EMERGING CONCERNS IN THE WTO REGIME: CHANGING THEMES IN MULTILATERAL TRADE NEGOTIATIONS

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The World Trade Organization (WTO), which underpins the existing multilateral trading system, disciplines its Members' conducts primarily in accordance with the criteria that have been laid down by orthodox capitalist ideas, which contains a clear purpose of promoting trade liberalization. However, recent multilateral trade negotiations (MTNs) has reflected a change in the themes of the WTO regime, as negotiating parties have attached increasing importance to diversified interests rather than free trade. This article aims to identify the main changes presented by recent MTNs and to explore the factors causing the changes. For this purpose, the article outlines the current situation of the Doha Development Agenda, which is the most recent round of MTNs, and then illustrates the changes in themes of the negotiations. Following, the essential reasons underlying these changes in themes are explored. Through the investigation on recent MTNs, the article argues that, the WTO regime is experiencing a transition towards a diversification of values, and such a shift ultimately results from the changes in economic and social grounds of the multilateral trading system.

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INTRODUCTION

The World Trade Organization (WTO), based on the doctrine of neo-liberalism, disciplines its Members' conducts mainly according to the criteria that are mainly concerned with boosting various commercial interests and enhancing free trade. As the most important institutionalized organ of the multilateral trading system, the WTO has constantly sought greater liberalization on an international level since its establishment in 1995. Guided by the orthodox of neo-liberalism, the WTO regime obliges its Members to remove and eliminate various trade barriers to a maximum extent.

Multilateral trade negotiations (MTNs) are present as a continuous negotiating forum for WTO Members to introduce new rules to the multilateral trading system.¹ MTNs were initially conceived by the *General Agreement on Tariffs and Trade* (GATT) to maintain an ongoing process of reducing trade barriers and promoting free trade. After 1995, when the GATT was reformed into the WTO, MTNs continued to function as the main mechanism for the further development the multilateral trading system. The Uruguay Round, which was a MNN round started in 1986 and ended in 1995, established several major treaties of the multilateral trading system and led to the foundation of the WTO.² Although negotiating parties successfully reached consensus on a numbers of issues, especially tariff concession, during the Uruguay Round, there were still many issues remained unsettled. In order to tackle the issues left unsolved, the 4th Ministerial Conference, held in Doha, Qatar, in 2001, officially made an announcement to launch a new Round of MTNs, the Doha Development Round.³ However, Doha Round has confronted unprecedented difficulties, as divergence among negotiating parties was shown significantly and any substantial concession was reluctant to be made.

This article argues that, the current situation of MTNs reflects a fact, the WTO is progressively reconciling trade with the interests of development as well as other non-commercial interests. This change may revise the traditional criteria that have been routinely contemplated by the multilateral trading system. The article completes the argument by demonstrating the change in the themes of the most recent MTNs, namely

¹ Kyle Bagwell, & Robert W. Staiger, *Multilateral Trade Negotiations, Bilateral Opportunism and the Rules of GATT/WTO*, 63 J. INT. ECON 1 7 (2004).

² *The Uruguay Round*, (World Trade Organization). Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Feb. 30, 2016).

³ *The Doha Round*, (World Trade Organization). Available at http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Feb. 30, 2016).

the Doha Round, and identifying the factors affecting this process. Following, the article explains why the changing themes of recent MTNs can be comprehended as a process of the diversification of values by examining the demands of parties of negotiations, such as environment and labor interests. Then, it unveils the change of economic and social grounds causing the change, and links the social and economic factors with the themes of recent MTNs.

I. BRIEF ON RECENT MULTILATERAL TRADE NEGOTIATIONS

This section provides a basic context of the recent MTNs at a glance. It briefly demonstrates the main agenda of a series of negotiating sessions and then identifies the prominent characteristics of the negotiations.

A. *Agenda of Recent Multilateral Trade Negotiations*

Doha Round was launched in a certain historical background. Its previous MTN round, namely the Uruguay Round, had greatly contributed to the advancement of trade liberalization, for it radically advanced the progress of lowering down the thresholds for market access by revising the General Agreement on Tariffs and Trade (GATT) and developing it into the WTO regime, as well as establishing a series of covered agreements that form the framework of the WTO regime. However, the Uruguay Round left many issues unsolved, prominently agricultural issues and development issues.

Besides, after entering the 21st Century, the WTO regime was faced with several newly emerged challenges. One of the striking challenges was the surprising proliferation of various kinds of preferential trade agreements (PTAs), which refer to treaties governing trade issues between particular countries, aiming to reduce trade barriers and promote regional liberalization among members.⁴ The radical growth of PTAs was recognized to be detrimental to the principle of non-discrimination, which is recognized as one of the pillars of the WTO regime.⁵ Another reason was many developing countries sought to re-arrange the international trading system

⁴ Leonard Alan Winters, *Preferential Trading Agreements: Friend of Foe?*, PREFERENTIAL TRADE AGREEMENTS: A LAW AND ECONOMICS ANALYSIS 7 (Kyle W. Bagwell, & Petros C. Mavroidis, eds. 2011).

⁵ Richard Baldwin, & Caroline Freund, *Preferential Trade Agreements and Multilateral Liberalization*, PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT 212 (Jean-Pierre Chauffour, & Jean-Christophe Maur, eds. 2011).

and give more special treatments for the interests of development.⁶ In addition, some newly emerged global affairs, such as terrorism, aroused Members' awareness of the importance of enhanced cooperation among different countries.⁷

Driven by the factors mentioned above, the Ministerial Conference, which is the top decision-making body of the WTO, announced a start of the new Round of MTNs, called Doha Round or Doha Development Agenda, at its 4th meeting.⁸ The goals of Doha Round seemed ambitious at the beginning, as it wished to form a package of various issues, and develop the WTO into a more inclusive organization.⁹ The Doha Ministerial Conference formulated the *Doha Ministerial Declaration*, which provided a mandate covering a wide range of issues of negotiations.¹⁰

