

International Trade in Civil Aircraft: Cleared for Takeoff

A great deal of attention has been lavished on the trade agreements negotiated at the recently concluded Tokyo Round of the Multilateral Trade Negotiations (MTN),¹ particularly on the Subsidies/Countervailing Measures, Antidumping, and Customs Valuation Codes.² The international trade accord which heralds the advance of a tariff-free era for the aerospace industry also deserves our note.

On July 26, 1979, President Carter signed into law the Agreement on Trade in Civil Aircraft.³ Passed by nearly unanimous margins in both houses of Congress as Title VI of the Trade Agreements Act of 1979 (Pub. L. No. 96-39, the "Act"), the Civil Aircraft Agreement took effect on January 1, 1980, and sets up a free trade zone among signatory nations⁴ in the importation of all civil aircraft, engines, and flight simulators for civil aircraft.

The signatories have agreed that they will avoid attaching any political or economic inducements or sanctions to the sales of civil aircraft, engines, or parts. Export subsidies are prohibited, as are import quotas or restrictive import licensing requirements. Import monitoring or licensing systems, consistent with the General Agreement on Tariffs and Trade, are not precluded. While signatories may no longer require or pressure their national airlines to procure nationally produced aircraft, governments may require that qualified local firms be permitted to bid on a competitive basis for available subcontracts from companies located in another signatory nation.⁵ Offset pro-

¹Conducted under the aegis of the General Agreement on Tariffs and Trade (GATT) the Tokyo Round of Multilateral Trade Negotiations was spawned by a ministerial Trade Conference meeting in that city from September 12-14, 1973. While it was intended that the framework of GATT be expanded and liberalized by negotiations culminating in a trade agreement to be concluded by 1975, an actual package draft was not available for signature by national delegations meeting in Geneva until April 1979.

²Reprinted, respectively, in MULTILATERAL TRADE NEGOTIATIONS, INTERNATIONAL CODES AGREED TO IN GENEVA, SWITZERLAND, April 12, 1979, House Comm. on Ways and Means and S. Comm. on Finance, WMPC 96-18, 96th Cong. 1st Sess. 1, 45, 67 (hereinafter AGREEMENTS). See, e.g., *Symposium on the Tokyo Round*, 9 GA. J. INT'L & COMP. L. No. 2; Mark K. Neville, Jr., *The Draft Trade Agreements Act of 79*, N.Y.L.J., June 22, 1979 and *Multilateral Trade Negotiations—Changes in Valuation of Imports*, N.Y.L.J., July 27, 1979.

³AGREEMENTS, 289-302.

⁴The term "signatory nations" embraces all States which have formally accepted the Agreement. As of this writing, signatories include the United States, Canada, Japan, Sweden and the nine-member European Economic Community (United Kingdom, France, Germany, Italy, Denmark, Ireland, Belgium, Luxembourg, and the Netherlands). Norway and Switzerland have both signed the Agreement subject to later parliamentary ratification.

⁵Section IV(2) of the Agreement.

duction (the practice of subcontracting production to one nation's manufacturer in return for an aircraft order) cannot be required, nor may inducements (offering a domestic or international route in return for a major equipment purchase) be offered.⁶

Purpose of Agreement

The primary function of the Agreement is to enable the aerospace industry in each signatory nation to compete freely with its counterparts, and not with the foreign governments with which foreign manufacturers are often closely integrated.⁷ The Agreement permits purchases of civil aircraft on the basis of commercial and technological factors, without concern for tariff-induced price distortions or government-sponsored nontariff barriers.

Former Barriers to Trade

Tariff

While several signatories had tariff provisions covering aircraft, the foreign laws were really unenforced.⁸ The United States was the only nation to actually enforce a 5 percent duty on the importation of civil aircraft. The imposition of the 50 percent duty on the maintenance and repair of United States aircraft performed in foreign nations was without parallel, as was the 10 percent tariff on the importation of aircraft seats.⁹

Nontariff

While the removal of formal tariff barriers represents a significant advance in world trade, the major thrust of the Agreement has been the elimination of nontariff barriers.¹⁰ Nontariff barriers include government procurement obligations (*e.g.*, the "Buy American Act," *infra*), the use of government certi-

⁶*Id.*, at IV(3).

