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The ITO Charter Model for "Sustainable Development": A framework for a self-evolving transnational economic order by "middle powers"*

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Abstract

This paper proposes an alternative framework for the international economy, based on the concern that superpowers such as the United States and the EU have increasingly adopted so-called production process and method (PPM) measures, which restrict or deny benefits to imports or other economic activities in their territory because of environmental protection, labor protection, and other non-product-related aspects of production or other economic activities in any foreign jurisdiction. While these measures may contribute to improvement in the level of environmental protection, and so on, which is necessary to achieve "sustainable development," they would generate inefficiency by forcing middle or small countries to adopt standards designed by superpowers for their own economies. Furthermore, middle or small countries see no merit in allowing PPM measures because their economic power is insufficient to effectuate their own PPM measures, unlike superpowers. This article analyzes the ITO Charter, which was negotiated and agreed upon as the predecessor to the GATT but did not come into force, and finds that it was intended to establish a framework whereunder each Member undertakes the primary responsibility for labor protection, economic development, and other matters within its own territory, and other Members and the ITO and other international organizations assist Members' efforts. Accordingly, the Charter contemplates that any complaint about other Members' domestic policies be exclusively addressed by a political organ of the ITO, which represents all Members, thus enabling the ITO to use it for rulemaking as well, while prohibiting any PPM measures taken as unilateral countermeasures. This framework should be considered as "the ITO Charter model" for the international economic order for the "sustainable development" by "middle powers."

Keywords: global governance, middle power, sustainable development, ITO charter, WTO, PPM, judicialization

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I. Introduction - Increases in PPM Measures and Increased Needs for an Alternative Model

Global warming and other environmental degradations are considered to have become so serious as to threaten human sustainability. It is evident that global cooperation is indispensable to tackle these challenges and attain the Sustainable Development Goals (SDGs), which set individual goals intended to ensure the survival of human beings. Nonetheless, with the occurrence of several serious armed conflicts that threaten to cause cracks in the world order, such as Russia's invasion of Ukraine and the Israel-Hamas War, the grounds for building a framework for global cooperation may be collapsing.

Focusing only on international economic relations, the conflict between the United States and China has exacerbated, thus blowing headwinds against the formation of cooperative relations. The incessant conflicts in international relations have apparently reduced patience to bear and gradually alleviate the frictions that inevitably arise from coexistence with disparate countries and societies. In response to increased public awareness of environmental problems, human rights problems, and other problems involving non-economic values, Western governments have increasingly required that business enterprises operating in their countries address such issues, but in doing so, they have recently included the operations of business enterprises outside their territories as subjects of the requirements to ensure that domestic operations are not at a disadvantage in relation to competing foreign operations. Thus, the Western governments have increased measures on the production process and method ("PPM measures") (e.g., those requiring environmental protection, worker protection in the production process of products consumed in their markets), and as a result, stepped-up intervention in these policy issues in foreign countries. For example, the European Union (EU) has introduced the Carbon Border Adjustment Mechanism (CBAM), a measure that requires imported goods to pay a surcharge equivalent to the excessive environmental cost borne by domestically produced goods for greenhouse gas emissions.[1] Similar non-trade measures are also observed. Some European countries have introduced the mandatory requirements for human rights due diligence recommended by the United Nations Guiding Principles,[2] not only requiring respect for human rights in corporate activities within their respective territories, but also for human rights in overseas activities.[3] Similarly, the EU and the United States have concluded several free trade agreements that require compliance with international standards for worker protection

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[1] See the EU website <https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en>.

[2] John Ruggie, "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises - Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31, Human Rights Council, 19 March 2011.

[3] *See* the EU website <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1145> [accessed on 12 January 2024>.

and include enforcement procedures.[4] The US has also introduced trade restrictions and other measures concerning human rights violations in the import supply chain, such as the Uyghur Forced Labor Prevention Act.[5]

Under the World Trade Organization (WTO) agreement, which supports the global free trade order, jurisprudence has been established to ensure that trade measures requiring a certain level of environmental protection in the production process of imported and domestic products are WTO-inconsistent unless the level of protection properly reflects the specific situation in each producing country. Nevertheless, it is necessary to consider the treatment of PPM measures from the broader perspective of international economic law. Should the same approach be taken for non-trade PPM measures, or are such non-trade measures not generally regulated, and should WTO jurisprudence be changed to allow PPM trade measures as well as non-trade measures? As "sustainable development" is gaining importance as a shared value but the movement to global cooperation is slow, it is increasingly necessary to answer this question.

The choice of this point implicitly presupposes the choice of a certain governance structure for the international economic order, particularly regarding how to seek sustainable development globally. Indeed, it is indisputable that PPM measures encourage compliance by subject business enterprises with higher standards for environmental protection, worker protection, etc., in foreign countries. Thus, PPM measures seem to contribute to the realization of the SDGs or the maintenance of human sustainability. This explains, to some extent, why PPM measures are gaining political support in countries that have implemented them. However, in the author's view, it is doubtful that PPM measures are the best option for solving global issues, and it is thus necessary to elaborate an alternative model for transnational governance in which each country assumes responsibility for the optimization of its own economy vis-à-vis all other countries, and in turn, no PPM measure is permitted.

PPM measures bear the structural risk of generating inefficient outcomes. Technical details of the subject economic or social situation are important in designing the optimal regulation of economic activity, and the state of relevant factors varies from country to country. It is doubtful that countries taking PPM measures have the ability and will to design and choose the standards optimal for all foreign countries. Even if the standards have been discussed and agreed upon by multiple nations (e.g., EU members), they essentially represent local interests only, reflecting the social interests, economic and social structures, and history of development of the countries or regions in question. There is no guarantee of optimality given that the situation in overseas producing countries varies; thus, it is likely that the chosen standards inevitably favor domestic companies or operations. Furthermore, due to the political and diplomatic considerations of the implementing country, it is likely that the standards and their

[4] *E.g.*, Article 16.3 of the Agreement between the European Union and Japan for An Economic Partnership.

[5] *See, e.g.,* the U.S. Customs website <https://www.cbp.gov/trade/forced-labor/UFLPA>.

applications will be lenient toward friendly or like-minded foreign countries, and there is a possibility that their application will involve compromise with powerful countries that strongly oppose them. Also, the priority of agenda should differ from country to counry, for example, between reduction in greenhouse gas emissions and the prevention of desertification. Nevertheless, the imposition of a PPM measure by a country with respect to the former would force other countries to give a priority to the former.

From the viewpoint of small- and medium-sized countries, there should be little merit in allowing even non-trade PPM measures, while superpowers such as the US, China, and the EU may effectively use such measures to compel business enterprises in other countries to follow the same standards or codes of conduct. Small- and medium-sized countries may have no choice but to align their environmental or labor standards with those of superpowers that are significantly different, although the differences reflect those in value orders, economic and social structures, and other factors. In addition, small- and medium-sized countries that wish to maintain good relations with multiple major powers will be forced to choose which relations to prioritize if conflicts between the major powers escalate. If they choose, they become more economically dependent on a particular superpower and more susceptible to its policy choices. The more radical and innovative the abilities of small and medium-sized countries to design and reform their domestic policies, the more likely they will be to want alternative models for an international economic order that does not tolerate PPM measures. These considerations also indicate that the comprehensive rejection of PPM measures would be effective in preventing the spread of bloc economies and maintaining the diversity of economic systems.

To explore this possibility, this paper examines the Charter of the International Trade Organization (ITO), the predecessor of the GATT/WTO Agreement, by contrasting its normative structure with those of the GATT/WTO Agreement. The ITO Charter was drafted with the mission of preventing serious international conflicts and realizing peaceful coexistence at a time when the balance of power among major powers had collapsed and the devastation of world war had been repeated in a more tragic manner. Although the Charter did not come into effect, it is worth revisiting today, a time witnessing several serious economic (and armed) conflicts and the spread of PPM measures that may lead to the revival of bloc economies.

