivals and 1115 departures in winter and 0925 arrivals and 1125 departures in summer. These slots were lined up every day in season and differing by only 10 minutes from one season to another.*
- vii. *By contrast, the JM slots being offered for sale were a daily slot-pair but had arrivals no earlier than 1050 local time in winter and 0955 in summer, and differing by up to 3 hours 10 minutes from day to day in winter, and in summer by up to 5 hours 10 minutes and so were not well lined up. Virgin assessed that the much later arrival times, the large variation by season and very large spread of times by day of week made the slots worth significantly less than BWIA's slots. Also, the JM slots were not well suited to arrivals from the US East Coast-unlike the BWIA slots.*

- viii. *Virgin therefore submitted a first bid to JM reflecting that assessment to purchase the slots for £4.1 million. The bid included among other things a proposal to introduce flights on the Gatwick-Kingston route, and an offer to carry JM's code on relevant Virgin flights.*
- ix. *JM requested a revised bid in March 2007. Virgin submitted a new bid with a higher price for the slots £5.1 million. The bid value of £5.1m was higher than the value of the more desirable BWIA slots purchased by BA in 2006.”<sup>65</sup>*

Based upon the foregoing, the OCG found that BWIA had sold one (1) slot-pair, which, in the winter season, had arrival times as early as 9:15 am and departure times of 11:15 am and, in the summer, the arrival time was 9:25 am and the departure time, 11:25 am. As such, BWIA's slots were viewed as being more desirable, given the daily arrival times which only varied by 10 minutes from one season to the next.<sup>66</sup>

In contrast, the AJLHS had relatively varied daily arrival and departure times. In winter, the earliest arrival time was 10:50 am and, in the summer, the earliest arrival time was 9:55 am. As a result of the variance in the arrival and departure times of the AJLHS, the then Executive Management of Air Jamaica, and VS, had deemed the AJLHS to be less desirable than those of BWIA.

Further, the OCG has found that Air Jamaica, in arriving at a value for its slots, never treated the slots as a separate and distinct asset. Instead, they became a component within a much broader arrangement framework for exiting the London route, in respect of which Air Jamaica was seeking to (a) achieve a reasonable price for the slots; (b) enter into an appropriate commercial arrangement with the chosen carrier; and (c) secure replacement flights on its London/Jamaica route.

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<sup>65</sup> Virgin Atlantic. Letter to the OCG. 2008 August 14

<sup>66</sup> Virgin Atlantic. Letter to the OCG. 2008 August 14

Sloley/Melhado, in their sworn and joint response to the OCG's Requisition, which was dated 2008 July 15, stated that *"In determining the value of the Air Jamaica/VS transaction, timing was also very important. Every additional month that Air Jamaica operated on the London route would cost Air Jamaica an additional US\$3 million in losses (note that, with current fuel prices, this would now be in the order of US\$4 million per month). Therefore in evaluating the value of the transaction, time delays have to be weighted against any possible price increase that could be negotiated. Furthermore, delays would diminish the likelihood of disposing of the two loss-making A340's on favourable economic terms."*<sup>67</sup>

The OCG in its Requisition/Questionnaire, which was dated 2008 July 8, asked Sloley/Melhado the following question:

*"What was the value of the seven (7) Heathrow slots at the time they were being sold and what factors and/or source(s) informed this value?"*

In their sworn response to the OCG's Requisition/Questionnaire, which was dated 2008 July 15, they stated that *"It is difficult to quantify all aspects of the value received from the sale, especially the broader (but critical) benefits to Jamaica's tourism industry of ensuring replacement flights to the Island. Nonetheless, the following shows that a value of at least US\$22.5million was achieved from the sale of Air Jamaica's slot pair:*

- *Cash of US\$10M; plus*
- *Estimated value of code share and handling agreements of US\$3 million per annum for five years(which, discounted at 8%, is a Net Present Value of US\$12 million); plus*
- *Assimilation of passengers who had pre-paid for bookings on Air Jamaica flights which were scheduled for after the discontinuance on*

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<sup>67</sup> Sloley/Melhado. Response to OCG Requisition. 2008 July 15

*the route, on terms whereby half of the passengers were carried by the buyer at no cost to Air Jamaica, and the remainder were carried at the fare that they had paid (i.e. with no surcharges to Air Jamaica). This yielded a value of approximately US\$0.5 million.”<sup>68</sup>*

Sloley/Melhado further stated that *“This value of over US\$22M does not include the anticipated revenues that Air Jamaica could generate from providing the cross-island service. In addition, the replacement of 900 seats per week, assuming 50% to be exclusively tourist with an average stay of 10 days and a daily spend of US\$100, would mean additional revenue to the country of about US\$23 million per annum.”<sup>69</sup>*

The OCG, however, found no evidence to suggest that an analysis was undertaken by the then Executive Management of Air Jamaica with regard to the likely impact of the EU-US OSA on the value of the AJLHS.

### ***Application of the Procurement Guidelines and Policy***

#### ***➤ Competitive Tendering***

Minister Shaw, in his presentation to Parliament on 2008 April 23, stated that *“The process was not subject to public tender. It appears that only two companies had been courted- British Airways and Virgin.”<sup>70</sup>*

The OCG has identified three (3) airlines which were approached by Air Jamaica, in respect of the sale of the AJLHS. The airlines identified were BA, VS and AA. Of note, is that all three airlines made an offer to Air Jamaica for its slots. However, only the offers from BA and VS were actively pursued.

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<sup>68</sup> Sloley/Melhado. Response to OCG Requisition. 2008 July 15

<sup>69</sup> Sloley/Melhado. Response to OCG Requisition. 2008 July 15

<sup>70</sup> Minister Audley Shaw. Closing Budget Speech. 2008 April 23

It is, however, instructive to note that it was reported that BA actually approached Air Jamaica from as early as 2006 November.

The Minutes of the Meeting of the Air Jamaica Board of Directors, which was dated 2006 November 28, stated that “...*the Chairman advised the Board that British Airways (BA) have approached Air Jamaica Ltd. for discussions and a meeting is being scheduled at a neutral location in the next week. BA have indicated that they wish to discuss the London services but have not put forward any specifics.*”<sup>71</sup>

The Minutes of the Board Meeting, which was dated 2007 January 10, stated that “*BA’s primary interest relates to the slots which Air Jamaica currently owns at Heathrow Airport and BA have made it quite clear that if they acquire those slots from Air Jamaica they would not be used to provide service to Jamaica. The discussions also included the monetary value of the slots and potential opportunities for a code share relationship.*”<sup>72</sup>

The OCG found that the AA deal was, however, not actively pursued by Air Jamaica. This is evidenced by the sworn statements which were received from Sloley/Melhado, who informed the OCG that, in accordance with the Air Jamaica Business Plan, which was presented to the Cabinet on 2007 January 29, BA and VS were the desired carriers.

Sloley/Melhado, in their sworn response to the OCG’s Requisition, which was dated 2008 July 15, stated that “*In keeping with the Plan approved by Cabinet, the CEO of Air Jamaica was instructed to contact BA and VS. In addition, he was asked to contact American Airlines (“AA”) which had a long-standing relationship with Jamaica. Although AA was constrained by the UK-Jamaica bilateral agreement, it was a major player at LHR, and so it was possible that AA would make an offer that would give an indication of the value of Air Jamaica’s slot pair or even be high enough to be considered.*”<sup>73</sup>

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<sup>71</sup> Minutes of the Air Jamaica Ltd. Board of Directors, 2006 November 28

<sup>72</sup> Minutes of the Board of Directors. 2007 January 10

<sup>73</sup> Melhado/Sloley. Response to OCG Requisition. 2008 July 15

The OCG found that the selection of VS and BA by Air Jamaica was premised upon the need to ensure that the flights were replaced on the London/Jamaica route after Air Jamaica ceased to operate on the said route.

Further, Air Jamaica had a desire to maintain a presence on the said route and, as such, felt that a codeshare agreement would provide the best opportunity to achieve this objective. A codeshare agreement with either BA or VS was deemed to be preferable given that these airlines were the primary competitors on the London/Jamaica.

The OCG found that the methodology which was utilized by Air Jamaica to select the carriers to negotiate the divestment of the AJLHS was one which was akin to the *Limited Tender* methodology.

It must be noted that after receiving Cabinet's approval for its Business Plan, the Air Jamaica Board instructed the then President & CEO of Air Jamaica to approach BA and VS in an effort to carry out the objectives of the plan to close the London/Jamaica Route.

The OCG, however, found no documentary evidence to suggest that Air Jamaica had developed a formal Request for Proposal (RFP), which would have provided (a) the conditions that were to be met in the proposals to be submitted by each bidder; (b) the criteria which would be utilized for the evaluation of the bids or proposals; and/or (c) the selection methodology and/or method of assessment.

In their sworn response to the OCG's Requisition, which was dated 2008 July 15, Sloley/Melhado stated that "*There was no formal RFP, as the industry practice for the sale of slots is by way direct approaches to credible potential buyers/sellers, and in practice an airline in need of slots will initiate negotiations with another carrier that controls slots that they have an interest in acquiring.*"<sup>74</sup>

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<sup>74</sup> Melhado/Sloley. Response to OCG Requisition. 2008 July 15

However, the OCG found that based upon the evaluations which were undertaken by the Management of Air Jamaica., there were indeed specific criteria by which the proposals from VS and BA were evaluated.

Based upon the evaluation report which was prepared by the former Air Jamaica President and CEO, Mr. Michael Conway, which was dated 2007 April 19, the following were the criteria by which the BA and VS proposals were evaluated:

- i. Slot Purchase
- ii. Full Slot takeover
- iii. Passenger Handoff
- iv. Prorates and Gateways
- v. Frequent Flier Programs
- vi. Tenure
- vii. Tourism Consideration
- viii. Commitment to Jamaica
- ix. Ability to Perform
- x. Diaspora Issues

➤ ***Evaluation of the Proposals***

According to Melhado/Sloley, in the evaluation of the proposals from BA and VS, several points were taken into consideration. In their responses to the OCG Requisition, which was dated 2008 July 15, they stated that “...*The most important were:*

1. *The amount offered for the slot pair.*
2. *The additional flights to be committed to Jamaica to offset the negative economic effects of Air Jamaica’s exit from the route.*
3. *The nature and duration of the code share agreement.*

4. *The date of slot takeover. Any delay in the date of exit from the route would result in Air Jamaica. incurring additional operating and financing losses, and would also jeopardize the possible success of exploiting the window of opportunity for the disposal of the two A340 aircraft....*
5. *The possibility for advantageous fare sharing arrangements that would leverage the network of routes to which the other carrier has access (in particular, those known in the industry as "pro rating") that would enhance Air Jamaica's ability to generate additional net revenues from the partnership, and the gateways these would apply to.*
6. *Access to a Gatwick slot pair in the event the code-share agreement was discontinued.*
7. *The availability of a favourable passenger hand-off arrangement (i.e. the ability of the purchaser to accept the passengers already booked on Air Jamaica, and the acceptance of those passengers at the fare paid so that Air Jamaica did not incur related costs).*
8. *The assimilation of Air Jamaica's frequent flier credit into the equivalent programmes offered by the other carrier.*

*On a more subjective level, consideration was also given to the buyer's perceived commitment to Jamaica, the strength of each airline's Tour Operator arm, and its potential to bring increased tourism business into Jamaica.*"<sup>75</sup>

These concerns and/or areas, which were identified by the former Air Jamaica Board Chairman and Director, were confirmed by the OCG via the evaluation reports which were examined and which had generally reflected the referenced criteria.

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<sup>75</sup> Melhado/Sloley. Response to OCG Requisition. 2008 July 15

In the '*Position Paper*' which was dated 2007 April 17, and which was prepared by the former Air Jamaica President & CEO, Mr. Michael Conway, an analysis of the outlook on the closure of the London route was included, along with a comparative analysis of the proposals that were received from BA and VS.

The '*Position Paper*' included information which related, *inter alia*, to (a) "*BA and Virgin Proposal*"; (b) *Our pick is BA*; and (c) *the recommendation*." Below, is the extracted information which was taken from the 2007 April 17 comparative analysis of the BA and VS proposals in the aforementioned areas:

**(a) *The BA and Virgin Proposal***

- i. *The offers for the slot purchase from BA is \$9.4 million and from VS \$9.6 million [hand written on the document is \$10.1]. Both carriers are ready to assume full utilization of the slots beginning with the winter season of 2007 (starts Oct. 27<sup>th</sup>).*
- ii. *BA has increased their slot offer from a starting point of \$7.0 million, and VS has moved from their starting position of full utilization of the slots beginning with the winter 2008 season.*
- iii. *BA has offered a guarantee of a daily slot pair at LGW at a cost of \$1.8M should they exit the Jamaica market prior to contract completion. (We will seek to get this agreement to include a failure to renew their agreement with JM).*
- iv. *Both will add additional service of at least 2 x per week to the Jamaican city not currently served (BA to MBJ and Virgin to KIN). The BA offer represents 560 seats configured for 4 classes; and, the VS is for 900 seats in a 3 class configuration.*
- v. *Both will offer Frequent Flier earn/burn reciprocity.*

- vi. *Both will offer code-share and SPA's (Special Prorate Agreements) from their respective gateway cities in North America.*
- vii. *Marketing agreements for 3- years in both cases, but we believe the "winner" will agree to go longer to get the deal, as well as the possibility of common-rating the fares out of Manchester with those out of London.*

**(b) Our Pick is BA:**

- i. *BA's network is substantially larger-they serve eight [hand written on the document is nine] common gateways with JM in No. Am.,[North America] compared to only three [hand written on the document is five] for VS.*
- ii. *BA has been in the JM market for 60 years; VS entered the market only last summer. There is much less uncertainty with respect to BA's continued commitment and support of the Jamaican market.*
- iii. *BA appears to have a much better understanding of the West Indian population in the UK, and in our view, BA will be a better partner in achieving a smooth transition from both a commercial and political standpoint.*
- iv. *Lastly, and given the similarities in the two offers with respect to the key commercial factors, it is of interest to note that the current overcapacity and low yield condition on the route is due largely to Virgin's entry into the Jamaican market this past summer.*

**(c) Recommendation:**

*Set forth below is the Company's recommendation regarding the London Route:*

- i. *LHR slots to be sold to BA for a minimum of \$9.4 million concurrent with the execution of a long-term comprehensive marketing and code-share agreement.*
- ii. *Service levels be reduced from daily to 5x per week from July 1- Sept. 5<sup>th</sup>; this will allow one A340 to be used on the North American system during the peak summer period and will substantially reduce the need for wet-leasing from other carriers.*
- iii. *Service further reduced to 4 x per week Sept. 6<sup>th</sup>-Oct. 27<sup>th</sup>; this will allow one A340 to exit the fleet.*
- iv. *Total exit from Route on Oct. 28<sup>th</sup>; remaining A340 exits the fleet.*<sup>76</sup>

Given the foregoing comparative analysis of the proposals from BA and VS, the OCG found that BA was substantially the preferred partner for the commercial agreement which was envisioned by the Executive Management of Air Jamaica. This was so despite the fact that VS had presented an offer for the AJLHS which was US\$700,000 dollars more than the BA offering, as was evidenced by the hand written notes which were marked on the said document.

The rationale of this recommendation was that:

1. BA had a wider network, which included nine (9) common gateways with Air Jamaica, as against VS, which only had five (5). This was significant in light of the desire of Air Jamaica to enter into a codeshare arrangement which, for the airline, meant that the scope for this was greater given the wider access to the markets which BA already served.

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<sup>76</sup> Michael Conway. London Route-Position Paper. 2007 April 17

2. BA had displayed a level of commitment to Jamaica which presented less uncertainty. The airline had been operating in the island for sixty (60) years.
3. BA had a more intimate knowledge of the West Indian community in the UK. This meant that it would be a much better partner for Air Jamaica.
4. The overcapacity on the Jamaica/London route had resulted from the entry of VS into the market. This was evidenced by the fact that Air Jamaica had previously received 35% of its passengers on this route from Virgin Holidays and, with Virgin now flying on said route, this traffic was naturally redirected to that airline.

Given this fact, questions would have been raised as to (a) whether VS had the capability to expand the customer base and increase the number of visitors to the island, or (b) whether VS was simply redistributing existing clientele. In this respect, and given the fact that BA had a more expansive network, BA would have been the favoured carrier.

It is instructive to note that on 2007 April 17, the same day on which Mr. Conway prepared his paper and recommended the acceptance of the BA proposal, the then Minister of Finance and Planning, Dr. the Hon. Omar Davies, directed a letter to VS outlining six (6) proposed areas for improvement for the VS proposal.

In his sworn response to the OCG's Requisition, which was dated 2008 July 21, Dr. Davies, informed the OCG that "*Toward the end of the process of evaluation of the two proposals by the Board and management of Air Jamaica, **I received a telephone call from the Chairman of Virgin Atlantic, Sir Richard Branson, in which he expressed concern that the Board/senior management intended to accept the proposal from BA but that he wished me to know that he would be willing to improve his offer.** I indicated to Sir Richard that, as per my policy, I had not been involved in assessing the proposals*

*and I would need to be briefed before having any further discussions with him.”<sup>77</sup> (OCG Emphasis).*

It is of critical importance to emphasize that, based upon Dr. Davies’ sworn testimony, Sir Richard Branson appeared to have been well informed about the evaluation process and the subsequent recommendation of the then Management of Air Jamaica to accept the BA proposal and not VS’.

The OCG, in its Follow-up Requisition Questionnaire, which was dated 2008 September 18, to Dr. Davies, asked, *inter alia*, the following question:

*“In your response dated July 21, 2008, to the OCGs’ requisition which was dated July 7, 2008, you stated that you became involved in the evaluation process when you were asked to intervene. Please provide answers to the following questions and, where possible, provide documentary evidence to substantiate your assertions/responses:*

- i. The name of the entity(s) and/or individual(s) and the title(s) of the individual (s) who asked you to intervene;*
- ii. The date(s) on which you were asked to intervene;*
- iii. Detail the nature of the intervention requested of you;*
- iv. Detail the nature and level of intervention granted by you;*
- v. Detail the result(s) of your involvement.*

In his sworn response to the OCG, which was dated 2008 October 5, Dr. Davies stated that “.... *I was asked to intervene by Sir Richard Branson, Chairman of Virgin Atlantic. I do not have a precise recollection but I believe it was during the period April 12-13, 2007. Sir Richard indicated me [sic]that he was willing to improve his offer as, although those negotiating on behalf of Virgin felt they had put forward the company’s best offer,*

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<sup>77</sup> Dr. Omar Davies. Response to OCG Requisition. 2008 July 21

*he, as Chairman, could make adjustments....I merely conveyed the request for improvements on the offer to Sir Richard after meeting with the Air Jamaica Board Chairman and CEO....I asked the Chairman and CEO to prepare a matrix which compared the offers from the two airlines on each of the critical criterion on which the proposals were being assessed. The matrix was prepared and sent to me. I subsequently conveyed Sir Richard's improved offer to the Chairman and CEO.*"<sup>78</sup>

On 2007 April 17, Dr. Davies wrote to VS, outlining six (6) suggested areas for improvements. These areas for improvement were conceptualised after he, Dr. Davies, had consulted with the then Air Jamaica President & CEO, Mr. Michael Conway, and the former Chairman of the Air Jamaica Board of Directors, Mr. O.K. Melhado.

