
International Trade and the GATT/WTO Social Clause: Broadening the Debate

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1. Introduction

Whether international human rights standards should be brought within the General Agreement on Tariffs and Trade (GATT) and World Trade Organisation (WTO) agreements¹ by way of a new “social clause”, is *not* currently being debated by governments multilaterally. This is despite a flurry of activity to mainstream human rights throughout the United Nations (UN) following the 1993 Vienna World Conference on Human Rights and the 1995 Fourth World Conference on Women.² The social clause proposal aims to link the human rights standards of some of the most highly ratified International Labour Organisation (ILO) Conventions with the GATT and WTO agreements. But it continues to falter. Governments are looking to strengthen the existing UN human rights machinery and to improve inter-agency cooperation and coordination, rather than to amend the GATT/WTO agreements to

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1 The Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations was concluded on 15 December 1993 and signed by more than 120 States in Marrakesh, Morocco, in April 1994. The Final Act comprises the text of the Final Act, the Agreement establishing the World Trade Organization (the WTO Agreement) and agreements annexed to it, and also other Ministerial decisions and declarations. The Uruguay Round agreements came into force from 1 January 1995: General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (the Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, December 15, 1993, with introduction by A Porges (1994) 33 *ILM* 1. The WTO had 132 members at 22 October 1997: <<http://www.wto.org>>.

2 *Coordination of the Policies and Activities of the Specialized Agencies and Other Bodies of the United Nations System Related to the Coordinated Follow-up to and Implementation of the Vienna Declaration and Programme of Action: Report of the Secretary-General*, ECOSOC, 1 June 1998, UN Doc E/1998/60; *Follow-up to the Fourth World Conference on Women: Review of Mainstreaming in the Organizations of the United Nations System: Follow-up to and Implementation of the Beijing Declaration and Platform for Action: Report of the Secretary-General*, 20 January 1998, UN Doc E/CN.6/1998/2.

include human rights exceptions to free trade. The WTO is pursuing trade and environment issues more seriously however, and a recent Appellate Body ruling on an environment-related GATT exception, discussed below, is likely to be acclaimed by environmentalists as an overdue breakthrough.³

This article examines recent multilateral considerations of the social clause proposal and suggest that it warrants continuing discussion. It is argued that its scope should be broadened to include customary and treaty-based human rights, and environmental standards, and that these could be brought within Art20 of the GATT.⁴ The article first examines the terms which are proposed for the social clause, and related proposals. It then examines its lack of progress in multilateral fora. It then reviews selected GATT and WTO articles and processes relating to trade and environment, followed by an examination of some of the practical and philosophical arguments for and against a broadened social clause. It concludes by suggesting that a broadened social clause could promote sustainable and peaceful development, and more humane governance.

2. The Content of the Proposed Social Clause

In the 1940s, full employment, fair labour and natural resource standards were proposed for inclusion in the Havana Charter establishing the International Trade Organisation (ITO). The ITO was not established though, with the GATT taking its place.⁵ Negotiating proposals to include a general article on workers' rights and international environmental agreements in the GATT were not adopted. Proponents of the social clause today still argue that it should be included in the GATT.

The GATT⁶ is a post-WWII multilateral agreement which is intended to promote international economic cooperation, and prevent any continuation of the economic mercantilism which exacerbated international tensions between World War I and II. The economic discourse to which the GATT is most clearly indebted includes works by Adam Smith on trade specialisation, David Ricardo on comparative advantage, and Eli Heckscher and Bertil Ohlin on relative factor endowments for comparative advantage.⁷ The current GATT and WTO agreements assume that an open, non-discriminatory trading system is best able to promote undistorted trade, efficient and highly productive growth, and aid a transition to sustainable development for

3 World Trade Organisation, *United States - Import Prohibition of Certain Shrimp and Shrimp Products: Report of the Appellate Body (AB-1998-4): WTO Doc. WT/DS58/AB/R*, 12 October 1998.

4 Quoted in the text after n10.

5 S Charnovitz "Linking Topics in Treaties" (1998) 19(2) UPJIEL 329.

6 The original GATT was agreed to on 30 October 1947, and came into effect on 1 January 1948. Second and subsequent GATT negotiating rounds included Annecy (1949), Torquay (1950-1), Geneva (1955-6), "Dillon round" (1960-1), "Kennedy Round" (1964-67), Tokyo round (1973-9) and the Uruguay Round (1986-94): *Trade Policies for a Better Future: The "Leutwiler Report", the GATT and the Uruguay Round with an Introduction by Arthur Dunkel* Martinus Nijhoff Publishers Dordrecht, 1987, pp 160-166.

7 For a theoretical overview see for example: JR Markusen and JR Melvin *The Theory of International Trade and its Canadian Applications* Butterworths, Toronto, 1984.

all economies. Social considerations are not dominant in this discourse. GATT and WTO Parties assume that growth with only limited constraints will promote employment and improve social conditions.⁸ From this perspective, enforceable labour standards can be seen as an interference in market forces, and as inhibiting comparative advantage and competition amongst employers. Targeted environmental restrictions on imports from States with unsatisfactory domestic environmental laws are also seen to undermine free trade and non-discriminatory market access.

The GATT does include some general exceptions, which have tended to be construed narrowly. Under Art 20 for example, States Parties can restrict the import of products if they are produced by prison labour, contrary to public morality or health, or place animal, plant or human life or health at risk. Trade restrictions can also be imposed so as to conserve exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption. None of these measures may be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination however. States Parties may also claim exemptions for technical measures taken for environmental protection,⁹ and for emergency or national security measures.¹⁰

The chapeau (introductory clauses) and key paragraphs of Art 20 of the GATT provide:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

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- (b) necessary to protect human, animal or plant life or health;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

...

These exceptions have been construed narrowly so as to preserve the objectives of the GATT and not to erode its promotion of the right of access to markets.

The GATT requires of its States Parties several basic commitments. These

8 "Declaration on the contribution of the MTO [WTO] to achieving greater coherence in global economic policymaking" (1994) 33 *ILM* 139.

9 Agreement on Technical Barriers to Trade (TBT), and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), Annex 1A to the Agreement establishing the World Trade Organisation (1994) 33 *ILM* 1128.

10 Art 19 (Emergency Action on Imports), Art 21 (Security Exceptions).

include a willingness to negotiate tariff reductions, the same treatment of own-country and overseas nationals under trade laws and procedures,¹¹ equal treatment for imported and domestic goods,¹² transparency and notification, and the elimination of quantitative restrictions on imports and exports.¹³ But since the early 1970s governance by the GATT has broadened from a primary focus on trade liberalisation and trade in goods, to include issues such as subsidies, customs, services, agriculture, intellectual property, and foreign investment.

The Uruguay Round of multilateral trade negotiations, which began in 1986, marked a high-point for the inclusion of broader issues such as intellectual property, trade-related investment measures, and trade in services within the established GATT agenda. Many of the Uruguay Round instruments are to be administered by the new WTO which was established on January 1, 1995.

Recent proposals for a GATT/WTO social clause have been supported by the governments of the United States (US), France, Belgium, Mexico, the Netherlands, the European Parliament,¹⁴ Scandinavian Governments,¹⁵ and peak international trade unions organisations.¹⁶ Various academics also support the idea.¹⁷ The U.S. and the European Union (EU) particularly, wish to expand the GATT/WTO agenda to include labour standards, and competition policy and corruption, but G77 countries are resisting this on the grounds that increasingly globalised standards erode national sovereignty and comparative advantage in selected areas.

