

SOCIAL CLAUSE IN TRADE

HUMAN RIGHTS PROMOTION OR PROTECTIONISM ?

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Introduction

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The idea of linking trade with adequate labour and social standards seems to be quite simple and is yet difficult to implement and monitor. "Conceptually, the social clause is an international trade arrangement which renders it feasible to link imports with conformity to labour standards. This arrangement could provide for restriction or prohibition of imports of products from countries, industries or enterprises where there is no compliance with stipulated labour standards. It could also provide for preferential imports of products from where there is compliance with stipulated standards"^[1]. The idea is also:

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To give various trade related incentives (e.g. reduce custom duties, excise taxes etc.) when the pre defined standards are met. Promote the trade and help the countries to consolidate the social and political human rights in concordance with the national and international legal framework.

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Or, introduce trade related barriers and sanctions (e.g. additional custom duties, restriction of the products etc.) if these standards are violated. Discourage the trade and thereby force so the producers to fulfill the human rights. In case of gross violations (e.g. forced or bonded labour, child labour etc.) impose tough conditions or ban the trade of these products totally.

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Though the idea itself is quite old, the concept of social clause in the international trade is being intensively discussed since last two years, when the final metamorphosis of GATT (General Agreement on Trade and Tariffs) into WTO (World Trade Organisation) started in the 8th round of the Uruguay rounds in December 1993. International Labour Organisation (ILO) has discussed this many times since its inception in 1919 and formulated a number of conventions^[2] to protect

¹]The Fifth Conference of Labour Ministers of Non-Aligned and Other Developing Countries, 19-23 January 95, Dehli; Published in:

²Social Clause in Multilateral Trade Agreements

(A Dossier on Labour Standards, Environmental Standards and Human Rights in Global Trade), May 1995, Page 90; Published by: Centre for Education and Communication, Dehli

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[] Important ILO Conventions:

No.87: Freedom of association and Protection of the rights to organise (1948)

No.98: Right to organise and Collective bargaining (1949)

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No.111: Freedom from discrimination in employment (1958)

No.100: Equal remuneration for women and men (1951)

No.155: Occupational safety and health

No.138: Minimum age for employment of children (1973)

Nos.29/105: Freedom from forced labour and compulsory labour (1930, 1957)

the social rights of the labourers. But ILO is politically a weak institution. Even other UN bodies like the General Assembly, Security Council have practiced trade restrictions in other contexts, e.g. apartheid in South Africa or the occupation of Kuwait by Iraq. Trade with South Africa was officially banned during apartheid and was lifted when apartheid was abolished. But now in the WTO context, the social clause discussion may take different shape and develop long term monitoring instruments for implementing the ILO conventions globally.

The reactions of the governments, trade unions, employers' associations, non-governmental (NGO) and human rights organisations in the South and North are quite divergent towards the social clause. The trade unions of the northern industrialised countries, the International Confederation of Free Trade Union (ICFTU), the governments of USA and France have all welcomed the idea of social clause, each having different motives behind their support. Employers' associations of most of the countries, most southern countries organised as the Non-Aligned Movement (NAM) and also many governments of the northern industrialised countries have partially or totally rejected the social clause. Even trade unions and NGOs in the south are sceptical. One cannot draw a clear line of separation between North and South, trade unions and employers' associations, NGOs and governments.

Besides, the discussion concerning social clause is till now restricted to the international trade (Multilateral Trade Agreement) only. No one has thought whether the social clause could be applied to the internal trade of a country and discuss the consequences for labour, trade or social development of that country. The Indian Constitution and the labour laws do provide the framework to accommodate the above mentioned ILO conventions. Why can't we campaign for boycotting the products and services of children below 14 years? Who will suffer more? We, the ignorant consumers or the feudal, capitalist employer of the children or the children themselves who suffer anyway and are being robbed of their emotional and intellectual development? I think, we should link the social clause also with the internal trade and seriously combat the gross violations of the social and labour standards.