The analysis and argument of this paper is organized as follows. In contrast to the GATT/WTO agreement, the ITO Charter does not merely set forth discipline over the trade policy of its Members, but requires that each Member discharge its own responsibility for domestic worker protection, economic development, etc., within its own territory, and that other Members, the ITO, and other international organizations support and in effect press any Member to fulfill its own responsibility.[6] This structure

[6] Jean-Christophe Graz, “The Political Economy of International Trade: The Relevance of the

could provide a model for an international economic order constituting a viable alternative to the contemporary one, in which a limited number of large or developed countries are effectively permitted and able to force other countries to raise their standards of environmental protection, worker protection, etc., through non-trade PPM measures. Indeed, the ITO Charter was not ratified by most negotiating countries, and thus did not enter into force, because they were afraid that the Charter would impose significant restrictions on domestic policy, thus generating a risk of injuring their sovereignty. However, today, when global cooperation is urgently needed to ensure human sustainability, no country can justifiably claim unlimited sovereignty. Nevertheless, it is still true that many countries have as yet not attained the capacity to develop their own economies optimally, and thus need support from other countries. The ITO Charter should be revisited because it appears to provide for an alternative framework for transnational economic order in which all Members contribute to the pursuit of the common goal of sustainable human development.

II. Overview of the ITO Charter and Differences from the GATT/WTO Agreements

The following analysis will clarify the differences between the ITO Charter and the GATT/WTO Agreement with respect to labor standards and environmental protection. Thus, we propose an alternative framework for improving the levels of environmental protection, labor protection, and other aspects of production and corporate activities in foreign countries, without relying on PPM measures by major powers, which may be arbitrarily implemented.

1. Life History of the ITO Charter

The United States and the United Kingdom had discussed how to construct a postwar international trade order since before the end of World War II. The Atlantic Charter, which was agreed in 1941,[7] included Article 4, which concerns the enjoyment of the equal right to trade and access to raw materials, and Article 5, which clarifies their "desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement, and social security." In 1942, they concluded the Anglo-American Mutual Assistance Agreement, clarifying the significance of the US lending arms and other equipment to the United Kingdom.[8] Article 7 of the Agreement stipulates that "the terms and

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International Trade Organisation Project," Journal of International Relations and Development, Volume 2, No. 3 (September 1999), noted that "the key question addressed by the negotiators of the Havana Charter remains valid: how can we comprehensively define a compatible relationship between the transnationalisation of capitalism and the economic and social roles of political authority?", and this article attempts to answer this question.

[7] The text of the Atlantic Charter is available, for example, from the website of the Yale University Library's Collection of Historical Documents (Avalon Project) <https://avalon.law.yale.edu/wwii/atlantic.asp> [accessed on January 12, 2024].

[8] The text of the Anglo-American Mutual Assistance Agreement is available, for example, from the

conditions [of the assistance provided by the United States to the United Kingdom] shall be such as not to burden commerce between the two countries, but to promote mutually advantageous economic relations between them and the betterment of worldwide economic relations." The Article goes on to state that "[t]o that end, they shall include provision for agreed action by the United States of America and the United Kingdom, open to participation by all other countries of like mind." Such agreed action shall be directed "to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods, which are the material foundation of the liberty and welfare of all peoples; to the elimination of all forms of discriminatory treatment in international commerce; and to the reduction of tariffs and other trade barriers." It shall be further directed "in general to the attainment of all the economic objectives set forth in the [Atlantic Charter]." They decided that "[a]t an early convenience, conversation shall be begun between the two Governments" to embody the foregoing idea.

In pursuance of this decision, at the Washington Conference (1943) the two countries discussed five specific policy areas: international monetary policy, commercial policy, commodity policy, cartel policy, and international coordination for high-level employment. The "Agreed Anglo-American Document on Commercial Policy," 1943, refers to multilateral reduction of tariffs, preferential trade treatment, quantitative trade restrictions, export taxes and restrictions, subsidies, and state trading, and includes the formation of multilateral trade agreements and an international trade policy organization. [9] Regarding international monetary policy, the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD) were established following the Bretton Woods Agreement in 1944. Regarding other trade-related policies, the United States announced the "Proposal for World Trade and Employment Expansion"[10] in December 1945 after various discussions within the government. This proposal states in the third paragraph of its preamble that "[t]he fundamental choice is whether countries will struggle against each other for wealth and power, or work together for security and mutual advantage," regarding the course after the war, and that the latter choice "was made at [the] San Francisco [Conference]" (April–June 1945), where the United Nations was established. The proposal goes on to state in the following two paragraphs that "[s]uccess requires that the United Nations work together in every field of common interests, in particular the economic," and also that "[t]he United Nations should also endeavor to harmonize their policies with respect to international trade and employment. An International Trade Organization is still to be

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Avalon Project website <https://avalon.law.yale.edu/wwii/angam42.asp> [accessed December 8, 2023].

[9] With respect to the discussion and agreement reached at the Washington Conference, see Kazuto Yamamoto, "Formation of the Postwar World Trade Order: Anglo-American Cooperation and Competition for Leadership" (In Japanese) (Minerva Shobo, 1999), Section 8.

[10] The text of the Proposal is available, for example, from WorldTradeLaw.net, Drafts of the GATT website <https://www.worldtradelaw.net/static.php?type=public&page=gatttexts> [accessed January 13, 2024].

created. To this end, it is now proposed that an International Conference on Trade and Employment should be called by the United Nations, to meet not later than the summer of 1946."

Following the creation of the United Nations, the International Conference on Trade and Employment was called at a meeting of the United Nations Economic and Social Council on February 18, 1946, and a Preparatory Committee was constituted with a mission to submit draft international agreements relating to the "high and stable levels of employment and economic activities," "regulations, restrictions and discriminations affecting international trade," "restrictive business practices," and "intergovernmental commodity arrangements," and a draft Charter of the International Trade Organization, for consideration by the Conference.[11] Nominated as members of the Preparatory Committee were Australia, Belgium, Brazil, Canada, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom, and the United States of America (Paragraph 6). The United States submitted a draft Charter of the International Trade Organization in September.[12] After various discussions and negotiations at the Preparatory Committee, the International Conference on Trade and Employment adopted the ITO Charter in 1948.[13]

However, the ITO Charter has never been enforced. Before the adoption of the Charter, in doubts that the ITO Charter would come into effect, the United States took the lead in tariff negotiations and created the GATT in October 1947 in accordance with the results of the tariff negotiations. The provisions to ensure their effectiveness were extracted from the ITO Charter,[14] and provided for its application until the ITO Charter came into force. Despite some minor differences, the provisions of the GATT are almost all extracted from Chapter IV of the ITO Charter, that is, the rules regarding commercial policy. If and when the ITO Charter comes into force, the main provisions of the GATT would be replaced by the corresponding provisions of the ITO Charter. The ITO Charter was subsequently adopted as mentioned above, but was not ratified by most of the signatories, including the United States, and thus did not come into effect. Consequently, the GATT survived with some changes and additions and continued to assume the role of underpinning the free trade system until 1995, when the WTO Agreement was established and entered into force.

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[11] Resolution of the Economic and Social Council of 18 February 1946, E/1st sess./Resolutions, available from UN Digital Library <https://digitallibrary.un.org/record/3843513> [accessed January 12, 2023].

[12] The text of the draft is available from, for example, the WorldTradeLaw website, "Drafts of the GATT," <https://www.worldtradelaw.net/static.php?type=public&page=gatttexts> [accessed December 8, 2023].

[13] "The Final Act of The United Nations Conference on Trade and Employment: Havana Charter for an International Trade Organization," signed March 24, 1948.

[14] "The Final Act adopted at the second session of the Preparatory Committee of the United Nations Conference on Trade and Employment," signed October 30 1947.

2. Normative Structure: Each Member assumes a responsibility to optimize its own domestic economic policies and to support other Members in discharging such responsibility

The GATT did not include the four chapters of substantive provisions other than Chapter IV of the ITO Charter, which concerned employment, development and reconstruction, restrictive business practices, and international commodity agreements. Each chapter consists of three elements. The first element is the recognition that each of the concerns of each Member (e.g., securing employment and economic development) is in the interest of not only that Member but all Members. Second, each Member undertakes proactive responsibilities and obligations to implement these policy agendas appropriately. Finally, based on the same recognition, a mechanism will be established for other Members and the ITO to provide policy cooperation, including information gathering and analysis, the supply of goods, funds, technology, and other multifaceted support.