However, after the Doha Ministerial, the negotiations proceeded unsatisfactorily. The following Ministerial Conference, launched in Cancun, Mexico, in 2003, failed to advance the negotiations, and finally did not meet the deadline set by Doha Declaration.¹¹ The primary cause of the stalemate was that, negotiating parties presented a considerable difference in agricultural issues.¹² The stalemate in 2005 highlighted the urgency of catching consensus, and atmosphere of pessimism pervades the negotiations. Afterwards, the following 6th Ministerial Conference, held in Hong Kong, was once regarded as the last chance to catch consensus on the crucial issues of Doha Round. Disappointedly, the Hong Kong Ministerial still left the main issues unsolved.¹³

Being widely considered reluctant to proceed after successive failures, the Doha Round was announced to be indefinitely suspended in July 2006, and all the negotiating sessions of the WTO were halted by the indefinite

⁶ Ian F. Fergusson, *World Trade Organization Negotiations: The Doha Development Agenda*, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS 2. Available at <https://www.fas.org/sgp/crs/misc/RL32060.pdf> (last visited Feb. 30, 2016).

⁷ Raj Bhala, *Poverty, Islamist Extremism, and the Debacle of Doha Round Counterterrorism: Part One of a Trilogy-Agricultural Tariffs and Subsidies*, 9 UNIVERSITY OF ST. THOMAS LAW JOURNAL 4-5 (2012).

⁸ *The Doha Agenda*, (World Trade Organization). Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm (last visited Feb. 24, 2016).

⁹ Elimma Ezeani, *WTO Post Doha: Trade Deadlocks and Protectionism*, 12 JOURNAL OF INTERNATIONAL TRADE LAW AND POLICY 272 (2013).

¹⁰ Ministerial Declaration WT/MIN(01)/DEC/1 (Nov. 14, 2001).

¹¹ Fergusson, *supra* note 7, at 3.

¹² *Ibid.*

¹³ Jeffrey J. Schott, *Completing the Doha Round*, POLICY BRIEF. Available at <http://www.iie.com/publications/pb/pb06-7.pdf> (last visited Feb. 30, 2016).

suspension.¹⁴ The impasse was reached by the collapse of a meeting of G-6 group of six key trading nations, including the U.S., the E.U., Japan, Australia, Brazil and India.¹⁵ This was, again, due to the significant divisions on the issues as of how to cut down the tariffs and domestic supports in agriculture. During the period of suspension, several attempts were made to reconcile Members' positions and lay the groundwork to restart the negotiations. In November 2006, Pascal Lamy, the WTO Director-General, started an informal discussion at the Trade Negotiation Committee (TNC) meeting, and urged all the negotiators back to the Doha Round.¹⁶ In 2008, a package of draft texts was put forward by the chairs of the agriculture and industrial market access (NAMA), in order to facilitate the talks and break the deadlock.¹⁷ Being produced for the finalization of the negotiations on agriculture and other non-agricultural issues, the package narrowed some differences among Members.¹⁸ Generally speaking, however, the endeavors still could not reverse the pessimistic conditions. The global financial crisis further deterred the Members to promote the trade negotiations, for the Members had to turn their focuses of policies back on revising the economic recession.

The 9th WTO Ministerial Conference concluded in Bali brought a favorable turn for the advancement of the Doha Round. In 2013, Members approved a Bali Package, which was recognized as the first major breakthrough in the Doha Round.¹⁹ The agreements contained in the Bali Package are legally binding to every Member of the WTO. Bali Package solved a few issues regarding agriculture, cotton, trade facilitation and Development. It offered some new arrangement in agricultural area, such as the shielding public stockholding programs for food security.²⁰ However, it is argued that, the achievement accomplished by Bali Ministerial was still preliminary, because it still left the core issues, especially the tariffs and

¹⁴ Sungjoon Cho, *The WTO Doha Round Negotiation: Suspended Indefinitely*, AMERICAN SOCIETY OF INTERNATIONAL LAW. Available at <http://www.asil.org/insights/volume/10/issue/22/wto-doha-round-negotiation-suspended-indefinitely> (last visited Feb. 30, 2016).

¹⁵ Fergusson, *supra* note 7, at 5.

¹⁶ *Director-General's Remarks at the Informal TNC*, (World Trade Organization 2006). Available at http://www.wto.org/english/news_e/news06_e/tnc_dg_stat_16nov06_e.htm (last visited Feb. 30, 2016).

¹⁷ *The July 2008 Package*, (World Trade Organization 2008). Available at http://www.wto.org/english/tratop_e/dda_e/meet08_e.htm (last visited Feb. 30, 2016).

¹⁸ Faizel Ismail, *An Assessment of the WTO Doha Round July-December 2008 Collapse*, 8 WORLD TRADE REVIEW 1 (2009).

¹⁹ Bali Ministerial Declaration WT/MIN(13)/DEC (Dec. 7, 2013).

²⁰ *Days 3, 4 and 5: Round-the-Clock Consultations Produce "Bali Package"*, (World Trade Organization 2013). Available at http://www.wto.org/english/news_e/news13_e/mc9sum_07dec13_e.htm (last visited Feb. 30, 2016).

subsidies in agriculture, unsettled.

The Doha Development Agenda have concentrated on several main topics, prominently agriculture, developing issues and trade facilitation. Agriculture is one of the most important issues addressed in the Doha Round. The debates regarding agriculture concentrate on two issues, namely market access and domestic supports. Market access has been the focal issue in the WTO regime over time, but the issues of market access of certain market sectors, prominently agricultural products, had not been solved by the Uruguay Round. The U.S. required further cuts on tariffs for agricultural products, but most developing Members insisted the existing level of agricultural tariffs.²¹ As for domestic supports, especially subsidization, while both African countries and the U.S. strongly wished to cut down the subsidies on agriculture in the E.U., the E.U. refused to make concessions.²²

Developing issue, which means special legal arrangement which may benefit the developing countries, especially the least-developed countries, was another controversial topic in the Doha Round. The 4th Ministerial attached much attention to the mechanism of compulsory licensing of patented pharmaceutical products, which will be addressed later in this article when discussing the increasing concerns on development issues. Besides, the special and differential (S & D) treatment was also eagerly pursued by developing countries. Developing countries also motioned to revise the current framework of implementation, for they found it was rather difficult to implement the agreements reached in the Uruguay Round.