The core standards, which most supporters of the social clause agree should be linked with GATT and WTO processes and remedies, are found in various ILO Conventions that have a high ratification rate. These Conventions promote:

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- 11 Art 3: national treatment on internal taxation and regulation.
 - 12 Art 1: most-favoured-nation treatment.
 - 13 Art 11: general elimination of quantitative restrictions.
 - 14 The incorporation of human rights standards within international trade law has been discussed in the European Parliament periodically since the early 1980s. The European Parliament's Standing Committee on Foreign Affairs, Security and Defence Policy Subcommittee on Human Rights conducted a public hearing on the social clause in 1997: "Public Hearing on the Social Clause: Human Rights Promotion or Protectionism? Brussels 17 and 18 June 1997: Summary Record of Presentations" <<http://www.europarl.eu.int/dg7/hearings/sc1b/soclause/en/doc4.htm>>. In 1994, the Committee on External Economic Relations endorsed a resolution which *inter alia*, called for a ban on imports of goods produced with child labour, and for an amendment to Art 20(e) of the GATT: European Parliament *Report of the Committee on External Economic Relations on the Introduction of a Social Clause in the Unilateral and Multilateral Trading System (Rapporteur André Sainjon)* Bruxelles 6 January 1994 DOC_EN\RR\243\243101; PE 205.101/fin.fr.-OR.fr. at 3,4-6.
 - 15 VA Leary "The WTO and the Social Clause: Post-Singapore" (1997) 1 EJIL 118 at 120.
 - 16 Including the International Confederation of Free Trade Unions (ICFTU), and the European Trade Union Confederation (ETUC). But some members of these umbrella organisations oppose the social clause, such as the Indian National Trade Union Congress: N Haworth and S Hughes "Trade and International Labour Standards: Issues and Debates over a Social Clause" (1997) 39(2) JIR 179 at 190.
 - 17 S Charnovitz "The World Trade Organization and Social Issues" (1994) 28(5) JWT 17; E de Wet "Labor Standards in the Globalized Economy: The Inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organisation" (1995) 17 HRQ 443.

- freedom of association, collective organisation and bargaining¹⁸
- freedom from forced and compulsory labour¹⁹
- non-discrimination in employment,²⁰ and
- abolition of exploitative forms of child labour.²¹

Many of the obligations in ILO instruments are also found in the six better-known UN human rights treaties although the linking of the social clause with these standards is less often advocated.²² Proponents of a social clause also sometimes include ILO occupational health and safety, and minimum wage fixing Conventions.²³ But customary international norms,²⁴ the ILO Convention concerning the rights of tribal and indigenous peoples,²⁵ the twenty or so international environmental agreements with trade provisions, and the International Undertaking on Plant Genetic Resources tend not to be brought within the social clause debate. Other international instruments which arguably might be considered for inclusion on the social clause trigger list are the draft UN Declaration on the Rights of Indigenous

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- 18 ILO Convention 87, Freedom of Association and Protection of the Right to Organise Convention, 1948, 122 ratifications at November 1998; ILO Convention 98, Right to Organise and Collective Bargaining Convention, 1949, 139 ratifications: <<http://www.ilo.org/>>
- 19 ILO Convention 29, Forced Labour Convention, 1930, 147 ratifications; ILO Convention 105, Abolition of Forced Labour Convention 1957, 133 ratifications, *id.*
- 20 ILO Convention 111, Discrimination (Employment and Occupation Convention), 1958, 130 ratifications: *id.*
- 21 ILO Convention 138, Minimum Age Convention 1973, 66 ratifications: *id.*
- 22 The *International Covenant on Civil and Political Rights* (ICCPR), *International Covenant on Economic, Social and Cultural Rights* (ICESCR); *Convention on the Elimination of All Forms of Racial Discrimination* (CERD), *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), *Convention on the Rights of the Child* (CROC); and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). The number of States Parties to these instruments in 1996 were: ICCPR 134, ICESCR 134, CERD 147, CEDAW 153, CAT 98, CRC 187: *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments: Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System: Note by the Secretary-General*, 27 March 1996, UN Doc E/CN.4/1997/74, para 37, Table 1.
- 23 de Wet *supra* n17 at 453.
- 24 Customary human rights norms include prohibitions against torture, arbitrary detention, summary execution or murder, causing the disappearance of individuals, cruel, inhuman or degrading treatment, genocide, slavery, and systematic racial discrimination: RB Lillich "The Growing Importance of Customary International Human Rights Law" (1995-6) 25 (1&2) GJICL 1 at 6. James Anaya argues that the rights of indigenous peoples are also protected by customary international law: SJ Anaya *Indigenous Peoples in International Law* Oxford University Press New York 1996 at 51-8, 73-112.
- 25 International Labour Organization, *ILO Convention 169: Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, ratified by 13 countries as at 25 May 1998: <<http://www.ilo.org/>>.

Peoples²⁶ and the draft International Covenant on Environment and Development,²⁷ if these become Conventions and are widely ratified.

The International Confederation of Free Trade Unions (ICFTU) proposes that a joint WTO/ILO advisory committee be established to ensure that core labour standards are observed. The advisory committee would recommend remedial action and a timeframe to governments found to be in breach of those standards. Financial or technical aid from an international social fund and the ILO could be made available to encourage compliance. At the end of the period set, a further report would find compliance, or find progress and recommend an extension of time, or that reforms had not been implemented and that trade sanctions such as increased tariffs should be levied against the exporting state by all WTO members. Joint ILO/WTO responsibility, with the WTO dispute resolution process only becoming active after the failure of moral persuasion by the ILO, has also been suggested as a possible reform.²⁸

One version of the ICFTU proposed social clause reads as follows:

The Contracting Parties agree to take steps to ensure the observance of the minimum labour standards specified by an advisory committee to be established by the GATT and the ILO, and including those on freedom of association and the right to collective bargaining, the minimum age for employment, discrimination, equal remuneration and forced labour.²⁹

This clause is worded loosely and would seem to enable States to defend most charges of human rights violations by arguing that some steps have been taken to ensure compliance with core labour standards, however ineffective. But this clause could be strengthened. It could also be broadened to enable the GATT/WTO dispute resolutions processes to be invoked where other identified human rights and environmental obligations are being breached.

There are various dispute resolution mechanisms within the GATT/WTO agreements, which could be used to ensure compliance with international human rights, and environmental standards, where all States are parties to the relevant instruments. The WTO dispute resolution processes include preliminary consultations, investigations of allegations of non-compliance, good offices conciliation and

26 The Declaration is currently being considered by an open-ended inter-sessional inter-governmental working group in the Commission on Human Rights, and is expected to be adopted by the General Assembly within the International Decade of the World's Indigenous People ie by December 2004: Commission on Human Rights Resolution 1995/32. It may eventually become a Convention.

27 IUCN Commission on Environmental Law *Draft International Covenant on Environment and Development* Prepared in cooperation with the International Council of Environmental Law Environmental Policy and Law Paper No 31 IUCN Gland and Cambridge 1995.

28 de Wet *supra* n17 at 456-7, preferring the multilateralism inherent in Art 23 of the GATT to the unilateralism envisaged in Art 20.

29 ICFTU Department of Employment and International Labour Standards "Labour Standards and Trade: What is the Social Clause?" <<http://www.icftu.org/english/sclause/esclslst.html>>.

mediation, the suspension of trade concessions or other obligations in serious situations, panel determinations, and rights of appeal to a standing Appellate Body (sometimes dubbed the 'trade supercourt'). The Appellate Body can issue binding determinations which are enforceable with trade sanctions.³⁰ It is this enforcement capacity, and the absence of due process guarantees and broad standing rules which has some critics of the WTO worried about the fairness and legitimacy of the process.³¹ These are justifiable concerns, but they are not insurmountable and could be addressed with amendments to the Understanding on Rules and Procedures Governing the Settlement of Disputes. For example, United States President Clinton suggested at the May 1998 Ministerial meeting that increased opportunities should be available for the involvement of non-government actors in GATT/WTO dispute resolution, and for WTO meetings to be open to the public.³² Such an amended dispute resolution process could be used as a means of promoting significantly better compliance with current multilateral human rights and environment regimes. But this suggestion generated little interest.