The elements in the four omitted chapters are not found in GATT, leaving the overall impression that the ITO Charter significantly differs from GATT. GATT focuses on eliminating trade barriers. While GATT may presuppose that each contracting party will optimize its own domestic policies, it provides no obligation or responsibility for doing that vis-à-vis other contracting parties. It provides for certain affirmative obligations, for example, publication of laws and regulations and establishment of a judicial remedy system (Article X), but it is understood that they are prescribed to ensure the trade interests of other contracting parties, rather than to ensure the appropriateness of a contracting party's policy implementation. In the same vein, the Fourth Part, titled "Trade and Development," which was added in the 1960s, states that "the basic objectives of the Agreement include … the progressive development of the economies of all contracting parties," but it is not recognized as a concern of all contracting parties. The Part provides for the obligation of developed contracting parties to increase trade opportunities for the sake of national development, but it remains a "best effort" obligation (Article XXXIX, Paragraph 3). The WTO Agreement further provides for affirmative obligations, for example, control over monopolies in the service sector (Article 9 of the GATS) and the development of intellectual property rights regimes (the TRIPS Agreement), but does not divert the primary focus from the elimination of trade barriers. Even regarding IPR protection, the main objective is to eliminate trade distortions and obstacles, and there is no provision that states that IPR protection should be sought for all contracting parties, for example, to promote technological development that benefits all contracting parties (See Preamble of the TRIPS Agreement).

The following is an overview of the provisions of Chapters II and III of the ITO Charter.[15]

[15] This paper does not discuss Chapter V on Restrictive Commercial Practices and Chapter VI on

Chapter II, entitled “Employment and Economic Activity,” contains six articles (Articles 2–7).

Article 2 establishes the fundamental recognition of the Members in the field of employment security. First, “the avoidance of unemployment and underemployment … is not of domestic concern alone, but is also a necessary condition for the achievement of the general purpose and objectives set forth in Article 1,” for example, ”of “peaceful and friendly relations among nations.” On this basis, Paragraph 2 of Article 2 describes the Members’ further recognition thus: “while the avoidance of unemployment and underemployment must depend primarily on internal measures taken by individual countries, such measures should be supplemented by concerted action under the sponsorship of the Economic and Social Council of the United Nations in collaboration with the appropriate inter-governmental organizations.” Paragraph 3 goes on to state, “[t]he Members recognize that the regular exchange of information and views among Members is indispensable for successful cooperation in the field of employment and economic activity, and should be facilitated by the [ITO].”

Following this recognition, Article 3 sets out the fundamental obligations of each Member under the heading “Maintenance of Domestic Employment,” as “[e]ach Member shall take action designed to achieve and maintain full and productive employment and large and steadily growing demand within its own territory through measures appropriate to its political, economic and social institutions” (Paragraph 1). However, measures taken to comply with this obligation must “be consistent with the other objectives and obligations of the Charter,” and “Members shall seek to avoid measures which would have the effect of creating balance-of-payments difficulties for other countries” (Paragraph 2). In essence, Members are required to do their best to secure employment, but at the micro level they are not allowed to implement policies that protect inefficient domestic industries from international competition, and at the macro level, they are not allowed to adopt expansionary financial policies, for example, by lowering interest rates to cause a fall in the exchange rate that increases exports and decreases imports, thereby inducing difficulties in making external payments in other countries.

Article 5, Paragraph 1 provides the obligation for Members to exchange information and participate in policy consultation, specifically, to “participate in arrangements made or sponsored by the Economic and Social Council of the United Nations.” The arrangements shall be: first, “for the systematic collection, analysis and exchange of information on domestic employment problems, trends and policies, including as far as possible information relating to national income, domestic demand and the balance of payments”; second, “for studies, … concerning the international aspects of population and employment problems” to the extent that they are relevant to the objectives of the

International Commodity Agreements in detail, because it has little relevance to the subject of this paper.

Charter; and third, "for consultation with a view to concerted action on the part of governments and intergovernmental organizations in order to promote employment and economic activity." Paragraph 2 adds "[t]he [ITO] shall, if it considers that the urgency of the situation requires, initiate consultations among Members with a view to their taking appropriate measures against the international spread of a decline in employment, production, or demand."

Article 7 provides for the Members' obligation to maintain fair labor standards pursuant to productivity. In Paragraph 1, following the first sentence that requires employment policies to fully consider the rights of workers under international treaties, the second sentence notes the Members' recognition that "all countries have a common interest in the achievement and maintenance of fair labor standards relating to production, and thus in the improvement of wages and working conditions as productivity may permit." The third sentence requires that "the Members shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory." Paragraphs 2 and 3 prescribe their relationships with the International Labour Organization.

Chapter III is titled "Economic Development and Reconstruction." It consists of eight articles, Articles 8 to 15.

First, Article 8 clarifies the basic recognition of the Members in the field of development and reconstruction in the provision "that the productive use of the world's human and material resources is of concern to and will benefit all countries, and that the industrial and economic development of all countries, particularly of those in which resources are as yet relatively underdeveloped … will improve opportunities for employment, enhance the productivity of labour, increase the demand for goods and services, contribute to economic balance, expand international trade and raise levels of real income." Article 9 then requires that Members "within their respective territories take action desired progressively to develop … industrial and economic resources and to raise the standards of productivity." Article 10, Paragraph 1 states that "Members shall cooperate with one another, with the Economic and Social Council of the United Nations, with the [ITO] and with other appropriate inter-governmental organizations in facilitating and promoting industrial and general economic development." In addition, Paragraph 2 sets forth that the ITO "shall, within its powers and resources, at the request of a Member: … (i) study the Member's natural resources and potentialities for industrial and general economic development, and assist in the formulation of plans for such development, [and] (ii) furnish the Member with appropriate advice concerning its plans for economic development … and the financing and carrying out of its programmes for economic development." Further, Article 11 stipulates that "Members shall cooperate … in providing or arranging for the provision of [capital funds, materials, modern equipment and technology, and technical and management skills whose adequate supplies are necessary for progressive industrial and general economic development]." Article 12, on the recognition that "international investment … can be of great value in promoting economic development," obligates Members to improve the business environment for

investments.

In this regard, the GATT/WTO Agreement also includes a chapter on development, but its content is fundamentally different, as briefly mentioned earlier. The Fourth Part of GATT starts by "recalling that the basic objectives of [the GATT] include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed contracting parties," and then states, "considering that export earnings of the less-developed contracting parties can play a vital part in their economic development" in Paragraph 1 of Article XXXVI, and on this basis, Article XXXVII obligates the developed contracting parties to "accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties." Unlike the ITO Charter, the GATT/WTO Agreement is premised on the fact that the economic development of developing countries is of interest to developing countries themselves but not all countries. The GATT/WTO Agreement has no provision for a Member's primary responsibility for its own economic development, nor any provision for other Members' secondary responsibility to provide support in matters such as policy, financing, equipment, and technology. Article XXXVIII states that "the CONTRACTING PARTIES shall … collaborate in analysing the development plans and policies of individual less-developed contracting parties," but with a limited focus on export expansion.

In addition to worker protection and economic development, the ITO Charter stipulates positive obligations regarding competition policy (correcting restrictive business practices); however, this does not apply to other policy areas such as environmental protection. However, this does not indicate that the ITO Charter is silent on environmental protection. For example, Article 45, entitled "General Exceptions to Chapter IV," explicitly states that the GATT does not prevent measures "taken in pursuance of" not only "intergovernmental commodity agreements," but also "any intergovernmental agreement which relates solely to the conservation of fisheries resources, migratory birds or wild animals," subject to certain conditions (Paragraph 1(a)(x)). This provision apparently intends to justify in the first place restrictions on exports of such living natural resources, but also PPM measures that require compliance with standards established by intergovernmental agreements, but only if such measures must be explicitly authorized as such or as countermeasures in the relevant intergovernmental agreements, as the term "in pursuance of" so requires.

3. Non-Judicialized Dispute Resolution Procedures

The ITO Charter prescribes dispute resolution procedures that are significantly different from the dispute settlement mechanisms prescribed in GATT 1947 and have since evolved in practice and those that have been succeeded by the WTO Agreement. Following Chapter VII, which deals with the institutional matters of the ITO, Chapter VIII prescribes dispute resolution procedures, consisting of six articles, Articles 92 to 97. The

Executive Board (as explained below) is in charge of investigating the facts of disputes, examining the matter, and making recommendations if appropriate.