Besides the two major topics mentioned above, the Doha Agenda also contains other controversial topics, such as trade facilitation, non-agricultural market access, services and the WTO rules. The aim of trade facilitation is to contribute to faster and more efficient customs procedures by promoting more effective cooperation between customs and other relevant authorities.²³ The issues regarding non-agricultural market access and services mainly aimed at the continuity of the reduction of trade barriers. The WTO rules, which could be referred to the internal rules of WTO regime, concern the perfection of some procedural aspects, including democracy and transparency. Because that relatively little divergence had been shown on these issues, some arrangements regarding these issues had already been agreed by Members and embodied in legally binding

²¹ Fergusson, *supra* note 7, at 10.

²² Ezeani, *supra* note 10, at 273-274.

²³ *Trade Facilitation*, (World Trade Organization). Available at http://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (last visited Feb. 30, 2016).

documents, such as the Bali Package.²⁴

B. Features of Recent Multilateral Trade Negotiations

Compared with previous MTNs, the recent sessions of negotiations have presented a few distinctive features. Firstly, the coverage of topics in the negotiations has been extended. The Doha Round sought greater inclusiveness in its coverage, the mandate initiated by the *Doha Ministerial Declaration* set out an ever-increasing range of the issues related to trade.²⁵ The negotiations not only sought to promote liberalization in agriculture, services and intellectual properties, but also strove for greater integration of various interests beyond purely commercial, such as anti-terrorism.

Secondly, huge differences between the demands of different negotiators have been augmented. The negotiations were hindered by the negotiating parties' persistence, as the parties just repeatedly claimed their demands and refused to make concessions.²⁶ Irreconcilable conflicts exist not only between developing and developed Members but also within the camp of developed countries. Regarding the agricultural issues, for example, while the U.S. firmly claimed a reduction of domestic supports, the E.U. presented its reluctance to cut down agricultural subsidies.²⁷

Thirdly, the negotiations have confronted unprecedented opposition from various social groups. For example, the 6th Ministerial held in Hong Kong was faced with a large-scale protest, which jointly organized by a number of social groups. This situation will be illustrated in more detail when discussing the causes of the diversification of values.

Finally, as an inevitable consequence caused by the factors identified above, the process of the negotiations did not proceed smoothly. Although the Doha Round has lasted for twelve years, consensus has been reached only on a few issues that are recognized to be unessential to the advancement of the multilateral trading system. As a comparison, the Uruguay Round swimmingly formed a series of agreements, which are recognized as the core treaties of the WTO regime, including GATS, TRIPS and TRIMS.

To conclude, after entering the 21st Century, MTNs turned to be rather difficult to be proceeded and have been posed with a series of challenges in various areas. Although many scholars have carefully analyzed each aspect

²⁴ Agreement on Trade Facilitation, WT/L/911 and WT/MIN(13)/36 (Dec. 7, 2013).

²⁵ Ademola Oyejide, *Development Dimensions in Multilateral Trade Negotiations*, Doha and Beyond: The Future of the Multilateral Trading System 68 (Mike Moore, ed. 2004).

²⁶ Fergusson, *supra* note 7, at 3.

²⁷ Ismail, *supra* note 19, at 2.

of the Doha Round and forecasted the prospect of the current negotiations, the future of MTNs still seems to be unknown. Accordingly, rather than providing a prediction of the future, this paper attempts to argue in the following context that, the recent negotiations indicate a possibility for the WTO regime to experience a change towards greater diversification of values.

II. CHANGING THEMES OF THE MULTILATERAL TRADE NEGOTIATION: DIVERSIFICATION OF VALUES

The Doha Round has marked several changes in the themes of recent MTNs. This article argues that, these changes can be described as a graduate transition towards diversification of values. This may imply that, whether a measure can facilitate free trade and contribute to liberalization may no longer be the sole criterion for the WTO to discipline its Members, but the balance between various interests, including the demands of development and non-commercial interests, is increasingly becoming the concerns of the WTO regime.

A. *Traditional Theme of the WTO*

Promoting free trade globally has been a long-held philosophy incorporated within the multilateral trading system, and so is the case with MTNs. Such an ideology is based on an implicit assumption that, the rules established and approved by participating parties in MTNs to achieve greater liberalization in international trade activities can automatically lead to economic development in all the negotiating parties, regardless their initial level of development.²⁸ Since 1980, trade negotiations presented a transition from discussing border measures, mainly the custom tariffs, to behind-the border measures, such as non-tariff barriers (NTBs) and technical barriers to trade.²⁹ Nonetheless, through the change, the focus of trade negotiations has always been how to cut down the obstacles faced with traders undertaking transnational trade activities. This value-orientation is clearly reflected in both the principles and specific rules established by various sessions of MTNs. Key principles of the WTO are affirmed by all the major treaties forming the WTO regime, such as the GATT, the GATS and the TRIPS Agreement. For instance, the most prominent principles are

²⁸ Oyejide, *supra* note 26, at 69.

²⁹ Konrad von Moltke, *Trade and Sustainable Development in the Doha Round*, DOHA AND BEYOND: THE FUTURE OF THE MULTILATERAL TRADING SYSTEM 1 (Mike Moore, ed. 2004).

most-favored-nation (MFN),³⁰ which obliges a Member to equally treat other Members, and national treatment (NT),³¹ which requires the equality between foreign competitors and the nationals of a Member. In short, both principles strive for the elimination of discrimination against foreign traders and essentially remove the obstacles set by sovereign boundaries. As for specific rules of the WTO regime, Members are obliged to remove trade barriers, mainly in the form of tariffs, under the series of WTO agreements and their annexes.

