COMMISSION OF THE EUROPEAN COMMUNITIES

COM(92) 222 final

Brussels, 25 May 1992

Proposal for a

COUNCIL DECISION

concerning the conclusion of an Agreement between the European Economic Community and the United States of America on trade in large civil aircraft

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. By decision of 4 February 1991, the Council authorised the Commission to open negotiations both with the United States of America and with other Parties to the GATT Agreement on Trade in Civil Aircraft in order to conclude new arrangements governing trade in civil aircraft.

2. In accordance with this decision and with the detailed negotiating directives adopted by the Council and in consultation with the 113 Committee, the Commission held negotiations with the United States which on 31 March 1992 resulted in the enclosed agreement.

3. The enclosed agreement corresponds closely with all points in the negotiating directives. In particular the scope of the agreement has been limited to large civil aircraft. In this regard, since it was not possible to reach a satisfactory definition in terms of seating capacity, explicit reference is made to aircraft produced in the Community by the Airbus consortium. Moreover, the Commission considers that a balanced set of disciplines has been introduced covering both indirect and direct support.

4. In Article 12 of the Agreement, both the United States and the Community re-affirm their determination to achieve revision of the GATT Civil Aircraft Agreement. As foreseen in the above-mentioned Council decision, the Commission now expects this multilateral process to be launched immediately in conjunction with the United States Government.

PROPOSAL FOR A COUNCIL DECISION

concerning the conclusion of an Agreement between the European Economic Community and the Government of the United States of America on trade in large civil aircraft

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THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 113 thereof,

Having regard to the proposal from the Commission,

Whereas the Agreement negotiated between the European Economic Community and the Government of the United States of America on trade in large civil aircraft in Brussels on 31 March 1992 should be approved,

HAS DECIDED AS FOLLOWS:

Article 1

The Agreement between the European Economic Community and the Government of the United States of America on trade in large civil aircraft is hereby approved on behalf of the Community.

The text of the Agreement is attached to this Decision.

Article 2

The President of the Council is hereby authorised to designate the person empowered to sign the above Agreement in order to bind the Community.

Done at Brussels

For the Council

The President

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AGREEMENT
CONCERNING THE APPLICATION
OF THE GATT AGREEMENT ON TRADE IN CIVIL AIRCRAFT

Between the European Economic Community (hereinafter referred to as "the EC") and the Government of the United States of America (hereinafter referred to as "the US") on trade in large civil aircraft,

Recognising the need to promote a more favourable environment for international trade in large civil aircraft and to reduce trade tensions in the area,

Recognising that the disciplines in the GATT Agreement on Trade in Civil Aircraft should be strengthened with a view to progressively reducing the role of government support,

Recalling the principles and objectives agreed upon by representatives of the US and of the EC at their meeting held in London on 27 October 1987,

In pursuit of their common goal of preventing trade distortions resulting from direct or indirect government support for the development and production of large civil aircraft and of introducing greater disciplines on such support and of encouraging the adoption of such disciplines multilaterally within the GATT,

Noting their intention to act without prejudice to their rights and obligations under the GATT and under other multilateral agreements negotiated under the auspices of the GATT,

THE EC AND THE US HAVE AGREED:

Article 1

Government-Directed Procurement, Mandatory Sub-contracts and Inducements

With respect to issues concerning Article 4 of the GATT Agreement on Trade in Civil Aircraft ("Aircraft Agreement"), the Parties agree to act in conformity with the interpretative note to Article 4 of the Aircraft Agreement contained in Annex I of this Agreement.

Article 2

Prior Government Commitments

Government support to current large civil aircraft programmes, committed prior to the date of entry into force of this Agreement, is not subject to the provisions of this Agreement except as otherwise provided below. The terms and conditions on which such support is granted shall not be modified in such a manner as to render it more favourable to the recipients; however, de minimis modifications shall not be deemed inconsistent with this provision.

Article 3

Production Support

As of entry into force of this Agreement, Parties shall not grant direct government support other than what has already been firmly committed for the production of large civil aircraft. This prohibition shall apply both to existing and to future programmes.