In his response to the OCG's Requisition, Mr. Melhado stated that "*Towards the very end of negotiations, when it appeared that we could not extract any further concessions, the Chairman of VS contacted the MOFP directly. The MOFP in turn called the Chairman and CEO to his office and informed them that he had received a telephone call from the Chairman of Virgin Atlantic. Based on the conversation he felt that the door was open to obtain further concessions from VS. We indicated that there were certain areas where further negotiations would be useful, but that we would also want to give BA the opportunity to respond on these points.*"<sup>79</sup>

The former Minister's letter to VS, which was dated 2007 April 17, stated that "*This represents a follow-up to our three (3) conversations today, April 17, on the above topic. In response to your request, the following are the six (6) points about which we would need clarification in order to make a final decision on the way forward:*"<sup>80</sup>

1. *Time period for the Agreement: I am advised that your offer is for this agreement to last for three (3) years. Air Jamaica officials would prefer five years.*

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<sup>78</sup> Dr. Omar Davies. Response to the OCG's Requisition. 2008 October 5

<sup>79</sup> Sloley/Melhado. Response to OCG Requisition. 2008 July 15

<sup>80</sup> Omar Davies. Letter to Virgin Atlantic Airways. 2007 April 17

2. *Air Jamaica wishes to have the fare for Manchester to Jamaica to be the same as that from London to Jamaica. In other words, there should be no additional charge for the Manchester to London leg.*
3. *Air Jamaica would wish for a favourable pro rate in instances where Virgin's services to other destinations are utilized.*
4. *Air Jamaica wishes to have the passengers who have already booked for Air Jamaica to be taken over by Virgin at no charge.*
5. *There is a desire for an improved offer for the Heathrow slots.*
6. *In the event that Virgin ceases to fly to Jamaica, two (2) slots at Gatwick should be offered at a minimum of (US)\$1.8 million per year.”<sup>81</sup>*

It is instructive to note that item (6), the provision of a Gatwick slot for US\$1.8 million, was apparently taken directly from the BA proposal. This is premised upon the analysis that was contained in the *'Position Paper'*, which was dated 2007 April 17, in which Mr. Conway had included this item as a feature of the BA offer.

In fact, the improvements which were listed by Dr. Davies, in his letter of 2007 April 17, reflected the areas in which Air Jamaica had wanted to achieve a better offer.

In his analysis on 2007 April 17, Mr. Conway had stated that *“Marketing agreements go for 3- years in both cases, but we believe the “winner” will agree to go longer to get the deal, as well as the possibility of common-rating the fares out of Manchester with those out of London.”*

Therefore, the OCG found that the areas which were identified for improvement were in line with the assessment of the then Executive Management of Air Jamaica.

Dr. Davies, in his sworn response to the OCG's Requisition, which was dated 2008 July 21, informed the OCG that VS agreed to improve its offer in the following areas:

- (i) a tenure of 5 years;

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<sup>81</sup> Omar Davies. Letter to Virgin Atlantic. 2007 April 17

- (ii) the fare for Manchester to Jamaica would be the same as that from London to Jamaica;
- (iii) a favourable pro rate in instances where Virgin's services to other destinations are utilized;
- (iv) VS agreed to take up 50% of the cost of the pre-booked Air Jamaica Ltd. passengers;
- (v) in the event that Virgin ceases to fly to Jamaica, two (2) slots at Gatwick should be offered at a minimum of US\$1.8 million per year.

However, Dr. Davies, in his sworn statement to the OCG, stated that Sir Richard Branson said that “..... he was aware that Virgin's offer, in terms of payments for the slot, was superior to that of BA's.”<sup>82</sup> As such, VS refused to improve the price offered for the slots.

Of very critical importance, is that the OCG has found **that subsequent to VS making improvements to its proposal**, the former President & CEO of Air Jamaica, Mr. Michael Conway, prepared an evaluation report of both offers, which was dated 2007 April 19. Of significant note is that Mr. Conway wrote on this paper **'Final Position Paper'**, which suggests that this was the Management's final recommendation. **As will be seen, the “final” recommendation of Air Jamaica's Executive Management, notwithstanding VS' improved offer, was for the acceptance of the BA proposal.**

The OCG's finding, in this regard, is evidenced, *inter alia*, by the fact that when compared to the 2007 April 17 'Position Paper', the 2007 April 19 'Final Position Paper' reflected a change in the areas which were identified for improvement of the VS proposal. For example, in the 2007 April 19 'Final Position Paper,' the VS offer with regard to tenure had increased from three (3) to five (5) years pursuant to the request for improvement which was contained in Dr. Davies' 2007 April 17 letter to VS.

Detailed in the following table, is the information which was contained in the evaluation report, that was prepared by Mr. Conway on 2007 April 19:<sup>83</sup>

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<sup>82</sup> Omar Davies. Response to the OCG. 2008 July 21

<b>LONDON ROUTE</b>					
				<b>Favourability</b>	
<b>Deal Component</b>	<b>BA</b>	<b>VS</b>	<b>Comment</b>	<b>BA</b>	<b>VS</b>
<b>Direct Financial Consideration:</b>					
<i>Slot Purchase</i>	<i>\$9.4 M</i>	<i>\$10.1M</i>			<i>\$0.7</i>
<i>Full Slot Takeover</i>	<i>Sep. 23rd</i>	<i>Oct. 27th</i>	<i>Would allow JM to exit market one month sooner; Oct. period ranks among worst performing months; in 2006, JM experienced a negative contribution on the Route of \$3.0 million. The net effect of a total exit for this period versus a reduced level of service is reflected in the comparative favourability</i>	<i>\$2.0</i>	
<i>Passenger Handoff</i>	<i>Undecided</i>		<i>Not clear at this point whether VS would only commit to what BA would do. In any event, we are not likely to get any meaningful difference between the two when it's all said and done. Total size of the pot is approx. \$1.5 million</i>	<i>N/A</i>	<i>N/A</i>
			<i>S/T</i>	<i>\$2.0</i>	<i>\$0.7</i>
			<i>Net</i>	<b><i>\$1.3</i></b>	

<sup>83</sup> Michael Conway. "Final Position: Paper. 2007 April 19

<b>LONDON ROUTE</b>					
				<b>Favourability</b>	
<b>Deal Component</b>	<b>BA</b>	<b>VS</b>	<b>Comment</b>	<b>BA</b>	<b>VS</b>
<b>Other Considerations:</b>					
<i>Pro-Rates and Gateways</i>	<i>Similar</i>		<i>Both airlines have agreed to a structure that will include No. Am. gateways under a structure known as, Fare Triangulation - two cities for price of one. BA has the edge due to their greater number of gateways, frequencies to and from the gateways and nonstop access to LHR and their larger network beyond. BA has nine common gateways with JM in the US/Canada: seven to LHR (YYZ, LAX, MIA, ORD, EWR, JFK and PHL) and two to LGW (MCO and ATL). Virgin has five common gateways with JM: four to LHR (LAX, EWR, JFK and MIA) and one to LGW (MCO).</i>	<i>X</i>	
<i>Frequent Flier Programs</i>	<i>Similar</i>		<i>Reciprocal earn/burn mileage arrangement</i>		
<i>Tenure</i>	<i>3-yrs., plus, ... "full &amp; open discussions &amp; would expect to extend the arrangement."</i>	<i>5-yrs</i>			<i>X</i>
<i>Commitment to Jamaica</i>			<i>BA has been in JM market for 60 years, versus 10 months for VS; it is unlikely that BA would alter its commitment to the Jamaican market due to cyclical downturn in the industry.</i>	<i>X</i>	

<b>LONDON ROUTE</b>					
				<b>Favourability</b>	
<i>Deal Component</i>	<b>BA</b>	<b>VS</b>	<b>Comment</b>	<b>BA</b>	<b>VS</b>
<b>Other Considerations:</b>					
<i>Tourism Consideration</i>	<i>Will add MBJ</i>	<i>Will add KIN</i>	<i>BA's entry to MBJ will provide this destination with two major airlines providing complementary services. Virgin's major customer base comes from Virgin Holidays. BA has a broader distribution and acceptance level among a wider range of hotels and tour operators; additionally, BA will provide a 4-class service that will include an offering for the higher end of the market and be more inclusive of the other UK Tour Operators. If VS were selected, they would supply additional seats to KIN; however, it is very unlikely that BA will start service to MBJ, thereby relegating that market to one dominant carrier. The more extensive BA network in Europe also provides a stronger presence in this area which is critical to the new hotel development and the much desired diversification of the Jamaica market.</i>	X	
<i>Ability to Perform</i>			<i>BA being the much larger carrier and the dominant slot holder at LHR has much more flexibility to execute the slot takeover. This was evident from the outset in the negotiations as evidenced by their ability to accommodate our slot transition timing.</i>	X	
<i>Diaspora Issues</i>			<i>BA is clearly better positioned on this important area, not only for the reasons noted above re Commitment to Jamaica and Tourism Considerations, but also for their long history of working directly with the Jamaican community both here and in the UK.</i>	X	

**Recommendation**

*While there are differences between the two bids as noted above, it is the view of the Management that none are so compelling as to readily rule out one over the other. Accordingly, we can take a high degree of comfort that we have in all likelihood pretty much extracted what exists to be gotten, which has been facilitated by MOF in the last phase of the deliberations.*

**JM management is more comfortable with the BA commitments with regard to transition and their longevity in the Jamaica market. There is, in the considered opinion of our Management and the Chairman of the Sales and Marketing Board Committee a significant plus to Jamaica's Tourism by bringing BA into MBJ.** (OCG Emphasis).

**It is the recommendation of the Management of JM that we go with BA and move to execute an Agreement with that carrier.** (OCG Emphasis).

In making the recommendation for the acceptance of the BA proposal, Mr. Conway proceeded to ask the then Senior Vice President, Sales & Marketing, of Air Jamaica Ltd., Mr. Paul Pennicook, to prepare a justification for the referenced recommendation. This report was prepared by Mr. Pennicook on 2007 April 24.

Mr. Pennicook in his justification paper, stated that “*An agreement with Virgin Atlantic (VS), while it may assure us of great support from Virgin Holidays, it would leave us with a single scheduled carrier into Montego Bay. An agreement with BA would not only keep two scheduled carriers into Montego Bay from London, but would offer the potential for even more growth because of the additional tour operators who would be able to sell Jamaica on BA. The VS flight is dominated by Virgin Holidays at the exclusion of many other tour operators which may be great for Virgin Holidays but not necessarily good for Jamaica.*”<sup>84</sup>

In Mr. Pennicook's analysis of Virgin Holidays, he cited the St. Lucian experience, where Virgin Holidays was described as “*...an extremely aggressive and fierce competitor....They are the fastest growing British tour operator to the region, but at a price. In the case of St. Lucia they were so aggressive that they drove most of the British charters out of the market. The end result is that Virgin Holidays is now the biggest*

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<sup>84</sup> Paul Pennicook. Air Jamaica Ltd. Agreement: British Airways vs. Virgin Atlantic for the London Route. 2007 April 24

*British tour operator to St. Lucia but business overall from the UK/Europe to St. Lucia was down 16% in 2006 compared to 2005.”<sup>85</sup>*

In analysing the possible impact of the acceptance of the Virgin proposal for the Jamaican market, Mr. Pennicook stated that *“In 2006, some 42.6% of Jamaica’s business from the UK came on charters. We have a lot of rooms to fill in Jamaica, so we need the supplemental airlift from the charters. We cannot afford to make Virgin Atlantic the only scheduled carrier into Montego Bay and run the risk of them just redistributing the business by driving out the charters and leaving the destination with a net decline in business..... In addition to a decline in seats if this were to happen, Jamaica would also be losing major players from the market and putting all our eggs in the proverbial one basket.”<sup>86</sup>*

On the other hand, in his analysis of the possible impact of the acceptance of the BA proposal for the Jamaican market, he stated that *“The difference with a potential BA agreement is that it would broader [sic] the market instead of redistributing the same business. In addition to business from the preferred BA tour operators who do not or cannot work with Virgin Atlantic, there would also be increased potential for the upper end of the market which is another plus for the industry’s development strategy.”<sup>87</sup>*

Mr. Pennicook further stated that *“...BA would be in a much better position to offer increased service to Kingston either via the USA with Air Jamaica or even to add an additional frequency into Kingston....BA has a vastly superior European network for connections than does Virgin. This would suggest that an agreement with BA is the better option in as far as tourism growth strategy is concerned.”<sup>88</sup>*

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<sup>85</sup> Paul Pennicook. Air Jamaica Ltd. Agreement: British Airways vs. Virgin Atlantic for the London Route. 2007 April 24

<sup>86</sup> Paul Pennicook. Air Jamaica Ltd. Agreement: British Airways vs. Virgin Atlantic for the London Route. 2007 April 24

<sup>87</sup> Paul Pennicook. Air Jamaica Ltd. Agreement: British Airways vs. Virgin Atlantic for the London Route. 2007 April 24

<sup>88</sup> Paul Pennicook. Air Jamaica Ltd. Agreement: British Airways vs. Virgin Atlantic for the London Route. 2007 April 24

The fact that the Management of Air Jamaica supported and recommended the acceptance of the proposal from BA is further corroborated by the airline's then Senior Director, Customer Service, Ms. Susan Rosen.

In her sworn response to the OCG's Requisition, which was dated 2008 July 23, Ms. Rosen stated that "*Although I was at no time involved in the decisions regarding the purchase of the Air Jamaica Heathrow slots by Virgin Atlantic or British Airways, during a Air Jamaica's weekly Operations/Sales & Marketing meeting chaired by Paul Pennicook...a recommendation was made to the President that the best code share partner would be British Airways. There was no evaluation made of the terms of the slot agreement proposals by either airline as we were not privy to this information. The recommendation was based on the following points:*

- i. British Airways would fly into Montego Bay*
- ii. British Airways had a more extensive route network than Virgin Atlantic*
- iii. Air Jamaica's historical relationship with British Airways (former marketing agreement)*
- iv. British Airways history in Jamaica (60 years of service)<sup>89</sup>*

Notwithstanding the Air Jamaica Management's analysis and consequential recommendation for the acceptance of the BA proposal, of note is that by way of letter which was dated 2007 April 23, Dr. Davies informed VS that he had approved "*in principle*" the VS offer. On the said date, the then Minister also directed a letter to BA and to the then Board Chairman of Air Jamaica, Mr. O.K. Melhado, informing them of *his* decision to proceed with the VS proposal.

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<sup>89</sup> Susan Rosen. Response to OCG Requisition. 2008 July 23

The Minister's letter to the Air Jamaica Chairman, which was dated 2007 April 23, stated that **"I have decided that the proposal put forward by Virgin Atlantic will be more beneficial to Jamaica and Air Jamaica in the long run and I have so indicated to both Mr Branson and Mr Walsh the CEO of British Airways. However, I should add that having been asked to request of Virgin, improvements in six (6) specific areas, to which I received positive responses, I would feel somewhat compromised to subsequently rule against that company. To do so would raise questions as to whether my intervention, requesting improved responses had been in good faith."**<sup>90</sup> (OCG Emphasis).

In return, on 2007 May 2, the Chairman wrote to the then Minister Omar Davies, and stated **"In order to facilitate the final decision we have summarized for you an updated comparison between VS and BA. As you know, officials from Virgin met with the company Monday and Tuesday for the purpose of putting together an MOU on our agreement with VS."**<sup>91</sup> (OCG Emphasis).

The 'Updated Summary', which was provided to the then Minister by the Chairman, reflected a more favourable analysis of the VS proposal.

Below is a detailed comparison of the 'Updated Summary', that was dated 2007 May 2, with the information which was contained in the 'Final Position Paper', which was prepared by Mr. Conway on 2007 April 19.

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<sup>90</sup> Dr. Omar Davies. Letter to O.K. Melhado. 2007 April 23

<sup>91</sup> O.K. Melhado. Letter to Minister Omar Davies. 2007 May 2

	<b>VS</b>	<b>BA</b>	<b>OCG's Comparison of the Updated Summary with that of the Conway Analysis- 'Final Position Paper', 2007 April 19</b>
<b>Slot Purchase</b>	<i>(US\$) 10.2 million</i>	<i>(US\$) 9.4 million</i>	<p>The VS offer which was reported in the 'Updated Summary' was US\$10.2. However, the VS offer which was analyzed in Mr. Conway's 'Final Position Paper' was US\$10.1.</p> <p>As such, the 'Updated Summary' reflected a VS offer which was US\$0.8 million more than that of BA.</p>
<b>Passenger Handoff</b>	<i>Will take steep discount; value to JM approx. \$250 thousand, or 50% of JM's total exposure</i>	<i>Never committed to discount and unlikely it would have approached VS offer</i>	<p>Mr. Conway, in the 'Final Position Paper', stated that "Not clear at this point whether VS would only commit to what BA would do. In any event, we are not likely to get any meaningful difference between the two when it's all said and done. Total size of the pot is approx. \$1.5 million"</p> <p>Based upon Mr. Conway's foregoing analysis, Air Jamaica had approximately US\$1.5 million in passengers which were pre-booked.</p> <p>According to the 'Updated Summary', the VS proposal included an offer to take up approximately US\$250,000 or 50% of JM's total exposure.</p> <p>However, Mr. Conway had assessed that the BA proposal would have had a higher net return based upon an earlier withdrawal date. In this regard, he calculated the BA offer as being US\$1.3 million more than that of the VS proposal.</p> <p>In this respect, when the US\$250,000, which the 'Updated Summary' attributed to the VS proposal was taken from the US\$1.3 million, which Mr. Conway had calculated in favour of the BA proposal, the BA offer was still more significant than that of VS, as the BA proposal would have had a net monetary value of approximately \$1,050,000.</p>
<b>Tenure</b>	<i>5 years</i>	<i>3 years</i>	There is no difference in the information.

	VS	BA	OCG's Comparison of the Updated Summary with that of the Conway Analysis- 'Final Position Paper', 2007 April 19
<b>No. Am. Gateway Link</b>	All current & <u>future</u> gateways served by VS and JM during tenure of agreement	Future gateways never offered	In the 'Final Position Paper', both offers were assessed as being similar in this area.  However, Mr. Conway had in the final analysis, assessed the BA offer as the stronger of the two proposals and, in so doing; he stated "Both airlines have agreed to a structure that will include No. Am. gateways under a structure known as Fare Triangulation - two cities for price of one. <b><u>BA has the edge due to their greater number of gateways, frequencies to and from the gateways and nonstop access to LHR and their larger network beyond. BA has nine common gateways with JM in the US/Canada: seven to LHR (YYZ, LAX, MIA, ORD, EWR, JFK and PHL) and two to LGW (MCO and ATL). Virgin has five common gateways with JM: four to LHR (LAX, EWR, JFK and MIA) and one to LGW (MCO).</u></b> " (OCG Emphasis).
<b>Prorates</b>	We are convinced what we got is a superior offer, and a 10% improvement over VS's last offer	Very much doubt BA could have matched VS due to precedent it would have set with BA's extensive and much larger agreements they have with other carriers	Mr. Conway, in the 'Final Position Paper', analyzed the VS and BA offers as being similar in this area. However, Mr. Conway had, in the final analysis, assessed the BA offer as the stronger of the two proposals and, in so doing; he stated that "BA has the edge due to their greater number of gateways, frequencies to and from the gateways and nonstop access to LHR and their larger network beyond. BA has nine common gateways with JM in the US/Canada: seven to LHR...and two to LGW.... Virgin has five common gateways with JM: four to LHR ... and one to LGW...."
<b>LGW Slot Option</b>	Likely we will get the option extended beyond the termination date of the 5 year tenure	BA tenure, as noted above is 3 years	Both VS and BA had offered a Gatwick slot-pair in the event that it breached the agreement with Air Jamaica and withdrew operations before the tenure which was stated.