International environmental lawyers have suggested a draft article which accommodates unilateral responses to environmental concerns where multilateral remedies are unavailable or unsatisfactory. Article 30 of the draft *International Covenant on Environment and Development* for example, could be brought within the social clause debate. It provides:

1. Parties shall co-operate to establish and maintain an international economic system that equitably meets the developmental and environmental needs of present and future generations. To this end, Parties shall endeavour to ensure that:
 - (a) trade does not lead to the wasteful use of natural resources nor interfere with their conservation or sustainable use;
 - (b) trade measures addressing transboundary or global environmental problems are based, as far as possible, on international consensus;
 - (c) trade measures for environmental purposes do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade;
 - (d) unilateral trade measures by importing Parties in response to activities which are harmful or potentially harmful to the environment outside the jurisdiction of such Parties are avoided as far as possible or occur only after consultation with affected States and are implemented in a transparent manner; and
 - (e) prices of commodities and raw materials reflect the full direct and indirect social and environmental costs of their extraction, production, transport, marketing, and where appropriate, ultimate disposal.
2. As regards biological resources, products and derivatives, Parties shall endeavour to ensure that:

30 See generally "Understanding on Rules and Procedures Governing the Settlement of Disputes" (1994) 33 ILM 112.

31 GE Evans "Intellectual Property Disputes and the Supercourt of the World Trade Organisation: The Case for a New Model of Dispute Resolution" (1998) 16 *Prometheus* 395.

32 EJ Dionne Jr "Globalism With a Human Face" *Washington Post* 29 May 1998, <<http://www.globalpolicy.org/socecon/bwi-wto/dionne.htm>>.

- (a) trade is based on management plans for the sustainable harvesting of such resources and does not endanger any species of ecosystem; and
- (b) Parties, whose biological resources cannot be exported due to prohibitions imposed by a multilateral environmental agreement, shall receive appropriate compensation for losses suffered due to non-compliance by any other party to agreement (sic).³³

Many of these paragraphs are particularly germane to the social clause debate. Paragraph (a) prioritises sustainable development. Paragraph (b) permits unilateral trade barriers so as to protect the environment in rare circumstances. Paragraph (d) suggests that transparent unilateral actions by States to protect the environment in areas beyond national jurisdiction may be acceptable following consultations with affected States. This paragraph may be a response to commentators' concerns about several GATT panel determinations which found several US environmental Acts to be inconsistent with the GATT, as discussed below. Clause 2 promotes the better management of biological resources involved in, or prohibited from trade.

Proposals for amendments to Art 20 of the GATT so that it specifies criteria limiting the range of life, health and resource conservation policies which are GATT-consistent have even been raised by a GATT panel. In 1991 the panel in the US-Mexico tuna dispute, suggested that while the current GATT exemptions did not allow States to restrict imports from other States which had disagreeable environmental policies, Art 20 of the GATT could be amended or supplemented so as to "impose limits on the range of policy differences justifying such responses and to develop criteria so as to prevent abuse".³⁴ Suggestions have been also made within the WTO Committee on Trade and Environment (CTE) about trade measures applied pursuant to multilateral environment agreements. These, as discussed below, might be made permissible within the WTO regime where they are effective, no more restrictive of trade than necessary to achieve the environmental objective, do not constitute arbitrary or unjustifiable discrimination, and address transboundary or global environmental problems. The EU and New Zealand particularly, have been recommending amendments to Art 20, without yet persuading most other members.³⁵

33 IUCN *supra* n27, with commentary on the clause, at 92-97.

34 GATT "General Agreement on Tariffs and Trade -Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna" (1991) 30 ILM 1594 at 1623, para 6.3 (unadopted report).

35 World Trade Organisation "WTO Trade and Environment Committee Discusses Proposals on Trade Measures in Multilateral Environmental Agreements and on Eco-labelling" *PRESS/TE 008* <<http://www.wto.org/>> 29 April 1996; World Trade Organisation "WTO Trade and Environment Committee Discusses Proposals on MEAs, Ecolabelling, Transparency, Market Access, and Domestically Prohibited Goods", *Press/TE/011* <<http://www.wto.org/>> 9 August 1996.

3. A Recent History of the Social Clause Proposal

In December 1996 debate about the social clause was effectively stymied by opposition from various G-77 States and the United Kingdom at the first WTO Ministerial Conference in Singapore. The Governments of Indonesia, Malaysia, Brazil, Egypt, India and Pakistan were amongst those which successfully opposed the social clause idea. Instead, Governments renewed their commitment to compliance with the international labour standards promoted by the ILO. They agreed that the WTO and ILO Secretariats should continue to collaborate on those standards. They also agreed that labour standards should not be used for protectionist purposes, and that countries with a comparative advantage, such as low-wage developing countries, should not lose that advantage.³⁶ Although some developing countries opposed the inclusion of human rights matters in the declaration at all, the view that the issue should be raised, but left to the ILO, prevailed.

The ILO has not strongly favoured the social clause idea. In June 1998 the 86th International Labour Conference did reaffirm, however, the international community's commitment to upholding fundamental rights in the workplace by adopting the ILO Declaration on Fundamental Principles and Rights at Work with a vote of 273 in favour, zero against, with 43 abstentions.³⁷

Addressing the conference, the UN High Commissioner for Human Rights, Mary Robinson, stressed the interlinkages and close cooperative relationship between the work of the Commission on Human Rights and the ILO. She acknowledged the importance of labour standards and the indivisibility of all human rights.³⁸ Before the Singapore WTO meeting the chairpersons of the UN human rights treaty committees noted the social clause proposal and said that whatever its merits, the system of treaty supervision in which the treaty bodies were engaged already provided an important avenue for monitoring compliance with States obligations and that a greater effort should be made to strengthen those existing opportunities. They also recommended improved dialogue and exchange of information between the Bretton Woods institutions and the Centre for Human Rights.³⁹ They suggested that the Bretton Woods institutions should refer to applicable UN human rights instruments preeminently, when referring to human rights.⁴⁰

36 World Trade Organization Ministerial Conference *Singapore Ministerial Declaration* adopted 13 December 1996 WT/MIN(96)/DEC, para 4.

37 International Labour Organization "Fundamental Rights Declaration Clears Final Hurdle: ILO Conference Seeks End To Child Labour Abuses. Thursday 18 June 1998" ILO 1998 Press Releases (ILO/98/28)', <<http://www.ilo.org/>>.

38 Address by Mrs Mary Robinson, UN High Commissioner for Human Rights, 10 June 1998, <<http://www.ilo.org/>>.

39 As of 15 September 1997 the Office of the Commissioner for Human Rights (OHCHR) and the Centre for Human Rights has been consolidated into the OHCHR: <<http://www.unhchr.ch/>> .

40 *Human Rights Questions: Implementation of Human Rights Instruments: Effective Implementation of International Instruments on Human Rights, including Reporting Obligations under International Instruments on Human Rights: Note by the Secretary-General*, 11 October 1996, UN Doc A/51/482, paras 49 and 56.

In 1994 the ILO's Governing Body had established a Working Party on the Social Dimensions of the Liberalisation of International Trade to identify core labour conventions which could be linked to trade.⁴¹ The working party later agreed to suspend discussions on trade, labour standards and WTO remedies, following opposition from employers and G-77 countries particularly. It agreed to examine instead, trade liberalisation, country studies, compliance with core standards, and ILO's possible role in better promoting compliance.⁴² In 1997-8 the working party produced country studies on the impact of globalisation and trade liberalisation, and discussed the desirability of promoting social labelling as one means of promoting trade in products not produced by child labour.⁴³

The late 1980s and early 1990s saw a range of unsuccessful attempts to progress the social clause idea. In April 1994 at the GATT Ministerial Meeting in Marrakesh, States could not agree on ways to address the social implications of increasingly globalised trade. At that meeting the US and France failed in their bid to have a social clause included in the WTO Agreement.⁴⁴ Labour standards were not mentioned in the Marrakesh Ministerial Declaration, but were referred to in the Chairman's list of possible future items for the WTO programme. The United States supported by the EU, had tried unsuccessfully to include the issue in the Uruguay Round negotiations in 1986, and on the GATT Council agenda in 1990.

It is apparent however that the United States has not abandoned the issue. United States President Clinton at the second WTO Ministerial Meeting in May 1998 called on the WTO to better integrate labour and environmental standards. This reflects a principal trade negotiating objective of the United States Government, which is to promote respect for workers' rights and to secure a review of the relationship between workers' rights and the GATT and related instruments.⁴⁵ But as an interesting aside, it can be said that this United States commitment to workers' rights is a very partial one. The United States has not been strongly committed to the recognition and implementation of Farmers' Rights in the FAO's Commission on Genetic Resources for Food and Agriculture (CGRFA). Farmers' Rights are seen by some G-77 Governments as a human rights issue involving compensation and incentives for traditional farmers' skill and labour contribution to the conservation and development of plant genetic resources for food and agriculture, and its continuation. It should be noted also that in developing countries more than 55% of the food grown and 67% of the agricultural labour force are hardworking and usually

41 Organisation for Economic Co-operation and Development *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade* OECD Paris 1996 at 16.