Article 4

Development Support

4.1 Governments shall provide support for the development of a new large civil aircraft programme only where a critical project appraisal, based on conservative assumptions, has established that there is a reasonable expectation of recoupment, within 17 years from the date of first disbursement of such support, of all costs as defined in Article 6(2) of the Aircraft Agreement, including repayment of government supports on the terms and conditions specified below.

4.2 As of entry into force of this Agreement, direct government support committed by a party for the development of a new large civil aircraft programme or derivative shall not exceed:

a) 25 per cent of that programme's total development cost as estimated at the time of commitment (or of actual development costs, whichever is lower); royalty payments on this tranche shall be set at the time of commitment of the development support so as to repay this support at an interest rate no less than the cost of borrowing to the government within no more than 17 years from first disbursement, plus

b) 8 per cent of that programme's total development cost as estimated at the time of commitment (or of actual development costs, whichever is lower); royalty payments on this tranche shall be set at the time of commitment of the development support so as to repay such support at an interest rate no less than the cost of borrowing to the government plus 1 per cent within no more than 17 years from first disbursement.

These calculations shall be made on the basis of the forecast of aircraft deliveries in the critical project appraisal.

4.3 Royalty payments per aircraft shall be calculated at the time of commitment of the development support to be repaid on the following basis:

a) 20 per cent of aggregate payments calculated in accordance with Article 4.2 above are payable on the basis of the delivery of a number of aircraft corresponding to 40 per cent of forecast deliveries;

b) 70 per cent of aggregate payments calculated in accordance with Article 4.2 above are payable on the basis of the delivery of a number of aircraft corresponding to 85 per cent of forecast deliveries.

Article 5

Indirect Government Support

5.1 Parties shall take such action as is necessary to ensure that indirect government support neither confers unfair advantage upon manufacturers of large civil aircraft benefiting from such support nor leads to distortions in international trade in large civil aircraft.

5.2 As of entry into force of the Agreement, identifiable benefits to the development or production of any of the products covered by this Agreement, net of recoupment, derived from indirect support shall not exceed in any one year:

a) 3 per cent of the annual commercial turnover of the civil aircraft industry in the Party concerned for the products covered by this Agreement, or

b) 4 per cent of the annual commercial turnover of any one firm in the Party concerned for the products covered by this Agreement.

5.3 Benefits from indirect support shall be deemed to arise when there is an identifiable reduction in costs of large civil aircraft resulting from government-funded research and development in the aeronautical area performed after the entry into force of this Agreement.

Where it can be demonstrated that the results of research and development have been made available on a non-discriminatory basis to large civil aircraft manufacturers of the Parties, benefits deriving from such technologies shall be excluded from the calculation in paragraph 5.2. However, identifiable benefits may result when large civil aircraft manufacturers are responsible for, or have early access to, the conduct or results of such research.

If a Party has reason to believe that other indirect supports provided by a government are resulting in identifiable reductions in the costs of large civil aircraft, the Parties shall consult with a view towards quantifying such reductions and including them in the calculation described above.

Benefits from indirect support resulting from the technology obtained through government-funded research and development or through other government programmes shall normally be calculated in terms of the reduction in the cost of research and development and in the reduction in the cost of the production equipment or production process technology.

Article 6

General Purpose Loans

Parties shall assume no liability for specific loans that aircraft manufacturers make or make available, through direct loans, guarantees, or otherwise, to airlines, other than through official export credit financing consistent with the Large Aircraft Sector Understanding of the OECD Understanding on Official Export Financing.

Article 7

Equity Infusions

Equity infusions are excluded from the scope of this Agreement. Equity infusions will not, however, be provided in such a manner as to undermine the disciplines in the Agreement.