The Doha Round has never intended to revise the traditional theme, namely the promotion of trade liberalization; rather, its main objective has consistently been further lowering trade barriers and deepening liberalization. Although the progress of lowering down the trade barriers have been hindered by various appeals concerning diversified interests, it can be argued that, the traditional theme of the WTO still remains its central role in the recent MTNs.³²

B. Concerns on Development

It has been recognized that, the Doha Round has paid particular attentions to the development issues. The sub-section describes this trend by illustrating several changes in recent negotiations, particularly the change in the legal arrangement concerning compulsory licensing of patented pharmaceutical products.

One of the most noteworthy issues in which could illustrate the increasing concerns about development dimensions of the multilateral trading system was a substantial modification of the rules concerning compulsory licensing of patented pharmaceutical products in the *Trade-Related Aspects of Intellectual Property Rights* (TRIPS). Among the few resolved issues of the Doha Round, the issue of compulsory licensing of pharmaceuticals could be regarded a relatively remarkable achievement accomplished by the negotiations.³³

Compulsory licensing refers to a mechanism allowing a person other than the owner of a patent to manufacture and sell the patented products

³⁰ *General Agreement on Tariffs and Trade 1994* LT/UR/A-1A/1/GATT/1 (Apr. 15, 1994), Art. I (1), see also *General Agreement on Trade in Services* LT/UR/A-1B/S/1 (Apr. 15, 1994), Art. II (1).

³¹ *Ibid.*, GATT (1994) Art. III (1), see also GATS Art.XVII (1).

³² For example, The US intended to achieve greater liberalization in every field included in the negotiations. See David Orden, *US Agricultural Policy: The 2002 Farm Bill and WTO Doha Round*, WTO NEGOTIATIONS AND AGRICULTURAL TRADE LIBERALIZATION: THE EFFECT OF DEVELOPED COUNTRIES' POLICIES ON DEVELOPING COUNTRIES 81 (Eugenio Díaz-Bonilla, et al. eds. 2006).

³³ Alan O. Sykes, *TRIPS, Pharmaceuticals, Developing Countries, and the Doha Solution*, 3 CHI. J. INT'L L. 48 (2002).

without the consent of the original owner.³⁴ This arrangement, aiming at enabling poor countries to acquire the medicines essential to public health from countries possessing the capacity of manufacturing, was originally stipulated in the *TRIPS Agreement* 1994.³⁵ However, before the modification, the implementation of compulsory licensing was subject to over-restrictive conditions. The TRIPS once stipulated that, compulsory licenses can only be granted if a medicine is mainly supplied within the domestic market of a less-developed country.³⁶

A document titled *Declaration on the TRIPS Agreement and Public Health* issued by the 4th Ministerial marked a change.³⁷ The Declaration affirmed that, the WTO regime should not deter its Members from taking measures to protect public health, and accordingly ordered the Council for TRIPS to seek effective and practical solutions to the problem that, the existing rules of TRIPS might harm the accessibility and affordability of vital medicines.³⁸ Under the instruction of the Declaration, the General Council passed a decision in 2003, claiming that, generic copies made under compulsory licenses are allowed to be exported to countries which lack the capacity of manufacturing, if certain requirements, listed in Article 31 (f) and (h) of the TRIPS, are met.³⁹ Afterwards, in 2005, the *Amendment of the TRIPS Agreement* was approved by the General Council, which formally revised the TRIPS according to the decision made by General Council in 2003.⁴⁰ The amended clauses have already been implemented. In July 2007, following the procedures required by the TRIPS Agreement, Rwanda informed the General Council that it would import 260,000 packs of TriAvir, a type of medicine, produced by Apotex, a producer in Canada over two years under compulsory licensing.⁴¹ This notification made by Rwanda was followed by the notification of Canada, the exporting country, and hence the

³⁴ *Compulsory Licensing of Pharmaceuticals and TRIPS*, (World Trade Organization). Available at http://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm (last visited Feb. 30, 2016).

³⁵ Jerome H. Reichman, *Compulsory Licensing of Patented Pharmaceutical Inventions: Evaluating the Options*, 37 THE JOURNAL OF LAW, MEDICINE & ETHICS 247 (2009).

³⁶ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, LT/UR/A-1C/IP/1 (Apr. 15, 1994). Art. 31.

³⁷ *Draft Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/W/2 (Nov. 14, 2001).

³⁸ *Ibid.*

³⁹ *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health—Decision of August 30, 2003*, WT/L/540 (Seat 2 2003).

⁴⁰ *Amendment of the TRIPS Agreement—Decision of December 6, 2005*, WT/L/641 (Dec. 8, 2005).

⁴¹ Keith Eugene Maskus, *Private Rights and Public Problems: The Global Economics of Intellectual Property in the 21st Century*, 106 (Peterson Institute 2012).

whole procedure was accomplished.⁴²

The modification of TRIPS Agreement obviously struck a balance between the pursuance of free trade, mainly sought by developed countries, and the consideration of development, prominently required by developing countries. Developed countries tend to emphasize the virtue of the monopolized rights granted by of patenting in promoting medical research and innovation. This is in accordance with the core ideology embedded within the WTO, which underscores the protection of the rights and interests of individual competitors of global trading regime to a maximum extent. However, from the viewpoint of developing countries, the legal monopoly may create the hardness for consumers in less-developed countries to obtain necessary medicines, especially those directly essential to livelihood.⁴³ Before the modification of the TRIPS, it had been frequently questioned whether the original compulsory licensing under the TRIPS left sufficient flexibility for less-developed countries to access and afford the essential medical products.⁴⁴ Critics raised a concern that, the TRIPS over-emphasized the protection of intellectual properties but failed to consider whether the relevant rules were sufficient enough to ensure that, people in less-developed countries can access certain medical products.⁴⁵ Behind the appeals for the greater flexibility of TRIPS was the fact that, for less-developed countries, many new medicines recognized to be vitally important to the survival of millions of patients are too costly.⁴⁶ Therefore, the differences actually mirrored a substantial conflict between developed countries and developing countries, for the former requests the higher standard of protection of individual properties, while the latter bargains with the interests that are crucial to development.⁴⁷

The negotiations concerning compulsory licensing of patented pharmaceuticals were obviously an attempt of striking the balance between the objective of promoting free-trade and the objective of public interests in developing countries, and its outcome was in favor of the latter. It was to

⁴² *Canada is First to Notify Compulsory Licence to Export Generic Drug*, (World Trade Organization 2007). Available at http://www.wto.org/english/news_e/news07_e/trips_health_notif_oct07_e.htm (last visited Feb. 30, 2016).