First, "[t]he Members undertake that they will not have recourse, in relation to other Members and to the [ITO], to any procedures other than the procedures envisaged in this Charter for complaints and the settlement of differences arising out of [the] operation [of the Charter]" (Article 92, Paragraph 1). "The Members also undertake … that they will not have recourse to unilateral economic measures of any kind contrary to the provision of the Chapter," unless otherwise stipulated in other international treaties (Paragraph 2). However, this does not preclude the use of other procedures prescribed in the Charter (Article 97), for example, referral to the ICJ (Article 96).

Second, the Charter makes the dispute resolution procedures available where "any Member considers that any benefit accruing to it directly or indirectly … under any of the provision of this Charter other than Article 1, is being nullified or impaired as a result of," not only "a breach by a Member of an obligation under this Charter," but also "the application by a Member of a measure not conflicting with the provisions of the Charter," or "the existence of any other situation" (Article 93, Paragraph 1). When a complaint is filed, the parties are first supposed to discuss or consult with each other, and/or the parties may submit the matter to arbitration by agreement (Paragraph 2). If the matter cannot be settled through consultation, any of the parties may refer it to the Executive Board. The Executive Board shall promptly investigate the matter, and if it determines that a subject measure is a violation or infringement, it will make an appropriate step, for example, a recommendation for further consultation between the parties, referral of the matter to arbitration with the agreement of the parties, or a recommendation that the measure be brought into conformity with the Charter (Article 94, Paragraph 2). The parties may refer any action by the Board to the Conference, which consists of all Members (Article 95).

The "Executive Board" is an organ of the ITO, consisting of 18 Members appointed by the Conference (Article 78, Paragraph 1). The Board shall be representative of the broad geographical areas (Paragraph 2(a)) and of "different types of economies" and "degrees of development" among the Members, and shall "include Members of chief economic importance" (Paragraph 2(c)). Every three years, a special majority vote of two-thirds of the Members present shall declare which eight Members are of "major economic importance," with particular regard to their shares in international trade, which will automatically become members of the Executive Board (Paragraph 3(a)). [16] The remaining members will be elected by a two-thirds special majority vote by the

[16] For example, in terms of export value alone, according to the Global Note website, the top eight countries at present are China, the United States, Germany, the Netherlands, Japan, South Korea, Italy, and Belgium. <https://www.globalnote.jp/post-3399.html> [accessed on January 12, 2024]. For comparison, the United Nations Security Council consists of 15 members, of which 5 are permanent members with veto power and 10 are non-permanent members.

Conference (Paragraph 3(b))[17]. Decisions of the Executive Board shall be made by a majority of the total votes cast, with each member having one vote (Article 79).

III Suggestions of the ITO model as an alternative for the global economic order

1. Transnational Framework for Global Economic Order – Each member undertakes and discharges the responsibility to optimize its own domestic economic policy and commits trade liberalization

PPM measures tied to trade regulations have been challenged in several cases under the GATT/WTO Agreement, and have generally been found inconsistent with the WTO Agreement. The largely established jurisprudence is that PPM regulations, that is, product regulations that focus on environmental protection, worker protection, etc., in the production process of subject products, violate GATT Article XI, Paragraph 1, and are not justified by GATT Article XX, for example, Paragraph (b) or (g), unless the standards adopted in the regulations do not appropriately reflect the situation of each producing country.[18] In contrast, no measures that are not linked to trade restrictions are within the scope of WTO Agreements and are thus considered illegal. This applies not only to unilateral measures. As mentioned in Section I, the United States and European Union, for example in negotiating free trade agreements and other agreements, seek commitments from contracting parties to comply with relevant international standards and establish procedures to ensure compliance.

On the other hand, unlike the WTO Agreement, the free trade framework envisaged by the ITO Charter, as its structure suggests, is self-consistent in prohibiting not only PPM measures tied to import restrictions, but also those tied to any non-trade economic restriction. The following paragraphs discuss this assuming for the sake of argument that the ITO Charter is effective today. A relevant element of the ITO framework is to require that Members undertake and discharge the responsibility for improving their own economic systems, and simultaneously, in collaboration with the ITO, that other Members assist any Member in discharging its responsibilities fully to improve the efficiency of the global economy as a whole. Allowing PPM measures, whether tied to a trade or non-trade measure, is incompatible with this normative structure; thus, one can easily find a specific provision that rejects any PPM measure. Article 92 of the Charter clearly states that only resort to the dispute resolution procedures prescribed therein is allowed for “complaints and resolution of differences arising from [the] operation [of the Charter]," and thus explicitly prohibits unilateral countermeasures taken in response to any non-fulfillment of obligations under the Charter or any other operation of the Charter. As discussed below, the author is of the view that PPM

[17] However, the initial Executive Board was required to have six members from the "Western Hemisphere" (North America, Central and South America; Appendix L).

[18] With respect to the relevant jurisprudence, *see e.g.*, Mitsuo Matsushita and Kazumochi Kometani, “International Economic Law” [Kokusai Keizai Ho] (University of Tokyo Press, 2015) (In Japanese), pp. 312–313.

measures are inconsistent with this provision, even if they are tied only to non-trade restrictions. Furthermore, it would be impermissible in negotiating free trade agreements and other agreements even to require trade partners to commit to complying with specific international standards unless such international standards are appropriate in light of the domestic economic and social situation. The same applies to human rights due diligence. Rather, it would be compatible with the legal structure of the international economic order established by the ITO if it is designed and operated so that business enterprises do not take for granted the labor standards set by each foreign country where their supply chains exist, but rather encourage them to strive to achieve appropriate working conditions, including improving labor productivity and working closely with foreign governments.[19] However, it would be inappropriate if it merely compels adherence to international labor standards, even if they are suboptimal in light of the situation in such a foreign country.

Let us consider as an example for the sake of discussion PPM measures concerning worker protection referred to in Chapter II of the Charter. Assume that they restrict the import of products that do not comply with a certain standard on the status of worker protection in their production process. Because the degree of worker protection in the production process of products has nothing to do with any specific product quality or other physical characteristics of the products, there should be little ground to deny that the objective of such a PPM measure is nothing but to require a certain level of worker protection in the production process.[20] If an exporting Member disputes the optimality of the standard in light of the relevant factors in its territory, this dispute should be deemed as one between the exporting Member and the Member taking that measure in preference to the interpretation and application of the provision requiring worker protection according to productivity, i.e., Article 7 of the Charter. Thus, the Member

[19] This possibility is explored and identified in Kazumochi Kometani, "'Guiding Principles on Business and Human Rights' in Perspective of Sustainable Development: Proposal on Integration of International Economic Law and Human Rights Protection" (in Japanese), International Economic Law Review [Kokusai Keizai Ho Zasshi], Issue 1 (2023), p. 161 et seq. (Kometani (2023b)).

[20] Furthermore, with respect to PPM measures that focus on human rights protection in the production process of subject products, it is necessary to examine the viability of the argument that their objective is to "protect the public morals" of the importing country, rather than protecting workers in the producing country, and thus are not in conflict with Article 92.1 of the ITO Charter. It should be decisive that products subject to such PPM measures have no observable property that harms "public morals," in contrast to prohibitions on the imports of goods whose physical property can harm local morals, such as pornography. What is inconsistent with "public morals" is the act of human rights violations in the product origins. Therefore, such PPM measures should be deemed to be taken to stop such human rights violations in the production process. In this connection, some support the limited application of GATT Article XX(a) to the prohibition or restriction of imports of products produced in violation of human rights, and there is an Appellate Body report concluding that a kind of PPM measures, import restrictions on products produced in a manner that is harmful to animal welfare, are justified by GATT Article XX(a) on public morals. Nevertheless, since the observable nature of the products cannot be immoral, the author is of the view that there is no basis to consider that "public morals" will be protected by prohibiting their imports. For further discussion of this point, *see* Kometani (2023b).

taking such a PPM measure should be deemed as having unilaterally decided that the exporting country has failed to fulfill its obligation under Article 7 and has taken countermeasures, rather than resorting to the dispute resolution procedure prescribed in the Charter. On this basis, the author is of the view that such PPM measures would constitute a violation of Article 92, Paragraph 1 of the Charter, which demands the exclusive use of prescribed dispute resolution procedures for solving disputes under the Charter.