Article 8

Transparency

8.1 To the extent necessary to ensure effective implementation of this Agreement, Parties shall exchange on a regular, systematic basis, all public information of a kind governments make available to their respective national elected assemblies relating to matters covered by this Agreement and its Annexes. Such public information will include at minimum the total amount of government support for new development projects and its share of total development costs, aggregate data on disbursements and repayments relating to direct government supports for commercial aircraft programmes, the annual commercial turnovers of the civil aircraft industry as specified in Article 8.5 b and the aggregate amounts of identifiable indirect benefits received by large civil aircraft manufacturers.

8.2 Furthermore, with regard to prior government commitments for large civil aircraft programmes described in Article 2, a complete list of such commitments by the Parties to this Agreement already disbursed or committed shall be separately provided, including information on the type of repayment obligation and the planned period of repayment. Annual disbursements and repayments relating to these programmes on an aggregate basis shall also be notified to the other Party for each government providing these supports. In addition, a Party shall notify the other Party to this Agreement of any changes which render the terms and conditions of such support commitments more favourable to the recipient, including: changes in the repayment period; failure to repay the support; or reduction of the scheduled repayments.

8.3 Furthermore, with regard to future large civil aircraft programmes, Parties shall provide, at the time of government commitment, the following specific information in relation to development support for each of the governments providing such support:

- the total amount of government support;
- the share of government support as a percentage of estimated total development cost;
- the anticipated return to the government;
- the planned period of repayment of government support; and
- the forecast number of planes on which the calculations made in accordance with Article 4.2 are based.

8.4 In the course of the consultations provided for under Article 11 of this Agreement, Parties shall exchange information on government commitments and support for each of the governments providing such support including but not limited to:

- any changes which render the terms and conditions more favourable to the recipient, including: changes in the repayment period; failure to repay the support; or reduction of the scheduled repayments; and

- annual disbursements and repayments on a per programme basis for new programmes launched in accordance with Article 4. Such information will be provided at the first regular consultation taking place at least twelve months after the end of the year in which the disbursements and repayments are made.

8.5 In the course of consultations under Article 11,

a) Parties will on an annual basis provide information on new government-funded research and development undertaken or initiated during the previous year and on ongoing research and development projects in the aeronautical area, including per programme details on those projects in which large civil aircraft manufacturers participate. This shall include information on the area of activity and the amount of government funding for such projects.

b) Parties will provide information on identifiable benefits derived from indirect supports for each large civil aircraft programme.

This will include recoupment per programme received from large civil aircraft manufacturers. The following specific information will be provided on an annual basis for each of the governments providing such support:

1) the annual commercial turnover of the civil aircraft industry in the Party concerned in relation to products covered by the Agreement;

2) the annual commercial turnover in relation to products covered by the Agreement of each firm in the Party concerned which manufacturers products covered by the Agreement; and

3) the total amount of indirect benefits as defined in Article 5.2 for the civil aircraft industry in relation to the products covered by the Agreement and for each firm involved in the manufacture of such products.

8.6 If a Party considers that additional information directly relevant to the implementation of the provisions of this Agreement is necessary, such information will be provided upon duly motivated request.

8.7 Parties shall upon duly motivated request provide at the time of commitment of new development support non-proprietary information on the critical project appraisal in so far as this relates to the provisions of Article 4.1.

8.8 Any information not in the public domain, which a Party may provide, shall at the request of the Party providing the information, be considered as proprietary. A recipient government shall take all measures necessary to ensure that information thus designated not be disclosed to anyone outside that government even after expiry or termination of the present Agreement. In addition, proprietary information shall not be used in possible trade disputes except for the purposes of confidential internal government discussion and decisions in relation to the implementation of the Agreement.

8.9 Parties shall, unless otherwise indicated, exchange the information specified above on an annual basis. Any disagreement concerning information to be provided pursuant to this Article shall be resolved through consultations under Article 11.

8.10 Parties shall provide information on new infusions of equity or changes in equity positions by governments into firms engaged in civil aircraft production, including the amount and type of equity provided.

8.11 Parties will encourage firms engaged in the manufacture of large civil aircraft to increase the public disclosure of disaggregated financial results of their civil aircraft operations through the separation of reporting on military and civilian aircraft operations and the adoption of lines of business financial reporting. These disaggregated financial results would at a minimum be expected to include information on sources and uses of funds including specific information on revenue, operating income, net assets, capital investment and government equity infusions.