30 "Social Clause" Debate in WTO Context: An Overview

The debate on social clause intensified at the end of 1993 when the Uruguay rounds reached the final stage. The governments of USA and France tried very much to put this point on the agenda of the GATT final conference in April 94 at Marrakesh and to define it as the priority task of the newly formed WTO. USA had just then introduced the social clause in the North American Free Trade Agreement (NAFTA) and was under tremendous pressure from the trade unions AFL-CIO and the US Labour Advisory Committee For Trade Negotiations and Trade Policy (LAC) to get the social clause anchored in the WTO. US trade laws like the Omnibus Trade and Competitive Act (1988) or The Generalised System of Preferences (GSA) Act of 1984 cover some areas of the social clause (Freedom of association, Right to organise unions and bargain collectively, prohibition of forced labour, Minimum age for child labour and Acceptable conditions of work with respect to minimum wages, hours of work, occupational health and safety), allowing USA to enforce the standards in the bilateral trade.

France, too, was quite active through the European Union (EU) to press for the social clause during the formation of WTO. The EU had formed as early as February 93 the Andre Sainjon Committee on External Economic Relations to prepare a report 'On the Introduction of A Social Clause in the Unilateral and Multilateral Trading System'. The report tabled in January 94 recommended, introduction of social clause stating: "The European Parliament... considers it essential that a social clause designed to combat child and forced labour and to encourage trade union freedom and the freedom to engage in collective bargaining on the basis of the ILO conventions mentioned above be introduced in the multilateral and unilateral framework (GSP) of international trade..." and "calls for Article XX (e) of GATT to be changed by introducing a ban on child and forced labour and the right to join trade unions and engage in collective bargaining; accordingly, considers it essential that a code be negotiated between all the Contracting Parties to determine the way in which these principles can be implemented in practice" (EUROPEAN PARLIAMENT, Session documents, 6 January 1994)[³]. In its explanatory statement the report states: "At present, the practice of relocation towards developing countries with low labour costs has taken on worrying proportions for Community countries in certain industrial and service sectors. This explains why relocation is a source of serious concern at national level, especially during periods of acute recession and growing unemployment... We shall look more closely at the social aspects of the problem, in other words the unfair 'social dumping' practices, which are based on a lack of respect for certain human rights in the workplace and violate human dignity. It should, nevertheless, be pointed out that the debate on the introduction of a social clause in international trade should not be used as an excuse for greater protectionism against developing countries"[⁴]. Even after the formation of the WTO France continued to push forward the debate on the social clause. In March 95 the 'French memorandum' was presented to Social Affairs Council of the EU in which the President urged to define "a core of fundamental social rights at world level"[⁵].

The resistance of many industrialised countries of the north and the Third World countries of the south, particularly from Southeast Asia, Brazil and India who threatened not to sign the GATT final document at Marrakesh forced the conference only to mention the necessity of the social clause without committing to any concrete actions. The social clause was excluded from WTO till 1997. The issue was not resolved at Marrakesh.

In 1995 the discussion continued at different levels. The trade unions, employers' associations, governments and NGOs started studying the ILO conventions, national labour laws, human rights declarations etc. in order to define their own political and strategical positions. OECD formed a committee to work on the social clause and submit the report to the OECD Council of Ministers in 1996. The OECD members still have divergent views. France favor the social clause, whereas Germany is reserved towards the concepts of linking trade with the social standards.

The foremost proponent of the social clause in the Multilateral Trade Agreement is ICFTU where the trade unions of the industrialised countries have a dominating influence. Its position is: "We

3[]Social Clause in Multilateral Trade Agreements, Page 128

4[]Social Clause in Multilateral Trade Agreements, Page 131

5[]DOCUMENTATION CENTRE EUROPEAN PARLIAMENT, N 1928, Brussels, 4 April 1995, Bulletin Europe

believe that in an increasingly competitive world trade market, governments should agree to a minimum floor level of labour standards so as to ensure that social conditions improve as trade expands. The 'trickle down' theory of trade policy does not work. There are no automatic mechanisms by which increased exports lead to improved wages and conditions. Increased exports do provide the resources for improvements but only trade unions through collective bargaining or governments through adequately enforced labour laws can ensure that increased trade does really lead to higher standards of living for all workers"^[6]. For ICFTU the social clause is a practical proposition to ensure free trade and ease "the pressures for increased trade protection". It believes "that many if not most developing countries could derive great benefits from a social clause". Many other national trade unions of the industrialised countries (Germany, Netherlands, USA) support the ICFTU positions whereas the trade unions of the Third World countries are reserved. The Indian trade unions have rejected the social clause strongly "because it can be used as political weapon in the global politics against the interests of the country. There is no need to provide additional handle to certain developed countries' governments to armtwist... This may also lead to further immiseration... HMS believes that India (& developing countries) must put forward their own social clause, dictated by our domestic needs of public welfare and development"^[7].