	<b>VS</b>	<b>BA</b>	<b>OCG's Comparison of the Updated Summary with that of the Conway Analysis- 'Final Position Paper', 2007 April 19</b>
<b>Leadership Commitment</b>	<i>Sir Richard personally engaged in transaction which should be a big plus in the commitment from all other VS personnel</i>	<i>Willie Walsh of BA did not demonstrate the same level of enthusiasm for the agreement</i>	<p>Mr. Conway's analysis in the 'Final Position Paper' focused upon the airlines' general commitment to Jamaica. In this regard, Mr. Conway stated that "BA has been in JM market for 60 years, versus 10 months for VS; it is unlikely that BA would alter its commitment to the Jamaican market due to cyclical downturn in the industry."</p> <p>As such, Mr. Conway had, in the final analysis, assessed the BA proposal as the stronger of the two proposals.</p>
<b>So. American Routes</b>	<i>None served by VS, and accordingly, they are most interested in expanding the codeshare with JM when we enter the S.A. markets</i>	<i>BA currently serves S.A., and as a result, we see less codeshare opportunities with them.</i>	This criterion was never utilized by Mr. Conway in his analysis of the offers which was contained in the 'Final Position Paper'.
<b>Singapore Airlines</b>	<i>Has 49% stake in VS, which has agreed to facilitate the opportunity for JM to expand its codeshare opportunities to Asia via SQ's common gateways in N.A</i>	N/A	This criterion was never utilized by Mr. Conway in his analysis of the offers which was contained in the 'Final Position Paper'

Having regard to the comparative analysis which is captured above, the OCG has found that the '*Updated Summary*' which was submitted by the then Board Chairman of Air Jamaica, to the then Finance and Planning Minister, Dr. Omar Davies, on 2007 May 2, was one which lacked objectivity.

The analysis excluded criteria that were included in Mr. Conway's analysis of the offers. The areas that were excluded from the '*Updated Summary*' included:

- i. **Full Slot Takeover** – For this criterion, Mr. Conway, in the '*Final Position Paper*', which was dated 2007 April 19, had asserted that the BA proposal was more beneficial to Air Jamaica as it would allow the airline to terminate its London Route one month earlier, at the end of 2007 September, as opposed to VS which would allow for the termination of the route at the end of 2007 October. Mr. Conway had calculated that the airline could lose as much as US\$2 million for each month that it continued with the London route. Of note, is that the month in question (October) was recorded as being one of the worst performing months for Air Jamaica in 2006, given that the airline had sustained a loss equivalent, therein, of US\$2 million.

Based upon the foregoing operating loss assessments, Mr. Conway had recommended that the BA proposal should be accepted even though VS was offering more in terms of a dollar figure for the AJLHS (i.e. BA-US\$9.4M and VS-US\$10.1M).

BA's proposal to take up operations one month earlier meant that the net effect of its proposal would be US\$1.3M more than that of VS', once the operational costs for October were accounted for.

- ii. **Frequent Flier Programs** – Both airlines offered this option.
  
- iii. **Commitment to Jamaica-** In the ‘*Updated Summary*,’ this criterion was replaced by ‘*Leadership Commitment*’. The new assessment was based solely upon the fact that Sir Richard Branson had initiated contact with Air Jamaica Ltd./MOFP.

However, of note is that Sir Branson had approached the then Minister, Dr. Omar Davies, when he felt that Air Jamaica was going to accept a BA proposal.

In his response to the OCG’s Requisition, which was dated 2008 July 21, Dr. Davies informed the OCG that “*Toward the end of the process of evaluation of the two proposals by the Board and management of Air Jamaica Ltd., I received a telephone call from the Chairman of Virgin Atlantic, Sir Richard Branson, in which he expressed concern that the Board/senior management intended to accept the proposal from BA but that he wished me to know that he would be willing to improve his offer.*”<sup>92</sup>(OCG Emphasis).

The OCG found that this criterion of ‘*Leadership Commitment*’ was too subjective given the fact that (a) the EU-US Open Skies Agreement was being signed in a matter of weeks; (b) BA was a major competitor of VS, especially within the Caribbean; and (c) Heathrow slots were in high demand.

In this respect, the OCG found that the criterion of ‘*Commitment to Jamaica*’, which was included in Mr. Conway’s ‘*Final Position Paper*’, was a more objective criterion.

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<sup>92</sup> Dr. Omar Davies. Response to OCG Requisition. 2008 July 21

In respect of this criterion, Mr. Conway had assessed BA as the stronger of the two airlines given the fact that it had been operating in Jamaica for sixty (60) years as against VS, which was operating in Jamaica for only ten (10) months. In Mr. Conway's view, it was, therefore, "...unlikely that BA would alter its commitment to the Jamaican market due to cyclical downturn in the industry."<sup>93</sup>

- iv. **Ability to perform** – Mr. Conway assessed BA as the stronger of the two airlines in this respect and used its ability to take over the slots at an earlier date to reinforce his point.
  
- v. **Diaspora Issues** – Mr. Conway had assessed the BA proposal as being the stronger of the two offers. In his '*Final Position Paper*', which was dated 2007 April 19, he stated that "*BA is clearly better positioned on this important area, not only for the reasons noted above re Commitment to Jamaica and Tourism Considerations, but also for their long history of working directly with the Jamaican community both here and in the UK.*"<sup>94</sup>

While the foregoing criteria were excluded from the '*Updated Summary*', the OCG found that four (4) new evaluation criterion were included. These new criteria established the premise upon which the VS proposal was evaluated as the stronger of the two offers.

- i. **LGW Slot Option** – Both airlines offered a pair of Gatwick slots for \$1.8 million in the event that they breached the agreement and terminated the London/Jamaica route. In fact, this criterion appears to have been taken directly from the BA proposal, as Mr. Conway, in his 2007 April 17 analysis, which was contained in the '*Position Paper*', had included this item as a feature of the BA offer.

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<sup>93</sup> Michael Conway. '*Final Position Paper*'. 2007 April 19

<sup>94</sup> Michael Conway. '*Final Position Paper*'. 2007 April 19

The assessment in the *'Updated Summary'*, in this regard, stated that for the VS proposal it was *"Likely we will get the option extended beyond the termination date of the 5 year tenure"*, while *"BA tenure, as noted above is 3 years."*

The OCG found that this line of reasoning was premised upon speculation. Further, Mr. Conway had asserted that BA showed a stronger commitment to Jamaica and it was *"...unlikely that BA would alter its commitment to the Jamaican market due to cyclical downturn in the industry."*<sup>95</sup>

- ii. Leadership Commitment** – As was previously discussed, this criterion replaced *'Commitment to Jamaica.'*
  
- iii. South American Routes** – This was included based upon the assumption that there was the possibility for a future codeshare with VS when it begun to fly to the South America region. However, the OCG found that this was an intangible criterion of evaluation since there was no guarantee that VS would begin operations in South America.

On the other hand, BA was already serving this market and, as such, would be the more likely candidate to negotiate this area. The prospect of a codeshare with BA was, therefore, more tangible.

Further, it is instructive to note that the OCG saw no documentary evidence to suggest that Air Jamaica had initiated negotiations with BA with regard to this area.

- iv. Singapore Airways-** The suggestion here was of the future possibility of a codeshare between Air Jamaica, VS and Singapore Airlines, given that Singapore Airlines was stated to have a 49% stake in VS. However, this,

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<sup>95</sup> Michael Conway. 'Final Position Paper'. 2007 April 19

again, was based upon a seemingly intangible and purely speculative assumption. The proposals that were being assessed were VS proposals. Accordingly, it is obvious that VS could not commit to any arrangement which would involve Singapore Airlines.

Further, of the two airlines, Mr. Conway asserted that BA had a more extensive network. The OCG found that BA's network included a subsidiary airline, Open Skies, which flies within Europe, while BA also had alliances with Qantas, which flies to Asia.

The OCG, during a review of Mr. Conway's files, on 2008 September 23, identified a document which was entitled 'BA/VS Evaluation-Major Issues,'. The document was dated 2007 April 19. It appeared that it was prepared prior to the 'Final Position Paper' of said date.

The document covered the following areas which are detailed below:<sup>96</sup>

1. *"CONTRACT PERIOD: Both airlines have agreed to a 5 year term. (As of this afternoon, BA was at 3-years with some form of renewal rights, not yet specified; I advised that they need to go to 5 years and that it shouldn't be that big a deal for them; while my BA counterpart did not disagree, he said he needed to get approval on this. We'll know the outcome when we get their fax.) While I am aware that we should not allow VS to dictate the pace of our decision, I have to protect Omar who promised an early response-we need to know their position on this.*
2. *LGW SLOTS: Both airlines have agreed to provide a daily slot pair at Gatwick in the event they terminate their arrangement with JM.*

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<sup>96</sup> 'BA/VS Major Issues'. 2007 April 19

3. *SPECIAL PRO-RATE AGREEMENT:* (this information was substantially the same as that which was contained in the 'Final Position Paper', which was dated 2007 April 19)
4. *CODE SHARE:* Both airlines will provide for a JM code on all non-stop flights to Jamaica.
5. *CROSS-ISLAND SERVICE:* Both airlines will use JM KIN-MBJ-KIN in order to sell both destinations on all flights.
6. *TAKE OVER OF PRESOLD TICKETS:* VS has inferred they will do this at no cost [if BA was also offering to do this]. We are awaiting a final position from BA. The estimated gross value of the overhang is US\$3,000,000. (If in fact it is VS's position that they are only willing to do what BA is willing to do in this regard, then by definition, this component should be eliminated from the plus and minus comparison below. Not to beat a dead horse, but if BA can take over all the slots in Sept., then this component does have relevance for the paxs that BA will take for the one month, which would make the financial comparison go in BA's favour because VS can't do this). In any event, we really need to really scrub the number to determine exactly how many paxs we have that have both booked and paid for post Sept. 27<sup>th</sup> travel, especially if you disagree with my foregoing view). My guess is that we can get this from VS regardless, however, are we now saying that we are definitely converting to BA in Sep. Then we need to get the hangover numbers sorted out and compare this with the savings from an earlier conversion. See next point also.
7. *TRANSITION:* Both airlines have agreed to an end of October date, however, BA has also indicated they may be able to do the final cutover at the end of September. A confirmation is being sought on this as every month saved is worth US\$2,000,000. JM management is more confident

*that BA will perform- that is takeover the slots and put the additional flights to Jamaica in service on those dates. This is based on BA's position from the outset that they could accommodate these dates compared to the 'last minute' move from summer 08 by VS.*

8. *OFFER FOR LHR SLOTS: VS has offered GBP5.1M=US\$10.2M. BA has offered US\$9.4M.*

9. *FINANCIAL IMPACT:*

*TAKEOVER PRESOLD TICKETS-assume BA only accepts 50%, VS +US\$1.5M???**Need a position on this from BA.*

*SLOTS-VS + .7M.*

*SEPTEMBER TRANSITION-BA US\$2M.*

*The net difference is negligible and represent a one time benefit.*

10. *TOURISM CONSIDERATIONS: BA's entry to MBJ will provide this destination with two major airlines providing complementary services. VS major customer base comes from Virgin Holidays, [and to a great extent excludes the other UK tour Operators-\* NB- this information is crossed out]. BA will provide a 4-class service that will include an offering for the higher end of the market and be more inclusive of the other UK Tour Operators.*"<sup>97</sup>

In addition, it is interesting to note that on 2007 May 2, by way of letter from the former Air Jamaica Board Chairman, Mr. O.K. Melhado, to the then Minister of Finance & Planning, Dr. the Hon. Omar Davies, the Chairman stated that "*Both carriers made strong offers, however, VS has offered more for the slots, have given very attractive pro rate fares, agreed to an evergreen commitment on triangular fares over the USA, (that is, they will extend prorates as new gateways are opened in the USA), a major defrayment on the passengers handed over in October and a five year contract. As a whole, these in*

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<sup>97</sup> BA/VS Evaluation- Major Issues. 2007 April 19

**our judgement are of greater value than the agreement by BA to cut over one month earlier. Other aspects of the offers are fairly similar.**<sup>98</sup> (OCG Emphasis).

However, in his sworn response to the OCG, which was dated 2008 July 15, Mr. Melhado appears to have contradicted himself when he stated that **“In determining the value of the Air Jamaica/VS transaction, timing was also very important. Every additional month that Air Jamaica operated on the London route would cost Air Jamaica an additional US\$3M in losses (note that, with current fuel prices, this would now be in the order of US\$4M per month).** Therefore in evaluating the value of the transaction, time delays have to be weighted against any possible price increase that could be negotiated. Furthermore, delays would diminish the likelihood of disposing of the two loss-making A340 on favourable economic terms.”<sup>99</sup> (OCG Emphasis).

It is also important to recall that the then President & CEO of Air Jamaica, Mr. Michael Conway, had assessed the BA offer as having a higher net value than that of the VS proposal. This was because the acceptance of the BA offer would allow Air Jamaica to save US\$2 million as a result of the earlier withdrawal date from the London route which was associated with the BA offer.

In Melhado/Sloley’s statements to the OCG, the delay time was posited to incur a loss of US\$3 million per month – US\$1 million more than that which Mr. Conway had indicated in his analysis. The OCG found this to be an important factor, as acceptance of the BA offer would, therefore, yield a net minimum return for Air Jamaica of US\$1.3 million.

Further, it is instructive to note that the OCG has seen no documentary evidence to suggest that BA was given the same opportunity to respond to the exact six (6) areas that were listed for improvement in the Dr. Davies’ letter to VS, which was dated 2007 April 17.

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<sup>98</sup> O.K. Melhado. Letter to Minister Dr. Omar Davies. 2007 May 2

<sup>99</sup> Sloley/Melhado. Resposne to the OCG’s Requisition. 2008 July 15

The OCG has found that based upon the information which it has reviewed, both the former Air Jamaica Chairman, and the then Air Jamaica President and CEO, had expressed the desire to have BA respond to the areas, which were being presented to VS, by the then Minister.

Sloley/Melhado, in their sworn and joint Response to the OCG's Requisition, which was dated 2008 July 15, stated that "*We indicated that there were certain areas where further negotiations would be useful, but that we would also want to give BA the opportunity to respond on these points.*"<sup>100</sup>

However, the OCG has seen no documentary evidence to prove that BA was actually afforded the referenced opportunity.

In fact, when informed about the then Minister's decision to accept the VS proposal, Mr. Willie Walsh, the CEO of BA, by way of letter, which was dated 2007 April 27, stated that "*..I do not believe that British Airways has been given the opportunity to respond to any perceived shortcomings in our proposal, nor to extending the discussion as to what further support is required.*"<sup>101</sup> (OCG Emphasis).

The OCG has, however, seen evidence that there was some sort of deliberation on the matter in the form of what appears to have been a verbal communication between the Air Jamaica Executive Management and BA. This is premised upon information which is embodied in the document which is entitled "*BA/VS Evaluation – Major Issues*". The document, which is dated 2007 April 19, and which was taken from Mr. Conway's official Air Jamaica files, states thus: "**CONTRACT PERIOD:** *Both airlines have agreed to a 5 year term. (As of this afternoon, BA was at 3-years with some form of renewal rights, not yet specified; I advised that they need to go to 5 years and that it shouldn't be that big a deal for them; while my BA counterpart did not disagree, he said he needed to get approval on this. We'll know the outcome when we get their fax).*...**TAKE OVER OF**

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<sup>100</sup> Sloley/Melhado. Response to OCG Requisition. 2008 July 15

<sup>101</sup> Willie Walsh. Letter to the Hon. Dr. Omar Davies. 2007 April 27

***PRESOLD TICKETS:*** *VS has inferred they will do this at no cost [if BA was also offering to do this]. We are awaiting a final position from BA... ”<sup>102</sup>*

In light of the foregoing, the OCG found that three (3) of the six (6) areas for improvement which were identified by the then Minister of Finance and Planning, Dr. Omar Davies, in his letter to VS, were in fact communicated to BA. The three (3) areas which were communicated to BA were (a) tenure; (b) LGW slots; and (c) Passenger handoff.

However, with regard to (a) the price for the AJLHS; (b) a more favourable prorate agreement in instances where BA’s services to other destinations are utilised; and (c) making the fare from Manchester to Jamaica the same as from London to Jamaica; there is no evidence that BA was presented with these areas for improvements to be made.

The OCG has also found that BA, by way of letter, which was dated 2007 April 19, to the then Minister, Dr. Omar Davies, emphasised the value of the BA proposal. A review of the BA letter has revealed that there were no changes in the BA offer, particularly in the areas which were identified by the Minister in his letter of 2007 April 17 to VS.

However, the OCG has found that in a Memo, which was dated 2007 November 8, and which was directed to the Hon. Minister Mike Henry by Mr. Conway, Mr. Conway advised that *“As I have previously indicated, the evaluation process between these two carriers, as well as other analyses and relevant matters regarding the London route, took place over a period of several months. As you might expect, numerous conversations occurred between the parties and a number of early proposals and counter-proposals ensued. In addition, my files contain various correspondence and hand written notes on these matters.... ”<sup>103</sup>*

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<sup>102</sup> ‘BA/VS Major Issues’. 2007 April 19

<sup>103</sup> Michael Conway. Memo to Hon. Mike Henry. 2008 November 8

This would suggest that several verbal conversations took place between both VS and Air Jamaica, and BA and Air Jamaica. The OCG, however, notes that there is an absence of documentary evidence to actually prove that BA had received equal treatment in the BA/VS proposal negotiation process.

In an effort to obtain definitive information about whether BA was extended the same courtesy as was VS, the OCG asked the former Board Chairman of Air Jamaica, Mr. O.K. Melhado and former Board Director, Senator Noel Sloley, the following question:

*“Did the then Minister Omar Davies direct a letter to BA, detailing the exact terms stipulated in his letter to VS, dated April 17, 2007? If no, do you think it would have been prudent to have done so, given that he had become involved in the negotiations and evaluation of the offers? If so, why was this not done?”*

Sloley/Melhado, in their sworn and joint response to the OCG’s Follow-Up Requisition, which was dated 2008 September 22, stated that *“...O.K. Melhado and M.J. Conway agreed with the MOFP that they would contact BA with the same points that were being discussed with VS, with a request that they should review their proposal. Further, through our CEO’s direct contact with his negotiating counterpart at BA, he informed them that the VS Chairman was in direct contact with the MOFP and they should get their Chairman/President to also communicate directly with the MOFP. The goal was simply to give BA an equal chance to enhance their offer and hopefully get significant improvements from them, especially, with regard to the price offered for the slot pair and the extension of the contract period to five years.”*<sup>104</sup>

Sloley/Melhado also provided the OCG with a copy of an email from the former President & CEO, Mr. Michael Conway, which was dated 2008 September 20.