8.12 Nothing in this Agreement shall be construed to require any contracting Party to furnish any information the disclosure of which it considers contrary to its essential security interests.

Article 9

Exceptional Circumstances

9.1 Where, as a result of an unforeseen, exceptional situation, the survival of a significant proportion of the civil aircraft manufacturing activities in one of the Parties[1] and the continued financial viability of the company or the division of a company responsible for such civil aircraft manufacture are put in jeopardy, that Party may derogate temporarily from the disciplines laid down in this Agreement. In this context, the disaggregated financial results of civil aircraft operations will be reported publicly by that company or division[2]. This derogation may not be invoked, however, in respect to the disciplines applying to the launch of new civil aircraft programmes as specified in Article 4.

9.2 The Party concerned shall provide notice of its intentions to the other Party and an opportunity for prior consultations unless it is prevented from doing so for legal reasons and shall in any event notify the other Party immediately of its reasons for invoking this Article and fully disclose the specific measures which it has taken, including the amount and nature of the measures, and their expected duration.

9.3 Specific measures taken by a Party in accordance with this Article:

a) shall be limited in scope and duration to the extent strictly necessary to remedy the difficulties referred to in paragraph 1;

b) shall be designed to return as quickly as possible the beneficiary company to commercial viability;

c) shall take due account of the possible implications for other large civil aircraft manufacturers and shall avoid depressing prices on the world market for civil aircraft by the manufacture of inventory for which no firm order exists.

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[1] For the purposes of this paragraph, "Parties" shall be deemed to include any of the individual Member States of the EC.

[2] These disaggregated financial results would at a minimum include information on sources and uses of funds including specific information on revenue, operating income, net assets, capital investment and government equity infusions.

9.4 If, after consultations pursuant to Article 11, a Party determines that the action taken under this Article significantly undermines the objectives of this Agreement, it shall have the right to suspend some or all of the provisions of this Agreement or to terminate it within 15 days of the conclusion of consultations.

Article 10

Avoidance of Trade Conflicts and Litigation

10.1 Parties shall seek to avoid any trade conflict on matters covered by the present Agreement[3].

10.2 They will not self-initiate action under their national trade laws with respect to government supports granted in conformity with this Agreement for as long as this Agreement is in force. However, nothing in this paragraph shall prevent a Party from abrogating this Agreement on grounds of non-compliance by the other Party.

10.3 In order to avoid trade conflict they will strongly encourage private parties to request the use of the provisions of Article 11 to resolve any disputes on matters covered by this Agreement. If, however, private petitioners request that action be taken under national laws on matters covered by this Agreement, the petitioners' government will immediately inform the other Party and offer to enter into consultations in accordance with Article 11. The Party against whom such action is brought shall have the right either to suspend the application of some or all the provisions of the present Agreement or to terminate the Agreement 15 days after the conclusion of consultations.

10.4 In the conduct of any investigations of trade allegations concerning products covered by this Agreement that have been initiated under national trade laws as the result of private petitions, Parties shall, consistent with their law take account of representations concerning compliance with the terms of this Agreement.

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[3] Action with respect to "matters covered by the present Agreement" refers to trade actions relating to direct and indirect government support as defined by this Agreement. It does not include actions relating to dumping, intellectual property protection, or anti-trust or competition laws.

Article 11

Consultations

11.1 Parties shall consult regularly and, in any case, at least twice a year, to ensure correct functioning of the Agreement.

11.2 A Party may request consultations on any development related to the functioning of the present Agreement. Such consultations shall be held not later than 30 days following the date on which the request is received.

11.3 Parties agree to seek to resolve any disputes within three months of the date of the initial request for consultations. Consultations will not be deemed to be concluded for the purposes of Articles 8 and 9 of this Agreement before this three-month period has expired.