42 GB.264/WP/SDL/1, cited in *id* at 170.

43 Presentation of the Report of the Chairperson of the Governing Body, Mr El-Amawi, 2 June 1998, International Labour Conference 86th Session Geneva June 1998 <<http://www.ilo.org/>>.

44 Tripartite Working Party on Labour Standards *Report on Labour Standards in the Asia-Pacific Region* Australian Government Publishing Service Canberra 1996 at 9.

45 *Omnibus Trade and Competitiveness Act of 1988* Pub L No 100-418 s1101, 102 Stat. 1107 (1988).

poor rural women.⁴⁶ Recognition of Farmers' Rights is currently being negotiated as part of the harmonisation of the International Undertaking on Plant Genetic Resources with the Convention on Biological Diversity (CBD). But Farmers' Rights issues are still far from agreed.⁴⁷ Farmers' Rights and the recognition of the value of indigenous and local communities' knowledge, innovations and practices are pressing examples of the central linkages between human rights and sustainable development but to date they have not been brought squarely within the social clause debate.⁴⁸

In 1995 receptivity to the social clause idea had also been limited. The Commission on Global Governance urged a reinvigoration of the ILO and a strengthening of its dispute resolution procedures, with trade measures being used only in extreme and predetermined cases. It criticised the suggested involvement of the WTO with labour standards.⁴⁹ Two important multilateral conferences that year also affirmed the importance of core labour standards but did not endorse their linkage to international trade law. Heads of State and Government at the World Social Summit in Copenhagen agreed that safeguarding and promoting workers' basic rights as defined by the ILO were necessary for the attainment of sustained economic growth and sustainable development, but they not endorse a social clause. The Summit encouraged ratification and compliance with human rights instruments and agreed that the activities of the World Bank, the International Monetary Fund and the WTO ought to be better coordinated. It also invited the WTO to consider how it might contribute to the implementation of the Programme of Action, including activities in cooperation with the UN system.⁵⁰ The 1995 conference of non-aligned and developing country Labour Ministers in New Delhi also endorsed core labour standards and the need to strengthen the ILO, but strongly criticised the linking of trade to ILO standards in international fora.⁵¹

The Australian Federal Coalition Government's position on the social clause

46 *Improvement of the Situation of Women in Rural Areas: Report of the Secretary-General* 8 September 1997: <gopher://gopher.un.org/00/sec/dpcsd/daw/ga/ga52nd/A-52-326.EN>; *Advancement of Women: Bangladesh, Belgium, Bhutan, China, Costa Rica, Dominican Republic, Greece, Guinea, Indonesia, Kyrgyzstan, Madagascar, Mongolia, Morocco, Mozambique, Myanmar, Netherlands, Nigeria, Norway, Philippines, Portugal and Turkey: draft resolution: Improvement of the Situation of Women in Rural Areas*, 23 October 1997, UN Doc. A/C.3/52/L.15.

47 The International Undertaking on Plant Genetic Resources, as constituted by FAO Conference Resolutions 8/83, 4/89, 5/89, and 3/91, is a non-binding agreement dealing with the collection, conservation, evaluation and utilisation of plant genetic resources. Farmers' Rights "arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources" were recognised in Res 5/89 and 3/91.

48 See generally J Sutherland "TRIPS, Cultural Politics and Law Reform" (1998) 16 *Prometheus* 291.

49 Commission on Global Governance *Our Global Neighbourhood: Report* Oxford University Press, New York, 1995, p 170.

50 *Report of the World Summit for Social Development (Copenhagen, 6-12 March 1995)* 19 April 1995 UN Doc A/CONF.166/9, paras 51, 54-56, 98.

51 "Delhi Declaration" summarised in Tripartite Working Party on Labour Standards, *supra* n44 at 95-96.

debate seems unequivocal. In 1997 it opposed "the WTO adopting positions that create divisions on the basis of divergent social or cultural values, and that are of doubtful or negative trade relevance." It suggested that such rules "would dilute the WTO's core business, and weaken its authority and credibility in the eyes of significant members".⁵² The Federal Government prefers to concentrate on practical measures and to address human rights issues within bilateral relationships. This critical stance on the social clause was also shared by a majority of the then Federal Labor Government's Working Party on Labour Standards. But that Working Party did recommend that more attention be given to core labour standards within Australia's overseas aid program and by international financial institutions, and that the Australian Government encourage APEC⁵³ members to "move towards a constructive dialogue on core labour standards within APEC".⁵⁴

Last but not least in this survey of critics, it should be noted that several academics are cynical about the motives behind bilateral or multilateral trade-linked social clauses and argue for a reconceptualisation of institutions and strategies.⁵⁵

Despite this brief review of stakeholders who are critical of the social clause idea, some of the arguments in its favour will be assessed very briefly below, and the arguments against it queried. The next section will briefly review aspects of the trade and environment debate concerning the WTO and suggest the need to bring this debate within the social clause debate.

4. The GATT/WTO Agreements and Sustainable Development Discourse

Until recent years, sustainable development and human rights discourses have been relatively uninfluential within the GATT. The GATT 1971 Working Party on Trade and Environment had not met before 1991, for example.⁵⁶ A GATT group on environmental measures in international trade and the preparatory committee on trade and the environment did meet more often in the closing year of the Uruguay round negotiations. The Agreement establishing the World Trade Organisation now includes in its preamble a commitment to sustainable development. After the Uruguay Round negotiations were concluded and before the Final Act had been signed by Ministers, the Trade Negotiations Committee agreed to prepare a broad work programme on trade, environment and sustainable development for signature with the Final Act in Marrakesh in April 1994. States agreed that at the first meeting of the WTO General Council, a Committee on Trade and

52 Australia Department of Foreign Affairs and Trade *In the National Interest: Australia's Foreign and Trade Policy White Paper* DFAT, Canberra, 1997 at 44.

53 APEC is an organisation promoting Asia-Pacific Economic Cooperation.

54 Tripartite Working Party on Labour Standards, *supra* n44 at 83-85.

55 P Alston "Labor Rights Provisions in US Trade Law: 'aggressive unilateralism'?", (1993) 15 HRQ 1; JL Dunoff "Institutional Misfits: the GATT, the ICJ and Trade-environment Disputes" (1994) 15 MJIL 1043.

56 S Charnovitz "Improving Environmental and Trade Governance" (1995) 7 IEA 59 at 66.

Environment (CTE) would be established to begin a comprehensive work programme on trade and environment, with a sub-committee undertaking the work meanwhile.

The WTO CTE, established in January 1995, provides analyses of the links between trade and environmental measures, and makes recommendations on trade liberalisation and sustainable development. The CTE reports to the WTO Ministerial Conferences and to the WTO General Council.⁵⁷ But some academics and NGOs have been critical of its discussions, suggesting that progress on its broad range of agenda items is disappointing.⁵⁸ Steve Charnovitz attributes the failure of the CTE to lack of leadership, the dominance of trade officials, a paucity of commissioned research, lack of NGO input and weak or non-existent linkages with inter-governmental organisations for the environment.⁵⁹ Another explanation may be that the CTE is overly constrained by its trade focus, which is not an environmental-effects of trade focus. The WTO is limited to examining trade policies, and trade-related aspects of environmental policies which are of significance for Members' trade, and cannot examine environmental issues generally.⁶⁰ The CTE's meeting in March 1998 for example, focused on market access and the implications of removing trade restrictions for identified industry sectors, suggesting that less restrictions would lead to economic and environmental benefits.⁶¹

The GATT/WTO's poor record on environmental issues may also be partly because non-corporate international NGOs have only recently been permitted access to GATT meetings and processes independent of Government delegations. To date NGOs have had little influence on WTO governance compared with corporate actors. But the new WTO Constitution includes provision for establishing consultative relations with NGOs,⁶² and the WTO General Council has approved new arrangements for WTO-NGO relations. Another positive development foreshadowing increased openness to NGO input is that the WTO Appellate Body recently reversed a Panel's finding that accepting non-requested *amicus briefs* submitted by NGOs was incompatible with the provisions of the GATT Dispute Settlement Understanding. The Appellate Body also ruled that Panels may allow any party to a

57 "The Marrakesh Ministerial Decision on Trade and Environment" <<http://www.wto.org/wto/enviro/marrakes.htm>>. The CTE's report (WT/CTE/1, 12 November 1996) is available from the WTO Secretariat <<http://www.wto.org/>>.

