THE TOKYO ROUND: A LABOR VIEW

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I. INTRODUCTION

Organized labor has traditionally supported United States reciprocal trade policies and the expansion of world trade. Particularly since the end of World War II, the American labor movement as a whole has supported the view that international commerce should be as free as possible. This view is based on organized labor's goals of increasing employment and improving living standards both in the United States and abroad.

Organized labor particularly supported the United States Government's efforts to reduce tariffs during the Kennedy Round of tariff negotiations in the 1960's. Since that time, however, labor has increasingly come to realize that the old categories of "free trade" and "protectionism" are obsolete. Those who believe in expansion of trade with other nations are no longer labelled as "free traders" when they believe that such an expansion should be accomplished in a fair and orderly manner. The old concepts have become outdated in the new world of managed national economies, state-owned enterprises and multinational conglomerates. In light of these structural changes in the national and international economies, organized labor currently believes that free trade must be fair trade so that all segments of society may gain from the benefits resulting from expanded commerce in an open trading system.

The structure of the global economy and world trade has changed since the ideal laissez-faire model of trade was first constructed. The growth of non-tariff barriers is not accounted for by the laissez-faire model. In addition, the players themselves have changed in that state-owned or subsidized enterprises now figure prominently in former laissez-faire economies. Indeed, even the procedures have changed. Different rules are applied to different countries depending on whether they have market economies, non-market economies or developing economies; or according to the nature of their business enterprises—statal or para-statal, multinational or domestic. Thus, both the players and the strat-

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egies involved in international trade have changed, making the old rules obsolete.

It is within the context of these new realities that organized labor has directed its policy toward the Tokyo Round of multilateral trade negotiations (MTN), carried on under the auspices of the General Agreement on Tariffs and Trade (GATT).[1] Throughout the negotiations, labor has tried to emphasize to the United States negotiators the altered reality of international trade since the GATT was formulated in 1947. Some recognition of the new structure can be seen in the fact that this round of talks primarily concentrated not on tariff-cutting, as had all previous rounds since 1934, but on other barriers to trade that have been built up over the years, the so-called "non-tariff barriers" (NTBs).

Through the advisory committee process established by section 135 of the Trade Act of 1974,[2] utilizing the Labor Policy Advisory Committee (LPAC) and the Labor Sector Advisory Committees (LSACs) among other means, labor has attempted to influence the negotiating process, and at the same time, educate labor leaders, themselves, on the issues involved in the negotiations. This advisory process will continue as Congress considers the MTN package in the Spring of 1979.

The international trade agreements arising out of the Tokyo Round, which will be ratified by Congress along with domestic implementing legislation, recognize to some extent labor's concerns about the altered nature of international trade. For the most part, however, the labor unions believe initially that these agreements do not go far enough to (1) ensure that, in the words of President Carter's 1978 State of the Union address, "free trade [is] also fair trade,"[3] and (2) ensure that all the players are playing by the same rules. In addition, organized labor feels that the agreements by no means address the full scope of structural changes in international trade. For example, organized labor supports certain regulation of multinational corporations, revision of laws relating to taxation and financing of these corporations and revision of certain customs laws, none of which are addressed by the Tokyo Round agreements. Nor do the agreements address the question of goods produced under substandard working conditions, goods which labor believes should not be allowed to freely compete with domestic

[1] *See* Graham, *Results of the Tokyo Round*, at 153 *supra*.

[2] Trade Act of 1974, Pub. L. No. 93-618, § 135, 88 Stat. 1978 (1975).

[3] President Carter's 1978 State of the Union Address, H.R. DOC. NO. 95-273, 95th Cong., 2d Sess. (1978).

goods and thereby undermine United States employment and labor standards.

Therefore, the Tokyo Round agreements are viewed by labor as only the first faltering steps toward a hoped-for new regime in international trade which would embody the concept of fair trade as its underlying principle. The discussion that follows addresses the major Tokyo Round agreements and assesses how far, in the eyes of labor, these agreements go toward meeting this goal.