The same applies to PPM measures concerning environmental protection. Indeed, as noted earlier, the Charter has no provision that imposes on each Member a specific obligation to implement appropriate environmental protection within their own territories, but each Member is required to "take actions … to develop … economic resources" (Article 9). Thus, the author is of the view that such PPM measures should also be found in violation of Article 92, Paragraph 1 of the Charter. Because the "productive use of the world's human and material resources is of concern to and will benefit all countries" (Article 8), the term "development" in Article 9 should be interpreted in this context to include the optimization of resource utilization. Therefore, it should be deemed that there is a difference in views regarding the fulfillment of development obligations between the Members taking such PPM measures and those that do not accept them. Even if PPM measures apply the same environmental standards (e.g., an upper limit on carbon dioxide emissions during the manufacturing process) regardless of the origins of the subject products, there will be legitimate grounds for an exporting Member to claim a difference of opinions because the maximum consumable amount of the subject environmental resources differs across countries. Even if "development" in Article 9 is not interpreted in that manner, there should be no impediment to finding a difference of views "arising out of [the] operation [of the Charter]" with respect to such PPM measures. As noted earlier, the ITO Charter is not indifferent to environmental protection, even though it does not explicitly set forth the Members' obligations to carry out appropriate environmental protection within their own territories. In addition, the Charter prescribes dispute resolution procedures to deal with differences of opinion on the use of resources. Article 93(1)(c) recognizes the possibility of a "situation" complaint. The objective of environmental PPM measures, that is, improvement of environmental protection in the production process of imports, can be pursued by filing a complaint that there is a situation in an exporting Member in which certain environmental resources of that country are being wasted, and consequently, the interest of the importing Member in the optimal economic efficiency is "nullified and impaired." Resorting to PPM measures as a unilateral countermeasure without using this "situation" complaint procedure is in violation of Article 92, Paragraph 1.[21] Further, one may argue that non-trade PPM measures are inconsistent with the provisions of Chapter III, for example, because they prevent other Members from taking measures properly designed for development thereby failing to "cooperate with one

[21] However, in light of contemporary international law, where the concept of *jus cogens* has been established, it should be permissible even under the ITO Charter to restrict imports of products whose production process involves genocide.

another … in facilitating and promoting industrial and general economic development" in contravention of Paragraph 1 of Article 10.

The foregoing comprehensive rejection of PPM measures[22] is also consistent with the negotiating history and the entire structure of the ITO Charter. The circumstances that led to the negotiation of the ITO Charter show that the Charter was devised to address the negative effects of the spread of bloc economy policies, and thus aimed at promoting multilateral economic interdependence on a non-discriminatory basis to ensure peace and security as well as to achieve economic development. However, by nature, a country resorting to PPM measures, whether trade or non-trade, takes advantage of other countries' economic dependence on its own market to encourage or coerce such other countries to accept its request for certain policy changes, such as

[22] Furthermore, the comprehensive ban of PPM measures is also of high relevance to the relationship between major powers. One of the causes of the ongoing trade war between the United States and China is the US recognition that its liberal market economy cannot coexist with China's "socialist market economy." Based on this recognition, the United States appears to be trying to eliminate its dependence on supplies of key products from China. To this end, the tariff rates on certain imports from China were raised pursuant to Article 232 of the Trade Expansion Act. (For example, regarding steel products, see the U.S. Department of Commerce website <https://www.commerce.gov/issues/trade-enforcement/section-232-steel> [accessed on January 12, 2024].) Since this tariff increase is a measure that focuses on the nature of the economic system where subject products are produced but that have no effect on their product property, it can be characterized as a PPM measure. On one hand, under the ITO Charter, the US argument that such a measure is justifiable under the security exception should be rejected. With respect to the interpretation of GATT Article XXI, *see* Kazumochi Kometani, "Economic Security in the WTO Agreement: Balancing trade liberalization with protection of security interests," (In Japanese) RIETI Policy Discussion Paper Series 23-P-010, available from the RIET website <https://www.rieti.go.jp/jp/publications/summary/23070008.html> [accessed on January 12, 2024] (Kometani (2023a)). On the other hand, it is necessary to develop and elaborate disciplines on interactive measures between the government and the market economy, such as subsidies, state-owned enterprises, and government procurement, so as to increase the possibility of coexistence with China. As an example of such disciplines, *see* Kazumochi Kometani, "What kind of 'market economy' system does the WTO Agreement envisage?" [WTO Kyotei ha Ikanaru "Shijokeizai" taisei wo Soutei shiteiruka] (In Japanese), Masaharu Yanagihara et al. (eds.), *International Legal Order And Global Economy - In Memoriam Of Professor Isamu Mamiya* (Shinzansha, (2021), pp. 217 et seq. However, unlike the ITO Charter, the WTO Agreement has only a small foothold to ensure the optimization of the domestic economy, because there is no obligation to adopt fair labor standards. Also, the WTO Agreement has only weak rules and mechanisms to prevent domestic economic management from deviating in an inappropriate direction. Therefore, it should be understood that in cases where a Member feels it unbearable to coexist with another Member, GATT Article XXVIII provides an option for that Member to withdraw tariff concessions on an MFN basis in order to restore so proper a distance that coexistence is rendered bearable, rather than to establish a trade barrier only against an allegedly "hostile" Member pursuant to the security exception. For this argument, *see* Kometani (2023a), in particular, pp. 15–17. *Also*, Warren Maruyama and Alan Wm. Wolff, "Saving the WTO from the National Security Exception," Peterson Institute for International Economics Working Paper No. 23-2, May 23, 2023, available from the SSRN website <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453718> [accessed on January 12, 2024].

increases in the level of environmental protection, worker protection, and human rights protection. Such measures will be significantly effective when taken by a superpower with a relative economic advantage and become greater as the degree of economic interdependence between the parties increases. In other words, PPM measures can function as a means for large countries to impose their political will on small and medium-sized countries. Therefore, if large countries reserve the right to adopt PPM measures, small- and medium-sized countries would hesitate to agree on trade liberalization, even if the right is limited to those linked to non-trade economic measures or conferring non-trade benefits. This hesitation is reasonable, because trade liberalization is likely to result in increased economic dependence on the major powers. Unlike the Charter, if trade liberalization intends only to seek trade profits, each party would simply weigh the increase in trade profits against an increase in economic dependence when making decisions on whether and how much they commit to trade liberalization; consequently, the parties might have chosen not to completely prohibit PPM measures. However, if a trade agreement promotes trade liberalization and consequent economic interdependence as a goal, the lack of strict restrictions on PPM measures means a lack of systemic integrity or an internal inconsistency in the system. Incidentally, with respect to Article 92, Paragraph 1, one might argue that non-trade PPM measures are permissible because it prohibits only resort to "procedures" other than those prescribed in the ITO Charter, and that Paragraph 2 then prohibits any measure "other than "procedures", only to the extent it is "contrary to the provisions of the Charter." In the author's view, nonetheless, such interpretation does not fit into the overall structure of the ITO Charter. Paragraph 2 of Article 92 should be rather interpreted as confirming that even in response to a violation of the ITO Charter by a Member, no other Member is permitted to take a trade measure that is inconsistent with the Charter as a countermeasure. Alternatively, it is plausible to argue that non-trade PPM measures are inconsistent with the provisions of Chapter III, as discussed above.

Furthermore, it would be generally inconsistent with the foregoing structure of the ITO Charter and Article 92, Paragraph 1 that a Member makes inflexible commitments on the level of their domestic worker protection, environmental protection, or any other policies in a free trade agreement (FTA) or any other international agreement with another Member or any non-Member. For example, unless the level of worker protection is set according to labor productivity, it would by nature reduce the efficiency of the domestic economy. This is the case even if compliance with the international labor standards established by the ILO is required and is thus recognized as legitimate. In reality, such commitments are made by an economically superior party to the FTA in return for further access rights to its own market. To the extent and only to the extent that the agreed standards are objectively not suboptimal in light of the labor productivity of each of the contracting parties, such commitments could be viewed as reasonable from the ITO Charter's perspective. Conversely, if a Member has adopted labor standards that do not align with labor productivity within its territory, it should be considered a breach of the ITO Charter's obligations to optimize labor protection within

its territory.