58 C Carpenter A Cosbey et al "WTO Symposium on Trade, Environment and Sustainable Development, 20-21 May 1997" (1997) 5(1) ENB <enb@iisd.ca>.

59 S Charnovitz "A Critical Guide to the WTO's Report on Trade and Environment" (1997) 14(2) AJICL 341 at 374-5.

60 KP Ewing and RG Tarasofsky *The "Trade and Environment" Agenda: Survey of Major Issues and Proposals from Marrakesh to Singapore* IUCN Gland Switzerland and Cambridge 1997 at 19.

61 World Trade Organization "Second Ministerial Conference of the World Trade Organisation: Press Pack" <<http://www.wto.org/>>.

62 Article V (2) of the WTO Constitution on "relations with other organizations" states that: "The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO."

dispute to attach all or part of an NGO brief to its own submissions.⁶³ Another indicator of improving communication between the GATT/WTO and NGOs is that the GATT/WTO has held symposiums attended by NGOs since 1994, on trade, environment and sustainable development.⁶⁴ These are likely to continue. So Charnovitz' assessment of processes to date, that the CTE has failed to move the WTO close toward a faithful implementation of WTO Art 5(2), may be too harsh,⁶⁵ and it will be interesting to see what influence, if any, NGO submissions have within dispute-resolution processes in future.

The reluctance of the GATT/WTO to give priority to sustainable development concerns over free trade is evident in several panel determinations on trade disputes, where the environmental exemptions in Art 20 (b) and (g) were argued in defence of trade-restrictive measures, and were found not to apply. However a ruling by the WTO Appellate Body indicates a significant change in approach which is likely to be welcomed by commentators critical of earlier panel reports.

Fortunately, the very narrow approach which has been taken to Art 20 in several panel reports has been criticised by the WTO Appellate Body. It said in October 1998, that while maintaining the multilateral trading system is necessarily a premise underlying the WTO Agreement, it is not a right or an obligation, nor an interpretative rule for assessing measures under the chapeau of Art 20. The Appellate Body said that the correct approach to interpreting Art 20 involved two steps: first, a characterisation of the measure under the specific exceptions in the paragraphs of Art 20, followed by a further appraisal of the same measure under the chapeau. The Appellate Body recognised that access to a market may be made dependent on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by an importing Member invoking one of the exceptions of Art 20. The Appellate Body said that to disallow all unilateral measures would be inconsistent with the purpose of the article, and such measures might be lawful provided they did not constitute arbitrary or unjustifiable discrimination. In this appeal the failure of the United States to pursue serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, was one of the relevant factors indicating arbitrary discrimination.

Environmentalists are likely to welcome this ruling from the Appellate Body as its approach to sustainability demonstrably improves earlier approaches. The panel report on the shrimp/turtle dispute from which the appeal was taken was issued in May 1998. The panel ruled that the United States' prohibitions on the importation of certain shrimp and shrimp products from particular countries violated the GATT's prohibition of quantitative restrictions on imports and exports:

63 World Trade Organisation *supra* n3; World Trade Organization, *Report of the Panel on United States - Import Prohibition of Certain Shrimp and Shrimp Products*, May 15 1998, WTO Document No WT/DS58/R, excerpted in (1998) 37 ILM 832.

64 World Trade Organisation "GATT/WTO Activities on Trade and Environment 1994-95" *WTO Trade and Environment Bulletin No 2*, 8 May 1995 <<http://www.wto.org/>>.

65 Charnovitz *supra* n59 at 370.

Art 11. The United States had attempted to protect sea turtles from shrimp trawlers by prohibiting imports from countries whose commercial fishers did not use turtle excluder devices on their trawlers. The Panel ruled that the basic objectives and principles of the GATT, including the right of access to markets had to be paramount, and that the exceptions in the GATT had to be construed narrowly. It ruled that GATT exceptions should not be interpreted so as to permit contracting parties to derogate from their GATT obligations to force other countries to implement conservation policies. Multilateral cooperation, rather than unilateral measures, needed to be taken to promote sustainable development. The panel found that the United States legislation had attempted to influence the operation of other governments' policies in a way which threatened the multilateral trading system and that this was not consistent with the GATT.⁶⁶

Environmentalists had reacted with dismay to this ruling, as they had to earlier panel reports, such as the unadopted panel rulings on U.S. dolphin-protection measures.⁶⁷ In 1994 a GATT Panel said that the GATT exceptions could not be used to justify States' unilateral trade measures which sought to compel other countries to change their resource management policies. The GATT multilateral trade liberalisation objectives had to be paramount.⁶⁸ The Panel suggested that since trade embargoes could not further environmental objectives by themselves, because they could only be effective if exporting States agreed to change their laws or policies, such embargoes could not be primarily aimed at conservation, or at rendering effective restrictions on domestic production or consumption as required by Art 20(g).⁶⁹ Another panel had ruled that for measures to be considered 'related to the conservation of an exhaustible natural resource' such measures must be 'primarily aimed' at that conservation, even if it they were not necessary or essential'.⁷⁰ Others, that

66 World Trade Organization *Report of the Panel on United States - Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* n.63.

67 GATT *supra* n.34.

68 The United States was required to bring its *Marine Mammal Protection Act 1972* into conformity with the GATT. The GATT has also been used to have environmental action dropped in other cases. In 1993 Canada repealed its law prohibiting the importation of United States puppy mill dogs, and the United States dropped its threat of sanctions against Norway because of commercial whaling due to threats of GATT action: RD Ryder "The New World Trade Organisation - A Major Threat to Social Values" (1995) 4 *Biodiversity and Conservation* 206. See also BF Chase "Tropical Forests and Trade Policy: The Legality of Unilateral Attempts to Promote Sustainable Development under the GATT" (1994) 17 *HI&CLR* 349. The United States *Clean Air Act* had to be amended to lower its standards so as to comply with the GATT ruling. A finding of GATT-consistency on "petrol-guzzler" car taxes is one ruling viewed positively by environmentalists: "General Agreement on Tariffs and Trade - Dispute Settlement Panel Report on United States Taxes on Automobiles, October 11 1994" (1994) 33 *ILM* 1397. See also: E Phillips "World Trade and the Environment: The CAFE Case" (1996) 17 *MJIL* 827.

69 "General Agreement on Tariffs and Trade - Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna" (1994) 33 *ILM* 839 at 893-4.

70 General Agreement on Tariffs and Trade "Dispute Settlement Panel Report on United States Taxes on Automobiles" (1994) 33 *ILM* 1397 at 1441-1442 citing the GATT Panel report on Canada-Herring and Salmon, *BISD* 35S/98, para 4.6.

measures inconsistent with the GATT would only be exempted if there were no alternative measures available which a party could reasonably be expected to employ. Art 20 had to be interpreted narrowly.⁷¹

Another contentious issue in the trade and environment debate is the relationship between trade provisions in post-1947 multilateral environmental agreements (MEAs) and the GATT/WTO agreements. Some commentators suggest that MEAs would usually take precedence over the GATT (where parties are members to both) as later-in-time treaties relating to the same subject-matter,⁷² or as a specific treaty prevailing over a more general one (*lex specialis* under customary international law). The WTO CTE has also suggested that WTO members who are also parties to a MEA should first resolve their difficulties via the MEA procedures, and only then consider WTO action.⁷³ But where later MEAs are weak or cannot be negotiated because of State opposition, this response does not allay environmentalists' concerns because the WTO is then the appropriate dispute resolution forum. In any event legal commentators are divided over the compatibility of MEAs with the GATT/WTO agreements.⁷⁴ The Appellate Body has however given some guidance on this, suggesting that environmental concerns should be given increased weight.