II. THE CURRENT TOKYO ROUND AGREEMENTS

A. *The Subsidies Code*

Perhaps the most important of the international agreements, from the perspective of organized labor, is the arrangement on Subsidies and Countervailing Duties (Subsidies Code).[4] The Subsidies Code attempts to limit trade distorting government subsidies given to domestic industries in order to promote exports by those industries. The code further recognizes that domestic subsidies, i.e., subsidies which on their face do not have an export promotion purpose, may also have trade distorting effects. Some trade inhibiting subsidy practices have been indicated on an informal GATT list of examples. However, while the list of prohibitive practices has been updated and expanded, it does not include all forms of subsidization; for instance, the practice of rebating value-added tax is not included. The agreement does, on the other hand, eliminate the present requirement that the subsidy, in order to be actionable, must result in a lower price abroad than in the home market (dual pricing).

To a certain degree the code provides for special and differential treatment regarding the use of export subsidies by the lesser developed countries. Labor would prefer that LDCs be required to adhere to the same export subsidy standards as those demanded of the developed nations. However, as the code stands, a developed country must act to reduce or eliminate subsidies, or else run the risk of having countervailing duties imposed against it; while a lesser developed country is required only to promise or pledge to reduce or eliminate countervailing duties (not to act affirmatively to eliminate them) in order to escape the threat of countervailing duties.[5] If, however, an LDC signatory does not

[4] *See* Graham, *Results of the Tokyo Round*, at 153 *supra*.

[5] Robert S. Strauss Memorandum, (Dec. 27, 1978), Outline on Subsidies and Countervailing Duties, Part V (Developing Countries).

honor its pledge to phase out export subsidies in competitive sectors, the United States may take countervailing action without regard to injury. It should be noted that non-signatory countries can have United States countervailing duties imposed on their subsidized products without an injury test regardless of LDC/DC status.

Adoption of the code would necessitate a change in the United States countervailing duty statute to incorporate an injury test. The code requires a broad test of "material injury." In the implementing legislation, however, it is anticipated that the subsidy injury text will be merged with the very weak antidumping injury test adopted in Section 321 of the Trade Act of 1974.[6] Accordingly, domestic industries will be protected against threatened as well as actual injury, and domestic industries which are trying to become established will also be protected from retardation of growth due to foreign subsidy practices.

The code contains a flexible definition of the industry which may be deemed to be injured by foreign subsidy practices. For example, domestic producers who also import may be excluded from the universe of domestic producers who must show injury from the subsidy. Under certain circumstances, producers within a regional market may be considered to be a separate industry for purposes of ascertaining injury.

Along with this broad definition of industry, the Subsidies Code provides for a fast-track procedure whereby a deposit or bond for possible countervailing duties may be required for up to four months during an investigation where delay would result in injury to a domestic industry. In critical circumstances a countervailing duty may also be imposed on imports entered up to ninety days before the application of provisional duties.

These provisions are deemed by labor to be improvements over the present GATT subsidy procedures. Even the forced incorporation of an injury test into United States countervailing duty law is not necessarily seen as undesirable by all segments of organized labor, particularly those who reason that the Treasury Department failed to enforce the prior legislation adequately even with no test of injury. However, official AFL-CIO policy supports the strengthening of domestic countervailing duty and antidumping laws and does not favor the imposition of an injury test on the ground that subsidies are an unfair practice which should be ac-

[6] Trade Act of 1974, Pub. L. No. 93-618, § 321, 88 Stat. 1987 (1975).

tionable per se. Nevertheless, if an injury test is to be included in United States law, it should be an easily proven one which recognizes a need for growth and expansion of domestic industry.

B. *The Safeguards Code*

Also important in terms of reducing distortions to international trade is the proposed Safeguards Code.[7] This code, if agreed to,[8] will supplement the provisions of GATT Article XIX,[9] under which a country may restrict imports if a product is being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of a like or directly competitive product.

While under the present GATT a country taking action is required to prove injury and consult with other affected countries, the required procedures have not been followed in all cases. For example, many countries restrict imports for safeguard purposes without invoking Article XIX.[10] Certain E.E.C. countries have permitted private industries to negotiate voluntary export restraint agreements with their counterparts in Japan. The details of these private agreements have not been made public, but they may result in diversion of Japanese exports from Western Europe to the United States.