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<sup>104</sup> Sloley/Melhado. Response to the OCG’s Follow-Up Requisition. 2008 September 22

In the email, Mr. Conway stated that “...I can confirm that with respect to the several deal points that we identified to Min. Davies as areas for possible improvement during the final stages of the VS/BA negotiations, each point was discussed by me in detail with Steve Ronald of BA, which ultimately led to the letter from the BA Chairman to Min. Davies dated April 19, 2007. Throughout the negotiation process which spanned several months, each party (VS and BA) were advised of all key deal points in an effort to play off one against the other. This process led to the continuing improvement of offers received, as noted in the deal chronology provided earlier. At no time was VS or BA provided an “edge” in the negotiating process so as to favour a predisposition with respect to the outcome.”<sup>105</sup> (OCG Emphasis).

The foregoing email from Mr. Conway to Mr. Melhado is the only piece of documentation which the OCG has seen which definitively alludes to the fact that BA was given an opportunity to respond to the exact six (6) areas which were presented to VS for improvement by the former Minister of Finance and Planning, Dr. Omar Davies.

However, the OCG must formally record that it has not been able to fully corroborate the assertions of the former Air Jamaica President and CEO, Mr. Michael Conway, as there is an absolute absence of corroborative documented communication between BA and Air Jamaica regarding the matter.

Further, in an effort to obtain information about whether BA was extended the same courtesy as was VS, the OCG asked the former Minister, Dr. Omar Davies, the following question:

*“Did you direct a copy of your letter, dated April 17, 2007, to BA? If no, do you think it would have been prudent to have done so, given that you had become involved in the negotiations and evaluation of the offers? If so, why was this not done?”*

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<sup>105</sup> M. Conway. Email to O.K. Melhado and Noel Sloley. 2008 September 20

In his response to the OCG's Requisition, which was dated 2008 October 5, Dr. Davies stated that *"No, I did not direct a copy of my letter to BA. I thought that doing so would have been inappropriate and unnecessary, for two reasons. The first is that I had not initiated contact with Sir Richard. In that regard, it would have been inconsistent for me to initiate contact with BA. I responded to Sir Richard as a matter of courtesy since I had indicated that I would get back in touch with him."*<sup>106</sup>

Dr. Davies, further stated that *"Second, I was satisfied that the question of equity was addressed by directing the Air Jamaica CEO to inform his negotiating counterpart at BA that Sir Richard had contacted me directly and urge him to have the BA Chairman do the same. This was done and eventually, the President of BA wrote to me. However, his letter reflected no improvement on his company's original offer."*<sup>107</sup>

It is, however, instructive to note that based upon the evaluation which is contained in the documents that are entitled: 'BA/VS Evaluation-Major Issues', and which were dated 2007 April 19, the OCG has found that of the **six (6) areas**, which were presented to VS, BA was asked to respond to **three (3)**.

Consequently, the OCG is able to definitively state that BA was asked to improve its offer in **three (3) of the six (6)** areas that were presented by Dr. Davies to VS.

➤ ***Evaluation Process & Air Jamaica Ltd. Management's Involvement***

Minister Shaw in his presentation to Parliament on 2008 April 23, stated that *"It appears that legal officers of Air Jamaica and other senior government technocrats had no input in the negotiations and in the drafting of the Sale Agreement."*<sup>108</sup>

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<sup>106</sup> Dr. Omar Davies, Response to the OCG's Requisition. 2008 October 5

<sup>107</sup> Dr. Omar Davies, Response to the OCG's Requisition. 2008 October 5

<sup>108</sup> Minister Audley Shaw. Closing Budget Speech. 2008 April 23

In this regard, the OCG was interested in determining the level of involvement of Air Jamaica's Executive Management and Legal Department in (a) the evaluation of the proposals; (b) the negotiations; and (c) the drafting of the MOU and other legal documents, with regard to the AJLHS.

Senior Members of the Air Jamaica Executive Management team were questioned by the OCG regarding their involvement in and knowledge of the evaluation of the proposals which were received from BA and VS. The members of the Executive Management team who were questioned by the OCG included, *inter alia*, the following persons:

- i. Mr. Thomas Hill, Chief Revenue Officer, Air Jamaica;
- ii. Ms. Susan Rosen, Senior Director, Customer Service, Air Jamaica;
- iii. Mr. George deMercado, Senior Director Sales, North America & Europe, Air Jamaica;
- iv. Mr. William Rogers, the then Acting President & Chief Executive Officer, Air Jamaica;
- v. Mr. Mr. Paul Pennicook, the then Senior Vice President, Sales & Marketing, Air Jamaica.

The OCG found that Mr. Paul Pennicook had prepared a justification for the recommendation to accept the BA proposal which was contained in the '*Final Position Paper*' which had been prepared, on 2007 April 19, by the airline's then President and CEO, Mr. Michael Conway.

In his sworn response to the OCG's Requisition, which was dated 2008 July 22, Mr. Pennicook stated "*That I do not know what methodology was used in the evaluation of the proposals received from British Airways and Virgin Atlantic.*"<sup>109</sup>

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<sup>109</sup> Paul Pennicook. Response to OCG Requisition. 2008 July 22

Mr. Pennicook, however, noted that *“That I am aware of a report prepared by Mr Conway, but I do not know why the recommendation was not acted upon. As a matter of fact, I was asked to prepare a justification for going with British Airways in this deal and I did so. I was asked to do that having served as Director of Tourism and therefore could therefore speak to the potential tourism benefits.”*<sup>110</sup>

The OCG found that each of the Respondents listed above had similar responses. They had had no personal knowledge of the criteria for selection and/or of the method of evaluation of the proposals.

Mr. Thomas Hill, in his sworn response to the OCG’s Requisition, which was dated 2008 July 22, stated that *“...I have no personal knowledge of the criteria for selection and the sale of the Heathrow slots. That I have no direct knowledge used in the actual evaluations received from British Airways or Virgin Atlantic except that consideration was given for the fact that British Airways was a much larger carrier operating worldwide and they had a long standing good relationship with Jamaica and Air Jamaica. The fact that we handled British Airways flight was also considered.”*<sup>111</sup>

However, the OCG found that both Mr. George deMercado and Mr. Thomas Hill were involved in meetings to negotiate the commercial arrangement with VS, after the VS offer was accepted on 2007 April 23.

According to Thomas Hill, he was *“...informed of a meeting that had been set up by our President and CEO, Mr. Michael Conway to take place in Kingston, Jamaica during the first week of May 2007 with Mr. Edmond Rose of Virgin Atlantic(exact title unknown) and a Mr. Phillip Squires of Virgin Atlantic(exact title unknown).”*<sup>112</sup>

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<sup>110</sup> Paul Pennicook. Response to OCG Requisition. 2008 July 22

<sup>111</sup> Thomas Hill. Response to OCG Requisition. 2008 July 22

<sup>112</sup> Thomas Hill. Response to OCG Requisition. 2008 July 22

Mr. Hill further stated *“That I have no knowledge as to why a valuation was not undertaken and can only state that when I was instructed to complete an agreed code share agreement, the value of the slots had already been agreed to by our President & CEO, Mr. Michael Conway.”*<sup>113</sup>

Given the foregoing, the OCG’s Investigation revealed that the primary Air Jamaica representative, who was involved in the evaluation of the proposals and the negotiations with both VS and BA, was Mr. Michael Conway, who appeared to have worked closely with the airline’s then Board Chairman, Mr. O.K. Melhado.

In reviewing the Meeting Minutes of the Air Jamaica Board of Directors, the OCG saw evidence to suggest that the Board was kept abreast of the developments in the negotiations with both airlines.

Sloley/Melhado, in their sworn and joint response to the OCG’s Requisition, which was dated 2008 July 15, stated that *“Air Jamaica’s CEO was the leader of an evaluation team comprised of Air Jamaica’s senior management with expertise in particular aspects of the transaction being considered. The Board was kept informed on progress and any issues requiring its input. Reports were made to the Board on the following dates: 31/10/06, 28/11/06, 10/1/07, 15/2/07, 20/3/07, 2/5/07, 29/5/07, 4/7/07 and 1/8/07.”*<sup>114</sup>

However, the OCG found that on 2007 April 17, the then Minister of Finance and Planning, Dr. Omar Davies, became intimately involved in the negotiations with VS – this after he had allegedly received a telephone call from Sir Richard Branson, the Chairman of VS, and wrote a letter outlining six (6) areas for suggested improvements to the VS offer.

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<sup>113</sup> Thomas Hill. Response to OCG Requisition. 2008 July 22

<sup>114</sup> Sloley/Melhado. Response to OCG Requisition. 2008 July 15

In so far as the airline's Legal Department's involvement in the matter is concerned, the OCG has found that the General Counsel and/or the Legal Department of Air Jamaica did not have a role in (a) the evaluation of the proposals; (b) the negotiation and drafting of the MOU which was dated 2007 May 10; nor (c) the drafting of the final agreement for the exchange of the slots, which was signed with VS on 2007 July 24.

Further, the OCG has seen no evidence to suggest that any external legal advice was sought by the airline, its Board of Directors or its Management, to vet any of the referenced agreements with VS.

The OCG, in its Requisition to the General Counsel of the airline, which was dated 2008 July 8, asked, *inter alia*, the following, *inter alia*, question:

*"... is it customary for Air Jamaica to enter into negotiations for divestment of assets without the involvement of the General Counsel and/or Legal Department?"*

In her sworn response to the OCG's Requisition, which was dated 2008 July 23, the airline's General Counsel, Ms. Nerine Small, informed the OCG that *".... whether it is customary for Air Jamaica to enter into negotiations for divestment of assets without the involvement of the General Counsel and/or Legal Department does not admit a simple yes or no answer. Whether the General Counsel and/or Legal Department is involved has largely been dependent on the management style of the person at the helm of the Company at the time the decision to dispose of the asset is being effected."*<sup>115</sup>

Ms. Small further stated that *"I made enquiries with the Attorney General's Department which advises the Government of Jamaica generally and with the Ministry of Finance. In both cases, my enquiries did not unearth any evidence that legal advice was sought and/or received by Air Jamaica with regard to the sale of the Heathrow slots."*<sup>116</sup>

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<sup>115</sup> Nerine Small. Response to OCG Requisition. 2008 July 23

<sup>116</sup> Nerine Small. Response to OCG Requisition. 2008 July 23

Additionally, Ms. Small stated that “*I did not, neither in my capacity as General Counsel or otherwise review and or assess the Memorandum of Understanding between Virgin Atlantic Airways and Air Jamaica. The executed Memorandum of Understanding dated May 7/10, 2007, was received by me in or about August 2007, several months after it had been executed. I had received the code share agreement and the slot exchange agreement both between Air Jamaica and Virgin Atlantic Airways for review in or about July 2007 before they were executed. At that time I verbally advised Tom Hill, then Chief Revenue Officer, who requested that I review the code share agreement and the slot exchange agreement that, I could not/not properly review those documents in light of the fact that their terms were based on a Memorandum of Understanding which terms I was not privy to. In relation to my review of the code share agreement this is documented in an email dated July 17, 2007 from me to Tom Hill. Before my review of the slot exchange agreement was completed it was concluded and executed by Mr. Michael Conway, in other words, without the benefit of any legal review by me and/or the Legal Department.*”<sup>117</sup>

### ***Ministerial Intervention & Board & Public Bodies Responsibility***

The OCG has seen documentary evidence which conclusively confirms that Air Jamaica supported and recommended the acceptance of the proposal from BA. The then President and CEO of the airline, Mr. Michael Conway, had prepared two reports, one dated 2007 April 17 and the other, 2007 April 19, both in support of the BA offer. The report which was dated 2007 April 19, had hand written notes stating that it was the ‘**Final Position Paper.**’ (OCG Emphasis).

In an effort to justify the recommendation of the ‘*Final Position Paper,*’ Mr. Michael Conway requested that Mr. Paul Pennicook should prepare a justification report for the acceptance of the BA proposal. In this regard, the OCG found that Mr. Pennicook prepared the requested justification report on 2007 April 24.

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<sup>117</sup> Nerine Small. Response to OCG Requisition. 2008 July 23

The OCG, in its Requisition which was dated 2008 July 7 and 8, was interested in finding out, *inter alia*, why the recommendation of the Executive Management of Air Jamaica in favour of BA was neglected and/or rejected and the rationale for and/or the circumstances which led to the selection of VS.

In this respect, the OCG, in its Requisitions to the then Finance and Planning Minister, Dr. Omar Davies, the then Board Chairman of the airline, Mr. O.K. Melhado and former Board Director, Senator Noel Sloley, asked the following question:

*“In a report, dated 2007 April 17, prepared by the former President & CEO, Air Jamaica, Mr. M. Conway, he made the recommendation that the Heathrow slots should be sold to British Airways. However, the proposal from Virgin Atlantic was accepted and the slots sold to said entity on 2007 July 24. Please answer the following questions and provide documentary evidence, where possible, to substantiate your assertions.*

- i. *Are you aware of the report prepared by Mr. Conway? If yes, why was the recommendation of the President and CEO of Air Jamaica, Mr. Conway, not acted upon?*
- ii. *What was the final recommendation from the Air Jamaica Board, in regard to which proposal was best suited for the airline?...”*

In his sworn response to the OCG’s Requisition, which was dated 2008 July 21, Dr. Davies stated that *“I have never seen the report referred to in paragraph 15 of your correspondence. I later became aware that the Board considered making a recommendation for the sale of the slots to British Airways. However, this would have been prior to my discussion with the Chairman and the CEO and prior to the request to the two airlines for improvements on their offers. **The final recommendation was that the offer from Virgin Atlantic be accepted.**”*<sup>118</sup> (OCG Emphasis).

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<sup>118</sup> Dr. Omar Davies. Response to OCG Requisition. 2008 July 21

In their sworn joint response to the OCG's Requisition, which was dated 2008 July 15, Sloley/Melhado stated that "...the negotiations were over an extended period during which offers were modified. It was subsequent to the involvement of the MFOP, when the door was opened to seek further improvements from both airlines, that the scales tipped in favour of VS. **The Board supported the selection of VS.**"<sup>119</sup> (OCG Emphasis).

To the contrary, however, the OCG found that while the Executive Management of Air Jamaica was preparing its justification, which was dated 2007 April 24, to support its recommendation of the BA proposal which was contained in the 2007 April 19 'Final Position Paper', the then Minister **had already accepted** "in principle" the VS offer on **2007 April 23.**

The letter from the then Minister, Dr. Omar Davies, which was directed to VS, on 2007 April 23, stated "Whilst it is an extremely difficult decision to make, having assessed the two offers **I have decided to approve, in principle, the offer made by Virgin Atlantic.**"<sup>120</sup>(OCG Emphasis).

The then Minister of Finance and Planning, Dr. Omar Davies, on the said date, 2007 April 23, directed a letter to the then Air Jamaica Board Chairman, Mr. O.K. Melhado, stating that "**I have assessed the issues and I have closely examined the comparative matrix prepared by your senior management. In the final analysis it is a "judgement call."**"<sup>121</sup> (OCG Emphasis).

On 2007 April 23, the date on which Dr. Davies penned the letter to Mr. Melhado, and made reference to a **comparative analysis** which was **prepared by the senior management,** there were two (2) comparative analyses of the offers which were received from BA and VS that the OCG has seen, and which had been prepared by the Executive Management of Air Jamaica.

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<sup>119</sup> Sloley/Melhado. Response to the OCG's Requisition. 2008 July 15

<sup>120</sup> Dr. Omar Davies. Letter to Virgin Atlantic. 2007 April 23

<sup>121</sup> Dr. Omar Davies. Letter to O.K. Melhado. 2007 April 23

The first comparative analysis was contained in the ‘*Position Paper*’, which was dated 2007 April 17. However, of note, is that Dr. Davies, in his response to the OCG’s Requisition, which was dated 2008 July 21, stated that “**I have never seen the report referred to in paragraph 15 of your correspondence.**”<sup>122</sup> (OCG Emphasis).

The second comparative analysis was contained in the ‘*Final Position Paper*’, which was dated 2007 April 19. Of note, is that the OCG has seen a fax cover sheet, which was dated 2007 April 19, that was attached to the referenced paper, addressed to Dr. Davies from Mr. Michael Conway. The fax cover had the captioned subject “*AIR JAMAICA LTD.-LONDON ROUTE*”<sup>123</sup>

Further, the fax cover sheet stated that “*DEAR MINISTER DAVIES: PLEASE SEE ATTACHED AS REQUESTED RE LONDON ROUTE.*”<sup>124</sup>

In contravention of the Air Jamaica Executive Management’s recommendation for the acceptance of the BA proposal, which was contained in the 2007 April 19 ‘*Final Position Paper*’, the then Minister of Finance and Planning, Dr. Omar Davies, accepted on 2007 April 23, the VS proposal.

In his letter to then airline Board Chairman, Mr. Melhado, which was dated 2007 April 23, Dr. Davies stated that “*I have decided that the proposal put forward by Virgin Atlantic will be more beneficial to Jamaica and Air Jamaica in the long run and I have also indicted to both Mr Branson and Mr Walsh the CEO of British Airways. **However, I should add that having been asked to request of Virgin, improvements in six (6) specific areas, to which I received positive response, I would feel somewhat compromised to subsequently rule against that company. To do so would raise questions as to whether my intervention, requesting improved responses had been in good faith.***”<sup>125</sup> (OCG Emphasis).

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<sup>122</sup> Dr. Omar Davies. Response to OCG Requisition. 2008 July 21

<sup>123</sup> Michael Conway. Fax cover sheet to Dr. Omar Davies. 2007 April 19

<sup>124</sup> Michael Conway. Fax cover sheet to Dr. Omar Davies. 2007 April 19

<sup>125</sup> Dr. Omar Davies. Letter to O.K. Melhado. 2007 April 23

The material import of the forgoing is that on 2007 April 23, when Dr. Davies accepted the VS proposal, the final recommendation of the Management of the airline, as was contained in the ‘*Final Position Paper*’, was for the acceptance of the BA proposal.

In this regard, the OCG found that the final decision as to which offer to proceed with, and the official acceptance of the said offer, was one which was made solely and entirely by the then Minister of Finance and Planning, Dr. Omar Davies. Dr. Davies, after writing to VS to advise it that he had approved its proposal “*in principle*”, informed the Air Jamaica Board of Directors of his decision to approve the VS proposal and, also, informed BA of his decision as regards the outcome of the bidding process.

Dr. Davies, in his letter to BA, which was dated 2007 April 23, stated that “*I regret to inform you that I have decided that the agreement on the route should be made with Virgin Atlantic.*”<sup>126</sup> (OCG Emphasis).

Consequently, the MOU was signed by Air Jamaica Ltd. on 2007 May 7, while VS signed on 2007 May 10. The MOU was, therefore, fully executed by both parties on 2007 May 10.