⁷*Legislation Necessary to Implement the Multilateral Trade Agreement Concluded in Geneva, Switzerland: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, H.R. Doc. No. 96-13, 96th Cong., 1st Sess. 578 (1979) (hereinafter *Hearings*).

⁸Conversation with George C. Prill, industry spokesman, September 6, 1979.

⁹Duty is levied pursuant to Item No. 723.55, Tariff Schedules of the United States, 19 U.S.C. § 1202. See *Part Mfg. Associates, Inc. v. United States*, 73 Cust. Ct. 42, C.D. 4552, 377 F. Supp. 1356 (1974).

¹⁰The Tokyo Round was the seventh round of trade negotiations held under the auspices of GATT since 1948. The first five rounds were concerned solely with the progressive reduction of tariffs. While the sixth round, the Kennedy Round (1964-1967), was primarily concerned with tariff reductions, nontariff barriers, such as municipal antidumping and customs valuation laws, were discussed. The United States was a party to an International Antidumping Code concluded in 1967, but there were conflicts between the injury standard of that Code and the 1921 Antidumping Act, 19 U.S.C. §§ 160-171. Congress directed that the Treasury Department and the Tariff Commission (now the United States International Trade Commission, or "I.T.C.") follow the terms of the 1921 Act. Act of October 24, 1968, Pub. L. No. 90-634, Title II, § 201, 82 Stat. 1347. The principal object of the Tokyo Round was the elimination or reduction of nontariff barriers and the harmonization of municipal trade laws.

fication procedures or standards to thwart or effectively bar imports, the institution of import quotas and limitation on import licenses, export restrictions, and financial subsidies for products sold below cost in foreign markets.

Products and Services Affected

Civil aircraft, defined in the Agreement to encompass all aircraft other than military aircraft, are accorded duty-free status. Parts, components or subassemblies of civil aircraft are also to be duty-free if they (1) are for use in civil aircraft, and (2) are classified for customs purposes under one of the specific tariff headings listed in the Annex to the Agreement. In addition, all customs duties of any kind levied on the repair of foreign aircraft have been eliminated by Section 601(a)(3) of the Agreement. Of course, this duty-free treatment will not prevent the nondiscriminatory imposition of internal sales, excise, or value-added taxes on aircraft imports since the GATT recognized the destination tax principle under which such taxes are remitted upon exports and imposed upon imports.¹¹

Function of the Agreement

While the provisions of the existing Agreement on Technical Barriers to Trade cover most product standards which operate as barriers to trade,¹² the Civil Aircraft Agreement extends that coverage by providing that parties to the Agreement shall play a "full part" in the formulation of international standards in order to harmonize and broaden technical regulations wherever possible. This will discourage the manipulation of such technical regulations as product standards, mandatory testing, and certification systems to retard aircraft sales between nations.

United States Implementation

The Agreement took effect on January 1, 1980, with a linkage of authority to implement United States obligations under the Agreement with concomi-

¹¹Full or partial exemption or remission upon exportation of direct taxes, or a remission of an indirect tax directly related to the product in excess of the tax levy, would be an unfair export subsidy. See *Zenith Radio Corporation v. United States*, 437 U.S. 443 (1978). Section 771(5)(A) of the Tariff Act of 1930 (hereinafter "Tariff Act") [19 U.S.C. § 1677(5)(A)] expressly incorporates the Subsidies/Countervailing Duty Code Annex's illustrative list of export subsidies, Annex A to the Agreement). These include, other than the excessive remission of indirect taxes or remission of direct tax upon export: direct subsidy payments, more favorable transportation charges on exports than on domestic shipments, and excessive drawback payment of import duties previously paid. See AGREEMENTS, 39-41.

¹²Specifically, the Agreement on Technical Barriers to Trade states that certification requirements and specifications on operating and maintenance procedures shall not be constructed to promote trade obstacles. AGREEMENTS, 233-274, 238. While the imposition of technical regulations may form an integral part of a state's obligation to safeguard product users, such regulations may complicate and inhibit international trade by their introduction without sufficient warning and with less than full disclosure to foreign manufacturers.

tant acceptance of the Agreement by all signatory nations. This ensures that substantially equivalent competitive opportunities are afforded United States manufacturers of civil aircraft.¹³

Duty-free treatment will now be accorded on a Most Favored Nation basis. However, the President is authorized to terminate or withdraw that duty-free treatment if he determines that a signatory nation has withdrawn, suspended, or modified its obligations to the United States under the Agreement without granting adequate compensation. Less drastically, the President may invoke countervailing or antidumping duties¹⁴ if he determines that other signatories have "materially injured"¹⁵ a domestic industry through such devices as internal subsidies for overproduction of aircraft.