The foremost opponent of the social clause are the employers' associations and the governments of the Third World countries organised in the Non-Aligned Movement (NAM). The employers' associations would either reject the social clause outright or would not like to link the implementation of the ILO conventions with trade^[8]. The Third World countries already demonstrated their reservation at the Marrakesh conference. The next opportunity to express reservation towards the social clause was offered at 'The Fifth Conference of Labour Ministers of Non-Aligned and Other Developing Countries' in January 95 in Dehli which discussed in detail the implications of the social clause (Agenda Item six) and rejected it in the WTO context. Rather, the members gave ILO the preference to develop workable labour standards without any trade links. "While the substantial number of developing countries are not inclined to accept the social clause, they are also generally unanimous in their opinion that objective and neutral ILO action for standard setting should continue and that ILO's hands should be strengthened for the purpose". According to them the social clause will ultimately harm the workers. "The issue is, in fact, one of resource transfer and not comparative advantages or disadvantages. Invoking trade sanctions against exporters in developing countries on grounds of labour standards would hurt the workers themselves, causing unemployment and driving them from distress to destitution"^[9]. The ministers declared: "We are deeply concerned about the serious post-Marrakesh efforts, seeking to establish linkage between international trade and enforcement of labour standards through imposition of the social clause. We wish to reaffirm the position... that the social clause is totally unacceptable. In our view what is imperative is a commitment to promote and safeguard human dignity through the promotion of measures aiming at improving the working and living

6[]ICFTU, 23 February 1995 (See: Social Clause in..., page 136)

7[]HMS, Social Clause & International Trade, Dehli, November 1994, (See: Social Clause in Multilateral Trade Agreements, Page 167)

8[]Klaus Piepel (Ed.): Sozialklauseln in Welthandel -ein Instrument zur Förderung der Menschenrechte?

MISEREOR Medienproduktion, Aachen, Germany, 1995, Page 22

9[]Fifth Conference of Labour Ministers..., Dehli, January 1995

(See: Social Clause in Multilateral Trade Agreements, Page 99)

5 conditions of all people and providing better levels of protection"^[10]. Similarly, ASEAN expressed its reservations towards the social clause fearing possible protectionist practices of the industrialised countries. "Our main concern is that a social clause can become a means for developed countries to impose their social standards on us. The danger of a proposal for a social clause, a precise definition of which has not been established, is that it may be used as a protectionist tool to shield uncompetitive or stagnant sectors. The solution to the community' own structural problems cannot be found under the guise of action to promote social progress in developing countries"^[11]. A number of NAM countries are dictatorially governed where trade unions are banned, basic human rights are violated, feudal social structures are preserved, forced and jailed labour is used, free and democratic elections of the government are not allowed etc. 10 The ruling elite is not willing to allow any political and social changes. In NAM, all of them influence the position to be taken towards the social clause.

15 Indian parliament ratified the agreement establishing the WTO on 8.12.1994. Indian position towards the social clause remained critical and the subsequent actions were oriented towards gaining time. "Our first step should be to slow down this unholy hurry to get this social clause incorporated in either the ILO Agenda or WTO charter... Secondly,... the thrust of our argument should be positive: that the improvement of labour standards per se is plainly acceptable, but what is not acceptable is trade linkage even as a matter of principle as it would be a dangerous 20 policy instrument that is capable of misuse... Third, that the modalities of upgradation of labour standards... would encompass other issues such as international labour mobility which is presently hindered by the developed countries immigration policies. There can be no doubt that free labour movement will produce higher labour standards... Fourth, India should unilaterally declare that it seeks international partnership to abolish bonded labour and child labour, the only 25 two problems where we are vulnerable on the social clause issue, and ask the proponents of the social clause issue either to create a Global Social Facility Fund in the ILO to finance the abolition of the two problems or share the burden of our domestic prominence through bilateral aid. This will put the true motive of developed countries to test"^[12]. But the government knows that sooner or later the decision on the social clause in the WTO charter is bound to come. The 30 chairman of the Commission on Labour Standards continues: "Nevertheless, the linkage of labour standards to international commerce is an inevitable pill that we may have sooner or later to swallow. The question is how to formulate a strategy to define its scope, minimise its side effects, and how to facilitate its painless implementation. Some of the labour standards are worthy of adherence on our own, such as on abolition of child labour. We need a definite plan of action for 35 that".