⁴³ *The Separate Doha Declaration Explained*, (World Trade Organization). Available at http://www.wto.org/english/tratop_e/trips_e/healthdeclexpln_e.htm (last visited Feb. 30, 2016).

⁴⁴ *Ibid.*

⁴⁵ Sykes, *supra* note 34, at 47.

⁴⁶ Ellen F. M. 't Hoen, *TRIPS, Pharmaceutical Patents and Access to Essential Medicines: Seattle, Doha and Beyond*, ECONOMICS OF AIDS AND ACCESS TO HIV/AIDS CARE 41. Available at <http://cdrwww.who.int/intellectualproperty/topics/ip/tHoen.pdf> (last visited Feb. 30, 2016).

⁴⁷ Raadhika Gupta, *Compulsory Licensing under TRIPS: How Far It Addresses Public Health Concerns in Developing Nations*, 15 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 357 (2010).

meet the demands of the negotiators in developing countries that, the WTO regime finally allowed patented pharmaceutical products to be exported under certain circumstances.

Besides the compulsory licensing of pharmaceutical products under the TRIPS, some other examples demonstrating that, the WTO regime may pay increasing attention to development could also be found in the process of MTNs. The issue of special and differential (S & D) treatment, as one of the essential topics in the Doha Agenda, also urged the necessity of balancing the traditional values of the WTO with the interests of development. Another example is that, the use of special safeguards by developing countries triggered much debate in the Doha Round.

Overall, once development becomes a major concern of the contemporary international society, the expansion of the global market may inevitably collide with the interests of development. Consequently, the multilateral trading system, serving as the basic legal framework formulating the contemporary global market, should take the issues of development into considerations. The changes of the themes of MTNs, although rather slight, may indicate a tendency to the growth of attentions to the development dimensions in the WTO regime.

C. Concerns on Non-commercial Interests

Besides the growing concern of development, recent MTNs have paid surprisingly much attention to non-commercial interests. Non-commercial interests are usually equated to the demands of the civil society, such as environment, labor interests, and public health. Before the launching of the Doha Round, a numbers of the WTO agreements already covered various non-commercial concerns, but to a rather limited extent. Non-commercial concerns embodied in the WTO were generally in the form of exceptional clauses, or also called the “carve-out” clauses, which provide certain legitimate reasons that can justify a conduct of a Member that may contradicts to its WTO obligations. However, to prevent Members from unnecessarily restraining trade, the WTO had developed strict requirements for Members to apply these exceptions. The existing WTO rules therefore left rather limited flexibility for Members to protect the non-commercial interests when regulating domestic trade issues. As a result, the WTO regime has been widely criticized by various groups from civil society, accused for undermining public health and environment and trampling over

labor and human rights.⁴⁸

With the proceeding of the Doha Round, the importance of non-commercial considerations has been increasingly highlighted. Given the fact that, it is unrealistic to thoroughly explore all the topics related to non-commercial aspects, the article only addresses the public health issue to illustrate the growing concerns of non-commercial interests in recent MTNs.

Public health, recognized as an important aspect of non-commercial interests, can refer to “all organized measures to prevent disease, promote health, and prolong life among the population as a whole” according to a definition provided by the World Health Organization.⁴⁹ Concerns on public health, such as infectious disease control, food safety, access to drugs and vaccines, tobacco control and health services were initially embodied in different agreements under the WTO regime, including the GATT 1994, the GATS, the TRIPS Agreement, the Agreements on Technical Barriers to Trade (TBT Agreement), and Agreements on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).⁵⁰

Nevertheless, during the Doha Round, relevant WTO rules were alleged to leave rather limited room for the Members to take measures in response to the issues involving public health. Doctrinally, measures taken by Members for the purposes of public health were generally stipulated as exemptions of the WTO rules. According to the SPS Agreement, which is recognized as “the closest match between a health issue and trade”,⁵¹ sanitary and phytosanitary measures taken by a Member must not arbitrarily or unjustifiably discriminate between Members,⁵² and should be implemented in accordance with GATT 1994, particularly the in particular the provisions of Article XX (b).⁵³ Thus, arguably, the objectives of keeping the global market fully competitive and preventing the market from governmental intervention should be given priority, and the Members’ measures for the purpose of public health are merely the remedies to the defects of the market.

Besides, the WTO dispute settlement body also developed a series of

⁴⁸ *Top Reasons to Oppose the WTO*, GLOBAL EXCHANGE. Available at <http://www.globalexchange.org/resources/wto/oppose> (last visited Feb. 30, 2016).

⁴⁹ *Public Health*, (World Health Organization). Available at <http://www.who.int/trade/glossary/story076/en/> (last visited Feb. 30, 2016).

⁵⁰ *World Trade Organization and World Health Organization, WTO Agreements and Public Health: A Joint Study by WHO and the WTO Secretariat*, WTO/WHO 11. Available at https://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf (last visited Feb. 30, 2016).

⁵¹ *Ibid*, at 65.

⁵² *Agreement on the Application of Sanitary and Phytosanitary Measures*, LT/UR/A-1A/12 (Apr. 15, 1994). Art. 2 (3).

⁵³ *Ibid*, Article 2 (4).

tests for assessing whether a Member can apply these exemptions to justify its measures or policies. Generally speaking, when the Panel or Appellate Body determining whether a measure can be justified, it required a process of weighing and evaluating a sets of factors, including the importance of the interests that, the Member intends to protect, the efficiency of the measures and the actual impacts on trade.⁵⁴ Notably, it was identified by the WTO that, among various public interests, the human health is “important in the highest degree”,⁵⁵ which implies that, applying other legal reasons to justify a measure may require more strict criteria. Due to the reasons explained above, the existing rules concerning public health were accused to be incapable to meet the demands of people’s health.