Article 12

GATT Agreement on Trade in Civil Aircraft

12.1 The Parties shall propose jointly to other signatories of the Aircraft Agreement that disciplines along the lines of those laid down in the present Agreement and the interpretative note given in Annex I be incorporated into the aforementioned GATT Agreement. The Parties shall also propose that the improved dispute settlement provisions agreed in the Uruguay Round be used to resolve any dispute arising out of the implementation of the new Aircraft Agreement.

12.2 The Parties shall make their utmost efforts to ensure that these or similar disciplines are incorporated into the Aircraft Agreement or adopted by key signatories at the earliest possible date, and also to expand the coverage of the disciplines provided by this Agreement to all of the products covered in the Aircraft Agreement.

12.3 If multilateralisation has not been achieved in one year, the Parties shall review the question of the continued application of this bilateral Agreement.

Article 13

Final Provisions

13.1 This Agreement shall enter into force on the date of its acceptance by both Parties.

13.2 This Agreement may be amended by mutual consent of the Parties to take into account any new situation which may arise including possible amendments to the Aircraft Agreement.

13.3 One year after the entry into force of this Agreement, either party may withdraw from the Agreement. If a Party wishes to withdraw from the present Agreement it shall notify the other Party in writing of its intentions. The withdrawal shall take effect 12 months after the date on which the notification was received.

ANNEX I

INTERPRETATION OF ARTICLE 4 OF THE GATT AGREEMENT ON TRADE IN CIVIL AIRCRAFT BY SIGNATORIES OF THE AGREEMENT

Article 4 of the GATT Agreement on Trade in Civil Aircraft ("the Agreement") deals with three specific issues:

-- government-directed procurement (paragraph 2)

-- mandatory sub-contracts (paragraph 3)

-- inducements (paragraph 4)

ARTICLE 4.1

Paragraph 4.1 states the general principle, applicable throughout Article 4, that purchasers of civil aircraft[4] should be free to select suppliers on the basis of commercial and technological factors.

ARTICLE 4.2 (Government-Directed Procurement)

This paragraph states that "signatories shall not require airlines, aircraft manufacturers, or other entities engaged in the purchase of civil aircraft, nor exert unreasonable pressure on them, to procure civil aircraft from any particular source, which would create discrimination against suppliers from any signatory".

This means that signatories must abstain from imposing preference policies in favour of or against the suppliers of one or more signatories.

Unreasonable government pressure relating to the selection of suppliers by airlines, aircraft manufacturers or other entities engaged in the purchase of civil aircraft ("purchasers") is also prohibited. "Unreasonable pressure" is any action favouring products or suppliers, or which influences procurement decisions in a manner which creates discrimination against suppliers from any other signatory.

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[4] For the purpose of the Annex, "civil aircraft" is defined as in Article 1 of the GATT Agreement on Trade in Civil Aircraft.

The signatories agree that the following are examples of practices which are not considered as exerting unreasonable pressure:

-- the participation of government or former government representatives on the boards of wholly or partly government-owned purchasers but only if they act in the best commercial interest of the purchaser concerned, and do not influence procurement decisions in a manner which creates discrimination against suppliers from any other signatory.

-- government decisions concerning safety and environmental considerations.

ARTICLE 4.3 (Mandatory Sub-Contracts)

The first sentence states that "signatories agree that the purchase of products covered by the Agreement should be made only on a competitive price, quality and delivery basis". This means that signatories will not intervene to obtain favoured treatment for particular firms and that they will not interfere with the selection of vendors in a situation where vendors of different signatories are competing.

By emphasising that the only factors which should be involved in purchase decisions are price, quality and delivery terms, the signatories agree that Article 4.3 does not permit Government-mandated offsets. Further, they will not require that other factors, such as subcontracting, be made a condition or consideration of sale. Specifically, a signatory may not require that a vendor must provide offset, specific types or volumes of business opportunities, or other types of industrial compensation.

Signatories shall not therefore impose conditions requiring subcontractors or suppliers, to be of a particular national origin.