Issues Related to Social Clause

10[]Fifth Conference of Labour Ministers, Draft Dehli Declaration, in: Social Clause in Multilateral Trade Agreements, Page 161

11[]ASEAN Brussels Committee Statement, in: Social Clause in Multilateral Trade Agreements, Page 157

12[]Statement of Dr.S.Swamy, Chairman

Commission on Labour Standards and International Trade, Government of India, 2 June

Despite the vehement critics and rejection from different sides, it is essential "to look at the basic issues raised by the controversy, namely, the sad plight of labour in the developing country and to view the social clause from this aspect, rather than as a tool of the developed countries to suppress the developing world (which it has unfortunately become due to its linkage with trade)"^[13]. Child labour, bonded labour, forced labour, unequal payments for women and men, prohibition of trade unions etc. is still widespread in many countries. Only a minority is living a good life whereby the majority is deprived of opportunities of brighter future. They have to struggle daily for pure physical survival. What are the tools available at the global level within GATT/WTO or ILO to combat these evils and define social and labour standards?

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GATT established a number of trade related fundamental rules subject to certain limits of their range of application or subject to specified exceptions. None of the rules deal with labour related issues except the Article XX which provides some indication in the points (a), (b), (e).

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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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(a) necessary to protect public morales;

(b) necessary to protect human, animal or plant life or health;

(e) relating to the products of prison labour.

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But except for point (e), the Article XX does not reflect the direct link between labour issue and trade indicating that GATT did not give much attention to the issue of labour standards during its existence of more than four decades. The GATT (now WTO) has no comprehensive source of substantive labour and social standards.

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Unlike GATT, ILO, formed in 1919 and since 1946 a part of the UN system, has been dealing with the conditions of employment, developing a system of international social and labour standards to enable the 150 member countries to improve the condition of the labour with minimum effect on their competitiveness. It has drawn up 171 conventions and 178 recommendations. The effectiveness of enforcing the social and labour standards (without violating the sovereignty of individual nation) is weak. Distinct and vociferous debate on the social clause started in the recent times in July 1990 when in Germany a public campaign on child labour in carpet industry of India started. The campaign focussed on boycotting the carpets woven by children and certifying the carpets without child labour. With the introduction of the so-called Harkin Bill ("To prohibit the import of goods produced abroad with child labour and for other purpose") in August 1992, the social clause debate became intense and fundamental and widened its scope over to other areas of labour, like bonded labour, forced labour. By the time the

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13[]Sharit K Bhowmik: Social Clause: Is Its Opposition Justified?
Economic and Political Weekly, 16 December 1995, Page 3199

WTO formation appeared on the GATT agenda in 1993, the issue was perceptible in all labour and trade consultations.

Presently the social clause debate broadly covers the following ILO conventions:

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No.87: Freedom of association and Protection of the rights to organise (1948)

No.98: Right to organise and Collective bargaining (1949)

No.111: Freedom from discrimination in employment (1958)

No.100: Equal remuneration for women and men (1951)

10 No.155: Occupational safety and health

No.138: Minimum age for employment of children (1973)

Nos.29/105: Freedom from forced or compulsory labour (1930, 1957)