The foregoing analysis indicates that the ITO Charter intends to establish a framework within which (i) each Member assumes the responsibility of optimizing its domestic economic policy, (ii) a Member and the ITO provide support for another Member to discharge its responsibility, and (iii) certain dispute resolution procedures by the Executive Board are available for enforcement in place of unilateral countermeasures by major power Members. This framework could be an alternative model, in particular for small- and medium-sized countries to the current GATT/WTO Agreement, which is highly unlikely to preclude non-trade PPM measures,[23] and further, which can weakly resist pressure to allow even trade PPM measures, explicitly or implicitly. Nevertheless, superpowers do not consider this alternative model a viable option where small- and medium-sized Members merely undertake such responsibilities. Small- and medium-sized Members should demonstrate that they have sufficiently discharged such responsibilities and further proactively explain how they have discharged their responsibilities. For example, assuming for the sake of argument that WTO Members undertake the obligation to maintain fair labor standards pursuant to productivity, as prescribed in Article 7 of the ITO Charter, and further, a WTO Member is challenged in the WTO dispute settlement procedures for a failure to comply with the obligation, such Member should fully explain how its own labor standards are appropriate in light of the labor productivity within its territory, with supporting data on labor productivity. This would mean that each WTO Member effectively assumes accountability for the optimization of its own economic policies vis-à-vis any other Member. If worker protection is suboptimally low in light of domestic productivity, employers would have suboptimal incentives to improve labor productivity in their own operations because they can take advantage of unjustifiably low labor costs to meet international competition. Consequently, human resources will not be productively utilized to the

[23] The comprehensive ban of any economic coercion and unilateral countermeasure is consistent with that of PPM measures, as both bans are intended to prevent major powers from using their economic advantages, in particular, the economic interdependence that they have gained and deepened through trade liberalization, as a means of forcing other Members to meet their own political demands. It is clear that unilateral measures aimed at trade barrier issues, such as Section 301 measures, are inconsistent with Article 92, Paragraph 1 of the ITO Charter. However, economic coercive measures are not necessarily aimed at another party's economic policies, but may be directed to security concerns or diplomatic relations. It is thus doubtful that such measures fall within the scope of Article 92, Paragraph 1. Needless to say, nevertheless, if such measures are implemented as trade-restrictive measures, they should be found inconsistent with Chapter IV of the ITO Charter. Focus should be on the objective structure rather than the subjective intention of the measure, and thus, generally speaking, it is plausible to place on the Member taking that measure the accountability to specify the objective of such measures, and to explain whether and how the specified objective is legitimate (i.e., characterized as the correction of a market failure), and the policy tools that it chose is the best to attain the specified objective, and to examine whether the Member's explanation is reasonable. In this direction, one should interpret and apply relevant provisions and, if necessary, propose improvements to the existing rules. This approach can be taken under the WTO Agreement as well.

maximum. Thus, in contrast, if the core problem is found through dispute settlement procedures to be low labor productivity, the Member and other Members should cooperate to improve it, as envisaged in the ITO Charter.

To make this alternative model viable, it is important to establish as an enforceable norm the general responsibilities for each Member to take specific actions to optimize its own economic policies. The provisional goal could be to introduce specific provisions similar to or more elaborate than those in the ITO Charter into the WTO Agreement; to attain that goal, the first step could be a political declaration (such as a ministerial declaration) to that effect. For example, the preamble to the WTO Agreement refers to "full employment," but it is not stated anywhere that the "full employment" of each Member is of interest to other Members. To make this point clear, it is meaningful to recognize explicitly in such a political declaration that it is in the interest of all Members, not just that Member, that human and material resources be productively and fully utilized within the territory of each Member, and that each Member assumes responsibility for cooperation and takes an appropriate role to that end.

In terms of specific rule-making for the reform of global governance under the WTO Agreement, one may consider proposing a package that contains provisions concerning improved domestic governance by increasing the transparency of all administrative procedures, as well as those concerning the provision of technical support for compliance. The recently concluded "Trade Facilitation Agreement" has many procedural provisions in this direction; however, its objective is trade facilitation.[24] The objective of the proposed rules is to optimize policy formulation and implementation by Member governments as a precondition for trade liberalization, that is, to confirm the transnational nature of WTO governance over the global economy. Forming norms in this direction not only strengthens the world trading system but also contributes to the pursuit of "sustainable development" for humanity.

The author argues that the development of the world trading system can be logically linked to the pursuit of "sustainable development" if the objective of trade liberalization is identified as the improvement of economic efficiency rather than the expansion of trade activities, which is contrary to the prevailing view under the WTO Agreement. As already mentioned, the ITO Charter recognized, for example, in Article 8 that the productive and full use of human and material resources within the territory of each Member benefits not only that country but all Members as well. This indicates that the negotiators of the ITO Charter must have understood the significance of the agreed trade liberalization not as enabling individual Members to pursue their own trade

[24] The preamble of the Trade Facilitation Agreement states that the purpose is "to clarify and improve relevant aspects of Articles V, VIII and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit," but it would not mean that the expedited movements of goods is sought at any cost. It is clear that this presupposes that the expedited movement of goods is pursued because it contributes to improving economic efficiency.

interests but as improving the economic efficiency of all Members as a whole. Furthermore, the ITO Charter states that Members are obligated to ensure the optimal use of resources within their own territories. The Charter provides a framework within which each Member assumes and discharges the responsibility for improving the efficiency of its domestic economic system, and other Members and the ITO support that Member in discharging its responsibility. On these premises, trade liberalization will improve the efficiency of the overall world economy, and each Member will share the benefits. The contemporary theory of economics teaches that the governments of each Member should use optimal means to correct any "market failure" in their domestic markets and thus, to ensure the proper functioning of the market mechanism, and accordingly, trade liberalization will further improve the economic efficiency of the world as a whole. In this sense, the author is of the view that the ITO Charter provides a model transnational framework that can function effectively, thereby contributing to the attainment of "sustainable development for human beings.

This framework differs significantly from the current understanding of the WTO Agreement.[25] The dominant view is that Members seek their respective interests in expanding trade in pursuit of trade liberalization under the GATT/WTO Agreement, and to this end, each Member has conceded, to some extent, its discretion over not only trade policy but also regulatory sovereignty in return for access rights to foreign markets.[26] The Appellate Body has agreed with this understanding.[27] It is therefore the right of each Member, rather than its responsibility toward other Members, to ensure that the human and material resources within its territory be utilized productively and fully. This view will find nothing that prevents Members from conceding part of such sovereign rights or its regulatory authority to obtain trade opportunities in other trade agreements, including the WTO Agreement.

However, this understanding implies a risk of undermining the legitimacy of the WTO Agreement, as "sustainable development" has been recognized as a dominant common interest, and accordingly, environmental protection, human rights protection, etc. have gained importance in the order of values. Furthermore, it may make it difficult for the WTO to resist the pressure of marginalization. The understanding is premised on the fact that the WTO Agreement is interested in trade only, on the premise that trade interests are in conflict with the interests of environmental protection, human rights

[25]However, it is logically possible from the text of the GATT/WTO Agreement to conclude that the same normative structure was envisaged under the GATT/WTO Agreement. For this discussion, *see e.g.,* Matsushita and Kometani, op. cit., Section 1.

[26] *E.g.*, Peter Van den Bossche and Werner Zdouc, "The Law and Policy of the World Trade Organization - Text, Cases, and Materials (fifth ed.)," Cambridge University Press (2022), pp. 591–592.

[27] For example, Appellate Body Report on *EU - Seal Products*, paras. 5.124–5.125, understands that GATT Article XX (General Exceptions) sets forth reservations on measures for one of the enumerated policy objectives, even with respect to measures generating disadvantages for imports in contravention of the national treatment requirements under Article III.

protection, etc., and therefore that there is a possibility that the pursuit of trade interests would clash with the pursuit of environmental protection or other values. Consequently, the contribution of the WTO to "sustainable development" would be marginalized, for example, to the promotion of trade in products used for environmental protection. As for the increase in PPM measures aimed at environmental protection, insofar as they are untied to trade restrictions, the WTO Agreement cannot claim its relevance even though they affect international economic relations. Furthermore, it is difficult to find an effective counterargument if the WTO Agreement is requested to be revised to allow PPM measures linked to trade restrictions as environmental protection gains importance.