Because several Members felt that, the existing WTO regime provide them with insufficient flexibility to protect public health, the topic of public health and relevant policies was added on the agenda of MTNs. For example, the issue of food security was addressed as a major topic in the 9th Ministerial Conference in Bali, the most recent session of MTNs. In this session, India, positioned to be a leader of countries that maintain large populations of smallholder farmers, emphasized the significance of food-related safety, and argued that this issue was non-negotiable.⁵⁶ An issues dealing with the balance between trade and food security is the “Amber Box”, which means that, governments buy food from farmers at reduced prices to set up stocks, mainly for the purpose of protecting food security. The public stockholding programs were alleged to be trade-distorting, but they were allowed to be adopted in less-developed countries to a limited extent.⁵⁷ However, a number of developing countries claimed that, they found rather tough to stay within the limits. Although this problem has not yet been resolved, the negotiations to some extent has mitigated the tension between Members, for Members agreed to temporarily waive their rights to complaint against certain developing countries when they exceeding the limits, provided the measure of stockholding was made for food

⁵⁴ WTO/WHO, *supra* note 51, at 31.

⁵⁵ *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, REPORT OF THE APPELLATE BODY, WT/DS135/AB/R, (Mar. 12, 2001), Para. 172.

⁵⁶ Carlos A. Primo Braga, *The WTO Bali Package: The Doha Development Agenda (DDA) Is (Still) Alive*, INTERNATIONAL INSTITUTE FOR MANAGEMENT DEVELOPMENT (2013). Available at <http://www.imd.org/research/challenges/TC095-13-wto-bali-package-carlos-braga.cfm> (last visited Feb. 30, 2016).

⁵⁷ *Briefing Note: Agriculture Negotiations—The Bid to “Harvest” Some “Low Hanging Fruit”*, (World Trade Organization 2013). Available at http://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_agneg_e.htm (last visited Feb. 30, 2016).

security.⁵⁸ Another example can be seen in the *Doha Declaration on the TRIPS Agreement and Public Health*, which has been mentioned previously, for it indicated that, the WTO negotiations are increasingly interested in the balance between the trade and public health.

It is worth clarifying that, the trend in which increasing importance has been attached to public health is not only shown in the agenda of negotiations, but also the domestic legal practice of negotiating parties. It has been shown that, Member parties of the WTO have to balance the interests of free trade with public health in their domestic law, when they were faced with adverse effects brought by the liberalized global market. The *Australia—Tobacco Plain Packaging* case, which was brought to the WTO dispute settlement body in 2012 and begun to be reviewed by the panel recently, was an example presenting Members' practice of balancing trade with public health. In 2011, the congress of Australia passed the *Tobacco Plain Packaging Act*, in order to promote the people from the health hazard of cigarette smoking. According to the act, from 1st December 2012, all the retail packaging of tobacco products sold in Australia must comply with a series of requirements on appearance,⁵⁹ and trademarks are prohibited from generally appearing on the tobacco products.⁶⁰ The Act might effectively make the tobacco products less attractive for consumers, but meanwhile would reduce the value of trademarks. Therefore, major producers in tobacco industries immediately filed lawsuit against Australia, claiming that, the establishment of the Act is unconstitutional.⁶¹ The High Court of Australia eventually decided that, the Act did not infringe the constitution, and accordingly made a judgement in favor of the Australian Government.⁶² Laws and relevant regulations concerning plain packaging in Australia might have the effect of deterring foreign companies from exporting cigarette products to Australia and distorting the free trade. Therefore, several Members of the WTO, including Ukraine, Honduras, Dominican Republic, Cuba and Indonesia, successively complained to the WTO dispute settlement body, challenged that, the Australia's conducts of adopting plain packaging were not in consistency with relevant rules in the

⁵⁸ *Farm Talks Chair Outlines Shape of What Might be Possible for Bali Meeting*, (World Trade Organization 2013). Available at http://www.wto.org/english/news_e/news13_e/agng_11oct13_e.htm (last visited Feb. 30, 2016).

⁵⁹ *Tobacco Plain Packaging Act*, No. 148 (2011), Art. 18, division 1, part 2.

⁶⁰ *Ibid.* Art. 26, division 2, part 2.

⁶¹ Jonathan Liberman, *Plainly Constitutional: The Upholding of Plain Tobacco Packaging by the High Court of Australia*, 39 AM. J. L. & MED. 361-362 (2013).

⁶² *JT International SA v. Commonwealth of Australia*, HCA 43 (High Court of Australia 2012).

TRIPS Agreement, the TBT Agreement and the GATT.⁶³ A major defense of Australian Government was that, the measures were implemented in accordance with the rules mandated by the World Health Organization (WHO). Since the disputes were not resolved in the consultations, the General-Director composed the Panel in May 2014.⁶⁴ Although the measures taken to control tobacco were still controversial, it reflected a trend that, the significance of public health is gradually noticed by countries. It can be envisaged that, as a party in the negotiations, Australia may prone to put the interests of public health prior to the commercial interests. There are also other countries which have already begun to consider introducing plain packaging. For example, the governments of the United Kingdom⁶⁵ and New Zealand⁶⁶ have initiated public consultations on whether tobacco should be sold in standardized packaging. Additionally, the WHO announced that, it would actively support the Australian Government to take measures to control tobacco, and would firmly stand by all countries that take actions to deal with the intimidation from tobacco.⁶⁷ Based on the indications mentioned above, it can be expected more Members would attach more importance to the public health in future MTNs.

Public health is merely one of the various considerations of non-commercial interests. Besides public health, some other non-commercial issues, such as environmental issues, also frequently appeared in the recent negotiation agenda.⁶⁸ It can be reasonably said that, the concerns on non-commercial issues may witnessed a further growth during the ongoing development in the multilateral trading system.