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The member countries have ratified some of the ILO conventions and also passed national laws on these issues without significant difference to the working conditions of the labour. India has ratified the conventions 29, 100 and 111 from among above mentioned conventions. India has not yet ratified the other conventions 87, 98, 105 and 138 but has its own national laws and Constitutional provisions. Bonded Labour System (Abolition) Act was passed in 1976, yet people have to live and work in bondage. The Child Labour (Prohibition and Regulation) Act was passed in 1986. Yet about 45 million children (ILO Annual Report 1992) below 15 are widely employed in all types of hazardous jobs. The Equal Remuneration Act was passed in 1976, but women in unorganised sector get wages lower than those of men. These and many more other issues have not been tackled by the government yet. The social clause has raised very vital social, political and labour issues which have not been tackled in India, neither in the pre-independence period nor during the five decades of independence. The social balance sheet of the country even in 1996 is extremely poor. Child labour, bonded labour, forced labour, illiteracy among half the population between 6 and 60, extreme poverty among dalits and adivasis... The list is long. Though the economy showed enormous development over the decades, the wealth created by different labour, organised or unorganised, bonded or forced, women and children has not trickled down to change their plights. The society has remained by and large polarised with the concentration of the wealth and power among the 30% upper and middle class population in the society. They are by and large free from all this burden. The Indian government has failed, like in many other Third World countries, to address the issues raised by the social clause earlier. "Unfortunately they crop up only when there is a threat to international trade. Hence it is ironical that while some countries in the developed world attempt to use the social clause to better their own position in world trade, developing countries are counteracting these manoeuvres by opposing any attempt to protect their workers. They now tend to view any move to improve condition of workers as external threats... Had the conventions embodied in social clause been sincerely implemented by the government, the position of the labour in India may not have been as helpless as it is now... the quality of life of the workers would have improved and this too would have served the national interest"^[14]. In spite of the fact that India's share in world export is

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very low (1992: 0.52%; 19.56 billion US \$)^[15] of which about 30% is covered by the unorganised sector (Agriculture, Leather, Garments, Carpets, Handicrafts etc.) the policymakers react very sensitively to the international social pressure.

5 Unfortunately the trade unions have been supporting the government's position on the social clause to uphold the national interest. The organised sector employs only 8.5% of the Indian workers (Ministry of Labour, Annual Report 1993-94); the rest (91.5%), inclusive children and the majority of women, work in the unorganised sector and is not represented by the classical unions. The policymakers in government, employers' association and trade unions have ignored
10 the problems of these workers, which is criminal.

There are many evidences to show that the policymakers react to social issues much faster only when they are exposed to international queries and put under external pressure. The government of India declared an ambitious scheme for eliminating child labour only when the Rugmark certification for the Indian carpets became an international issue. National Human Rights
15 Commission was set up only after strong international criticism of India's human rights records. "Narmada project, one of the most environmentally unsound, economically ruinous and human misery-enhancing schemes undertaken anywhere, would not have been subjected to scrutiny, however belated, by the Jayant Patel Committee had it not been preceded by considerable
20 international controversy, leading to the withdrawal of the World Bank from it"^[16].

Enforcement and Dispute Settlement: Some Suggestions

25 Rejection of the social clause by the Third World countries is based on the fear that they would be forced by the industrialised countries to harmonise the labour standards according to their norms ("upward harmonisation") resulting loss of "competitive advantage" which they enjoy as they can practice low labour standards, including cheap labour. These tensions would definitely lead to conflicts which WTO will have to handle.

30 Unlike in the World Bank and IMF, WTO has one country - one vote system. The industrialised countries cannot overrule the voting majority. The WTO does provide an established process for trade related disputes under Article XXII and XXIII. In its first year of functioning (i.e. 1995), the WTO received 27 complaints^[17]. The majority of the cases are among the industrialised
35 countries. The Third World cases are south-south disputes. The only judgment given so far (Venezuela and Brazil vs. USA) has been in favour of Venezuela and Brazil. The other cases are still pending. The WTO dispute machinery does not require unanimous decision and has to settle the disputes within 18 months, including time for appeals.