5. Arguments in Favour of a Broadened Social Clause

The strongest arguments in favour of a trade-linked social clause stand on the universality and indivisibility of international human rights standards, and the need to promote better compliance with such standards in this era of continuing environmental degradation, and weakening union power under deregulatory economic policies.⁷⁵ Trade-related human rights violations can include ecologically damaging economic activities which threaten local communities, forced resettlement, exploitative child labour, violence against the critics of commercial activities, wrongful imprisonment, and restrictions on freedom of association and collective bargaining, amongst others. As one indication of the brutality of some regimes, in 1996, 264 trade unionists are reported to have been killed because of

71 GATT *Report of the Panel on Section 337 of the United States Tariff Act*, BISD 36S/345; GATT *Reports of the Panels in Canada-Administration of the Foreign Investment Review Act*, adopted 7 February 1984 30S/140 at 64 cited in GATT *supra* n69 at 879, 881, 894, 896-7.

72 *Vienna Convention on the Law of Treaties*, Art 30.

73 World Trade Organization "Second Ministerial Conference of the World Trade Organisation: Press Pack" <<http://www.wto.org/>>. Richard Tarasofsky argues similarly that trade and environment disputes should be referred to an MEA mechanism, the International Court of Justice or a new independent mechanism with sufficient legal authority and legitimacy: RG Tarasofsky "Ensuring Compatibility between Multilateral Environmental Agreements and GATT/WTO" (1996) 7 YIEL 52-74 at 73-74.

74 Charnovitz *supra* n59 at 349-350.

75 R D'Souza (gattwd@corso.ch.planet.gen.nz) "Linking Labour Rights to World Trade: Trade or Workers' Rights?" HURINET- *The Human Rights Information Network* <hurinet-development@mail.comlink.apc.org> 19 November 1997.

their union activities.⁷⁶

Some commentators argue that with trade liberalisation, highly mobile capital, and economic globalisation, governments are competing for direct foreign investment partly by reducing environmental regulation, corporate taxation, wages, working conditions and freedom of association. This is the downward pull or race-to-the-bottom thesis.⁷⁷ Advocates of a social clause argue that if production and trade involve non-compliance with fundamental human rights standards, this is an unfair trade advantage and can be equivalent to “social dumping”.⁷⁸ It is also suggested that globalisation is impacting on human rights as governments attempt to reduce public deficits by slashing social, health, education and anti-poverty programmes, thereby jeopardising economic and social rights.

Parallels can be drawn in the environmental context. It is suggested that increasing global competition encourages producers to not internalise environmental costs so that their costs of production are lower, possibly leading to ‘eco-dumping’.⁷⁹ An assessment of the empirical evidence on this issue is beyond the scope of this paper, but whether labour and environmental protection costs are often a determining factor for multi-national corporations investing and remaining in a jurisdiction, is obviously an important question.⁸⁰ But this issue will not be pursued here as it is argued below that human rights and sustainable development values should take priority over economic utilitarianism in any event.

It is arguable that the social clause is becoming increasingly necessary in the current international order. The UN’s multiple organs, agencies and committees concerned with human rights and the environment are constantly reporting on violations. Trade liberalisation and the collapse of state-socialism are enabling multi-national corporations to invest in, and produce and trade from countries with appalling human rights practices, and international law offers little in the way of regulation of multinational corporations. Such multinationals account for two-thirds of the world trade in goods and services: one-third in intra-firm transactions and the other one-third in inter-firm transactions.

Supporters of the social clause argue that today many governments are subordinating human rights concerns to their trade agendas. Human Rights Watch, a major human rights international NGO, has noted that in 1997 the major powers

76 B Jordan “Labour Rights: International Instruments and their Application” *Summary Record of Presentations, Public Hearings on the Social Clause: Human Rights Promotion or Protectionism?* Brussels, 17 and 18 June 1997, Subcommittee on Human Rights, Committee on Foreign Affairs, Security and Defence Policy, <<http://www.europarl.eu.int/dg7/hearings/sc1b/soclause/en/doc4.htm>>

77 Haworth and Hughes *supra* n16 at 185.

78 M Khor “The World Trade Organisation, Labour Standards and Trade Protectionism” (1994) 45 TWR 30 at 33-4.

79 D Reed “An Instrument of Global Economic Policy” in D Reed (ed) *Structural Adjustment, the Environment, and Sustainable Development* Earthscan Publications Ltd, London, 1996, 3 at 17.

80 Haworth and Hughes suggest that transnational corporations invested in Asia in the late 1980s and 1990s partly because of the attractively low labour costs in the region: Haworth and Hughes *supra* n16 at 180.

showed an increasing tendency to ignore human rights when they proved "inconvenient to economic or strategic interests".⁸¹ Human Rights Watch has argued that corporations and governments from the United States, France, Germany, Spain and Italy have all been securing lucrative trade deals with China, a State which has a grim human rights record.

Trade is also expanding with other States guilty of serious human rights violations such as Myanmar (Burma), Azerbaijan, Turkmenistan, Armenia, Georgia, Russia, Serbia, Turkey, Uzbekistan, Albania, Belarus, Bulgaria, Georgia, Macedonia, and Serbia. Multinational oil and mining companies have been implicated in human rights violations in countries such as Myanmar, Indonesia, Nigeria, and Colombia because the continuation of their activities has been partly contingent on the effective suppression of opposition, even if there is no direct corporate involvement in that suppression. Human Rights Watch argues that with the contraction of government foreign aid budgets, multinational corporations are now better placed to influence host governments' policies, but often fail to do so to protect human rights.⁸² African trade unionists have also deplored the increasing incidence of exploitative child labour in Africa; a continent recognised as suffering disproportionately under trade liberalisation and globalisation. Allegations of numerous instances of human rights violations associated with the activities of multinational corporations engaged in large-scale development projects, often in collaboration with government agencies, have been documented by the International Peoples' Tribunal on Human Rights and the Environment.⁸³ There is also a growing international legal and academic literature which identifies the linkages between human rights and the environment.⁸⁴ It is only a small step to argue further that the environment, production and human rights are issues which can be embraced within the concept 'trade-related'. In Australia for example, critical responses to the recognition of native title, the waterfront dispute and the One Nation phenomenon can be seen as a consequence of the subordination of human rights concerns to a trade-promotion agenda.

The WTO does currently have a work program on trade and the environment

81 KP Foley "Monitor Criticizes Economic Approach to Human Rights" *HURINet the Human Rights Information Network* 5 December 1997 <hurinet-development@mail.comlink.apc.org>.

82 R Dicker "Human Rights and the Activities of Multinational Enterprises" *Summary Record of Presentations, Public Hearings on the Social Clause: Human Rights Promotion or Protectionism?* Brussels, 17 and 18 June 1997, Subcommittee on Human Rights, Committee on Foreign Affairs, Security and Defence Policy, <<http://www.europarl.eu.int/dg7/hearings/sc1b/socclause/en/doc1.htm>>.

83 SH Mendlovitz "Statement of the International Peoples' Tribunal on Human Rights and the Environment: Sustainable Development in the Context of Globalization" (1998) 23(1) *Alternatives* 109.

84 *Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Human Rights and the Environment: Final Report prepared by Mrs Fatma Zohra Ksentini, Special Rapporteur*, UN Doc E/CN.4/Sub.2/1994/9; E/CN.4/Sub.2/1994/9/Corr.1; AE Boyle and MR Anderson (eds) *Human Rights Approaches to Environmental Protection* Clarendon Press, Oxford, 1996; D McGoldrick "Sustainable Development and Human Rights: An Integrated Conception" (1996) 45 *ICLQ* 796; A Sachs "Upholding Human Rights and Environmental Justice" in *State of the World 1996*, L Brown, JN Abramovitz C Bright et al (eds) Earthscan Publications Ltd, London, 1996, p 133.

and this process could be broadened to include human rights considerations, and the impact of multinational corporations on human rights and the environment. The social clause debate may also be broadly supported if international environmental standards, and additional human rights, such as the rights of indigenous peoples, are brought within it. A broader constituency to advocate for a social clause may increase its chances of being considered further. Moreover, international civil society, UN sustainable development organisations and many governments are increasingly concerned about worsening global environmental trends, the social costs of increasing globalisation and the non-realisation of many of the 1992 Rio Earth Summit aspirations.⁸⁵ Critics of globalisation say that it is marginalising some regions, such as most parts of Africa, and that it is empowering multinational corporations at the expense of governments and populations. Mounting criticisms of the proposed OECD Multilateral Agreement on Investment seems to have eclipsed the limited debate about the GATT/WTO social clause,⁸⁶ although protests against globalisation generally are growing.⁸⁷ At the 1998 WTO Ministerial Conference an estimated 10,000 protesters against free trade are reported to have rallied in Geneva.⁸⁸ Although opponents of the MAI share the human rights concerns which motivate many the proponents of the GATT/WTO social clause, MAI critics also emphasise sustainable development obligations under international law. These opponents seem to have been more successful in their anti-MAI campaign than proponents of a GATT social clause.