⁶³ *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging—Request for Consultations by Ukraine*, G/L/985, G/TBT/D/39, IP/D/30, AND WT/DS434/1 (Mar. 14, 2012).

⁶⁴ *Australia—Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, (World Trade Organization). Available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds434_e.htm (last visited Feb. 24, 2016).

⁶⁵ *Consultation on Tobacco Plain Packaging Launched*, (Government of the United Kingdom). Available at <https://www.gov.uk/government/news/consultation-on-tobacco-plain-packaging-launched> (last visited Feb. 24, 2016).

⁶⁶ *Proposal to Introduce Plain Packaging of Tobacco Products in New Zealand*, (Ministry of Health 2012). Available at <http://www.health.govt.nz/publication/proposal-introduce-plain-packaging-tobacco-products-new-zealand> (last visited Feb. 30, 2016).

⁶⁷ *Reducing the Appeal of Smoking—First Experiences with Australia's Plain Tobacco Packaging Law*, (World Health Organization 2013). Available at http://www.who.int/features/2013/australia_tobacco_packaging/en/ (last visited Feb. 30, 2016).

⁶⁸ For example, early in 2001, the environmental issues were already addressed in Ministerial Declaration.

III. CAUSES OF THE DIVERSIFICATION OF VALUES

It has been explained that, the promotion of trade liberalization is no longer recognized to be the only concern of MTNs, and the values embodied in recent MTNs have been diversified. This section further explores the reasons contributing to the trend towards the diversification of values.

A. Demands of Developing Countries

It is obvious that, the progressively active participation of developing countries has directly resulted in the gradual integration of development interests into recent MTNs. The participation of developing countries has greatly enhanced the appeal of protecting the interests of development. However, exploring the root of the change requires deeper analysis of why increasing number of developing countries have been increasingly willing to express their demands in MTNs.

The first reason for developing Member countries to become more active in MTNs was the increasing awareness that, such a mechanism could be utilized for the interests of not only developed countries but also developing countries. MTNs were once regarded as a forum only for the most influential developed countries to decide the framework of the world trade. It was routinely perceived that, developing countries always tolerated less degree of liberalization and their demanded more authorities kept by the government in order to protect their relatively fragile domestic market. This situation has been changed to some extent, for a number of developing countries have developed their advantageous industries which are considered to be more competitive than their counterparts in some developed countries. The shift can be obviously shown in the agricultural field, as many developing countries have felt that, their advantages in agriculture were neutralized by the domestic supports of developed countries, especially the E.U.. Therefore, these developing countries asked for the reduction of domestic supports for agriculture during the negotiations.

Besides, developing countries have found it unrealistic and impractical for them to apply the standards of liberalization which had been promoted and widely implemented by developed countries, and therefore they require special arrangements which were suitable for their economic and social conditions. Although free market may stimulate the competitors and may thus boost the economic growth, an undeniable truth is that, the initial level of the economy in developing countries is much lower than developed countries, and competitors in developing countries actually cannot compete

against their rivals in developed countries. Accordingly, developing countries should seek to legal arrangements which are specially designed for them, so that they needed to act more positively in the negotiations.

B. Demands of the Civil Society

A series of advancements of MTNs are the consequences of increasing demands of different groups of the civil society. It has been recognized that, a numbers of social movements have severely influenced the progress of MTNs.⁶⁹ At the end of the last century, various anti-WTO and anti-globalization protests began to be brought out.⁷⁰ Since the commencement of the Doha Round, the negotiations have been constantly faced with continuous protests and social movements. For instance, an incident directly contributed to the abortion of Cancun Ministerial was the suicide of Lee Kyung-hae, who was a farmer of Republic of Korea and a famous anti-WTO activist.⁷¹ In order to manifest his attitude that, the WTO policies on agriculture infringed the interests of Korean farmers and led to poverty, he stabbed himself in front of media cameras in Cancun in 2003. In December 2005 in Hong Kong, anti-globalization protesters began a series of demonstrations to denounce the policies of the WTO.⁷²

The movements against the WTO and globalization indeed have accelerated the shift in the themes of the WTO, but the turning of the theme has been ultimately determined by the constantly changing conditions of economy and society. In the contemporary society, the economic and social spheres cannot be clearly separated. With the expansion in the scale of global trading, trade interests inevitably clash with various non-commercial interests, and therefore trade issues become increasingly intertwined with non-commercial concerns. Adverse effects of the emphasis on commercial interests by the WTO regime may be imposed on various dimensions of the society, because unbridled pursuit of self-interests often leads to indifference of other interests. For example, it can be often seen that, a transnational trader may export products that are detrimental to the human or animal health in a Member state. In parallel with the change in the

⁶⁹ David Waddington, *Seattle and Its Aftershock: Some Implications for Theory and Practice*, 1 POLICING 380 (2007).

⁷⁰ José Seoane, & Emilio Taddei, *From Seattle to Porto Alegre: The Anti-Neoliberal Globalization Movement*, 50 CURRENT SOCIOLOGY 105 (2002).

⁷¹ Jonathan Watts, *Field of Tears*, THE GUARDIAN (2003). Available at <http://www.theguardian.com/world/2003/sep/16/northkorea.wto> (last visited Feb. 30, 2016).

⁷² Shiu-hing Lo, *The Politics of Policing the Anti-WTO Protests in Hong Kong*, 14 ASIAN JOURNAL OF POLITICAL SCIENCE 140 (2006).

economic and social grounds, the civil society itself has experienced a growth during the last few decades which contribute to the fact that, in the contemporary world, people can more easily expressed various voices.