15[]Social Clause in Multilateral Trade Agreements, Page 57

16[]Praful Bidwai, The Economic Times, 13 February 1995

17[]10 against European Union, 4 against USA, 4 against Japan, 3 against S.Korea, 1 each against Poland (vs. India), Malaysia (vs. Singapore), Brazil (vs. Phillipines), Venezuela (vs.
5 Mexico)

The Dispute Settlement Body of GATT/WTO is no doubt highly experienced in trade related issues. But it has no experience in social issues related to trade. The principles, terms of reference, the procedures etc. herefor are yet to be developed. One may doubt if WTO alone is the right body or if WTO and ILO can cooperate in the area of dispute settlement and enforcement. ILO is well experienced and has already developed many important social and labour conventions and recommendations. Many of them are ratified by the member countries. ILO and WTO can define and monitor the terms of reference of an Extended Dispute Settlement Body for social and labour disputes related to trade. This body can

- prepare regular reports on the state of labour rights and trade and make recommendations;
- monitor the norms and monitor them periodically;
- examine the complaints and settle them as far as they fall within the mandate. If a complaint relates to a specific business act within which the labour dispute can be resolved, then this body can deliver the judgment within short time;
- but in cases where the dispute resolution requires the change in social structure and production processes, and probably economic inputs (e.g. child labour), the body can insist on a national plan of action with specific time frame and in compliance with international laws; the body can offer any possible help within WTO and ILO competency and monitor the implementation;
- an international welfare fund should be set up to help national activities for combating worse forms of labour standards violations (child labour, bonded labour);
- WTO can develop a flexible trade preference mechanism to encourage the member countries to enforce the standards;
- and if a member country would not submit a plan of action or would not implement the activities to practice the labour standards, then trade sanctions can be suggested.

Social Clause and Child Labour in India

Let us take the case of child labour in India where about 45 million children (the highest figure worldwide) are employed in production and service sector, for the export industry and the internal market. According to UN estimates more than 100 million children are at work globally under exploitative conditions. The ILO Report of 1992 says that Asia has the highest figures relating to child labour, up to 11% of the total labour force in certain countries. Article 24 of the Indian Constitution prohibits employment of children below the age of 14 in factories, mines or other hazardous occupations. The Child Labour (Prohibition and Regulation) Act, 1986 defines further areas of prohibition and regulation but excludes the family labour which allows many small scale industries to function as family units without prohibiting child labour. Even the Factories Act (1948) does not prohibit child labour for small units using 10 persons or more with power or 20 persons or more without power. Child labour is rampant in the small scale industry.

Why do children have to work? Why is the child labour so high and has been existing for so long (for centuries) in India? The common belief is poverty, economic problems force them to work hard and long in order to meet both ends. But a number of studies have shown that this is not quite true. It is less a phenomenon of poverty than of social attitude and sensibility. "So far child labour has been accepted in India because it is believed to have an economic basis that fits into a demand-supply framework" [18]. Equally, the monetary contribution of the children to family budget is marginal and does not justify the child labour at all [19]. Moreover, the damage done to children in their early age make them vulnerable and unemployable in their later life. Even the argument that cheap child labour gives competitive advantage in international trade is not quite true. In the carpet industry, for example, a number of actors are involved: home based weaver, sub-contractor, contractor, exporter on one side and importer, retailer on the other side. About 75% of the selling price of the carpet is a value addition after import. The labour costs of the weaver are marginal and may increase by only 5% if the children are substituted by adult labour.

Would that justify the continuation of child labour practice in India? Who will lose (how much?) in the international trade if these children are sent to school? Is a nation going to suffer if the profits of some traders are reduced marginally for the price of the education of the children? Indicators relating to living standards and schooling show a significant correlation between the two factors (UNDP Annual Report 1992). Many Third World countries (Sri Lanka, Vietnam, Tanzania, Uganda, Zaire, Burma, Kenya and China) show that "the principle of compulsory education can be successfully adopted, with corresponding decrease in child labour. This puts to question the notion of industrial development acting as precursor to the abolition of child labour. Instead, it indicates a political will and commitment to put an end to a problem. It also stresses the role of education in reducing child labour"[20].

Conclusion

By rejecting the social clause, the Indian government has put off its responsibilities of sincerely combating the plight of the labour, particularly in unorganised sector. If it is not put under pressure, internally and externally, it will not show any political will to abolish even the worse forms of labour, namely child labour and bonded labour. Social clause implementation may provide an opportunity to focus this at the center of social change. The Indian labour will only gain from the social clause.

18[]Kiran Bhatta: Child Labour: Breaking the Vicious Circle, EPW, 17 February 1996, Page 384

19[]Myron Weiner: The Child and the State in India, Dehli, 1990, Page 33

20[]Kiran Bhatta: Child Labour..., EPW, 17 Feb.96, Page 385