Significantly, on 2007 May 2, approximately eight (8) days after Dr. Davies had informed VS of his acceptance of its offer “*in principle*”, the then Board Chairman of Air Jamaica, Mr. O.K. Melhado, wrote to Dr. Davies, informing him, *inter alia*, that:

**“In order to facilitate the final decision we have summarized for you an updated comparison between VS and BA. As you know, officials from Virgin met with the company Monday and Tuesday for the purpose of putting together an MOU on our agreement with VS.....Both carriers made strong offers, however, VS has offered more for the slots, have given very attractive pro rate fares, agreed to an evergreen commitment on triangular fares over the USA, (that**

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<sup>126</sup> Omar Davies. Letter to British Airways. 2007 April 23

*is, they will extend prorates as new gateways are opened in the USA), a major defrayment on the passengers handed over in October and a five year contract. As a whole, these in our judgement are of greater value than the agreement by BA to cut over one month earlier. Other aspects of the offers are fairly similar.”<sup>127</sup>*

Attached to the referenced letter was an ‘*Updated Summary*’, comparing both the BA and VS offers. A review of the ‘*Updated Summary*’ revealed the following:

1. Five (5) of the ten (10) criteria of evaluation which were utilised in the original analysis that was contained in the 2007 April 19 ‘*Final Position Paper*’, and which had been prepared by Mr. Michael Conway, were not used in the ‘*Updated Summary*’. The five (5) excluded evaluation criteria were as follows:

- i. Full Slot Takeover
- ii. Frequent Flier Programs
- iii. Commitment to Jamaica
- iv. Ability to perform
- v. Diaspora Issues

2. Four (4) new evaluation criteria were added, all of which favoured the VS proposal. The four (4) new evaluation criteria were as follows:

- i. LGW Slot Option
- ii. Leadership Commitment
- iii. South American Routes
- iv. Singapore Airways

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<sup>127</sup> O.K. Melhado. Letter to the Hon. Minister Omar Davies. 2007 May 2

It is instructive to note that on 2007 May 2, the Air Jamaica Board was providing the then Finance and Planning Minister with this ‘*Updated Summary*’, which (a) favoured a VS proposal; (b) included four (4) new evaluation criteria which assessed the VS proposal as the stronger of the two offers; (c) excluded the five (5) evaluation criteria which were contained in the analysis that was prepared by Mr. Michael Conway and which had assessed the BA proposal as the stronger of the two offers; and (d) was submitted by the then Board Chairman to the then Minister, after both VS and BA had been informed, on 2007 April 23, of a decision of the Minister of Finance and Planning to approve the VS proposal.

In the Minutes of the Meeting of the Air Jamaica Board of Directors, which was dated 2007 May 2, it stated that “*Mr. Conway reported that after several meetings with both parties, the offers are currently very similar and it can be concluded that the negotiations are at a level where no further concessions can be extracted from either party.*”<sup>128</sup>

The Board Meeting Minutes further stated that “*The Chairman noted that apart from the difference in slot prices (VS \$10.2M and BA \$9.4M), the other significant differences relate to VS’s new offer for earlier take-over of the slots and assuming approximately 50% of the exposure relative to passengers who are already confirmed and ticketed on Air Jamaica on flights subsequent to the proposed take-over date. This translates to a value of approximately \$250,000.00 of over \$500,000.00 worth of ticket sales. It was agreed that Mr. Conway would provide a written summary of the preceding report for the Board. The Chairman advised the Board that during the negotiations both carriers communicated with the Minister of Finance & Planning. The Minister evaluated both proposals and has indicated that he proposed, subject to having the support of the Air Jamaica’s Board and management, to seek Cabinet approval for the VS offer. There was general consensus that the reported terms of the VS offer appeared to be the better of the two (2); however, the Board requested full documentation of both offers, including*

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<sup>128</sup> Minutes of the Air Jamaica Ltd. Board of Directors. 2007 May 2

*justification for any recommendation, so that the Cabinet could have the benefit of full documentation on which to make its decision.*”<sup>129</sup> (OCG Emphasis).

It is also important to record that, based upon the contents of the 2007 May 2 Board Meeting Minutes, the entire Air Jamaica Board was not then informed of Dr. Davies’ **prior** acceptance of the VS offer on 2007 April 23. In contrast, both BA and VS were already informed of the then Minister’s decision from as early as 2007 April 23.

Further, by way of letter, which was dated 2007 April 25, Mr. Conway wrote to VS and stated that ***“It was good to talk with you as always, especially now that a decision has been reached as to the way forward; accordingly, congratulations again to you and Willy and the other Virgin team members who worked so hard on the project.”***<sup>130</sup> (OCG Emphasis).

Of additional significance, is the fact that BA was able to formulate and send a reply, by way of a letter which was dated 2007 April 27, to Minister Davies, in which it voiced its dissatisfaction with the Minister’s decision to proceed with the VS proposal.

On 2007 April 27, five (5) days after receiving the then Minister Omar Davies’ letter, which was dated 2007 April 23, Mr. Willie Walsh, the CEO of BA, wrote to the then Minister, stating, *inter alia*, that:

- i. In advancing the discussion over cooperation on the London route, we put forward a competitive and comprehensive proposal, ranging from the purchase of the London slot, to providing access to our extensive European and Global network.*

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<sup>129</sup> Minutes of the Air Jamaica Ltd. Board of Directors. 2007 May 2

<sup>130</sup> Michael Conway. Letter to VS. 2007 April 25

- ii. *The feedback we received throughout this process was positive, and we were not left with any impression there were any significant outstanding concerns.*
  
- iii. *I fully understand that this decision must be made in the best interests of the people of Jamaica. However, **I do not believe that British Airways has been given the opportunity to respond to any perceived shortcomings in our proposal, nor to extending the discussion as to what further support is required.**<sup>131</sup> (OCG Emphasis).*

The BA Chairman, in the closing paragraph of his 2007 April 27 letter, stated that **“Therefore, it should come as no surprise that I am asking you, and the Government of Jamaica, to reconsider this decision. We are available at your earliest convenience should you decide that a further meeting would benefit both parties.”**<sup>132</sup> (OCG Emphasis)

Quite surprisingly, however, there is no evidence in the Minutes of the Meeting of Air Jamaica’s Board of Directors that the Board was informed of BA’s dissatisfaction with Dr. Davies’ decision. Even more troubling, is that the Meeting Minutes do not reflect the fact of BA’s stated willingness to further negotiate the terms of its proposal – a proposal which had been rejected by Dr. Davies on 2007 April 23.

Indeed, the OCG has found that the Air Jamaica Board of Directors was misled into believing that **“The Minister evaluated both proposals and *has indicated that he proposed, subject to having the support of the Air Jamaica’s Board and management, to seek Cabinet approval for the VS offer.*”**<sup>133</sup>

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<sup>131</sup> Willie Walsh. Letter to the Hon. Dr. Omar Davies. 2007 April 27

<sup>132</sup> Willie Walsh. Letter to the Hon. Dr. Omar Davies. 2007 April 27

<sup>133</sup> Minutes of the Air Jamaica Ltd. Board of Directors. 2007 May 2

Further, it is instructive to note that in the Board Meeting Minutes which was dated 2007 May 29, it was clearly stated that “**The Chairman advised the Board that subsequent to the May 02, 2007 meeting of the Board of Directors at which the proposed plans for the discontinuation of the UK/Jamaica route were discussed, the Minister of Finance & Planning formally advised British Airways (BA) and Virgin Atlantic Airways (VS) of the decision to accept the offer of the latter.** A Cabinet Submission reflecting the decision was tabled before the Cabinet in the Minister’s absence; however, Cabinet deferred action on the Submission by one week to await the return of the Minister.”<sup>134</sup>

Based upon the foregoing, the OCG found that the then Board Chairman of the airline, Mr. O.K. Melhado, was disingenuous in his report to the Air Jamaica Board of Directors, as the referenced letter of Dr. Davies, which was dated 2007 April 23, had, in point of fact, preceded the 2007 May 2 Board Meeting.

By way of a letter, which was dated 2007 April 23, the then Minister, Dr. Omar Davies, effectively committed the Government of Jamaica to an agreement with VS when he notified the airline, in writing, of his approval of its proposal, albeit stating that it was one which had been made “*in principle*”. Subsequently, Air Jamaica and VS signed a Memorandum of Understanding (MOU) on 2007 May 10. However, Cabinet’s approval of the agreement was not granted until 2007 May 28.

Notwithstanding the Minister’s use of the term “*in principle*”, as regards his approval of the VS offer, the OCG has found that the 2007 April 25 letter, which was written by Mr. Conway to VS, had confirmed that Air Jamaica had in point of fact committed itself to the acceptance of the VS proposal which had been previously made by Dr. Davies on 2007 April 23.

Mr. Conway, in the said 2007 April 25 letter to VS, stated that “**The management of Air Jamaica is very much looking forward to welcoming you to Jamaica next week to document the Agreement,** including those matters set forth in Minister Davies’ letter to

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<sup>134</sup> Air Jamaica Ltd. Minutes of the Board of Directors. 2007 May 29

*Sir Richard dated April 17th. I trust we will be able to fast track this process in order that we can make the appropriate announcements to our respective customers and ensure that we accomplish an effective transition.*”<sup>135</sup>

Further, the language which Dr. Davies had used in his written communication to BA on 2007 April 23, when he advised BA of his decision in the matter, was such that there was no question that his decision was anything but one which had been made “*in principle*”.

Dr. Davies, in his letter to BA, which was dated 2007 April 23, stated that “*I regret to inform you that **I have decided that the agreement on the route should be made with Virgin Atlantic.***”<sup>136</sup> (OCG Emphasis).

Having regard to the foregoing, the OCG found that the VS transaction was approved by the then Minister on 2007 April 23, **prior** to the Air Jamaica Board’s consideration and approval of the matter, and that plans had been initiated with VS for the formalisation of the agreement. Consequently, the representations which were made to the Board of Directors on 2007 May 2 and 29, by the then Chairman, Mr. O.K. Melhado, were disingenuous and misleading.

Having particular regard to Mr. Melhado’s representations, it is critically important that attention should be paid to the following comments that were contained in an evaluation document which was entitled ‘*BA/VS Evaluation – Major Issues*’ and which was dated 2007 April 19. The referenced document was found by the OCG in the official files of Mr. Michael Conway which are located at Air Jamaica’s corporate office in Kingston.

**“While I am aware that we should not allow VS to dictate the pace of our decision, I have to protect Omar who promised an early response – we need to know their (BA’s) position on this.”** (OCG Emphasis).

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<sup>135</sup> Michael Conway. Letter to VS. 2007 April 25

<sup>136</sup> Omar Davies. Letter to British Airways. 2007 April 23

The foregoing comments, when coupled with those of Mr. Melhado's questionable representations to the Air Jamaica Board of Directors at its 2007 May 29 Board Meeting, raise, at a minimum, several serious questions with respect of the level of transparency, propriety, impartiality and objectivity that attended the negotiations and evaluation of the BA and VS proposals.

It is instructive to note that on 2007 October, Air Jamaica sought to obtain a legal opinion on whether the MOU was legally binding. In this regard, the opinion of Dr. Lloyd Barnett, which was dated 2007 October 5, and the opinion of Professor Stephen Vaccianne, which was dated 2007 October 11, were reviewed by the OCG.

In an Internal Memo, which was dated 2007 October 11, Professor Stephen Vaccianne, submitted to the Attorney General, Senator the Hon. Dorothy C. Lightbourne, his opinion with regard to the legality of the VS/Air Jamaica Ltd. MOU.

The Memo contained Professor Stephen Vaccianne's legal opinion and incorporated an analysis of Dr. Lloyd Barnett's own legal opinion, which was dated 2007 October 5, and proffered, *inter alia*, that:

*“ 3. The second paragraph of Dr. Barnett's Opinion indicates in part that :  
'The Memorandum of Understanding is not itself enforceable by reason of its general as well as specific provisions. However it contemplated that a separate slot exchange agreement which is legally-binding would be concluded by the parties. In my opinion the Letter on Slot Exchanges is binding and legally enforceable.'*

*The first sentence of this passage may not be fully consistent with the approach taken in my Opinion; for I take the view that the Memorandum of Understanding is a binding instrument. **In my opinion, the Memorandum of Understanding is binding, but one has to read particular provisions of the Memorandum of Understanding to see if a binding commitment is contemplated on specific***

*issues. So, for example, when the Memorandum of Understanding states in Paragraph (i) that from the week beginning 28 October 2007, Virgin Atlantic will introduce a new service to Kingston, this is intended as a statement with binding effect. On the other hand, when the Memorandum of Understanding indicates that “(s)subject to contract, Air Jamaica will exchange its daily arrival and departure slots at London Heathrow airport for both Summer and Winter seasons”, then this is not in itself binding for it expressly contemplates that a contract needs to be concluded on the issue. I make this point because I believe the Government of Jamaica should not proceed on the assumption that none of the terms of the Memorandum of Understanding can be found by a court to be binding: the Memorandum is a summary only but each of its provisions needs to be read to see whether it could create binding obligations.”<sup>137</sup> (OCG Emphasis)*

The essential import of this analysis is that Dr. Davies had committed the Government of Jamaica to a commercial arrangement with VS without having received the relevant authorisations and/or approvals from the Executive Management of Air Jamaica, the airline’s Board of Directors and the Cabinet of the Government of Jamaica, all in contravention of the Government’s Procurement Guidelines and other relevant laws.

In the latter respect, the OCG has seen no evidence to suggest that the Financial Secretary, who is the Accounting Officer, under law, of Air Jamaica, was availed with the proposed particulars of the VS/Air Jamaica deal or had approved the transaction, prior to the Dr. Davies’ written approval of the VS proposal on 2007 April 23.

It is critically instructive to record that the former Minister’s actions were undertaken contrary to the expressed and written recommendations of the Accountable Officer of Air Jamaica, who was the then President & CEO of the airline, Mr. Michael Conway, and contrary to the recommendations of the then Executive Management of the airline.

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<sup>137</sup> Stephen Vasciannie. Internal Memo- Air Jamaica Ltd./Virgin Slot Agreement

In light of the foregoing, the OCG believes that it is prudent to examine the issues of accountability and responsibility within the context of the requirements that are imposed in relation thereto by the Financial Audit and Administration Act and the Public Bodies Management and Accountability Act.

Pursuant to the FAA Act, *“Accounting Officers are responsible for the propriety of procurement expenditure affected by their portfolio entities. Accordingly, all Accounting Officers are required to adhere to the procedures contained in the Handbook of Public Sector Procurement Procedures.”*

In the case of Air Jamaica, the Accounting Officer at the time was the then Financial Secretary in the Ministry of Finance and Planning, Mr. Colin Bullock.

Section 16 (2) of the FAA Act puts the matter beyond doubt. It states that *“An accounting officer shall be responsible for the financial administration of the department specified in a designation under subsection (1) and shall be accountable to the Minister for (a) the assessment and collection of, and accounting for, all the moneys lawfully receivable by his department, ... (and) (c) making any payment required to be made in relation to such appropriation”*.

Pursuant to Section 2 (1) of the FAA Act, one of the Accountable Officers of Air Jamaica Ltd. would have been the President & CEO of the airline, Mr. Michael Conway.

These individuals, in accordance with Section 24F of the FAA Act, are vested with the authority and responsibility, *inter alia*, to make commitments and payments.

However, as discussed, the commitment was made by the then Minister, Dr. Omar Davies, on 2007 April 23.

In so far as the responsibilities that are imposed by law upon the Board of Directors of Air Jamaica are concerned, it being a “*Public Body*”, it is also instructive to record the provisions which are contained in Sections 6, 17 and 25 of the Public Bodies Management and Accountability Act.:

**Section 6 of the Public Bodies Management and Accountability Act** provides as follows:

*“6. Every board shall-*

*(a) take such steps as are necessary-*

*(i) for the efficient and effective management of the Public Body;*

*(ii) to ensure the accountability of all persons who manage the resources of the Public Body;*

*(b) develop adequate information, control, evaluation and reporting systems within the body;*

*(c) develop specific and measurable objectives and performance targets for that body”.*

**Section 17 of the Public Bodies Management and Accountability Act**

*17.-(1) Every director and officer of a Public Body shall, in the exercise of his powers and the performance of his duties-*

*(a) act honestly and in good faith in the best interests of the Public Body; and*

*(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances including, but not limited to the general knowledge, skill and experience of the director or officer.*

**Section 25 of the Public Bodies Management and Accountability Act** provides as follows:

*25. (1) If the Court is satisfied on an application by the Attorney-General that any person has contravened any of the provisions of-*

*(a) section 4 (acquisition of shares and payment of dividends);*

*(b) section 5 (exercise of borrowing powers);*

*(c) section 6 (corporate governance);*

*(d) section 14 (general duties of auditors);*  
*(e) section 15 (failure to furnish information to auditor);*  
*(f) section 20 (levels of emoluments);*  
*(g) section 21 (restriction on formation of new companies),*  
*the Court may exercise any of the powers referred to in subsection (2).*

*(2) The Court may-*

*(a) order the person concerned to pay to the Crown such pecuniary penalty not exceeding one million dollars; or*

*(b) grant an injunction restraining that person from engaging in conduct described in subsection (1).*

*(3) In exercising its powers under this section the Court shall have regard to-*

*(a) the nature and extent of the default;*

*(b) the nature and extent of any loss suffered by any person as a result of the default;*

*(c) the circumstances of the default;*

*(d) any previous determination against the person concerned.*

*(4) If in the opinion of the Attorney General there is a contravention of section 7, 8 or 9, he may make an application to the Court and the provisions of subsections (1), (2) and (3) shall apply in relation thereto.”*

## CONCLUSIONS

Based upon the documents which have been reviewed as well as the sworn testimony which has been received from the representatives of the former Air Jamaica Board of Directors, the members of the current and former Management of Air Jamaica, the former Minister in the then Ministry of Finance and Planning, other Public Officials and persons of interest, the OCG has arrived at the following considered Conclusions:

1. Air Jamaica's termination of the London route was premised upon a financial decision which was made by the Board of Directors and the Executive Management of Air Jamaica. This decision was made consequent upon a shortfall in revenue that occurred primarily as a result of the (a) increased competition and, (b) low traffic on Air Jamaica flights subsequent to VS' entry on the said route.

This increased competition also increased the supply of seats on the London/Jamaica route which, in essence, reduced the cost of tickets since the supply of seats far outweighed the demand for same.

In addition to the reduced revenue which arose in consequence of the foregoing, Air Jamaica was faced with high operating costs which were primarily associated with the lease of its A340 aircraft. In this regard, the airline was losing an estimated US\$25 Million annually on the London route. The termination of the route was, therefore, deemed to be in the best interest of the airline.

2. Air Jamaica recognised that with the termination of the London route there would be (a) a shortfall in the seats from London to Jamaica; and (b) the loss of the AJLHS, as a result of the 'use it or lose it' principle which governs the allocation of slots.

Consequently, in formulating a strategy to exit the London route, the Executive Management of Air Jamaica decided that the best option for the airline would be to enter, *inter alia*, into a codeshare agreement with either BA or VS. In so doing, Air Jamaica initiated negotiations for a broad commercial arrangement, a component of which was the exchange of the AJLHS.