Another problem is the prevailing understanding that trade liberalization is sought for the sake of trade interests. This would deprive the free trade framework of its flexibility to develop rules as the situation changes. Again, its premise is that the Members have acquired rights of market access under the WTO Agreement in exchange for concessions of part of their sovereign regulatory power, that is, any WTO provision embodies such agreed balances of various interests. Thus, it will be derived from these premises that under WTO Agreements, rule-making by majority vote should not be allowed, and consensus, that is, granting veto power to each member, should be forcefully required. One may point out provisions or practices to this effect in the WTO. For example, regarding the addition of "plurilateral" agreements, Article 10, Paragraph 9 of the Marrakesh Agreement requires agreement by all Members. In the ITO model, if the addition is a step toward better rule-making to attain a common goal, there will be little rationality in granting veto rights to individual members.

Furthermore, the ITO model should provide dispute settlement procedures with the additional role of contributing to rule-making. In the prevailing mindset, any dispute on a certain WTO provision between Members is of the nature of a zero-sum conflict, where if one side gains more, the other gains less. Thus, in dispute settlement proceedings, the core question will always be whether the WTO Agreement is implemented in accordance with the agreed balances of interests, and each party to the dispute will argue what was agreed upon. Consequently, it is unlikely that decisions on the question by adjudicatory bodies, as well as the parties' arguments, will provide useful guidance on what rules the Members should agree to in the future. What balances of interests are and will be agreed upon by and between the Members basically depends on their priorities of interests and their relative negotiating powers at the time of negotiation, even though it would be affected by the balance of interests agreed upon in the past. The dispute settlement procedures play a part only at the stage of enforcement.

In the ITO model, the role of dispute resolution procedures should not be so limited, and they should provide opportunities for the Members to compile examples of appropriate and inappropriate policy choices as bases for future rule-making. The procedures are premised on the fact that the Members share the common goal of maximizing global

economic efficiency, and accordingly, they are obligated and responsible, in particular, to improve their domestic economic policies to ensure the optimal use of all resources within their own territories. Accordingly, the parties' legal arguments would essentially focus on whether a subject measure is beneficial or harmful to the attainment of the common goal on the premise that any WTO provision provides relevant guidance. With respect to the interpretive questions raised on certain provisions in dispute resolution procedures, each party would argue which interpretation best contributes to the attainment of the common goal. The adjudicatory body would examine such arguments and render its own judgment. It is clear that this discussion and judgment will serve as material for future consideration of how to improve and upgrade the rules. The dispute resolution procedures thus assume dual roles in the incessant evolution of the transnational governance framework; they are retrospective in examining what agreements have been reached on such guidance but are also future-oriented in providing guidance for rule making.[28]

Nevertheless, dispute settlement procedures under the GATT/WTO have developed in a retrospective manner. Again, their "judicialized" or adversarial nature seems suitable to ensure the implementation of the agreed balances of interests, on the premises that the Members conceded part of its regulatory sovereignty in return for market access to other Members. How are the dispute resolution procedures set out in the ITO Charter different from those of its WTO counterpart and designed to ensure the function of the transnational governance model under the Charter described above? These topics will be discussed in detail in the next section.

2. Not Overly Judicialized Dispute Resolution Procedures

To highlight the features in the design and structure of the dispute resolution procedures under the ITO, the discussion begins with the history of the dispute settlement procedures of the WTO Agreement. Compared to the ITO Charter, the GATT had very weak provisions for dispute resolution procedures. GATT Article XXIII prescribes a simple procedure in which a case is referred to the "CONTRACTING PARTIES," a body consisting of representatives of all contracting parties, which is in charge of investigating the matter and making a recommendation, and the CONTRACTING PARTIES may take joint action by majority vote (Article XXV, Paragraph 4). As the number of contracting parties increases, the CONTRACTING PARTIES encounter technical difficulties in conducting factual investigations, legal research, and drafting recommendations on specific disputes.

The practices of the GATT dispute settlement procedures have been developed on the basis of this simple provision. This development is called "judicialization" and is highly regarded. However, it should be noted that judicialized practice may be fundamentally different from the mechanism envisaged by the ITO Charter. Because of the technical

[28] For a comparison of these two views, *see* Matsushita and Kometani, op cit., pp. 96–98.

difficulties described above, the CONTRACTING PARTIES assigned the task of investigation and analysis to a small panel consisting of three or five panelists agreed upon by the parties. The developed practice was that the panel investigated the case, examined the legal claims of the parties, and submitted draft recommendations for adoption by the CONTRACTING PARTIES.[29] Under the WTO Agreement, the practice has been textualized and further evolved into a two-stage judicial dispute settlement process consisting of the first-instance panel process and the Appellate Body process that addresses appeals.[30] During the GATT era, consensus by the contracting parties was required for the establishment of panels and the adoption of recommendations; therefore, each party to a dispute had de facto veto power. However, under the WTO Agreement, these procedural steps will necessarily be taken unless all present Members make objections; thus, veto power is effectively denied.[31] In WTO dispute settlement procedures, the Appellate Body, which is independent of the governments of the Members and thus aware of its own shaky ground for legitimacy, has chosen to rely on dictionary definitions in interpreting the terms used in the WTO Agreement to objectively clarify what was agreed upon by the Members.[32] This interpretative practice, often called "legalization," largely precludes policy and political considerations and, accordingly, may risk being too doctrinal to be persuasive or acceptable to Members. It would be prudent to be cautious about the viability of a purely legalistic approach, particularly in disputes over decisive policy implications involving the interpretation of relatively abstract provisions.[33]

In contrast, while the Chapter concerning the dispute resolution procedures in the ITO Charter makes available judicial dispute resolution procedures such as arbitration and referral to the International Court of Justice, the Chapter provides for, as the primary procedure, referral to the Executive Board, which consists of 18 Members and is authorized to investigate relevant facts and legal arguments and make

[29] For explanation on this point, *see e.g.*, Matsushita and Kometani, op cit., pp. 94–95.
[30] For explanation on this point, *see, e.g.*, Matsushita and Kometani, op cit., pp. 95–96.
[31] For example, DSU Article 16(4) on the adoption of panel reports.
[32] *E.g.*, Appellate Body Report on *Japan - Alcoholic Beverages II*, pp. 10–12.
[33] In this regard, it should be noted that the Appellate Body has relied on generally applicable but non-WTO international law materials in support of its interpretation of a general term "public body" in the US-China disputes on whether supplies of goods and services by Chinese state-owned enterprises may constitute countervailable subsidy. *E.g.*, Appellate Body Report on *US - Anti-Dumping and Countervailing Duties (China)*, paragraphs 304–322. This interpretation appears to be a major trigger for the US blockade of the appointment process of the Appellate Body members. See "Report on the Appellate Body of the World Trade Organization," February 2020, paragraphs 82–89, available from the USTR website <https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf> [accessed on January 13, 2024]. With respect to the author's view on this question, see Kazumochi Kometani, "Judicial Overreach Should Be Guided Rather than Suppressed in Order to Resolve the Appellate Body Crisis: Reflecting on Dworkin's View on Judicial Discretion," in Dai Yokomizo, Yoshizumi Tojo and Yoshiko Naiki (eds.), "Changing Orders in International Economic Law Volume 1: A Japanese Perspective" (Routledge 2023), Section 7.

recommendations. Since the number of members of the Executive Board is limited, and there is an explicit reference to arbitration, etc., it is reasonable to consider that the Charter envisages the Executive Board as conducting investigations by itself, rather than assigning its task to a small panel.