The Act has modified the Tariff Schedules of the United States by removing the existing 5 percent tariff on civil aircraft, engines, and specified civil aircraft parts. Section 601 of the Act amends Section 466 of the Tariff Act of 1930 (19 U.S.C. § 1466) to eliminate the 50 percent import duty on the cost of repair parts, materials, or expenses of repairs in a foreign country on a United States civil aircraft.¹⁶ In connection with nontariff practices, Section 303 of the Act permits the President to waive the provisions of the Buy American Act (41 U.S.C. § 10a *et seq.*) and permit the unrestricted procurement of civil aircraft, engines and parts by United States government agencies from signatory nations (aircraft purchased by the Department of Defense and the

¹³As a rule, the President may accept a trade agreement only if he determines that the European Community, Canada, Japan, and Sweden are also doing so. However, he may accept an agreement if all but one of these major industrialized countries also accepts, provided that acceptance by the hold-out demurring nation is not essential to the effective operation of the agreement.

¹⁴The procedure for the imposition of countervailing duties calls for a determination by the Administering Authority (the Secretary of Commerce) under Section 771(1) of the Tariff Act [19 U.S.C. § 1677(1)] that the manufacture, production, or exportation of a class of kind of merchandise imported into the United States is being subsidized, and a determination by the I.T.C. that an industry in the United States is materially injured, or threatened with such injury, or the establishment of an industry in the U.S. is materially retarded by the importation of such merchandise. In such cases, a countervailing duty (in addition to any other duty imposed) equal to the amount of the net subsidy (*see* Section 771(6) of the Tariff Act [19 U.S.C. § 1677(6)]) will be imposed. The imposition of antidumping duties calls for similar investigations and determinations by the Commerce Department and the I.T.C. of material injury or retardation to a U.S. industry by virtue of a sale in the United States of foreign merchandise at less than "fair value." In such instances, an antidumping duty (in addition to any other duty imposed) equal to the amount by which the "Foreign Market Value" (Section 773 of the Tariff Act, 19 U.S.C. § 1677b) exceeds the "United States Price" of the merchandise (Section 772 of the Tariff Act, 19 U.S.C. § 1677a) will be imposed.

¹⁵"Material injury," as used in the Act, means harm which is not inconsequential, immaterial or unimportant. Section 771(7) of the Tariff Act [19 U.S.C. § 1677(7)]. In determining whether there has been material injury, the I.T.C. will apply the standards delineated in Section 771(7)(C) and (D) of the Tariff Act [19 U.S.C. §§ 1677(7)(C) and (D)].

¹⁶A technical amendments act amending the Trade Agreements Act of 1979 is currently under consideration. Section 16 of this bill, H.R. 3122, would add foreign equipment to the list of items exempted from customs duty under the foreign aircraft repair exception of 19 U.S.C. § 1466(f) previously exempted by the Act.

United States Coast Guard fall outside of the Agreement). This waiver applies in addition to any waiver from the Buy American Act necessary to implement the separate Agreement on Government Procurement.

The waiver authority granted by Section 303 of the Act is specifically limited to foreign countries that are parties to the Agreement. This authority, coupled with the authority to modify or withdraw such waivers, will allow the President to ensure that other countries adhere to their obligations under the Agreement.