A more philosophical argument for supporting the primacy of human rights and sustainable development concerns over multilateral trade rules, is that those trade rules are essentially utilitarian, and should be 'trumped' by concerns for human rights. Governments assume that free trade will enhance the well-being of the greatest number of traders, and that the benefits of economic growth will reach an increasing percentage of the world's population. But following Dworkin, one can argue that while free trade is important so too are human rights values, and that utilitarianism is corrupted if people affected by it are not treated equally.⁸⁹ Indigenous peoples in some countries for example, may be dispossessed of their lands,

85 See for example, *Programme for the Further Implementation of Agenda 21* 19th Special UNGA, 11th plenary meeting, 19 September 1997, UN Doc A/RES/S-19/2.

86 See for example, "Joint NGO Statement on the Multilateral Agreement on Investment to the Organization for Economic Cooperation and Development Endorsed by 565 Organisations in 68 Countries" *HURINet – the Human Rights Information Network*, <hurinet-development@mail.comlink.apc.org> 4 March 1998.

87 Peoples' Global Action and People's News Agency (PNA) "Global Protests Against WTO and MAI: 3rd International Press Release May 18 1998" *HURINet - The Human Rights Information Network* <hurinet-development@mail.comlink.apc.org> 11 June 1998; twnet@po.jaring.my "Globalisation Under Attack ... or Not" < hurinet-development@mail.comlink.apc.org> 19 June 1998.

88 J Madeley (twnet@po.jaring.my) "WTO Party Marred by Anti-globalisation Protests" *HURINet - The Human Rights Information Network*, < hurinet-development@mail.comlink.apc.org> 24 June 1998.

89 R Dworkin "Rights as trumps" in J Waldron (ed) *Theories of Rights* Oxford University Press, Oxford, 1984, p 153.

and cultural heritage, or denied their entitlements to share in resource rents, for the sake of maximising revenue through free trade. In this respect they are being denied rights which may be available to others and this may be in breach of customary and treaty international human rights law. But if such rights could be considered as trumps over unrestricted utilitarianism, indigenous peoples' rights would be better protected.

There are precedents in current WTO Agreements for giving priority to existing international instruments in an area, and for linking extant agreements with a GATT/WTO agreement and its dispute resolution processes. For example the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS), provides that in respect of particular parts of that Agreement, Members shall comply with identified articles of other intellectual property Conventions.⁹⁰ The UN Convention on the Law of the Sea also has a forum clause which refers production subsidy disputes to the GATT.⁹¹ It could be argued similarly in relation to identified provisions of human rights and environmental Conventions, that they must be complied with for the purposes of the WTO regime.

Another persuasive argument in favour of using WTO processes to promote human rights and sustainable development is that the current extensive array of UN procedures for responding to breaches of human rights and environmental standards is inadequate. At face value, the ILO does have elaborate supervision and review processes for countries which have ratified ILO Conventions. Governments are supposed to report on compliance to the ILO every two to five years, or more often if requested. Reports are sent to representative employer and employee organisations for comment. States' reports and comments are considered annually by an independent Committee of Experts on the Application of Conventions and Recommendations (CEACR). That committee's report is then considered by a tripartite ILO Conference Committee on the Application of Conventions and Recommendations which can discuss problems and trends with member governments. A final report is then considered at the plenary session of the International Labour Conference.⁹² But in 1995 most States' reports were either so late or incomplete that they could not be considered in detail by the Committee of Experts.⁹³

The ILO also has complaints mechanisms which enable Convention violations

90 See for example Arts 1-3 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the TRIPS agreement (1994) 33 ILM 83 or 1197; the *Agreement Between the World Intellectual Property Organization and the World Trade Organisation*, December 22, 1995, (1996) 35 ILM 754; P Drahos "Global Property Rights in Information: The Story of TRIPS at the GATT" (1995) 13 *Prometheus* 6 and AJ Bradley "Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations" (1987) 23 *SJIL* 57.

91 Charnovitz *supra* n59 at 353 n83. Other trade instruments containing labour standards or human rights clauses include the Lomé Conventions of 1984 and 1989, the Caribbean Basin Initiative, the Generalized System of Preferences and a side-agreement to the North American Free Trade Agreement: de Wet *supra* n17 at 444-445. Article 104 of the North American Free Trade Agreement, 17 December 1992 permits some environmental treaties to override its provisions: IUCN, *supra* n27 at 94.

92 Organisation for Economic Co-operation and Development *supra* n41 at 154-155.

93 *Ibid* at 154, 159.

to be scrutinised by ILO bodies. Under the more commonly used procedure, a tripartite committee established by the ILO Governing Body can examine representations made by employer or employee organisations about a Convention violation. A lesser used procedure enables a violation complaint by a government, an ILO Conference delegate or the ILO Governing Body to be examined by an independent Commission of Inquiry established by the Governing Body. The committee can make recommendations which governments can accept or dispute before the International Court of Justice.⁹⁴ The ILO also has a Committee on Freedom of Association which meets three times a year and which, by 1996, had heard some 1800 complaints concerning alleged non-compliance with the principle of freedom of association. Other compliance-promoting activities include direct contacts between members and the ILO and technical assistance programmes.⁹⁵ In recent years the ILO Governing Body has been attempting to strengthen the ILO's supervisory procedures and although it has been reluctant to support a social clause, under the IFCTU proposal, ILO procedures would be better integrated with WTO dispute settlement processes and this could promote better compliance with ILO standards.

The use of the UN extensive human rights machinery is less often argued in the social clause context, but it suffers from similar monitoring shortcomings as the ILO system. Compliance with non-ILO international human rights standards is monitored through States' reports to treaty committees and the Commission on Human Rights (at least once described as 'often government propaganda on human rights'),⁹⁶ individual communications, and special communications procedures.⁹⁷ Human rights expert, Philip Alston examined the chronic problem of late and no reports and the long delays before the reports were considered, in his report to the Commission on Human Rights in 1996. He described the existing reporting system as "unsustainable".⁹⁸

Other commentators also acknowledge that the core UN human rights machinery is under-resourced, cumbersome, politically-charged and overburdened, and that resolution upon resolution is often ineffective in the short term. Human rights treaty committees report to the UN General Assembly periodically. Human rights lawyer, Hilary Charlesworth, has suggested that although the current system is fairly well developed, "in practice it is in many ways deeply flawed, and in need of significant reform".⁹⁹ She has called for a strengthening of the system, including by

94 By 1996 the former complaints mechanism had been used only 59 times and the latter only 23: *ibid* at 155.

95 *Ibid* at 156-158.

96 H Charlesworth "The UN Treaty-based Human Rights System: An Overview" in S Pritchard (ed) *Indigenous Peoples, the United Nations and Human Rights* Zed Books and The Federation Press, London and Sydney, 1998, p 66 at 72.

97 *Human Rights Questions: Implementation of Human Rights Instruments: Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights: Note by the Secretary-General*, 11 October 1996, UN Doc A/51/482.

98 UN Doc E/CN.4/1997/74, *supra* n22 at paras 37-47, 112-3, 120.

99 Charlesworth *supra* n96 at 66.

expelling from the regime recalcitrant States which do not adhere to minimum human rights standards.¹⁰⁰ The Commission on Human Rights has also considered a range of reform options.

