

# THE UNITED NATIONS IN THE ERA OF THE 'SOCIAL CLAUSE'

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## **INTRODUCTION**

"For many decades", said Steve Chernowitz,<sup>1</sup> "the trade regime has been parochial." It has its own rule book, its own actors, and its own language. Today this isolationist tendency is threatened. Environmentalists, public interest groups and labour unions are trying to import new ideas into the trade regimes. Among many other issues, there has emerged a controversy regarding the Social Clause.

Before one can move any further, it is important to understand what the 'social clause' is. Simply put the 'social clause' is the linking of trade agreements with labour standards.<sup>2</sup> That means Germany will not accept carpets from the Indian carpet industry if India uses child labour to make these carpets.

A country which accepts the social clause indicates its intention to see that global competition takes place within the broader framework of fundamental human rights at the work place. The air is however thick with conspiracy theories, which see this development as a subtle but deliberate attempt on the part of the industrialised nations to frustrate the valiant attempts of the developing world, to increase its share in the world trade.<sup>3</sup>

This article attempts to see whether the social clause is a condition precedent to concurrent social and economic development or whether it is indeed the threat that it is feared to be. It will further examine the role of the UN as opposed to the WTO and other Bretton Woods Institutions in the context of Arts 2(4) and Art. 2(7) of the UN Charter.

## **BRIEF HISTORY OF THE SOCIAL CLAUSE**

This section attempts to determine whether the social clause is a recent phenomenon and whether hence bad motive or malafide intentions are imputable to any country or block within the UN, regarding the clauses (un)popularity.

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1 Steve Chernowitz, 'The WTO and Social Issue', 28(5) *J.W.T.* 17 (1994).

2 The labour issues that the social clause deals with: (a) International Labour Organisation Convention 29 and 105 - forced or compulsory labour; (b) International Labour Organisation Convention 87 - Freedom of association and the right to organise; (c) International Labour Organisation Convention 98 - application of principles of the right to organise and to bargain collectively; (d) International Labour Organisation Convention 100 - equal remuneration for men and women (e) International Labour Organisation Convention 111 - discrimination of any sort between races, castes, etc.; (f) ILO Convention 134 - minimum age requirements.

The Havana Charter of 1948, which was the forerunner of GATT, included the following declaration,<sup>3</sup> "the members recognise that all countries have a common interest in the fulfillment and maintenance of fair working conditions, so far as productivity allows. The members recognise that unfair labour conditions, particularly for production in export create difficulties in international trade and every member should therefore take appropriate and realistic measures to abolish such conditions in its territory."

From the above it becomes quite obvious that the social clause is almost as old as the UN; in fact this conclusion is warranted by the following illustrations. Article XX(e) of GATT 1947 allowed members to take measures against products produced by prison labour.<sup>4</sup> In the last two decades we have Art. 45 of the 6th International Tin Agreement,<sup>5</sup> which provides that "members declare that in order to avoid the depression of living standards and the introduction of unfair competitive conditions in world trade, they will seek to ensure fair labour standards in the tin industry". Similar articles are also found in the International Sugar Agreement,<sup>6</sup> the International Rubber Agreement,<sup>7</sup> the International Cocoa Agreement,<sup>8</sup> and finally the Preamble to the WTO itself.

Therefore it should now be obvious that the social clause is not new, yet the controversy surrounding it is. This can possibly be explained because of the 'détenté' in the cold war following the untimely demise of the USSR. What this leads to is a change in the power dynamics within the UN and the focus thus shifts from a policy of arms build-up, in pursuance of the Mutual Assured Destruction (MAD) agreement to one in which peaceful issues like Human Rights invade volatile regimes like trade.<sup>9</sup> The recent efforts of the US and European Commission in December 1993, to incorporate a social clause in the WTO has been thwarted by compelling deadlock and strong protests from most of the South Countries. However the Agreement includes a statement of intentions to discuss the question of social standards in the domain of international trade. This gives rise to clear and present danger that the WTO's binding dispute resolution mechanism may become a weapon in the hands of the developed countries in imposition of certain social structures prevalent in the West on to everybody else. This sort of a view is in

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3 'India and the Social Clause', *The Hindu Online*, <http://www-webpage-com/hindu/951014/05>.

