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Foreign and Commonwealth Office

London SW1A 2AH

26 May 1983

*John John*

*Mr. Jeary*

*copies to all briefing folders please.*

*A.S.C. 27/5*

US-Anti-Trust Action against British Airlines

I enclose a brief on the US anti-trust action against British airlines for the Prime Minister's bilateral meeting with President Reagan at Williamsburg which was referred to in the bilateral steering brief. The brief has been prepared in conjunction with the DOT.

This is a contingency brief only. In the light of the progress made towards agreeing procedures for reaching a reasonable settlement, we do not ourselves consider it essential to raise the subject. As you know, the People's Express flights have now been authorised. Given, in addition, that further action on arbitration and on the issuing of directions under the PTI Act by the Department of Trade has been suspended for the time being, and given too that the Department of Justice has extended the subpoena deadline, we doubt whether this controversy will now affect the Summit.

*[Handwritten signature]*

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PMVZ(83)16

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26 May 1983

WILLIAMSBURG ECONOMIC SUMMIT

28 - 30 MAY 1983

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BILATERAL MEETINGS

Brief by Foreign and Commonwealth Office

PRESIDENT REAGAN (UNITED STATES)

US ANTI-TRUST ACTION AGAINST BRITISH AIRLINES

OBJECTIVES

To prevent the Department of Justice anti-trust investigation from inflicting severe damage on our airlines; to safeguard our principles on extraterritoriality and the sanctity of bilateral agreements; and to defuse a controversy which could disrupt UK/US relations. It is not essential to raise this subject with the President, but if Mr Reagan initiates discussion the Prime Minister should underline the importance we attach to finding a satisfactory solution to this highly contentious issue and her satisfaction at progress to date.

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POINTS TO MAKE (Defensive)

1. Following my personal message, you can be in no doubt about the importance we attach to this issue in the UK.
2. Welcome proposed arrangements under consideration to defuse situation.
3. Need for both sides to take a moderate approach to avoid further serious confrontation.
4. Hope that President will discourage the Department of Justice from taking any precipitate action with regard to the Grand Jury investigation pending the implementation of the proposed arrangements.
5. If our current efforts fail to achieve a reasonable settlement we remain ready to take the dispute to international arbitration.

BACKGROUND

6. Our immediate concern has been the subpoena deadline of 31 May requiring British Caledonian Airways and British Airways to disclose documents held in the United States. Unfortunately BCal hold documents there which relate to past discussions on pricing and other matters with other airlines (both British and American). These discussions are not illegal in the United Kingdom, in fact we encourage inter-airline tariff discussions; but they are illegal under US anti-trust law. The consequences of both the Department of Justice proceedings and the civil suits (which carry the possibility of treble damages) would be extremely serious.

7. The impact of the Prime Minister's message to President Reagan and the prospect of international arbitration under Bermuda 2 clearly induced a more amenable attitude on the part of the US Administration. The threat of arbitration was designed to force the Americans to recognise that in some instances anti-trust law must take second place to bilateral treaties such as Bermuda II.
8. As a result of the more flexible attitude shown by the US delegation at the second round of consultations in London on 23/24 May, a 'non-paper' was agreed ad referendum which without prejudice to either side's position would limit the potential damage to British airlines not least by giving little encouragement to private suits. The Department of Justice agreed to extend until 3 June the deadline on the subpoenas for the production of documents to the Grand Jury. This relieved the pressure on British Caledonian and in consequence Lord Cockfield believes that there is now no immediate need to initiate arbitration or proceedings under the PTI Act.
9. The initial reaction on both sides to the non-paper is favourable. We therefore expect the Department of Justice to extend the subpoenas further until 20 June, in order to allow time for the processes envisaged in the non-paper to be implemented (investigation and further consultation on the current allegations, and

LEON PLOOMER : US Grand Jury  
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negotiation of satisfactory procedures to avoid similar disputes in the future). If, however, in the event the process envisaged in the non-paper breaks down, we shall once again have to consider whether to initiate arbitration in order to give grounds for British Caledonian to apply in the US Courts for a stay of application of the subpoenas. With the extension of the subpoena deadline, the suspension of further action on arbitration and on the issuing of directions under the PTI Act, this controversy will not affect the Summit.

10. Following separate consultations earlier this week it was agreed that the People Express application for cheap flights from Newark to Gatwick should be approved following assurances from the Department of Justice which meet our concern over the possibility that a price-fixing conspiracy might be inferred from any moves by British airlines to respond to People Express's low fares.

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