1 Introduction

Contemporary international society is the most institutionalised in history and yet the rise of international institutionalism has not necessarily been accompanied by any far-reaching analysis of this phenomenon. In particular, the rise in international organisations has focused our attention on the peculiar blend of institutionalism and normativity that lies at the heart of so many of their activities. The establishment of the WTO as an international organisation, the founding instrument of which forms a constitution for the governance of world trade, raises a number of institutional and constitutional issues that are not readily explainable by reference to international institutional law.

Whereas in the previous chapter international institutional law was applied in analysing the extent to which the WTO fulfils the role of an international organisation, in this chapter regime theory is applied to explore the proposition that the WTO is better understood in terms of an international regime, which continues the tradition of the former semi-institutionalised GATT treaty regime alongside, and even within, the overall organisational and institutional framework of the WTO Agreement and its Annexes. The WTO will be read in the light of international relations theory pertaining to international regimes, or so-called ‘regime theory’, in order to better understand some of its institutional and normative dynamics.

Such a reading allows us to go beyond the constitutional and legal bases set out in the WTO Agreement and its associated legal instruments and to study the institutional and normative bases of the organisation from the broader perspect-

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The dynamics of a regime

ive of Members’ practice. One of the underlying notions that will be examined is whether the Members view the organisation as an area for interaction between themselves rather than as an independent actor, with separate legal personality, with a will of its own and capable of acting on its own accord.\(^2\) Put differently, do Members see the WTO as just a forum organisation\(^3\) for the governance of world trade rather than a formal international economic organisation?

This chapter proceeds in the following manner. In section 2, we explore the nature of regime theory and its relationship to legal scholarship. This is followed in section 3 with a reading of the WTO as a regime, beginning with an examination of the practice of regime analysis with respect to the former GATT trade barriers regime and the international regime for the protection of human rights. Regime theory is then applied to the WTO and in doing so three specific questions are addressed. First, what does regime theory tell us about the development of the WTO that international institutional law does not? Second, what are some of the consequences of reading the WTO as a regime rather than as an international organisation? Third, do those consequences say anything about prospective institutional and normative developments at the WTO? In section 4 a number of conclusions are drawn from the preceding analysis that results from reading the WTO as a regime.

2 Regime theory and international legal scholarship

The term ‘regime’ and the development of regime theory became the subject of intense discussion by political scientists, and in particular international relations theorists, during the early eighties, following a conference on co-operation held in Los Angeles in 1980 where the concept was conceived.\(^4\) Serious thinking about the concept of regime came about as a result of a series of four analytical shifts in identifying and describing the phenomenon of international governance in the

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\(^3\) Robert Cox and Harold Jacobson in their introduction to the collection of essays, which they edited, use the specific term ‘forum organization’ to denote organisations that provided a framework or forum ‘for member states to carry on many different activities ranging from the exchange of views to the negotiation of binding legal instruments.’ See Robert W. Cox and Harold K. Jacobson (eds.) The Anatomy of Influence – Decision Making in International Organization (New Haven: Yale University Press, 1973) 5-6.