4 Paul Waer, "Social Clause in International Trade - the debate in the European Union", 30(4) *J.W.T.* 25 (1996).

5 Sixth International Tin Agreement, O.J. (1982) L342/1.

6 Art. 28 of the International Sugar Agreement, O.J. (1988) L58/4.

7 Art. 53 of the International Rubber Agreement, O.J. (1988) L58/15.

8 Art. 44 of the International Cocoa Agreement, O.J. (1994), L52/26.

9 *Supra* no. 4 at 26.

contradistinction to the declaration in the New International Economic Order (NIEO).<sup>10</sup>

Another possible way of looking at this would be to impute a highly fanatical humanitarian and moralistic character to those who view the clause with favour. However, before one decides whether it is the economic or moral critique of the social clause which is valid, it is imperative to understand whether the social clause whatever be its motives behind its resurrection is violative of charter principles or not.

### ***SOCIAL CLAUSE AS OPPOSED TO CHARTER PRINCIPLES***

States in their ongoing relations employ various means to influence each other's policies. These means may, for the purpose of this article be divided into those of a co-operative and those of a coercive character. Coercion however disguised may be at the very lowest of levels, a threat.

Protectionism of any sort, is coercion. Every restriction on imports of carpets made by child labourers is an attempt by the German Government to compel some Germans to pay higher prices to other Germans than they would otherwise have paid. No consumer offers voluntarily to pay these higher prices and the Indian State does not voluntarily agree to reduce exports of carpets. Higher prices are paid and exports are restricted only because numerous German service customs officials leave nobody any choice. In effect all protectionism is coercion, and the social clause is the epitome of protectionism.<sup>11</sup>

#### ***Article 2(4)***

The debate regarding Art. 2(4) is whether economic coercion can be deemed as 'use of force'. Art. 2(4) clearly lays down that member nations should refrain from the "threat or use of force against the territorial integrity or political independence of any State".<sup>12</sup>

Some writers<sup>13</sup> have read into Art. 2(4) the restrictive word 'armed' which does not appear in the text and was not thought to be a restriction in pre-Charter norms or in the drafting of the Charter itself.

The assumption that these writers base their argument on is that since the Preamble of the Charter states specifically that 'armed force' shall not be used save in the common interest, other forms of coercion (economic, diplomatic, ideological)

10 The New International Economic Order (N.I.E.O.) has put forward the idea that there should be a shift of political and economic power from the developed to the developing countries passed by the UN General Assembly and ratified by G-77.

11 James Bovard, 'Morality and Protectionism' 25(1) *N.Y.U.J. International L. & Pol.* 235 (1993).

12 Art 2(4) of the United Nations Charter.

13 Tom Farer, 'Political and Economic Coercion in Contemporary International Laws, 68 *A.J.I.L.* 415 (1974).

will go unregulated. This is despite other charter objectives mentioned concerning world public order and human dignity.

These writers have ever convincingly explained that economic aggression must remain unregulated when such a mode of coercion can be of such an intensity that it is comparable to an armed attack upon another State.

These writers also favour "this myopic and restrictive approach to the regulation of coercion hold the view that to prohibit other forms of coercion would allow a state to recognize its right to self defence in response to economic aggression, and diplomatic aggression.<sup>14</sup>

Really what this depends on is how Art. 5 is interpreted. Is the actual 'economic aggression', diplomatic coercion of such an intensity that it threatens the security of another state resulting in the other state using its right of 'self-defence'. Although Art. 2(4) and Art. 51 are usually 'complementary opposites', they do not cover all the complementarity of norms that are relevant today.<sup>15</sup> Once it is realized that Art. 2(4) is not just a use of force against the territorial integrity, political independence or security interests of another state, it will automatically be realised that a violation of Art. 2(4) will not reach a situation to create the 'condition of necessity' for a response under Art. 51. Similarly although a state may not respond under Art. 51, this does not mean that Art. 2(4) has not been violated.

Further proof that Art. 2(4) prohibits more than the threat or use of 'armed force' can be seen in a series of UN Charter documents which declare the goals that are sought to be shared by the international community. Examples of these documents are (a) the Vienna Convention on the Law of Treaties, 1969; (b) the Soviet Draft Resolution on the Definition of Aggression, 1984; and (c) the Declaration on Inadmissibility of Intervention into the Domestic Affairs of States, 1965.

The General Assembly has expressly declared in the Declaration on Friendly Relations<sup>16</sup> that it is the "duty of states to refrain in their international relations, from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state". The Declaration further states that "armed intervention and all other forms of interference or attempted threats against the personality of the State or against the political, economic and cultural elements, are in violation of international law".

The General Assembly declaration on the Inadmissibility of Intervention, 1965,<sup>17</sup> has also stated similar objectives including the free pursuit of "economic, social and cultural development and the interrelated ban on economic, political or

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14 Jordan J. Poust and Albert P. Blaustein, 'The Arab Oil Weapon - A threat to International Peace', cf. 68 *A.J.I.L.* 415 (1974).