3. Air Jamaica and VS signed a legally binding document on 2007 July 24 for the exchange of the AJLHS, for two VS summer slots. This was done in accordance with the IATA Scheduling Guidelines which only recognises slot exchanges as the sole medium by which airlines can acquire slots at coordinated airports.
4. VS acquired a total of 728 annual slots from Air Jamaica. However, only one (1) slot pair was sold to VS. This entitled VS to the 728 annual slots, which gave it the right to land and take off once every day, seven (7) days each week.
5. The OCG's Investigation has revealed that slot trading is a secondary market which is largely a UK practice. This practice has escalated due to the increase in the demand for Heathrow slots which has occurred as a result of the opening up of the transatlantic aviation industry with the signing of the EU-US OSA on 2007 April 30.
6. Prior to the EU-US OSA, only four airlines had the right to fly from the US to Heathrow and vice versa. However, the EU-US OSA changed the regulatory environment in 2007, by opening up the aviation industry within the EU, and between the EU and US.
7. Consequent upon the signing of the EU-US OSA, the demand for Heathrow slots has escalated. However, 98.5% of the slots at Heathrow were already allocated and the remaining slots were deemed unsuitable for transatlantic flights.

In this respect, the secondary market for slot trading had increased and *prime* Heathrow slots have been valued from anywhere between £20 and £30 million. However, based upon the slot exchange transactions which have been detailed herein, the OCG has found that the average value of a Heathrow slot, for the period 1998-2004, was between US\$6 Million to US\$8 Million. Of note, is that the information from which these figures were gleaned did not specify whether the said slots were deemed to be *prime* slots.

While it is difficult to definitively state whether Air Jamaica could have received more for its Heathrow slots had it delayed the sale, given the impending EU-US OSA, what is true is that recent international media and aviation business reports have posited that the demand for Heathrow slots has increased. This demand far exceeds the supply and this is to be attributed primarily to the EU-US OSA.

The demand for Heathrow slots has increased significantly and, with this increased demand, the value of Heathrow slots has also increased. Subsequent slot sales have highlighted the escalations in price. Accordingly, while BWIA sold its slots for £5 million in 2006, Continental, in 2007, purchased four (4) slots for US\$209 million/£105 million, with each slot being valued for an estimated US\$52 million/£25 million. Also, Alitalia, in 2007, sold three (3) slot-pairs for an estimated US\$133 million.

8. In arriving at an average value for Heathrow slots, the OCG found that while airlines were willing to pay a price for the slots, in many cases some form of commercial arrangement was also reached between the parties that were involved in the slot exchange. Indeed, this was the case with VS and Air Jamaica, both of which signed an MOU on 2007 May 10, outlining certain areas of cooperation between the parties.

9. It appears that the Executive Management of Air Jamaica, in assessing the value of the AJLHS, took into consideration the BWIA slot exchange which occurred in 2006. BWIA was reported to have received £5 million for its slots. Against this background, one could reasonably suggest that Air Jamaica had received fair market value for its slots since it had received £5.1 million for the AJLHS from VS; or £0.1 million more than that which BWIA had received. The contention of fair market value could be further buttressed by the fact that the BWIA slots were deemed by Mr. Conway and VS to be superior to the AJLHS, because of its more favourable assigned arrival and departure times.
10. It must, however, be noted that VS paid more for the AJLHS even though it had analysed the BWIA transaction and had deemed the AJLHS to be less desirable. As such, the OCG questions (a) whether this willingness to pay more, by VS, for what was perceived to be less desirable slots may have been as a result of the impending EU-US OSA; (b) whether VS was willing and able to pay more for the slots had BA improved its offer price; and (c) whether BA would have improved its offer price, in light of the EU-US OSA, had it been afforded the same opportunity as was given to VS by virtue of Dr. Davies' letter which was dated 2007 April 17.

These questions are particularly important in light of the fact that when VS responded to the six (6) suggested areas for improvements that were presented by Dr. Davies in his letter of 2007 April 17, Sir Richard Branson would not improve the VS offer because he was alleged to have stated that he knew that the VS offer was superior in this regard. The VS offer, at this point, was US\$800,000 more than that of BA.

However, given the fact that (a) the OCG has seen no documentary evidence to support the assertions that BA was given an exact opportunity to respond, especially on slot price and (b) in its letter of 2007 April 27, BA expressed concern as to whether it was given the same opportunity and wanted to know how

its offer could be improved, the OCG has concluded that Air Jamaica may have been able to achieve a higher price for its AJLHS.

11. The OCG has also concluded that the then Executive Management of Air Jamaica, the Members of the then Board of Directors and, in particular, Mr. O.K. Melhado, and the then Minister of Finance and Planning, Dr. Omar Davies, failed to undertake a comprehensive analysis of the value of the AJLHS, especially in light of the impending change in the regulatory environment which was expected to result from the EU-US-OSA.
  
12. On 2007 April 30, the EU-US OSA was signed with an effective commencement date of 2008 March 30. It is instructive to note that the signing of the EU-US OSA occurred (a) seven (7) days after Dr. Davies had accepted the VS offer in writing, (b) approximately one (1) month before the Cabinet granted final approval of the deal on 2007 May 28, and (c) twelve (12) days after Sir Richard Branson had allegedly contacted Dr. Davies, in an effort to improve the VS proposal.

In this respect, the OCG concludes that Air Jamaica, in retrospect, failed to fully analyse a critical factor (i.e. the EU-US OSA) which had serious implications not only for its Heathrow slots, but also for its likely partner for a commercial arrangement. The OCG's conclusion, in this respect, is premised upon the fact that with EU-US OSA, an airline with a more extensive network and/or gateways would have been a more desirable and attractive partner. In this regard, the recommendation of the then Air Jamaica Executive Management for the acceptance of the BA proposal which was contained in the 2007 April 19 '*Final Position Paper*', may have been more beneficial to Air Jamaica.

13. The OCG has concluded that both BA and VS were eager to acquire the AJLHS. This is evidenced by the fact that (a) VS paid £5.1 million for slots which it had deemed less desirable than those which were acquired from BIWA for £5 million; (b) the President of VS, Sir Richard Branson, had allegedly made personal contact with the then Minister of Finance and Planning, Dr. Omar Davies, when he thought that the Management of Air Jamaica was about to accept the BA offer; (c) BA had approached Air Jamaica from as early as 2006 November to negotiate the acquisition of the AJLHS; and (d) having been advised of Minister Davies' decision on 2007 April 23 in favour of the approval of the VS proposal, the Chairman of BA had, on 2007 April 27, asked for Dr. Davies' decision to be reconsidered.

Based upon the foregoing, the OCG has concluded that both BA and VS were interested in buttressing its respective positions at Heathrow ahead of the EU-US OSA. However, in the absence of a comprehensive analysis of the EU-US OSA, and its likely impact, it is reasonable to conclude that Air Jamaica would have failed to fully assess the potential value of its Heathrow slots.

14. The procurement method which was utilised by the Executive Management of Air Jamaica in selecting the carriers for negotiating the commercial arrangement is one which is akin to a *Limited Tender* methodology.

15. The arrangement that was reached between Air Jamaica and VS involved a broad commercial agreement which incorporated several elements. One of these elements was the sale/exchange of the airline's London Heathrow slots. This deal was accepted and approved "*in principle*" by Dr. Davies on 2007 April 23.

As a result, the MOU was signed on 2007 May 10, by Air Jamaica and VS, prior to the Cabinet's approval of same on 2007 May 28. Given the foregoing, the OCG has concluded that Dr. Davies committed the GOJ to a commercial arrangement

with VS without having first received the relevant authorisation from the airline's Executive Management, the airline's Board of Directors and the Cabinet.

Further, the OCG has seen no evidence that the Financial Secretary in the then Ministry of Finance and Planning, who is the Accounting Officer of Air Jamaica, was availed with the full particulars of the VS/Air Jamaica deal or had approved same, prior to Dr. Davies' approval of the VS proposal on 2007 April 23.

16. Air Jamaica did not treat the AJLHS as a separate and distinct asset. Consequently, the sale/divestment of the AJLHS was a component of a larger objective of securing a commercial arrangement in respect of which Air Jamaica had sought to (a) achieve a reasonable price for the slots; (b) enter into a codeshare agreement; and (c) secure replacement flights on its London/Jamaica route.

17. In the circumstances, and having regard to the foregoing, the Findings of the OCG have revealed evidence of breaches of the Contractor General Act, the Financial Administration and Audit Act and the Public Bodies Management and Accountability Act, in the process which led up to, and culminated in, the signing of the MOU between VS and Air Jamaica on 2007 May 10.

These breaches were due to what appears to have been an unwarranted, improper and unlawful Ministerial intervention, by the then Minister of Finance and Planning, Dr. Omar Davies, in the negotiation, evaluation and approval processes of a commercial arrangement which are reserved, by law, for execution by the Government's administrative arm and its Accounting and Accountable Officers and, in the case of Air Jamaica, also by its Executive Management and its Board of Directors, prior to endorsement by the Cabinet.

Further, even although Dr. Davies, in his letter to VS, which was dated 2007 April 23, stated that he had accepted its proposal “*in principle*”, the subsequent actions of the Minister, contradicts this. This Finding is unequivocally evidenced by the fact that on the said date, 2007 April 23, on which he accepted the VS proposal, he sent a letter to the other bidder, BA, informing it that the agreement would be made with VS.

Further, on 2007 April 25, Mr. Conway wrote to VS indicating that “**The management of Air Jamaica is very much looking forward to welcoming you to Jamaica next week to document the Agreement,** including those matters set forth in Minister Davies’ letter to Sir Richard dated April 17th. I trust we will be able to fast track this process in order that we can make the appropriate announcements to our respective customers and ensure that we accomplish an effective transition.”<sup>138</sup>

Accordingly, in contravention of the Financial Administration and Audit Act and the Contractor General Act, the commercial arrangement with VS was entered into by the political directorate of the Ministry, without any prior reference to the Accounting and Accountable Officers of Air Jamaica or the Cabinet of the Government of Jamaica or without their prior approval of same.

18. The OCG cannot definitively state that BA was given the same opportunity that was provided to VS to improve its offer in the referenced six (6) suggested areas. This is evidenced by the fact that the OCG has seen no documentary evidence that Dr. Davies’ letter, which was dated 2007 April 17, and which had outlined the said six (6) areas of improvement, was in fact presented to BA for its response.

In fact, of the six (6) areas that were presented to VS, the OCG has only seen documentary evidence of three (3) of these areas being presented to BA.

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<sup>138</sup> Michael Conway. Letter to VS. 2007 April 25

The OCG also took into consideration Mr. Conway's email of 2008 September 20 to Mr. Melhado, in which he stated that he had personally discussed each of the areas that were outlined in Dr. Davies' letter to VS, with BA. However, in the absence of documentary evidence of the said matter, this assertion cannot be corroborated by the OCG.

As such, the OCG has concluded that the evaluation process and subsequent Ministerial approval of the VS proposal was unfair, irregular and improper and lacked objectivity, transparency and impartiality. The OCG's Conclusion is fortified by the fact that in all of the documented evaluations which it has seen which contains a comparative analysis of both the VS and BA proposals, and which preceded the acceptance of the VS proposal on 2007 April 23, **the BA proposal was the one which was always recommended for acceptance.**

The acceptance by Dr. Davies of the VS offer was an act which was carried out in contravention of the written recommendations of the Executive Management of Air Jamaica. Further, the airline's Board of Directors was informed of the Minister's decision **after** VS had been informed and on the same date that BA was informed – i.e. on 2007 April 23. In addition, while the then Minister was informing the said parties of his decision, the Executive Management of Air Jamaica was preparing a justification for its 2007 April 19 **“final”** recommendation in support of the BA proposal.

The OCG has also deemed Cabinet's 2007 May 28 approval of the MOU, as a mere rubber stamp of an unauthorized and unlawful act which has been previously carried out by the Minister. In this regard, it is particularly instructive to note that the MOU with VS was signed on 2007 May 10, prior to the receipt of the approval of the Cabinet.

19. Five (5) of the ten (10) evaluation criteria which were embodied in Mr. Conway's 2007 April 19 '*Final Position Paper*', were not used in the '*Updated Summary*' that was submitted by the airline's Board of Directors to Dr. Davies on 2007 May 2.

The five (5) excluded points were as follows: (1) Full Slot Takeover; (2) Frequent Flier Programs; (3) Commitment to Jamaica; (4) Ability to perform and (5) Diaspora Issues. Of critical import is that all of these criteria had assessed the BA proposal as the stronger one.

On the other hand, four (4) new components were added to the 2007 May 2 '*Updated Summary*'. These were (1) KGW Slot Option; (2) Leadership Commitment; (3) South American Routes; and (4) Singapore Airways. Not surprisingly, all of these criteria were assessed in favour of the VS proposal.

In the OCG's considered opinion, the new evaluation criteria, as was contained in the 2007 May 2 '*Updated Summary*', appear to be based on insubstantial assertions which lacked objectivity. The OCG has also not seen any justification to support the selection of the VS proposal, such as that which was prepared by Mr. Paul Pennicook in support of the BA proposal. In fact, by all accounts, the Executive Management of Air Jamaica, as at the date of Mr. Davies' acceptance of the VS proposal, was still in full support of the BA proposal.

Given the foregoing, the integrity of the 2007 May 2 '*Updated Summary*' is called into question. Of critical note is the fact that the Summary was prepared ***after*** Dr. Davies had already accepted, '*in principle*', the VS offer, while simultaneously informing BA and the Chairman of the airline's Board of Directors of his decision. Therefore, by all accounts, the evaluation, as is contained in the '*Updated Summary*', may have been altered to reflect and justify an unauthorized and unlawful Ministerial action which had already been committed.

In the circumstances, the OCG has concluded that VS was given an unfair advantage. This is compounded by the fact that the pace of the VS/Air Jamaica negotiations were clearly accelerated after Dr. Davies had given a commitment for an early response to be made to the alleged enquiry, from Sir Richard Branson, as to how the VS proposal could be improved in the face of the perception that the Executive Management of Air Jamaica was ready to accept the BA proposal.

20. If the sworn testimony of Dr. Davies is to be believed, the OCG has also concluded that Sir Richard Branson was able to qualify his bid via his alleged telephone call to Dr. Davies in 2007 April. Under competitive tendering rules, Sir Richard's alleged actions and, more importantly, Dr. Davies' accommodation and facilitation of same, would be considered as constituting an act of interference in the bidding process as he, Sir Richard, had reportedly sought to qualify the VS tender and, by extension, influence the evaluation process. In this regard, the VS offer would have been summarily liable for disqualification from the tender process.

Notwithstanding this alleged interference by Sir Richard, the OCG has concluded that Minister Davies' actions, with respect to the negotiation and evaluation processes, were questionable and lacked transparency. Dr. Davies had, by his own sworn admission, failed to provide BA with the exact same opportunity which he had afforded to VS, *via* his 2007 April 17 letter. It is also instructive to note that, based upon Dr. Davies' sworn testimony, Sir Richard appeared to have been fully aware of the contents of the BA proposal.

21. The acceptance of the VS offer, which was slated to take effect one month after that which was proposed by BA, equated to an additional operating cost for Air Jamaica of US\$2 million, according to Mr. Michael Conway, and US\$3 million, according to Mr. O.K. Melhado and Senator Noel Sloley.

The OCG has found that, in a letter which was dated 2007 May 2, from Mr. O.K. Melhado to Dr. Davies, the Chairman stated that “*Both carriers made strong offers, however, VS has offered more for the slots, have given very attractive pro rate fares, agreed to an evergreen commitment in triangular fares over the USA, (that is, they will extend prorates as new gateways are opened in the USA), a major defrayment on the passengers handed over in October and a five year contract. As a whole, these in our judgement are of greater value than the agreement by BA to cut over one month earlier. Other aspects of the offers are fairly similar.*”<sup>139</sup>

However, when questioned about the possibility of delaying the transaction in the face of the EU-US OSA, to get more for the AJLHS, Melhado/Sloley informed the OCG that timing was important for the transaction because it would delay the sale of the A340 aircrafts and lead to a loss of US\$3M.

Nevertheless, the Air Jamaica Board sanctioned the acceptance of the VS proposal which had a later start date than that of the BA proposal. As such, Air Jamaica had to continue operations on the London/Jamaica route for an additional month.

The OCG has also concluded that, in justifying the decision of the Minister, the then Board Chairman of Air Jamaica, Mr. O.K. Melhado, was in possible breach of Section 6 (a) (1) of the Public Bodies Management and Accountability Act, as he had failed to take the necessary steps, *inter alia*, to efficiently and effectively manage the affairs of the airline and to act, in good faith, in the interest of the airline or to otherwise discharge his fiduciary duties to the company.

The losses that were incurred monthly by the airline, on the London route, according to Sloley/Melhado, were in the region of US\$3 million. When subtracted from the price of the US\$10.2 million which was paid by VS for the

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<sup>139</sup> O.K. Melhado. Letter to Minister Dr. Omar Davies. 2007 May 2

slots, the net return to the airline would have been US\$7.2 million. This, in essence, would suggest that the VS offer was US\$2.2 million less, in value, than the BA unimproved proposal of US\$9.4 million.

22. Based upon the analysis of the airline's Executive Management in its 2007 April 19 'Final Position Paper', the BA proposal for a commercial agreement, was substantially the better of the two proposals.

However, the VS offer was accepted solely at the discretion of Dr. Davies, who stated that it was a 'judgment call' and, having asked VS for certain improvements, which were granted, expressed the concern that "I would feel somewhat compromised to subsequently rule against that company. To do so would raise questions as to whether my intervention, requesting improved responses had been in good faith."<sup>140</sup> (OCG Emphasis).

The OCG found that the foregoing statements by the former Minister of Finance and Planning fundamentally undermined the competitive bidding process which is a core tenet of the Government's Procurement Policy and Procedure Guidelines. Both parties, i.e. BA and VS, should have been presented with the exact letter, outlining the exact six (6) areas which were suggested for improvement. Thereafter, their offers or responses should have been assessed in terms of (a) what was presented to Air Jamaica and (b) what was in the best interest of the airline and the Jamaican people.

In addition, the comments that were contained in a document which was entitled 'BA/VS Evaluation-Major Issues,' and which was dated 2007 April 19, should be noted. The document stated thus: "While I am aware that we should not allow VS to dictate the pace of our decision, I have to protect Omar who promised an early response-we need to know their position on this,"<sup>141</sup>. (OCG Emphasis).

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<sup>140</sup> Omar Davies. Letter to O. K. Melhado. 2007 April 23

<sup>141</sup> 'BA/VS Major Issues'. 2007 April 19

The referenced document was found in the official files of Mr. Michael Conway which are located at Air Jamaica's corporate office in Kingston.

The OCG has concluded that (a) VS was able to dictate the pace of the negotiations; (b) the then Minister appears to have been acting in a highly improper and irregular manner in respect of the VS proposal; and (c) the decision to accept the VS offer was not based upon an objective and impartial evaluation but, rather, in the then Minister's words, it was a decision which was based upon a **'judgment call'**.