The draft Safeguards Code addresses some export discipline restraints and requires transparent procedures for public hearings and examination of the evidence when a safeguard measure is contemplated. This should result in more openness and "due process" in the practices of other countries than existed prior to the code.

Despite the proposed code's benefits, organized labor groups consider it deficient in certain areas. In the first place, the code's definition of an affected industry is too narrow. For example, no language in the draft code refers to injury to producers of parts or components. An additional concern for labor under the draft agreement is the special treatment to be accorded to LDCs. The developed countries pledged (in the draft code) to avoid safeguard actions on items of special interest to LDCs, but received no cor-

[7] *See* Graham, *Results of the Tokyo Round*, at 153 *supra*.

[8] Negotiations have not been completed on this code. It will not be submitted with the Administration package in the Spring of 1979. If agreement is forthcoming, a later submission date is contemplated.

[9] The General Agreement on Tariffs and Trade, Article XIX, 55 U.N.T.S. 194.

[10] *Id.*

relative guarantee from the LDCs. While there will be provisions for the lesser developed countries to "graduate" from this favored status, labor would prefer that the criteria for graduation in this and in other codes be spelled out, either in the code itself or in the United States implementing legislation.

C. *The Standards Code*

Just as there is fear that under the Subsidies Code present levels of protection of domestic industry could be eroded, so is there fear that United States industrial standards could be reduced by adoption of the Agreement on Technical Barriers to Trade (Standards Code).[11] The Standards Code would attempt to reduce distortions of trade arising from product standards, product testing and product certification procedures which unnecessarily restrict trade.

Under the Standards Code, governments may complain to a committee of code signatories of certain product standards imposed by other signatories. This complaint process may ultimately lead to modification of the trade restricting standard or authorization of retaliatory action. However, as labor points out, neither the enforcement powers of the panel set up to supervise the procedure under the code nor the criteria by which the panel would determine violations are clear. Organized labor is especially concerned that the Standards Code may lead to an undermining of hard-won American standards, particularly occupational safety and health standards, and state and local building codes. Although the Standards Code contains, at several points, exemptions for standards "necessary for the protection of human health or safety,"[12] the labor movement will insist that United States application of the code respect present domestic standards, even though they may incidentally restrict international trade.

One final problem that labor sees in the Standards Code is the absence of time limits for the resolution of complaints. This suggests to labor that any final remedy would probably come too late to help United States industries harmed by foreign standards provisions.

D. *The Government Procurement Code*

The Government Procurement Code[13] is designed to prevent

[11] *See* Graham, *Results of the Tokyo Round*, at 153 *supra*.

[12] Strauss Memorandum, *supra* note 3, Proposed Draft GATT Code of Conduct for Preventing Technical Barriers to Trade § 2.2, 2.6.

[13] *See* Graham, *Results of the Tokyo Round*, at 153 *supra*.

discrimination against foreign suppliers in the public procurement process. In the United States, for instance, this code would do away with the Buy American Act[14] for all covered entities and its six per cent (or twelve per cent for small businesses or high unemployment areas) price margin in favor of domestic bidders on government contracts.

Some unions believe that the opening of opportunities for United States companies to bid on foreign procurement contracts as well as the creation of more open procurement systems in other countries should be to our advantage. However, the AFL-CIO points out that because of small business inexperience in foreign trade and the absence of institutions to help small businesses bid on foreign contracts, the only United States companies likely to benefit from foreign procurement contracts will be the largest companies.

Another problem perceived by labor arises from the fact that the Procurement Code contains no strict rule of origin, even though only those countries which are signatories to this particular code will be covered by its provisions. Without a tight rule of origin in the code or in the domestic implementing legislation, a foreign company, after winning a bid, could supply a product which in reality had been manufactured (for the most part) in a non-signatory country. A rule should be added that would require that a designated percentage of a product originate in a signatory country in order for it to be considered a true product of that particular country; moreover, the rule should provide a mechanism for "tracing" a product to the true country or origin. In addition, organized labor advocates a formal two-track system for United States procurement under the new code. One system would be for bidders from signatory countries and another much more rigid system would be for non-signatory countries. This would induce wider adherence to the code.