The author is of the view that such dispute resolution procedures under the ITO Charter, with a combination of judicialized and political elements (or adversarial and cooperative elements), are more compatible with the evolving structure of the free trade framework envisaged by the Charter than the purely "judicialized" dispute settlement procedures under the WTO Agreement. Again, the Charter sets out a framework under which the Members will cooperate with each other to attain the common interest of improving the economic efficiency of all the Members, rather than the balances of interests agreed by the Members to seek their respective interests in export expansion. The normative structure of the ITO Charter requires that the dispute resolution procedures be designed as a process through which the Members cooperatively consult with each other to explore a better path to the attainment of their common goal, rather than one similar to the adversarial civil trial between conflicting parties, such as the WTO dispute settlement procedures. Such a consultative process is aimed at helping the Members jointly seek the evolution of rules rather than helping each Member seek the enforcement of the acquired market access rights as agreed. Therefore, if a Member receives a complaint that it has not fulfilled its obligations—for example, that it has not fulfilled its obligation to maintain fair labor standards according to productivity under Article 7—it should be expected to explain that its labor standards are fair and appropriate and provide data to support this explanation, including the submission of data on labor productivity within its own territory. It should be implausible to avoid discussion of what is best for the common interest by using legal tactics such as relying on the burden of proof rules.

In this regard, the dispute resolution procedures under the Charter provide the Executive Board with the status of the primary adjudicative body. This institutional design might intend to choose the model of assisting rule-making for the common goal rather than of enforcing the agreed balances of interests. As explained above, the Charter allocates the responsibility of maintaining and developing the international free trade framework to each Member, regardless of its size or developmental stage, rather than only to large powers, by assigning the primary responsibility to each Member to optimize the management of its own domestic economic policies. This structure would support the aforesaid development of dispute resolution procedures as a feedback loop for the evolution of rules. In addition, the Charter enables the Members to file a complaint against consistent measures (i.e., a non-violation complaint) or "situation" that nullifies or impairs their interest (Article 93, Paragraph 1). This would also cast doubt on the understanding of the function of law enforcement under the Charter as limited to the full implementation of the agreed balance of interests.[34]

[34] In this regard, it must be noted that under the WTO Agreement, situation complaints are

Needless to say, the foregoing does not argue that adjudicatory dispute resolution procedures are harmful or useless, nor does it deny the importance of legal argumentation in the WTO dispute settlement procedures. The mandatory nature of the dispute resolution procedures under the ITO Charter would compel a responding party to fully explain what specific policy needs underpin challenged measures and how the measures are narrowly designed to meet the needs, together with relevant facts and evidence, in response to inquiries by a complaining party in consultation required before filing a complaint with the Executive Board. In this regard, it is important to establish a practice in which a challenged measure will be found to be inconsistent and thus recommended to be corrected unless a responding party provides such an explanation together with supporting facts and evidence, since it has not fulfilled its accountability and discharged the burden of proof.[35] Also, on the one hand, since the Executive Board has no authority to amend the agreed rules, it would not consider purely policy arguments. On the other hand, the Board is not supposed to reconcile the various interests of the Members in dispute; thus, it would be required to seek a solution that contributes to the objective of the Charter. To do so, it is first necessary to clarify what a Member must do under the existing rules; for this purpose, legal arguments supported by policy considerations must be respected. It is obvious that such legal arguments will be given more importance.

At first glance, the text of the provisions of the ITO Charter stipulating the obligation to rationalize domestic policies, even that of the provisions regarding worker protection and economic development, is too abstract for the Board to find a failure by a Member to comply with them, and therefore lacks effectiveness. However, it is reasonable to

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excluded from the adverse consensus rule (Article 26, Paragraph 2 of the DSU), and thus there is no basis to require the exclusive use of the dispute settlement procedures prescribed in the WTO Agreement on matters covered by situation complaints.

[35] In the practices under the DSU, a complaining party bears the burden of proof that the measure is WTO-inconsistent (*e.g.*, Appellate Body Report on *US - Wool Shirts and Blouses*, p. 14). Since the ITO Charter stipulates the obligation to exchange relevant information, the complaining party would have little difficulty with the burden of proof rule. In contrast, it is burdensome for a complaining party under the GATT/WTO Agreement because it has no such provision while the transparency requirements cover the publication of governmental measures. On the premise that the WTO Agreement stands on the agreed balances of interests between the Members, the allocation of the burden of proof to complaining parties is reasonable. However, on the understanding of the WTO Agreement as a framework for cooperation with a view to the common goal of sustainable development, the aforesaid burden of proof rule is not the sole option. The author considers it possible rather to interpret the current DSU as allocating the burden of proof to responding parties. Article 3, Paragraph 10 of the DSU provides: "if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute." This provision can be interpreted as requiring parties to a dispute, in particular, a responding Member, to proactively explain the optimality of its own governmental measures. *See* Kazumochi Kometani, "Memorandum on Correlations between the Enforcement of International Economic Law and that of Domestic Administrative Law" [Kokusaikeizai rule no Jisshi to Kokunaiho tono Rennkankanousei ni kannsuru Oboegaki] (In Japanese), Jurist, No. 1592 (2023), pp. 102 et seq.

consider that the negotiators of the Charter believed that these provisions were sufficiently effective in light of dispute resolution procedures that consisted of information gathering, policy analysis by experts, and policy evaluation by a small number of Members, rather than judicialized dispute resolution procedures. The author is of the view that the foregoing suggests instead that in reforming the WTO dispute settlement procedure, there could be an option other than the recovery of the two-tiered judicialized dispute settlement procedures consisting of panels and the Appellate Body as stipulated in the WTO Agreement, on the premise that the mission of the dispute settlement procedures is to ensure the enforcement of the WTO Agreement as agreed upon by Members. There is no need to limit the role of the dispute settlement procedures to enforcement.

IV Conclusions

Revisiting the ITO Charter and clarifying its normative structure and procedural design reveals the availability and usefulness of an alternative model of frameworks for the transnational economic order in which each member state optimizes its own economy, liberalizing its international trade with others on a non-discriminatory basis to improve worldwide economic efficiency. The prevailing view of the WTO Agreement is, contrary to the foregoing, that each Member seeks its own trade interests, and accordingly, each Member has acquired market access rights to other Members' markets in return for concession of rights to establish and maintain trade barriers, with certain reservations, under the WTO Agreement. The current WTO model is not the only option available to WTO Members seeking sustainable development in cooperation with others. The alternative framework is consistent with the common goal of sustainable development while prohibiting the use of PPM measures, whether trade or non-trade, particularly those by major powers. Rather, small and medium-sized countries would feel more secure in moving forward with trade liberalization and, consequently, increased economic dependence on other countries, including major powers.

Again, the key to this alternative model is building confidence in the collective commitment that each member state discharges the primary responsibility it assumes for optimizing its domestic economy vis-à-vis other member states, and also discharges the responsibility it assumes to provide various support to other member states so that they can fully discharge their own primary responsibility. If and to the extent that there is a reliable expectation that each member state will fulfill its responsibilities, major powers may concede the right to force other member states to improve their domestic policies on environmental protection, labor protection, etc., by PPM measures (and countermeasures of any kind), and thus leave the authority to determine whether they have fully discharged their responsibilities to multilateral dispute settlement procedures. It is important that each member country take ownership of the global framework to develop a transnational economic order. From this perspective, less judicialized and partly consultative dispute-resolution procedures may be preferable. The judicialized dispute settlement procedures under the WTO Agreement apparently presuppose that

the WTO Agreement reflects the agreed balances of interests; thus, the interests of the parties to a dispute are by their nature in conflict with each other. Consequently, the parties feel justified in using legal tactics to win the case. On the premise that each member state undertakes a positive responsibility to contribute to attaining the common goal of sustainable development, dispute resolution procedures should be designed as a future-oriented forum where member states, including the parties to a dispute, discuss what is better or the best to attain the common goal, rather than what was agreed upon by the member states in pursuit of their respective trade interests. Such a forum would encourage member states to take ownership of the framework. The dispute resolution procedures envisaged under the ITO Charter, which are not so judicialized as the WTO dispute settlement procedures, were apparently intended to create such a forum. The foregoing alternative model is for "middle powers" to manage transnational economic order voluntarily and proactively in order to attain the common goal of sustainable development.[36] This model merits consideration in our age of increased and aggravated conflicts and confrontations, as the underlying ITO Charter was negotiated and agreed upon by representatives of many countries to avoid the recurrence of the devastation of World War II.

(end)

[36] With respect to the concept of "middle power diplomacy," *see* Yoshihide Soeya, "Japanese Diplomacy: Understanding the Postwar Period" [Nippon no Gaiko - Sengowo Yomitoku] (In Japanese) (Chikuma Gakugei Bunko (2017)).