International Monitoring Body

An intergovernmental Committee on Trade in Civil Aircraft (hereinafter "the Committee") has been established by Section VIII of the Agreement to closely monitor the Agreement and to annually inform signatories of the status of the Agreement (while the Committee shall meet as often as necessary, it must convene at least once a year).¹⁷ Within three years, the Committee will meet and make recommendations that would effectuate a broadening of the Agreement on the basis of mutual reciprocity. While a nation may act unilaterally if it determines that it has been harmed by the activity of another signatory, an aggrieved nation would ordinarily petition the Committee for a review of the matter. In such a case, the Committee will convene within thirty days to equitably resolve the issues in question. Signatories may initiate bilateral discussions in an effort to settle outstanding disputes before resorting to either Committee action or unilateral activity.¹⁸

Future Projections

According to an industry witness at the House hearings, the Agreement will benefit all signatory nations by permitting increased competition in accordance with stipulated rules of fair play.¹⁹ The next two decades will provide a market for the civil aerospace industry of about \$300 billion (one-third in the United States, one-third in Europe, and one-third in other nations).²⁰ While the United States will remain the world's largest single national market, and will see an increase in gross sales, its percentage share of the aerospace market will decline.²¹ The removal of trade barriers, both direct and indirect, will assure a continuing strong United States presence in the aviation market.

¹⁷In this manner, the Committee will establish subsidiary bodies to monitor trade and to function as a dispute resolution and settlement forum.

¹⁸Section VIII(5) of the Agreement expressed the desirability of joint consultation prior to the initiation of a formal investigation as a means of obviating the need for countervailing measures.

¹⁹*Hearings*, 577-78.

²⁰*Id.*, 579.

²¹In 1978, U.S. civil aircraft exports were valued at slightly over \$6 billion, while imports totalled \$938 million. Boeing's share of the total volume of exports declined from 59 to 57 percent of the total world market; McDonnell Douglas fell from 28 to 17 percent; and Lockheed slipped from 7 to 6 percent. Thus, from 1977 to 1978, the U.S. share of the world wide civil aircraft trade dropped from 94 to 80 percent.

While the Agreement is specifically limited to civilian aircraft, its principles may be eventually applied to military aircraft. Though past efforts aimed at integrating Western military forces have been unsuccessful, the Civil Aircraft Agreement may provide an impetus for achieving the standardization of NATO's military hardware. Such coalescence is essential if NATO is to provide a credible deterrent to the unified forces of the Warsaw Pact.

Economic Interests of the United States

The Agreement will benefit the following segments of United States industry:²²

- United States airframe and engine manufacturers, by breaking down nontariff barriers and assuring they will not have to compete against national treasuries;²³
- United States civil aircraft parts manufacturers, by establishing a competitive market for foreign airframe and engine subcontracts and by eliminating offset procurement requirements by foreign governments;²⁴
- United States manufacturers of flight simulators, by making their exported products even more attractive than they already are;²⁵
- United States aerospace labor, by providing a more favorable environment for United States civil aircraft exports (and hence more United States employment opportunities) and restraining any future implementation of protectionist tariffs by the European Community or Japan;²⁶
- United States airlines, by providing duty-free access to foreign built aircraft, increasing competition and making a market for qualitatively superior aircraft at lower prices.²⁷

Finally, overall United States economic interests will be positively affected by the expansion of export opportunities for the aerospace sector, the largest net contributor to the United States industrial trade balance.²⁸

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²²See TRADE AGREEMENTS ACT OF 1979 STATEMENTS OF ADMINISTRATIVE ACTION, H.R. DOC. No. 96-153, part II, 96th Cong., 1st Sess. 505-10 (1979).

²³Domestic subsidies adversely affecting U.S. competitive interests in foreign markets are to be eliminated. If not, the U.S. can raise the issue of unfair trade practice before the Committee or institute countervailing duty proceedings to dissuade foreign governments from such activity.

²⁴European and Japanese manufacturers cannot offer economic or political inducements nor threaten sanctions in connection with aircraft procurement competition.

²⁵See, e.g., the discussion of one U.S. flight simulator manufacturer's success in the page one article *Booming Exports*, in *Wall St. J.*, Oct. 5, 1979.

²⁶By lessening the possibility of a major trade confrontation among the principal industrialized nations, the Agreement enhances the job security of the more than 200,000 U.S. aerospace workers whose positions are dependent upon the continued strength of the U.S. export market.

²⁷U.S. airlines will presumably no longer be parties in civil suits to recover duties paid on imported aircraft, e.g., *Braniff Airways, Inc. v. United States*, 83 Cust. Ct. 162, C.R.D. 79-14, reh. denied, 84 Cust. Ct. ____, C.D. 4837 (1980).

²⁸In 1978, exports of U.S. civil aircraft, engines and components exceeded \$10 billion, (\$10,001,463,300), while imports totalled under \$1 billion (\$943,126,300).