The Commission on Human Rights does have some effective processes, such as the system of special rapporteurs and fact-finding missions,¹⁰¹ urgent procedures, special reports and working groups.¹⁰² These enable efficient and independent on-site investigations to be conducted.¹⁰³ But it is arguable that some of the global NGO campaigns and organised consumer boycotts of products produced by companies using allegedly exploitative practices, such as Nestle, Nike and Shell, have had more impact on these companies than UN processes. But while such NGO campaigns may be more effective than governments which are often unable or unwilling to ensure compliance with domestic laws, there is little accountability with some of these NGO campaigns, and it may be preferable to have allegations investigated and ruled upon by an appropriate international body. Also, if the GATT/WTO dispute resolution procedures were to result in sanctions being instituted against particular products and companies, until prescribed standards were complied with, this could be a particularly effective remedy, as the NGO campaigns have shown. Sanctions are also one of the last-stage remedies, with various softer forms of GATT/WTO dispute resolution procedures available for use first.

Some commentators suggest from a more economic perspective, that developing country fears of a social clause impacting negatively on their economy are unfounded because the enforcement of core labour standards has been found not to impact significantly on economic performance in developing economies. Nor does a social clause necessarily imply standardisation of wage levels between countries. For the developed economies, continuing high levels of unemployment are attributed to technological change through computerisation and automation which have displaced many employees, rather than labour costs. Other structural factors such as low commodity prices and terms of trade, transfer pricing, currency instability, restrictive business practices and the oligopolisation of markets are said to influence economic and employment statistics more than labour costs per se. So the social clause could be effective in remedying rights violations without necessarily causing negative economic impacts.¹⁰⁴

100 *Ibid* at 72.

101 ECOSOC Res 1235 (XLII) (1967) provides that violations of human rights can be examined and responded to, and be the subject of annual debate within the Commission on Human Rights.

102 Under ECOSOC resolution 1503 (XLVIII) (1970) a working group of up to five members can be convened to consider communications where there is a "consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms" and to make reports to the Sub-Commission on Prevention of Discrimination and Protection of Minorities: HJ Steiner and P Alston *International Human Rights in Context: Law, Politics, Morals: Text and Materials* Clarendon Press, Oxford, 1996, p 376.

103 Human Rights Watch "Human Rights Mechanisms under Attack: A Call to Action" *HURINet - The Human Rights Information Network* <hurinet-ungeneral@mail.comlink.apc.org> 21 February 1998.

104 Khor *supra* n78 at 31, 34.

6. Arguments Against the Social Clause

One of the strongest arguments against the inclusion of a social clause in the GATT/WTO agreements is that other multilateral institutions and processes exist to promote compliance with core human rights and environmental standards, as just described, and that the GATT/WTO dispute resolution processes are a blunt and inappropriate mechanism. But the ineffectiveness of many of these rights monitoring mechanisms has been noted. Such alternatives include the ILO, other specialised human rights and environmental treaty bodies, UN Charter procedures, and unilateral procedures. Diplomatic representations to Governments about allegations of human rights violations are another compliance-promoting mechanism. Other mechanisms include bilateral aid programmes including financial and technological assistance, codes of conduct, and MOUs between international agencies, governments and industry, social and eco-labelling, NGO campaigns, ethical investment schemes and extraterritorial applications of domestic law in permitted circumstances (such as to nationals operating abroad). Many of these are already invoked as needed, yet non-compliance with standards remains problematic.

Governments and commentators who oppose the linking of trade and human rights argue that it is motivated by protectionist sentiment and a wish to shield stubborn and high unemployment levels in developed economies from increasing threats from cheaper imports from developing countries. The main difficulty with this argument, as noted above, is that some empirical studies suggest that major multinational companies are not so footloose and do not necessarily relocate after capitalising on low core labour standards initially. Investment decisions and patterns of in-country specialisation are influenced more by factors such as relative factor endowments, technology and economies of scale. One study, for example, suggests that semi-conductor firms in Malaysia have not relocated despite labour costs increasing significantly over a twenty-year period.¹⁰⁵ It is not necessary, the argument goes, to include a social clause in the international trade regime because the main underlying factors influencing investment decisions and employment levels are not labour costs. Violations of core labour standards flow from poverty and weak state institutions and infrastructure rather than corporate calculations about trade advantage flowing from human rights violations. But these kinds of arguments might also be used to persuade critics that the economic impacts of a social clause could be slight and that therefore such a clause should be supported.

Some critics suggest further that there is no international consensus on human rights standards and that they are not universal but a northern and western imposition which challenges national sovereignty.¹⁰⁶ Using the WTO to promote a social

105 K Ong-Giger *The Political Economy of the Semiconductor Industry in Malaysia: The New International Division of Labour Revisited* Thesis submitted for the degree of Doctor of Philosophy, Australian National University, Canberra, 1996.

106 See generally, S Pritchard "The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice" (1995) 2(1) AJHR 3.

agenda could be just a guise for 'dictating the national economic, social and political policies of the developing countries'.¹⁰⁷ The universalist/relativist debate about human rights will not be revisited in this paper but this argument was significantly weakened by the acclamation of the universality of international human rights despite cultural diversity, at the 1993 Vienna World Conference on Human Rights. Proposals for regional human rights organisations in South-east Asia and the south-west Pacific are another of many testaments to the expanding reach of international human rights norms.

Conclusions

I recognise that the social clause has met a determined opposition, but I have suggested a few reasons for continuing the debate the merits of the proposal, and for challenging some of the arguments raised by its opponents. A primary consideration is that the enforcement of human rights and environmental standards could be significantly strengthened were the WTO dispute resolution mechanisms to be brought into play on these issues. As Leary has noted, the issue will not go away because civil society continues to lobby governments to better consider the social aspects of trade liberalisation.¹⁰⁸ I have also suggested that the inclusion of the rights of indigenous peoples, environmental standards, and human rights linked to the environment, could be brought within the current social clause debate.

A positive international response to these issues could address in part, the concerns which many members of international civil society are expressing in relation to globalisation. Sustainable economic growth needs to be based on good governance and recognition of human rights standards, ethical responsibility and accountability by transnational corporations, and the protection of civil society. With the dramatic erosion of economic and political security in many East Asian and South-east Asian economies, human rights and environmental standards are at increased risk. The recession may relieve environmental pressures in some sectors in the short-term, but pressures on human rights will increase. But human rights and environmental standards have been threatened or breached in many jurisdictions for a long time, and this continues to be unacceptable. Given the parlous state of the indicators on the condition of our global environment and human rights, the inclusion of a broad-ranging social clause in the GATT/WTO agreements could be one way of moving more surely towards sustainable and peaceful development, and more humane governance.

Drawing on the suggestions of the IUCN Environmental Law Centre, the chapeau to Art 20 could be amended to include a further condition after "disguised restriction on international trade,":

107 M Khor "KL Meeting Brings South Together on WTO" <hrnet.development@Germany.EU.net> 8 August 1996.

108 Leary *supra* n15 at 120.

...and subject to the requirement that trade measures addressing transboundary or global environmental or human rights problems are based, as far as possible, on international consensus, nothing in this Agreement...

The inclusion of both customary and treaty-based human rights standards in the GATT could be achieved very simply, with an amendment to paragraph (b) of Art 20 to include “human rights or” before “human, animal or plant life or health”.

Article 20 (g) could be itemised, and could conclude with: “Such measures can include:

- (i) unilateral and transparent trade measures by importing Parties in response to activities which are harmful or potentially harmful to the environment outside the jurisdiction of such Parties only after consultation with affected states and if other reasonable measures have been unsuccessful;
- (ii) adjustments to the prices of commodities and raw materials to reflect the full direct and indirect social and environmental costs of their extraction, production, transport, marketing, and where appropriate, ultimate disposal;
- (iii) requirements that trade be based on management plans for the sustainable harvesting of biological resources, products and derivatives; and
- (iv) compensation for Parties whose biological resources cannot be exported due to prohibitions imposed by a multilateral environmental agreement, where losses arise from another party’s non-compliance with the agreement.”

These suggestions are preliminary only, but they demonstrate that there is potential to bring the human rights and sustainable development agenda directly within the GATT and WTO agreements without significant drafting difficulty. Political disinclination however, poses a significant barrier to the development of such a broadened social clause proposal.