15 *Supra* n. 14 at 417.

16 *Supra* n. 14 at 418.

17 Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression', 71 *A.J.I.L.* 230 (1977).

any other type of measure to coerce another state from impossible objectives of dominance or to extraction of advantages."

These declarations from the UN Charters make it amply clear that use of force is not simply confined to armed force but can be extended to the ambit of economic coercion. It is probably best summarized in the strong resolution passed by the General Assembly on Dec. 17, 1973<sup>18</sup> "Deplores acts of states which use force, armed aggression, economic coercion or any other illegal or improper measures in resolving disputes concerning the exercise of the sovereign rights."

*Article 2(7)*

The social clause has been described by many people as the consensus of the fact that global competition must take place within the broader framework of fundamental human rights at the workplace. One cannot deny that the 7 conventions of the ILO which have been enunciated before in this article<sup>19</sup> are co-human rights issues as opposed to good practice. Therefore one cannot deny the truth in the statement that these rights may in theory have an international character primarily because the conventions are widely accepted.

However this raises some very important issues such as a construction of the social clause on a theoretical plane would seem to deny the fact that countries who are not parties to this convention/have not ratified this convention have nay responsibility at all in the field of labour standards. Therefore we are once again left with the two extremes, either as it is suggested the social clause is made part of the WTO and thus, sanctions are institutionalised against breach of such clause. The other view which is radical and perhaps reflects classical realism is that illimitable external sovereignty of nations and their right to determine what is domestic and what is international. The crux of the matter rests on the interpretation of Art. 2(7) of the UN Charter.

Art. 2(7) has always been considered as the symbol of sovereignty. The concept of sovereignty includes the power of auto-interpretations 'of international obligations'. However, the question that crops up is whether this sovereignty that every member state is entitled to is origins maintain the right to interpret Art. 2(7).

The Rapporteur Committee<sup>20</sup> report has proposed that in day to day operations of the organisation each organ will interpret such parts as are applicable to its particular functions. In response the member states claim that day to day operations are a far cry from highly political issues.

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18 *Supra* n. 14 at 418.

19 *Supra* n. 2.

20 J.S. Watson, *Autointerpretation, competence and the Continuing Validity of Art 2(7) of the UN Charter*, 71 *A.J.I.L.* 60 (1977).

The proposal to allow the International Court of Justice to interpret Art. 2(7) is out of question because a state would have to consent on its jurisdiction under the procedures set out in Art. 36 of the Statute of the Court. On many important issues most states will be unwilling. Similarly even when a state is willing to have a court decide a matter, the organisation is not.

Another argument put forward by the UN is the concept of 'customary interpretation' of International Law. This concept tries to put forward the point that the meaning of any provision in the Charter can be found in the practice of the UN Organs, and this practice becomes valid international law on the basis of customary acceptance regardless of the specific provisions in the Charter, or the real or presumed intent of the provision.

What this argument lacks is an in-depth analysis of the relationship between usage and custom and the mechanism by which usage becomes custom. The UN is a political organisation where the motivation for behaviour is ad hoc or political and does not meet the requisites of customary international law. Most of the practices in the UN are governed by political considerations.

We believe that the clinching argument in favour of state sovereignty and individual judgment regarding what be declared domestic and what be not lies in the fact that the UN is not a global government, it is merely a supranational body. Further, one must come to the question of enforcement. "When states which are opposed in supranational jurisdiction begin to comply with the organisation's resolutions against their political interests and because of a feeling that they must comply then Art. 2(7) will truly have been made redundant."<sup>21</sup>

So the ultimate question is whether a resisting state will wish to be a part of a hostile world body at all in the light of the fact that the cold war is over and that you want one big brother to protect you against the other, the divide between the North and the South can assume proportions enough to rend the UN apart as the two sides are no longer equal.

Assuming that the 'social clause' is indeed an international affair, it becomes important to see whether it is a legitimate international affair, this will be achieved in the next section by trying to determine the motive of its proponents.

### ***THE LEGITIMACY AND FORUM FOR DISCUSSION OF THE SOCIAL CLAUSE***

The legitimacy of the social clause determines on whether we adopt the moral or the economic critique of the same. On the one hand as we have explained earlier is the moral aspect of the social clause which manifests itself as international fundamental human rights at the workplace. If such a motive can be attributed, the moral imperatives rests with the proponents and whatever be the costs to the nations

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21 *Supra* n. 20 at 82.

on whom the clause is being imposed, man's benefits must ultimately prevail. Such a view of the clause for instance found in the joint statement issued as recently as January 1986<sup>22</sup> regarding the need for a social clause which in spirit is for the benefit of all humankind.