The second sentence of this paragraph states that "in conjunction with the approval or awarding of procurement contracts for products covered by this Agreement a signatory may... require that its qualified firms be provided with access to business opportunities on a competitive basis and on terms no less favourable than those available to the firms of other signatories." This means that a signatory may require that the manufacturer not discriminate against the signatory's qualified firms with respect to any bid opportunities and to the evaluation of any competitive bids made by those firms.

Article 4.4 (Inducements)

This paragraph states that "signatories agree to avoid attaching inducements of any kind to the sale or purchase of civil aircraft from any particular source which would create discrimination against suppliers from any signatory".

This means that signatories shall refrain from the use of negative or positive linkages between the sale or purchase of civil aircraft and other government decisions or policies which might influence such sale or purchase whenever there is a competition between suppliers of signatories. The following is an agreed illustrative, non-exhaustive list of such prohibited inducements:

- rights and restrictions relating to the airline industry such as landing or route rights.

- general economic programmes and policies, such as import policies, measures aiming at changes in bilateral trade imbalances, policies on alien workers or debt rescheduling.

- development assistance programmes and policies, such as grant aid, loans and infrastructure financing; it is understood that the use of such assistance for the purchase of civil aircraft does not fall under this category to the extent that the granting of these funds is not conditional on such purchase taking place.

- defence and national security policies and programmes.

Without prejudice to Article 4.3, this also means that signatories shall not intervene in any way, nor exert any direct or indirect pressure on other governments or any entity involved in procurement decisions, including the establishment of any link of a negative or positive character between decision concerning the procurement of civil aircraft and any other issue or action in any other area which might affect the interest of the importing country.

ARTICLE 4.2 and 4.4 (Political Representations)

All participants of signatories in the domestic political decision-making process shall not take any action, including but not limited to political representations, pressure or inducements to other governments or foreign airlines, which would be contrary to Article 4 as interpreted in this Annex. Signatories shall draw the participants' attention to this interpretation of Article 4, and shall also use their best efforts to assure that the participants do not take such action.

ANNEX II

For the purposes of the present Agreement the following definitions shall apply:

1. "large civil aircraft"

   With respect to such aircraft produced in the US by existing manufacturers of large civil aircraft and in the European Community by the Airbus consortium, or their successor entities, all aircraft, as defined in Article 1 of the GATT Agreement on Trade in Civil Aircraft, except engines as defined in Article 1.1(b) of the Aircraft Agreement, that are designed for passenger or cargo transportation and have 100 or more passenger seats or its equivalent in cargo configuration.

2. "derivative" means an aircraft model the major design elements of which are derived from a prior aircraft model.

3. "total development cost" as referred to in Article 4.2.

   The following cost items, incurred prior to the date of certification, are those which may be taken into account in assessing the "total development cost" referred to in Article 4.2.

   - preliminary design
   - engineering design
   - wind-tunnel, structural, system and laboratory tests
   - engineering simulators
   - equipment development work, except for work directly financed by equipment and engine manufacturers
   - flight tests, including associated ground support, and analysis necessary to obtain certification
   - documentation required for certification

- the cost of manufacture of prototypes and test aircraft, including spares and such modifications as may be necessary to obtain certification, less the estimated fair market value of flight aircraft after refurbishment

- jigs and tools, except machine tools, for use on specific programmes.

4. "production"

All manufacturing, marketing and sales activities other than those described under point 3 above with the exception of official export credit financing consistent with the Large Aircraft Sector Understanding of the OECD Understanding on Official Export Financing.

5. "indirect government support"

Financial support provided by a government or by any public body within the territory of a Party for aeronautical applications, including research and development, demonstration projects and development of military aircraft, which provide an identifiable benefit to the development or production of one or more specific large civil aircraft programmes.

6. "direct government support" means any financial support provided by a government or by any public body within the territory of a Party which is provided:

(1) for specific large civil aircraft programmes or derivatives or

(2) to specific companies to the extent that large civil aircraft programmes or derivatives directly benefit.

7. "royalty payment" means repayment of a certain predetermined amount of development support per aircraft delivered.

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