My Views on WTO Reform

By:

David Unterhalter

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It is sometimes hard to remember that not very long ago the place of multilateralism in the world order seemed not just secure, but inevitable. In almost every field, co-operation that was global in reach and ambition appeared to be the obvious way to promote human welfare. Nowhere did this seem more self-evident than in the enhancements to welfare that flowed from the promotion of trade. The global economy was not an abstraction, but reflected the reality that national economies were ever more integrated, and trade flows had increased significantly.

Many developing economies enjoyed sustained economic growth, and trade contributed to that growth. So much so that there has been a realignment of global economic power, of which China is the exemplar. The institutional arrangements that enhanced global trade were never an achievement of the WTO alone. But there are good reasons to think that the WTO has been the basis of a stable and secure rule -based trading order. True enough, States have found it in their interests to reduce tariffs beyond their multilateral commitments. And the very large number of regional trade agreements concluded in the last twenty years reflects the widespread recognition that the

reduction of trade barriers, extending well beyond WTO commitments, gives rise to mutual advantage. But the WTO has remained the foundation upon which these enhancements rest.

The WTO dispute settlement system has been integral to the WTO as a rule-based order. Reduced to its essentials, the dispute settlement system has these attributes. First, its jurisdiction is compulsory and exclusive: WTO Members seeking redress must have recourse to the system and those against whom redress is sought cannot elect to opt-out. Second, the scope of its jurisdiction is wide: disputes between Members arising from the WTO covered agreements. Third, disputes are heard by Panels and the Appellate Body that embody adjudication widely regarded as fair, reasoned and independent. Fourth, the system is sufficiently effective. Reports of the Panels and the Appellate Body are invariably adopted by the Members of the WTO. And compliance, though slow and sometimes imperfect, can be exacted, with sanctions as a last resort. These matters have been so often stated that they have seemed self-evident. But that is so no longer. The WTO as an institution is increasingly contested, and with it, uncertainty hangs over the future of the WTO, and in particular, its dispute settlement system. Skepticism of the WTO and its system of dispute settlement reflects larger political and social movements that have little to do with the technical quibbles of lawyers.

The rise of nationalism and the strong assertion of national interest is to be observed in many places and among many people. The huge welfare gains that have been made from a world predicated upon global trade have, unavoidably, not been evenly distributed. In particular, the rise of economies in the developing world has led to less skilled workers in developed economies suffering static or falling incomes and much job insecurity. There has also been a shift in economic power. A world of singular political and economic power that was enjoyed by the United States after the demise of the Soviet Union is no longer. The long run effects of the great recession have been slow to recede.

These developments, among others, have given rise to political movements that consider globalism and the post war multilateral order to be corrosive of national identity and subversive of national interests. How this assertion of national identity has marked the politics of different countries permits of no uniform calibration. But a world where America First, Brexit, Alternative for

Germany and Italy's Matteo Salvini resonate, often for different reasons and with different consequences, is a world altered in significant ways. What this has meant is that the global institutional order, established after the Second World War, of which the WTO was a late but important addition, is subject to reassessment at best and outright rejection at worst. And the United States, which was central to the creation and maintenance of this order, now has a President whose political programme rests upon the express conviction that the global order should be no more than the expression of national self-interest. From this premise, there seems little reason why the WTO should continue. If States with significant economic power can secure as good and likely better outcomes than those achieved and agreed through successive trade rounds that are enforced through the WTO, then why continue to be bound by these agreements?

At the heart of the WTO system is the commitment to the foundational principles of MFN and national treatment. But in a world predicated upon national interest and economic power, the most powerful may not consider multilateral rule-based commitments to be optimal to the achievement of their national interests. One feature of the WTO dispute settlement system is that every Member of the WTO is entitled to have their dispute determined under agreed rules. This is a basic feature of rules-based dispute settlement. The rules, impartially applied, have no regard to the economic power of the parties. The settlement of disputes by recourse to rules of general application yield outcomes that do not depend upon which member is more powerful. The rules and their interpretation are determining.