Indeed, the former Minister of Finance and Planning, in further compounding the questionable circumstances of his intervention, expressed the supposed concern that he "**...would feel somewhat compromised to subsequently rule against hat company.**" (OCG Emphasis).

23. The Board of Directors of Air Jamaica, the Accounting Officer and/or one or more of the Accountable Officers of the airline and/or the former Ministry of Finance and Planning, have failed, at least, partly, in the discharge of the responsibilities which have been respectively imposed upon them by the Public Bodies Management and Accountability Act and the Financial Administration and Audit Act.

In this regard, the OCG has found that there is sufficient evidence to suggest that the former Board of Directors of Air Jamaica and/or one or more of their Members, were negligent in the discharge of those of their responsibilities that are prescribed by Section 17 (1) (a) and (b) and Section 6 of the Public Bodies Management and Accountability Act.

In the circumstances, the former Chairman of the Air Jamaica Board, Mr. O.K. Melhado, and those members of the former Board of the Air Jamaica (1) who had knowledge of the recommendations of the Management of the airline in favour of

the BA proposal (2) who supported or who were involved in the penning of the 2007 May 2 letter to the then Minister, Dr. Omar Davies; (3) who knowingly supported or assisted in the preparation of the 'Updated Summary' which was attached to the referenced letter; (4) who, in their divestment of the State's assets, failed to exercise due care, skill and diligence, *inter alia*, in researching the EU-US OSA and its likely impact upon (i) the assets that were to be divested, and (ii) the commercial arrangements which were being proposed regarding same; and/or (5) who supported the decision of the then Minister, *inter alia*, to approve the VS proposal, despite the recommendation of the airline's Management to the contrary, can be deemed to have (a) acted negligently in the discharge of their responsibilities as Air Jamaica Ltd. Directors, and/or (b) abused their authorities and offices as Directors of the Air Jamaica and/or (c) breached their respective duties of trust to the company and/or (d) breached their respective fiduciary or statutory duties to the airline.

Further, it is instructive to record that Sections 6 and 17 (1) of the Public Bodies Management and Accountability Act impose certain specific responsibilities upon the Board of Directors of Public Bodies as well as Board Members themselves.

24. While the OCG cannot definitively state that more money could have been obtained for the AJLHS, the fact is that, by all accounts, the demand for slots at Heathrow far exceeds the supply, even with the new construction of Terminal 5. Of significant note is that Terminal 5 is not slated to be completed until 2011 and the more likely beneficiary of the new facility is likely to be BA, who is also a major funding partner for the Project.

As such, given the fact that BA had wanted the Government of Jamaica to reconsider accepting the VS proposal, the AJLHS may very well have been valued more than what it was sold for since BA appears to have been willing to increase its offer to secure the slots.

25. (a) The highly irregular and improper state of affairs which has preceded the execution of the VS/Air Jamaica agreement (b) the absence of transparency, merit and impartiality in the processes which have led up to the award of the contract to VS, (c) the breaches of the Contractor General Act which have occurred in the award of the said contract, (d) the fact of the then Minister of Finance and Planning's questionable, improper, un-authorized and unlawful intervention in the evaluation and approval processes of the BA/VS proposals, (e) the fact that VS was facilitated with an opportunity to improve its proposal while the evidence does not disclose that BA was provided with the exact same opportunity (f) the fact that improvements were attained in respect of the VS proposal following the Minister's personal intervention into the matter, (g) the fact that, notwithstanding, the 2007 April 19 "final" recommendation of the airline's management remained one which favoured the BA proposal (h) the fact of the Minister's admitted approval of the VS proposal, based upon what he has termed a "judgement call", (i) the fact that the recommendations of the Executive Management and Accountable Officer of Air Jamaica were clearly bypassed by Minister Davies (j) the fact that the airline's Board of Directors had prepared an 'Updated Summary' of the evaluation for both the BA and VS proposal – which reflected a strong VS proposal – after the Minister had approved VS' proposal, (k) the fact that the said 'Updated Summary' had five (5) deleted evaluation criteria which had been assessed in BA's favour and added four (4) new criteria which were assessed in VS' favour (l) the fact that the Minister, while stating that he had accepted "in principle" the VS offer, however, communicated to the other bidder, BA, his decision to proceed with the VS proposal, (m) the fact that, based upon Dr. Davies' sworn testimony, Sir Richard Branson was able to inform the Minister that he was aware that his offer for the slots was superior to that of BA, (n) the fact that Sir Richard Branson had allegedly informed the Minister Davies that he was concerned that Air Jamaica's Management was going to accept the BA proposal, and then made an offer to improve the VS proposal – whilst, at the same time, the Management of Air Jamaica was preparing a justification in support of its recommendation that the BA proposal should be accepted, and (o) the fact that

the airline's then Board Chairman, Mr. O.K. Melhado, appears to have misinformed the 2007 May 29 Board Meeting about the circumstances which surrounded Dr. Davies' approval of the VS proposal – are all, in the OCG's considered view, powerfully persuasive and indicative pieces of evidence which, when taken together with the OCG's other Findings and Conclusions in this matter, raise, at a minimum, serious questions of impropriety and irregularity in the divestment of the AJLHS to VS.

In the circumstances, the OCG is of the considered view that the entire matter is one which warrants, at a minimum, a formal Public Enquiry or Hearing and/or further investigations into the circumstances which surrounded, *inter alia*, the questionable and unauthorized intervention of the former Minister of Finance and Planning into the divestment of the AJLHS.

26. The OCG has also concluded that the former Finance and Planning Minister, Dr. Omar Davies, the former Board Chairman of the airline, Mr. O.K. Melhado and former Board Director, Senator Noel Sloley, may not have been fulsome or forthright in the responses which they provided to the OCG's respective Requisitions to them.

This Conclusion is premised, *inter alia*, upon the following considerations

1. In his sworn response to the OCG's Requisition Questionnaire, which was dated 2008 July 21, Dr. Davies stated that **"I have never seen the report referred to in paragraph 15 of your correspondence. I later became aware that the Board considered making a recommendation for the sale of the slots to British Airways. However, this would have been prior to my discussion with the Chairman and the CEO and prior to the request to the two airlines for improvements on their offers. The final recommendation was that the offer from Virgin Atlantic be accepted."**(OCG Emphasis)

2. In their sworn and joint response to the OCG's Requisition, which was dated 2008 July 15, Sloley/Melhado stated that "...the negotiations were over an extended period during which offers were modified. It was subsequent to the involvement of the MFOP, when the door was opened to seek further improvements from both airlines, that the scales tipped in favour of VS. **The Board supported the selection of VS.**"<sup>142</sup>
3. However, contrary to the assertions of Dr. Davies, Mr. Melhado and Senator Noel Sloley, Dr. Davies had approved the VS offer on 2007 April 23 and the then President & CEO of Air Jamaica, Mr. Michael Conway, had made a final recommendation in favour of the BA proposal in his 2007 April 19 'Final Position Paper'.
4. Of further significance, is that the OCG has seen a fax cover sheet, which was dated 2007 April 19, that was attached to the referenced paper, addressed to Dr. Davies, from Mr. Michael Conway. The fax cover had the following captioned subject: "AIR JAMAICA LTD.-LONDON ROUTE"<sup>143</sup>. It further stated thus: "DEAR MINISTER DAVIES: PLEASE SEE ATTACHED AS REQUESTED RE LONDON ROUTE."<sup>144</sup>
5. The OCG has also found that the airline's Board of Directors was led to believe, by its then Chairman, Mr. O.K. Melhado, on 2007 May 2, that "**The Minister evaluated both proposals and has indicated that he proposed, subject to having the support of the Air Jamaica Ltd.'s Board and management, to seek Cabinet approval for the VS offer.**"<sup>145</sup> To the contrary, however, Dr. Davies had already approved the VS proposal on 2007 April 23.

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<sup>142</sup> Sloley/Melhado. Response to the OCG's Requisition. 2008 July 15

<sup>143</sup> Michael Conway. Fax cover sheet to Dr. Omar Davies. 2007 April 19

<sup>144</sup> Michael Conway. Fax cover sheet to Dr. Omar Davies. 2007 April 19

<sup>145</sup> Minutes of the Air Jamaica Ltd. Board of Directors. 2007 May 2

The sworn documentary evidence which has been presented to the OCG during the course of its Investigation has also comprehensively and unequivocally contradicted the assertion that the recommendation for the VS proposal was supported by the Air Jamaica Board of Directors.

In fact, by all accounts, it appears that the entire Air Jamaica Board was misled by the then Board Chairman, Mr. O.K. Melhado, on 2007 May 2, in an effort to have the Board lend its credence to an unauthorized decision which had already been made by the then Minister of Finance and Planning, Dr. Omar Davies.

It is primarily for this reason that the OCG feels that there is sufficient *prima facie* evidence on record which would suggest that Dr. Davies, Mr. O.K. Melhado and Senator Noel Sloley, have acted in contravention of Section 29 (a) of the Contractor General Act.

Further, in the circumstances, Dr. Davies, should be compelled to provide detailed responses to the considerations which informed his decision to accept the VS proposal.

## **REFERRALS**

The OCG, in the conduct of its Investigation, is required to be guided by Section 21 of the Contractor-General Act.

**Section 21 of the Contractor-General Act** provides as follows:

**“If a Contractor-General finds, during the course of his Investigations or on the conclusion thereof that there is evidence of a breach of duty or misconduct or criminal offence on the part of an officer or member of a public body, he shall refer the matter to the person or persons competent to take such disciplinary or other proceeding as may be appropriate against that officer or member and in all such cases shall lay a special report before Parliament.”**<sup>146</sup> (OCG Emphasis)

The OCG has found that there is sufficient *prima facie* evidence which is contained herein and, more particularly and importantly, in the sworn statements that were furnished to the OCG by the relevant Respondents, to suggest that the Board and/or some Board Members of Air Jamaica Ltd. were negligent in the exercise of those duties that are prescribed, in particular, by Section 17(1) (a) and (b) and Section 6 of the Public Bodies Management and Accountability Act.

The former Chairman of the Air Jamaica Board of Directors, Mr. O.K. Melhado, and those members of the former Board:

- (1) who had knowledge of the recommendations of the Executive Management of the airline in favour of the BA proposal;
- (2) who knowingly supported or who were involved in penning the 2007 May 2 letter to the then Minister of Finance and Planning, Dr. Omar Davies;

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<sup>146</sup> Contractor-General Act. 1983

- (3) who knowingly supported or who assisted in the preparation of the ‘*Updated Summary*’, which was attached to the referenced 2007 May 2 letter;
- (4) who, in their divestment of the State’s assets, failed to exercise due care, skill and diligence, *inter alia*, in researching the EU-US OSA and its likely impact on (i) the assets that were to be divested, and (ii) the commercial arrangements which were being proposed regarding same;
- (5) who knowingly supported the decision of the then Minister, Dr. Davies, *inter alia*, to approve the proposed commercial arrangements with VS, despite the several recommendations and justifications which had been advanced by the airline’s Accountable Officer and its Executive Management for entering a commercial arrangement with BA;

....can be deemed to have (a) acted negligently in the discharge of their responsibilities as Air Jamaica Directors and/or (b) abused their authorities and offices as Directors of Air Jamaica and/or (c) breached their respective duties of trust to the airline and/or (d) breached their respective fiduciary or statutory duties to the airline.

Further, it is instructive to record that Sections 6 and 17 (1) of the Public Bodies Management and Accountability Act impose certain specific responsibilities upon the Board of Directors of Public Bodies as well as Board Members themselves.

Had these and other responsibilities been fully discharged in the instant matter, Air Jamaica would have, *inter alia*, equipped itself with a thorough analysis of the changing regulatory environment which was about to significantly impact the landscape of transatlantic travel.

**Section 6 of the Public Bodies Management and Accountability Act** provides as follows:

*“6. Every board shall-*

*(a) take such steps as are necessary-*

*(i) for the efficient and effective management of the Public Body;*

*(ii) to ensure the accountability of all persons who manage the resources of the Public Body;*

*(b) develop adequate information, control, evaluation and reporting systems within the body;*

*(c) develop specific and measurable objectives and performance targets for that body”.*

**Section 17 of the Public Bodies Management and Accountability Act** provides as follows:

*17- (1) “Every director and officer of a Public Body shall, in the exercise of his powers and the performance of his duties-*

*(a) act honestly and in good faith in the best interests of the Public Body; and*

*(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances including, but not limited to the general knowledge, skill and experience of the director or officer.*

**Section 25 of the Public Bodies Management and Accountability Act** provides as follows:

*25. (1) If the Court is satisfied on an application by the Attorney-General that any person has contravened any of the provisions of-*

*(a) section 4 (acquisition of shares and payment of dividends);*

*(b) section 5 (exercise of borrowing powers);*

*(c) section 6 (corporate governance);*

*(d) section 14 (general duties of auditors);*

*(e) section 15 (failure to furnish information to auditor);*

*(f) section 20 (levels of emoluments);*

- (g) section 21 (restriction on formation of new companies),  
the Court may exercise any of the powers referred to in subsection (2).*
- (2) The Court may-*
- (a) order the person concerned to pay to the Crown such pecuniary penalty not exceeding one million dollars; or*
- (b) grant an injunction restraining that person from engaging in conduct described in subsection (1).*
- (3) In exercising its powers under this section the Court shall have regard to-*
- (a) the nature and extent of the default;*
- (b) the nature and extent of any loss suffered by any person as a result of the default;*
- (c) the circumstances of the default;*
- (d) any previous determination against the person concerned.*
- (4) If in the opinion of the Attorney General there is a contravention of section 7, 8 or 9, he may make an application to the Court and the provisions of subsections (1), (2) and (3) shall apply in relation thereto*

Having regard to the following, the OCG now makes the following considered Referrals:

- 1 Pursuant to the mandatory statutory obligations which are imposed upon a Contractor-General by Section 21 of the Contractor General Act, the OCG is hereby formally referring a copy of this Report to the Attorney General on the basis that there is evidence which is recorded herein which would suggest that there was, *inter alia*, a clear and unambiguous breach of duty specifically on the part of (a) Mr. O.K. Melhado, the former Chairman of the Air Jamaica Board of Directors and (b) the former Board of Directors of the Air Jamaica and/or one or more of the Members of the Board, all in contravention, *inter alia*, of Sections 6 and 17(1) of the provisions of the Public Bodies Management and Accountability Act.

The matter is being referred to the Attorney General particularly, *inter alia*, in light of the provisions that are contained in Sections 6, 17 and 25 of the Public Bodies Management and Accountability Act.

Additionally, the matter is being referred to the Attorney General for consideration as to what actions, if any, may be pursued against any of the offending former Members of Air Jamaica Board of Directors, having regard to all of the circumstances of the case.

- 2 Pursuant to the mandatory statutory obligations which are imposed upon a Contractor-General by Section 21 of Contractor General Act, the OCG is hereby formally referring a copy of this Investigation Report to the Director of Public Prosecutions for such further investigation and/or action that the DPP may deem appropriate, on the basis, *inter alia*, that there is *prima facie* evidence that is contained herein and, more particularly and importantly, in the sworn statements that were furnished to the OCG by the relevant Respondents, which would suggest that Dr. Omar Davies, Mr. O.K. Melhado and Senator Noel Sloley attempted to mislead a Contractor General, in contravention of Section 29 (a) of the Contractor General Act and/or knowingly and wilfully made a false statement to a Contractor General in a material particular, contrary to Section 8 of the Perjury Act.

Of particular note is that in his sworn statement of 2008 July 21, given in response to the OCG's Requisition, Dr. Davies testified, *inter alia*, that "The *final recommendation* was that the offer from Virgin Atlantic be accepted."

In their joint and sworn response to the OCG's Requisition, which was dated 2008 July 15, Sloley/Melhado also stated that "...The Board supported the selection of VS."

To the contrary, however, the evidence has disclosed that Dr. Davies, on his own volition and without any prior notice given to, or approval received from, the then Executive Management or Board of Directors of Air Jamaica, on 2007 April 23, wrote to VS approving its proposal. After he had done so, he then wrote to BA and to the then Air Jamaica Board Chairman, Mr. O.K. Melhado and informed them of his decision to approve the VS proposal contrary to the 2007 April 19 written and “Final” recommendations of the then President, CEO and Accountable Officer of Air Jamaica, Mr. Michael Conway.

Indeed, the evidence before the OCG has disclosed that on 2007 April 23 when Dr. Davies communicated his decision to the foregoing parties to approve the VS proposal, the only Air Jamaica recommendations that were in existence, regarding the BA/VS proposals, were the written recommendations of 2007 April 17 and 19 in favour of BA which had been made by Air Jamaica’s then Accountable Officer, President and CEO, Mr. Michael Conway.

The OCG has found that the VS offer was accepted based upon the sole discretion and decision of the former Minister of Finance and Planning, who stated that it was a ‘judgment call,’ and, having asked VS for offer improvements, which were granted, had expressed the concern that “I would feel somewhat compromised to subsequently rule against that company. *To do so would raise questions as to whether my intervention, requesting improved responses had been in good faith.*”<sup>147</sup> (OCG Emphasis).

Accordingly, the OCG feels that there is sufficient *prima facie* evidence which is stated herein and, more particularly and importantly, in the sworn statements that were furnished to the OCG by the relevant Respondents, which would warrant that the matter be referred to the referenced authority for further investigation and such consequential action, if any, as the said authority may deem appropriate.

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<sup>147</sup> Omar Davies. Letter to O. K. Melhado. 2007 April 23

**Section 29 of the Contractor General Act** provides, *inter alia*, as follows:

*“Every person who –*

*(c) wilfully makes any false statement to mislead or misleads or attempts to mislead a Contractor- General or any other person in the execution of his functions under this Act; or*

*(d) without lawful justification or excuse –*

*(j) obstructs, hinders or resists a Contractor-General or any other person in the execution of his functions under this Act; or*

*(ii) fails to comply with any lawful requirement of a Contractor- General or any other person under this Act, ....*

*shall be guilty of an offence ...”.*

**Section 8 of the Perjury Act** provides, *inter alia*, as follows: *“Every person who knowingly and willfully makes (otherwise than on oath) a statement false in a material particular and the statement is made-*

*(a) in a voluntary declaration; or ....*

*(b) in any oral declaration or oral answer which he is required to make by, under, or in pursuance of any enactment for the time being in force,*

*shall be guilty of a misdemeanour, and liable on conviction on indictment thereof to imprisonment with hard labour for any term not exceeding two years, or to a fine, or to both such imprisonment and fine”.*

## **RECOMMENDATIONS**

Section 20 (1) of the Contractor-General Act mandates that “*after conducting an Investigation under this Act, a Contractor-General shall, in writing, inform the principal officer of the public body concerned and the Minister having responsibility therefor of the result of that Investigation **and make such Recommendations as he considers necessary in respect of the matter which was investigated.**” (OCG’s Emphasis).*

In light of the foregoing, and having regard to the Findings and Conclusions that are detailed herein, the OCG now makes the following Recommendations:

1. The OCG recommends that the Parliament of Jamaica should convene a Special Public Hearing at which, at a minimum, the following former or present Public Officers should be called upon to account for the role which they played in the agreement which was reached for Air Jamaica and the Government of Jamaica to divest the AJLHS to VS, namely, Dr. Omar Davies, the former Minister of Finance and Planning, and Mr. O.K. Melhado, the former Chairman of the Air Jamaica Board of Directors.
2. The OCG recommends that appropriate mechanisms should be immediately established to ensure that members of the Executive and the Political Directorate of Government are prohibited from committing the Government and State of Jamaica to binding contracts, contrary to applicable laws and Government accounting and procurement regulations and procedures.