On the other hand, the economic critique of the social clause is a rather nasty affair. "Those countries in the West which are suffering from unemployment are looking for a scapegoat, a convenient scapegoat is the foreigner and I suspect that the Western stand on such questions as child labour stem from this rather than any genuine concern."<sup>23</sup> Thus the social clause stems from the concept of de-industrialization.

The economic critique is that when production is based on coercive relationships, it is no longer clear that the market outcomes are good for all. Foreign companies go to the Third World to employ people there because labour is cheap. So there is unemployment in developed countries. Alternatively when a foreign country employs labour from foreign markets, the Third World countries which make products with cheap Third World labour and sell products at a lower cost and thus become more competitive. Therefore the developed countries feel that unless Third World labour is paid more money (since its own labour cannot be paid less money) it stands to lose either way. Hence the social clause is used inter alia to forcibly raise wages and labour cost.

The concept explained above is in economic theory called 'kaleidoscopic comparative advantage'. This critique will clearly show that the social clause is nothing but disguised protectionism and there can be no morality in protectionism.

The conspiracy theories by thus undermining the legitimacy of the social clause expose the impositionary character of the Bretton Woods Institutions themselves. But that is another issue altogether.

For the purpose of further analysis we shall now proceed with the rather outrageous assumption that the social clause is morality personified. This brings us to the question as to what the proper form would be for the enforcement of the clause.

The fact that the WTO has been considered as a forum is perhaps indicative of the failure of the International Labour Organisation. The proper forum for a human right issue cannot be an multilateral trade forum. The complications that arise with respect to state sovereignty and state pride if it were forced to do actions which though good for the labourers in effect cause a change in the social structure or a sudden redistribution of wealth and society have already been explained above.

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22 .<http://www;-newswire.coba/releases/Jan 1996/24>. It is for the first time that labour organisations of two different countries [(a) Canadian Labour Congress (Canada), (b) Central Unitoria de Trabajadoras (Chile)], have agreed to objectives and goals prior to the signing negotiations on a trade agreement.

Hence, the proper forum for this clause would be one which primarily rests on unilateral acceptance of states as a consequence of negotiations rather than a unilateral imposition from without.

So what we are looking at currently is a scenario in which a UN agency and a UN Special Agency adopt techniques which they are not mutually exclusive and are not coterminous special agencies like the WTO/GATT have always been guilty of inadequate interaction with their regular counterparts like ILO and United Nations Environment Programme (UNEP). The social clause best demonstrates this, for in a time when the WTO seems to be focussing on labour issues, the ILO seems hardly to figure in the discussion.<sup>24</sup>

So unless the 'disorganisation' is eliminated and harmony is achieved not merely in objectives but goal attainment as well, the UN agencies and the UN itself will be ineffective, controversial and hence a financial blackhole. The social clause best exemplified this controversy and if anything at all is to be gained from this debate, it is that forum for such human rights should not be linked with trade issues and even if such linkages is necessary, the means should be negotiation and not the binding dispute resolution system provided by the WTO.

### *CONCLUSION*

The Cold War is over and the North-South war rages hard and bitter, the dividends of peace are nowhere in sight. An insight into the UN in the era of the social clause is very helpful in our search for the elusive 'dividends'. The following three proposals are submitted to contain the debate on the social clause and to prevent the rise of any further such acrimonious human rights disputes, which are just waiting to explode.

- a) Art. 2(4) must now recognise economic aggression as use of force as the importance of trade and economics as a substitute of military might can no longer be ignored.
- b) Art. 2(7) should remain autointerpretative, so that in the absence of an eastern block to neutralise the western block, developed countries cannot at will determine what is domestic and what is not, and impose the same on everybody else.
- c) Human rights and trade issues be kept as far as possible for while the concept of human rights are merely endeavours by UN organisations at achieving good practices, linkages with trade is meddling with sovereignty.

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23 D. Gore Booth (U.K. High Commissioner) as reported in S. Swaminathan, 'Social Clause: A Search for Scapegoats', *The Hindu Online*, <http://www.webpage.com/hindu/951014/05>.

24 Jagdish N. Bhagwati, 'No challenges to the Doctrine of Free Trade' 25(1) *N.Y.U.J. International, L. & Pol.* 219 (1993).