It should be noted that in response to labor's concerns, United States negotiators excluded import-sensitive products such as textiles and apparel, hand tools and stainless steel flatware from coverage by the code. These products, which currently have a fifty per cent differential under the GSA Appropriations Act,[15] should not be affected by the code. The AFL-CIO also argues that state and local governments' Buy American Acts should not be affected

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[14] Buy American Act, Pub. L. No. 86-624, § 28, 74 Stat. 419 (1960).

[15] *See generally* 40 U.S.C. § 475 et seq.

(since their modification is not strictly required by the code), nor should purchases made under federal grants to the states and localities.

E. *The Customs Valuation Code*

Unlike the narrow focus of the Government Procurement Code, the Customs Valuation Code[16] would have broad application to all goods imported into a signatory country. Its purpose is to establish more uniform methods of appraising imports for duty purposes, thereby helping traders to more accurately predict the amount of duty owed. Among other things, the methods of valuation provided by the code will have the effect of doing away with the American Selling Price (ASP) method of valuation, the retention of which affected unions support.[17]

The code also provides appeal rights for those who wish to contest a valuation. However, the code does not protect the rights of persons other than traders. Clearly such other groups as United States workers and producers should have standing to appeal decisions under the code.

Moreover, organized labor hopes that the United States will adopt the Customs Valuation Code on a c.i.f. basis (the cost of getting goods to the point of exportation, plus the cost of shipping and insurance) and that this adoption will not be considered as a new barrier to trade which will require concessions to other signatories. Labor recommends this shift from an f.o.b. basis (which includes only the cost of getting goods to the point of exportation) because the result would make American goods more competitive with imports and would lessen the bias toward trade with more distant countries that an f.o.b. basis of valuation fosters.

F. *GATT Reform*

The final major agreement now contained in the Tokyo Round package of particular concern to labor is the Framework Agreement on GATT reform.[18] This agreement covers primarily four areas: special treatment for LDCs; safeguard action for developmental and balance of payments purposes; consultation, dispute settlement and oversight; and export restrictions.

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[16] *See* Graham, *Results of the Tokyo Round*, at 153 *supra*.

[17] As the basis for this statement of the labor position, the author relied on the comments of individual labor leaders.

[18] *See* Graham, *Results of the Tokyo Round*, at 153 *supra*.

Here, as in the Safeguards Code, organized labor sees the special and more favorable treatment to be accorded to LDCs, without a provision for "graduation" from that status, to be detrimental to the agreement. It is important, labor believes, for a definition of the concept of graduation to be incorporated into the United States enabling legislation.

The consultation, dispute settlement and surveillance procedure provisions of the framework agreement are essentially an affirmation of existing GATT commitments. Perhaps the real importance of the framework agreement is in its recognition that reform of the international trading system is a continuing process.

III. CONCLUSION

Not only does labor see the necessity for further reform, but also the necessity for clarification, through domestic implementing legislation or otherwise, of the present Tokyo Round package. The main concern is the relationship of the individual agreements to each other and the practical application of the multiplicity of dispute settlement or surveillance procedures contained in the package. Clearly the agreements could have an impact on preexisting domestic laws and procedures. In this event, labor wants to insure that the view of United States workers and industry will receive adequate representation as the new procedures are applied. Most important to labor is obtaining some means by which both American workers and industry can be assured that any relief or remedy provided under the agreements will be delivered to them in time. As Ray Dennison, the Associate Director of the AFL-CIO Department of Legislation told the Senate Finance International Trade subcommittee during hearings on these agreements, "[i]f the procedures do not result in swift action, a great many Americans will learn that a right delayed is no right at all."

Organized labor would like to be assured that the Tokyo Round agreements will allow for growth and expansion of United States industries and not just preservation of a status quo. In the final analysis, labor believes that the development of an open, nondiscriminatory and fair world economic system, in the spirit of the Trade Act of 1974, must depend upon the competitive strength of the individual participants.