The OCG laments the fact that the foregoing Recommendation is identical to a Recommendation which was previously made in the OCG’s **4M Energy Saving and Light Bulb Distribution Investigation Report**. That Report was tabled in the House of Representatives and in the Senate in February 2008. Regrettably, however, to date, no discernable action has been taken by the Government or by the State to give effect to the Recommendation.

There must be a strengthening of the relevant due diligence systems to ensure that members of the Political Directorate cannot and do not usurp or bring undue influence to bear upon the lawful authority of the administrative arm of Government and, in particular, upon the authority of the Accounting and Accountable Officers of Government, thereby inflicting damage to the principles of good public sector accounting, management and governance.

3. There is little doubt that the Jamaica/London route was becoming increasingly unprofitable for the national airline, Air Jamaica. However, where there is a likely opportunity to maximise the potential gains from the sale of a State asset, due care and diligence must be exercised in an objective, open and transparent manner by the divesting entity to ensure that this is done.

Accordingly, it is the recommendation of the OCG that when Public Bodies are divesting State assets, a thorough analysis of the value of the asset and of all of the factors which are likely to impact the possible proceeds of its sale, should be undertaken so as to ensure the realization of maximum gains.

4. The OCG recommends that Air Jamaica and every Public Body, when divesting States assets, and/or entering into asset divestment contracts or commercial arrangements, must adhere to the operational procedures which are stipulated in the relevant Government Procurement Procedures, the Financial Administration and Audit Act, the Public Bodies Management Act and the Contractor General Act.
5. The OCG also recommends that Public Bodies, when entering into legally binding agreements, must seek legal advice from the appropriate State or Public Body authority and have all contracts properly vetted to ensure that the interests of the Jamaican People, on whose behalf they act, are effectively secured.

Where the entity has its own general counsel and/or legal department, the procurement procedures for the entity must dictate that any contract and/or legal document that is to be executed by the entity should be reviewed by the entity's general counsel and/or legal department.

In the case of Air Jamaica, the prior review of all corporate commercial agreements and/or contracts by the company's general counsel, must be made mandatory.

6. It is recommended that an immediate review of the evaluation and approval processes for commercial agreements, by Air Jamaica and by the Ministry of Finance and the Public Service, be undertaken by the Public Administration and Appropriations Committee of the House of Representatives and by the Auditor General.

This review should be conducted to ensure that adequate procedures, systems, checks and balances are not only implemented by these Public Bodies, but are aggressively enforced to secure a radically improved level of compliance with the relevant Government approved procedures, regulations and laws.

Particular attention must be paid to the requirements of the Financial Administration and Audit Act, the Public Bodies Management and Accountability Act, the Contractor General Act and the Government's Procurement Procedures.

7. Finally, and in keeping with the tenor of similar Recommendations which it has previously made, the OCG again respectfully recommends that all appointees to the Board of Directors of all Public Bodies are fully made aware of their responsibilities and obligations under the provisions that are contained, *inter alia*, in the Public Bodies Management and Accountability Act.

# APPENDIX

## SPECIMEN OF OCG FORM OF REQUISITION

July 7, 2008

Dr. Omar Davies  
Houses of Parliament  
Gordon House  
81 Duke Street,  
P.O. Box 636,  
Kingston, Jamaica

Dear Dr. Davies:

**Re: Notice of Formal Requisition for Information and Documentation to be Supplied under the Contractor General Act – Conduct of Investigation – Concerning the Sale/Divestment of Air Jamaica’s Heathrow Slots to Virgin Atlantic Airways Ltd.**

The Office of the Contractor General (OCG), acting on behalf of the Contractor General, has formally commenced an investigation into the Sale/Divestment of Air Jamaica’s Heathrow Slots to Virgin Atlantic Airways Ltd.

As we will require your assistance and full cooperation to successfully prosecute this investigation, it is very important that your attention is formally directed to the following provisions of the Contractor General Act:

- (1) Sections 4 (1) (a) (i) and (ii) which mandates the Contractor General, “... on behalf of Parliament- to monitor the award and the implementation of Government contracts with a view to ensuring that such contracts are awarded impartially and on merit (and that) the circumstances in which each contract is awarded ... do not involve impropriety or irregularity ...”.
- (2) Section 4 (1) (b) which mandates the Contractor General, “... on behalf of Parliament- to monitor the grant, issue, suspension or revocation of any prescribed licence, with a view to ensuring that the circumstances of such grant, issue, suspension or revocation do not involve impropriety or irregularity and, where appropriate, to examine whether such licence is used in accordance with the terms and conditions thereof”.
- (3) Section 15 (1) which prescribes the discretionary power of a Contractor General to conduct an investigation into any or all of the following matters:
  - (a) “the registration of contractors”;
  - (b) “tender procedures relating to contracts awarded by public bodies”;
  - (c) “the award of any Government contract”;
  - (d) “the implementation of the terms of any Government contract”;
  - (e) “the circumstances of the grant, issue, use, suspension or revocation of any prescribed licence”;
  - (f) “the practice and procedures relating to the grant, issue, suspension or revocation of prescribed licences”.

- (4) Section 4 (2) (b) which prescribes the power of a Contractor General “to have access to all books, records, documents, stores or other property belonging to Government, whether in the possession of any officer of a Public Body or a contractor or any other person”.
- (5) Section 4 (2) (d) which prescribes the power of a Contractor General “to have access to all books, records, documents or other property used in connection with the grant, issue, suspension or revocation of any prescribed licence whether in the possession of any public officer or any other person”.
- (6) Section 4 (2) (e) which prescribes the power of a Contractor General “to have access to any premises or location where he has reason to believe that any such books, records, documents or other property as are referred to in paragraph (d) or any property which is the subject of a prescribed licence, may be found”.
- (7) Section 4 (3) of the Act which prescribes the power of a Contractor General to “require any Public Body to furnish in such manner and at such times as may be specified by the Contractor General, information with regard to the award of any contract and such other information in relation thereto as the Contractor General may consider desirable”.
- (8) Section 4 (4) which prescribes that, “For the purposes of paragraphs (d) and (e) of subsection (2) the Contractor-General shall have power to require any public officer or any other person to furnish in such manner and at such times as may be specified by the Contractor-General, information with regard to the grant, issue, suspension or revocation of any prescribed licence and such other information in relation thereto as the Contractor-General considers desirable”.
- (9) Section 5 (1) which provides that, “In the exercise of the powers conferred upon him by this Act, a Contractor-General shall not be subject to the direction or control of any other person or authority”.
- (10)Section 17 (1) which prescribes the power of a Contractor General “to adopt whatever procedure he considers appropriate to the circumstances of a particular case and, subject to the provisions of (the) Act, to obtain information from such person and in such manner and make such enquiries as he thinks fit”.
- (11)Section 17 (2) which provides that “Nothing in this Act shall be construed as requiring a Contractor General to hold any hearing and, no person shall be entitled as of right to comment on any allegations or to be heard by a Contractor General”.
- (12)Section 18 (1) which prescribes the power of a Contractor General, “at any time, (to) require any officer or member of a public body or any other person who, in his opinion, is able to give any assistance in relation to the investigation of any matter pursuant to this Act, to furnish such information and produce any document or thing in connection with such matter as may be in his possession or under the control of that officer, member or other person”.
- (13)Section 18 (2) which prescribes the power of a Contractor General “to summon before him and examine on oath any person who has made representations to him or any officer, member or employee of a public body or any other person who, in the opinion of the Contractor General, is able to furnish information relating to the investigation – and such

examination shall be deemed to be a judicial proceeding within the meaning of Section 4 of the Perjury Act”.

(14)Section 18 (3) which provides that “For the purposes of an investigation under this Act, a Contractor General shall have the same powers as a Judge of the Supreme Court in respect of the attendance and examination of witnesses and the production of documents”.

(15)Section 18 (4) which provides that “Any obligation to maintain secrecy or any restriction on the disclosure of information or the production of any document or paper or thing imposed on any person under the Official Secrets Act, 1911 to 1939 of the UK (or of any Act of Parliament of Jamaica replacing the same in its application to Jamaica) or, subject to the provisions of this Act, by any law (including a rule of law) shall not apply in relation to the disclosure of information or the production of any document or thing by that person to a Contractor General for the purpose of an investigation ...”.

(16)Section 22 which provides that, “The proceedings of a Contractor-General shall not be rendered void for want of form”.

(17)Section 29 which provides as follows:

“Every person who –

- (a) willfully makes a false statement to mislead or attempts to mislead a Contractor General or any other person in the execution of his functions under this Act, or
- (b) without lawful justification or excuse –
  - (i) obstructs, hinders or resists a Contractor General or any other person in the execution of his functions under this Act; or
  - (ii) fails to comply with any lawful requirement of a Contractor General or any other person under this Act, ....

shall be guilty of an offence ...”.

It is also instructive that you should note that there are Public Officers who are misguided in the belief that the aforementioned powers of the Contractor General, to monitor or to investigate the “award” of contracts etc., do not arise until the subject contract or licence/permit is actually awarded or issued, as the case may be. We are obliged to advise you that any such belief is unfounded and has no validity in law. In the case of *Lawrence v. Ministry of Construction (Works) and the A.G. (1991) 28 J.L.R. 265*, the Supreme Court of Jamaica was moved by way of originating summons, at the instance of the Contractor General, to rule on this very point. Mr. Justice Courtney Orr, in that case, held unequivocally as follows:

*“The proper interpretation of the (Contractor General) Act is one which empowers the Contractor General to monitor the pre-contract stages of government contracts and to obtain information from public bodies prior to the award of such contracts (my emphasis)... The ordinary meaning of the words of the statute in light of the context and grammar suggest no other interpretation”.*

In the discharge of the mandates of the Contractor General under the Contractor General Act and in furtherance of the expressed powers which are reserved to him by the Act, the OCG, acting on behalf of the Contractor General, now hereby formally requires you to fully comply with the below-mentioned requisitions by providing all of the information and documentation which is demanded of you and to supply same in a sealed envelope, marked 'Confidential' and addressed to the Contractor General. **The envelope must be deposited at the reception desk of the Offices of the Contractor General, PIOJ Building, 16 Oxford Road, Kingston 5, no later than 3:00 PM in the afternoon on Tuesday July 22, 2008.**

In responding to the below-mentioned requisitions or questions, you are respectfully asked to be guided by the following:

- (a) You must provide written responses to all of the requisitions or questions.
- (b) Your responses must be declared and certified by you before a Justice of the Peace to be complete, accurate and truthful. Your declaration must be in the form which is enclosed herewith.
- (c) All written responses which are provided by you must be provided in a single document and must be numbered in the same chronological sequence as the questions or requisitions to which they relate. For example, your response to Requisition/Question #1 must be numbered '1', your answer to Requisition/Question #2 must be numbered '2', and so forth.
- (d) Any document which is supplied by you in support of a response must be properly labeled, numbered and marked to identify what it is and the requisition or question to which it relates.
- (e) Should you mislead, resist, obstruct or hinder a Contractor General in the execution of his functions or fail to provide a complete, accurate and truthful response to any of the requisitions or questions which are set out below, you will become liable, *inter alia*, to criminal prosecution under Section 29 of the Contractor General Act.

### **REQUISITIONS / QUESTIONS**

1. What are the factors and/or circumstances which prompted the sale of the seven (7) Heathrow slots?
2. How did Air Jamaica and/or the Ministry of Finance and Planning (MOFP) go about getting proposals to purchase the seven (7) Heathrow slots?
3. Did Air Jamaica and/or the MOFP have a detailed Request For Proposal, outlining (a) the criteria for selection; and (b) conditions of agreement, for the sale of the seven (7) Heathrow slots?

4. What methodology was used in the evaluation of the proposals received from British Airways and Virgin Atlantic to purchase the (7) Heathrow Slots being sold by Air Jamaica?
  
5. In regard to the evaluation of the proposals which were received from British Airways and Virgin Atlantic to purchase the (7) Heathrow Slots, please provide answers to the following questions and, where possible, provide documentary evidence to substantiate your assertions/responses:
  - i. The criteria by which each proposal was assessed;
  
  - ii. Detail the primary conditions of sale which the proposals should satisfy;
  
  - iii. The source of the data which informed the criteria by which each proposal was measured. Please provide, where possible, documentary evidence to support same;
  
  - iv. Detail the priority areas of concern for Air Jamaica in assessing the proposals;
  
  - v. The scoring system which was utilized in the evaluation of each proposal, if any, and the score attached to each criterion used in evaluating the proposals.
  
6. It is reported that Air Jamaica negotiated with Virgin Atlantic and British Airways for the sale of the seven (7) Heathrow slots. Please provide answers to the following questions and, where possible, provide documentary evidence to substantiate your assertions/responses:
  - i. The name of the entity(s) and/or individual(s) and the title of the individual (s) who initiated communication with Virgin Atlantic and British Airways;
  
  - ii. The date communication in regard to the sale of the Heathrow slots was initiated with Virgin Atlantic and British Airways;

- iii. Detail the circumstances relating to same;
7. What was the value of the seven (7) Heathrow slots at the time they were being sold and what factors and/or source(s) informed this value?
8. Was a valuation of the slots undertaken prior to commencing negotiations with British Airways and/or Virgin Atlantic?
  - i. If yes, detail which entity(s) and/or individual(s) undertook the valuation. Provide the date of initiation of the valuation(s).
  - ii. If no, (a) why was a valuation not undertaken, and (b) what factor(s) were then used to determine the value of the slots?
9. It has been reported that during the negotiations for the sale of the Heathrow slots, both Virgin Atlantic and British Airways communicated directly with the MOFP, and that the Minister evaluated both proposals. Provide answers to the following questions and, where possible, provide documentary evidence
  - i. The name(s) of the individual(s) and the title(s) of the individual(s) who was/were involved in the evaluation of proposals from Virgin Atlantic and British Airways;
  - ii. The circumstances relating to same as well as the date on which such activity was undertaken;
  - iii. Detail your role and the Terms of Reference by which you were guided in the evaluation process;
  - iv. Who was the primary contact person at Virgin Atlantic and British Airways at the time the proposals were being reviewed?
10. Did the MOFP and/or Air Jamaica approach any other entity in regard to the sale of the Heathrow slots? If yes, detail:

- i. the name of the entity(s) and/or individual(s) approached;
- ii. the date on which the entity(s) and/or individual(s) was/were approached;
- iii. Detail the result(s) of the approach(es).
- iv. If no, give the rational for the decision not to approach any other carrier?

11. What attempts were made by the MOFP and/or Air Jamaica Ltd. to ensure that a fair market value was realized for each of the seven (7) slots sold to Virgin Atlantic Airways Ltd.? Where possible, please provide documentary evidence in support of the response given.

12. In a press release, dated 2007 April 7, from the Airport Co-ordination Ltd., which administers airports in the UK, including Heathrow, the following statement was made, "Heathrow slots are highly scarce and demand far outstrips supply". Please provide answers to the following questions and, where possible, provide documentary evidence to substantiate your assertions/responses:

- i. Are you aware of the statement?
- ii. If yes, please provide full particulars of your knowledge of the referenced statement, inclusive of the date and circumstances under which you became aware of the statement;
- iii. Please provide a statement as to your belief of the veracity, or otherwise, of the statement and any documentary evidence substantiating your reasons for same.

13. The Open Skies Agreement, was scheduled to come into effect on 2007 April 30. Please provide answers to the following questions and, and where possible, provide documentary evidence to substantiate your assertions/responses:

- i. Are you aware of the Open Skies Agreement, and its impact on the

airline industry? If yes, please state the date and circumstances under which you became aware of the Open Skies Agreement.

- ii. Please provide full particulars of your knowledge of the referenced Agreement;
- iii. Detail the implications of the Open Skies Agreement on the value of the Heathrow slots sold by Air Jamaica;
- iv. Detail whether Air Jamaica would have:
  - a. improved its bargaining position, and be able to demand more for the slots which were sold to Virgin Atlantic, had the sale been delayed until after 2007 April 30;
  - b. would its bargaining position been curtailed and/or limited if the sale had been delayed until after 2007 April 30;
  - c. Give the rational for answers given in 13(a) and 13(b) above and where possible, provide documentary evidence in support of same.
  - d. Would the value of the Heathrow slots have been impacted by Air Jamaica delaying the sale of the slots until after April 2007?
  - e. Was there a real and/or perceived urgency to sell the Heathrow slots, having regard for the pending Open Skies Agreement? If yes, please detail the full particular of any such urgency which existed at the time.

14. In regard to the agreement to sell the Heathrow slots to Virgin Atlantic, kindly provide answers to the following questions:

- i. The name(s) and title(s) of the GOJ official(s) who negotiated and concluded the agreement;
- ii. The name(s) and title(s) of the Virgin Atlantic official(s) who negotiated and concluded the agreement;
- iii. The rationale for selecting the proposal from Virgin Atlantic.

15. In a report, dated 2007 April 17, prepared by the former President & CEO, Air Jamaica, Mr. M. Conway, he made the recommendation that the Heathrow slots should be sold to British Airways. However, the proposal from Virgin Atlantic was accepted and the slots sold to said entity on 2007 July 24. Please answer the following questions and provide documentary evidence, where possible, to substantiate your assertions.

- i. Are you aware of the report prepared by Mr. Conway? If yes, why was the recommendation of the President and CEO of Air Jamaica, Mr. Conway, not acted upon?
- ii. What was the final recommendation from the Air Jamaica Board, in regard to which proposal was best suited for the airline?
- iii. Detail the rationale and/or circumstances which led to the selection of the proposal from Virgin Atlantic.
- iv. To the best of your knowledge, detail the unique elements of the proposals received from British Airways and Virgin Atlantic. Please provide documentary evidence, where possible, to substantiate your assertions.
- v. What do you consider to be the distinguishing factor(s) and element(s) of the proposal of Virgin Atlantic, as against the proposal from British Airways?

16. Are you aware of any additional information which you believe could prove useful to this Investigation or is there any further statement in regard to the Investigation which you are desirous of placing on record? If yes, please provide full particulars of same.

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**Form of Declaration**

**The Voluntary Declaration Act: Section 7: Declaration to be in form in Schedule:**

I, John Brown, do solemnly and sincerely declare as follows:

1. That I am [number] years of age and I reside and have my true place of abode at [address] in the parish of \_\_\_\_\_.
2. That I have answered the questions posed and fulfilled the requisitions made to me in a letter from the Contractor-General dated July 8, 2008, completely, accurately and truthfully.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the Voluntary Declarations Act.

**TAKEN and ACKNOWLEDGED** )  
**by the said JOHN BROWN at [address]** )  
**in the parish of** )  
**on this day of 2008** )  
**in the presence of:** )

\_\_\_\_\_  
**JOHN BROWN**

\_\_\_\_\_  
**JUSTICE OF THE PEACE**  
**For the parish of:-**