C. Necessity of Resolving the Fragmentation of International Law

The term “fragmentation” can be used to describe a situation of inconsistency, whereby the rules regulating the same subject-matter are separately stipulated in different international treaties and are inconsistent with each other. This concept was first mentioned in the context of public international law, when public international scholars pointed out that, while increasing numbers of international treaties have been concluded, the contemporary public international law is becoming increasingly fragmented.⁷³ Fragmentation is deemed to be problematic to international law, for it may inevitably result in overlaps and even contradicts between rules a consequence that, some rules may be not able to function. With the trend that, the world is experiencing a deeper integration among various areas of human activities, it becomes rather impossible for different legal arrangements to regulate the various kinds of activities independently of each other.⁷⁴

Like public international law, the WTO regime has also encountered the problems resulting from fragmentation. The fragmentation related to the WTO is jointly caused by at least three factors. Firstly, a precondition for the existence of fragmentation is that, there exit a large amount of international treaties regulating various human activities in the global stage. At the national level, concerns on various interests, such as environment, public health and labor issues, exist over time. However, those issues are traditionally regulated within the scope of a separate jurisdiction, and a state can manage these issues by exercising its sovereignty. Only in the era of globalization, when trans-boarder exchanges gradually become frequent, can those issues transcend the scope of sovereignty and become global concerns. Correspondingly, increasing numbers of international treaties have been concluded in order to regulate the issues beyond territories.

Secondly, the rapid development of the global market has contributed to a fact that, the multilateral trading system may unavoidably involve other fields of human activities. As mentioned previously, international trades may trample labor interests, environment, public health and human rights,

⁷³ *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 3-4 (2006).

⁷⁴ WTO/WHO, *supra* note 51, at 1.

and therefore more concerns on issues other than trade have been incorporated into the WTO system. Provided that, these issues have already been embodied in other international treaties, it may result in the inconsistency between the treaties and WTO rules.

Thirdly, when there shows a situation of fragmentation, there must be a conflict between WTO agreements and other international treaties. The term “conflict” has a lot of meanings, but here it should be interpreted in a narrow sense. It means that, two obligations cannot be performed together. Taking public health as an example, it conflicts with the WTO regime on many aspects. One of the most important principles of the international health regime, which is underscored by the WHO, is the requirement on transparency. Although WTO agreements also embody the principle of transparency, its threshold to establish that, a measure is inconsistent with such a principle is lower than the health treaties. Regarding the content that should be notified to the public, the WTO rules only require the governments to disclose relevant laws and regulations to maintain the predictability, while health treaties require the disclosure of various facts which may relate to public choices.

As explained previously, fragmentation is detrimental to international law, for it may actually nullify some rules by causing them cannot be implemented. Fragmentation in the WTO is also the case. In *Australia—Tobacco Plain Packaging*,⁷⁵ which represents a typical case of the fragmentation among the WTO and other international regimes, either the WHO or the WTO obligations cannot be performed. Therefore, it highlights the necessity for the WTO regime, including MTNs, to consider the harmonization among various regimes.

Through several ways can the WTO body integrate WTO rules with other international treaties and thereby contribute to greater harmonization between the multilateral trade system and other regimes. The WTO regime may refer to other international treaties when establishing the WTO rules. For instance, the *Codex Alimentarius*, which is a set of recommended criteria for food safety by the UN Food and Agriculture Organization (FAO) and the WTO, has been officially recognized as a reference for the WTO dispute settlement.⁷⁶ Therefore the application of the the *Codex Alimentarius* may effectively reduce the inconsistency between the WTO and other regimes on food safety. Another approach to improve existing situation of fragmentation is through the dispute settlement, as the WTO

⁷⁵ *Australia—Tobacco Plain Packaging*, supra note 64.

⁷⁶ *The WTO and the FAO/WHO Codex Alimentarius*, (World Trade Organization). Available at http://www.wto.org/english/thewto_e/coher_e/wto_codex_e.htm (last visited Feb. 24, 2016).

dispute settlement mechanism can refer to other international treaties as a basis for interpretation. Several reports made by dispute settlement body, notably the *America-Shrimps*, have already underlain a principle for interpretation in which the measures agreed by the parties to a multilateral environment agreement should be regarded as an acceptable measure, if they are not arbitrary or unnecessarily trade-distorting.⁷⁷

However, a more fundamental way to resolve fragmentation is through MTNs. As a law-making process, negotiations can directly confirm that, Members' conducts for the purposes of implementing other international treaties can be accepted to be a justification for not performing the WTO obligations.

To sum up, this part has mentioned three reasons that caused the changing in the theme of the WTO negotiations. While the more active participation of developing countries and the demands of civil society are the reasons external to the law, the necessity of resolving the fragmentation cares about the internal coherence of the legal system.

CONCLUSION

After the establishment of the GATT framework, especially the formation of the WTO in 1995, the multilateral trading system has continuously striven for greater liberalization and globalization. The development of the multilateral trading system was once recognized as a process that the global market is constantly liberalized. However, recent development of the WTO has challenged such a conception, as various concerns other than commercial interests have been paid increasingly more attention. This article has identified the recent changes in the theme under the WTO regime through an investigation on MTNs in the 21st Century, and has further analyzed the social conditions which facilitated the changes.

The conclusion achieved by the study is two-folded: firstly, the current WTO regime is experiencing a transition towards a diversification of values, which may vary the traditional themes of the WTO. Although the pursuance of trade liberalization still maintains its dominance in the current multilateral trading system, other concerns, namely the development interests and non-commercial interests have more frequently appeared in trade topics. This trend can be reflected by the proceeding of the Doha Round.

Secondly, this change has its deeper root in the social and economic

⁷⁷ United States, *Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4 REPORT OF THE APPELLATE BODY, WT/DS58/AB/R (Oct. 12, 1998).

grounds. From a socio-legal perspective, it is the increasingly positive participation of developing countries and greater involvement of the civil society that have greatly facilitated the change. From an analytical perspective, the problematic situation caused by fragmentation has called for the harmonization of various international treaties, and therefore the values possessed by the WTO should be inevitably diversified.

Overall, it cannot be purely affirmed that, the development of the multilateral trading system is a one-dimension process of gradually deepening the liberalization. Instead, it is a procedure that, various interests to be discovered and be balanced, in order to achieve a more rational system. The findings above suggest that, in order to acknowledge the future development of multilateral trading system, exclusively focusing on the existing WTO rules is no longer sufficient. Rather, it seems necessary to look outside the WTO regime and pay attention to various human activities.