By contrast, the resolution of trade disputes by the exercise of economic power will reflect the balance of power between the parties. States of significantly asymmetric power that find themselves at odds will resolve their dispute on terms that reflect that power asymmetry, other things equal. If one State is more powerful than those with which it trades, and the principle of national self-interest prevails, it may seem rational for the powerful to reject a rule - based system. Unless of course the rules themselves already reflected the prevailing power asymmetry. There are reasons why rule by power and the primacy of asserting national interest do not necessarily produce optimal results, judged even from the position of the powerful. First, a significant amount of global trade takes place between countries and trading communities

where there is no significant asymmetry of economic power. Under these conditions, trade disputes are not of necessity resolved quickly and to the advantage of one country. Trade disputes between equals (or near equals) may be drawn out and the exchange of retaliatory measures is likely to be mutually harming. Second, a rule -based order that promotes trade and secures compliance through institutions of dispute settlement enhances overall welfare. A larger slice of a smaller pie will seldom compensate a country for a more equal share of a much larger pie. Third, a rule-based order gives rise to systemic benefit. Some of that benefit arises from the value of certainty and predictability.

Unilateral assertions of power that are responsive to the vagaries of shifting national interests are inherently uncertain. Rule bound trade yields stability over time: an essential ingredient of investment and growth. Other benefits such as the building of ties that promote peace and prosperity may seem intangible but are formidable goods. Fourth, agreements that bind a large number of states over significant areas of trade hold the prospect of producing greater gains than unilateral efforts to dictate the terms of trade between countries. Why then the disenchantment with the WTO, the institutional values of which are so bound up with a rule based global trading order? First, the benefits once achieved may be taken for granted. It may be thought that the WTO has served its purpose and global trade secured in the future by bilateral agreement, at best, and unilateralism as the default position, will provide a better outcome. Second, there is a position, less concerned with any fine calculus of national advantage, that considers supra-national institutions corrosive of national sovereignty. So even if the welfare calculus is adverse or ambiguous, sovereignty matters more. Third, there is a position that disruption and even destruction allows for something better to be constructed. Fourth, there is fatigue.

An institution that cannot renew itself through the conclusion of a further successful trade round is an ossified institution that cannot be salvaged. What is to be done? Amid the clamour of doubt and skepticism, there remain very few who consider the world without the WTO (or a version of it) to be propitious. Even those with strong beliefs that supra-national institutions are undemocratic and permit of meddling contrary to the national interest will allow that it is improbable trade will flourish without security and predictability. A

state of affairs in which disputes, retaliation and counter-retaliation becomes the norm is unlikely to be good for trade. It may be argued that regional trade agreements are now so extensive and well entrenched that even if this edifice was built on WTO foundations, the foundations are no longer necessary. I am doubtful that this is so. It is the commitments of the multilateral order and its ability to settle disputes that continue to secure regional trade agreements.

On prudential grounds alone, it would take some heroic risk-taking to test the issue. What is required is a reconceptualizing of the WTO and not technical adjustments at the margins. Two overarching points of principle need to be considered. The first is governance by unanimity. This has led to the ossification of the system because rules without renewal give rise to institutional decay. Absent unanimity, plurilateral agreement with generous terms of later accession would be a norm that permitted of movement, modernization and greater latitude. True, a unitary concept of membership would end, but participation on different trajectories would allow members with more ambitious agendas to advance and those with greater caution to observe outcomes and make an election at a later date. Second, there are many different ways of entrenching effective dispute settlement. There is a spectrum of arrangements from ad hoc arbitration to institutional adjudication.

I consider the compulsory features of the current system to be an attribute. Rules without authoritative interpretation and enforcement will ordinarily suffer secular decline. But reform should be open to models that allow for more member control and perhaps choices as to how a particular dispute is to be settled. Flexibility may ultimately secure greater institutional loyalty. These suggestions will not appeal to all. There is always a desire to make modest changes that preserve an institution rather than to reconceptualize it. I fear that will not be enough. The corrosive dangers of disenchantment and stasis risk the slow demise of the WTO, as key members look elsewhere. That should not be allowed to happen. Better to be bold and think through the foundations of the institution so as to secure the benefits of multilateralism. That will be more appealing to the critics of the WTO, and in the long term interests of its defenders.

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