

# Using *res judicata* to resolve jurisdictional conflicts between WTO and regional trade agreements' dispute settlement mechanisms

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## Abstract

*The WTO has a renowned dispute settlement body, distinguished from other dispute settlement bodies by its compulsory and exclusive jurisdiction. However, regional trade agreements provide for rights and obligations similar to those guaranteed by the WTO thus, causing material jurisdictional overlaps between the WTO institutions and regional dispute resolution institutions. Potentially, a State aggrieved by measures that contravene rights or obligations within such overlaps has two alternative fora for dispute resolution. Where the regional trade agreement dispute resolution mechanism resolves the dispute first, the compulsory and exclusive nature of the WTO jurisdiction allows the matter to be re-determined at the WTO level, causing jurisdictional conflicts and duplicative proceedings.*

*Although it is an established principle in customary international law, *res judicata* is not provided in any of the instruments guiding the jurisdiction of the WTO dispute settlement system. The jurisprudence of WTO Panels and the Appellate Body are also thin on this matter. Seemingly, the inclination has*

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*been to exercise the compulsory and exclusive jurisdiction, without regard to other existing fora. This paper therefore suggests clear recommendations to be employed in widening the existing WTO jurisprudence on res judicata as a solution to jurisdictional conflicts. In doing so, this paper further acknowledges the possible criticisms against res judicata in WTO dispute settlement and provides possible solutions to these challenges to ensure the peaceful and harmonious coexistence of the WTO dispute settlement mechanisms vis-à-vis those of regional trade agreements. Using the South American region as an example, this paper enunciates the jurisdictional overlaps and proposes the application of res judicata by the WTO dispute settlement mechanisms in judicial restraint.*

**Keywords:** dispute resolution, *res judicata*, WTO, jurisdictional overlaps, regional trade agreements

## Introduction

International trade in particular continually presents a means of reducing poverty worldwide and prospering economies.<sup>1</sup> The World Trade Organisation (WTO) provides a platform for the economic engagement of States and the solution of trade challenges. Additionally, the WTO normatively strives for a greater measure of equity by integrating emerging powers and assisting marginalised countries in their efforts to participate in worldwide economic expansion.<sup>2</sup> The WTO has among its core functions, the settlement of disputes between Member States,<sup>3</sup> with a strong and binding dispute settlement system for the enforcement of negotiated international trade rules.<sup>4</sup> Since its formation in January 1995, over 300 disputes have been brought to the system.<sup>5</sup> The dispute settlement system comprises the Dispute Settlement Body (DSB),<sup>6</sup> with exclusive<sup>7</sup> and compulsory jurisdiction over WTO law disputes,<sup>8</sup> exercised through panels and the standing

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<sup>1</sup> Peter Van den Bossche and Werner Zdouc, *The law and policy of the World Trade Organization: Text, cases and materials*, Cambridge University Press, 2017, 2; M Bacchetta and M Jansen, 'Adjusting to trade liberalisation: The role of policy, institutions and WTO disciplines', *Special Studies Series*, WTO, 2003, 6.

<sup>2</sup> Bossche and others, *The law and policy of the World Trade Organization*, 32; R Coase, *The firm, the market and the law*, University of Chicago Press, 1988, Chapter 5, 4; P Sutherland, 'Beyond the market, a different kind of equity' *International Herald Tribune*, 20 February 1997.

<sup>3</sup> WTO, 'World Trade Organisation' (n.d.); Marrakesh Agreement Establishing the World Trade Organisation, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (1994), Article III.

<sup>4</sup> Bruce Wilson, 'WTO dispute settlement system training module, preface', *World Trade Organisation*, 21 April 2021.

<sup>5</sup> Bruce Wilson, 'WTO dispute settlement system training module, preface' *World Trade Organisation*, 21 April 2021.

<sup>6</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 2, 1869 UNTS 401, Article 2.

<sup>7</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 23.1, United States – *Section 301 Trade Act*, WT/DS152, Panel Report (22 December 1999), WT/DS152, para 7.43; European Communities – *Measures affecting trade in commercial vessels*, WT/DS301, Panel Report (22 April 2005), para 7.193.

<sup>8</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Articles 6.1 and 23.1; Bossche and others, *The law and policy of the World Trade Organ-*

Appellate Body established under the Understanding on Rules and Procedures Governing the Settlement of Disputes 1994 (DSU).<sup>9</sup> The panels are composed of at least three persons selected by the DSB at the request of the disputing parties.<sup>10</sup> The Appellate Body consists of a standing committee of seven persons appointed by the DSB for a four-year term that may be renewed once.<sup>11</sup>

In addition to hearing and giving recommendations on trade disputes, the panels and the Appellate Body have inherent adjudicative powers to determine whether they have jurisdiction in a given case and the scope and limits of that jurisdiction.<sup>12</sup> In this very context, the WTO also provides a platform for the formation of regional trade agreements.<sup>13</sup> The General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) provide for the formation of regional trade agreements, customs areas, and free trade areas.<sup>14</sup> The WTO has further established a Committee on RTAs (CRTA) that examines and approves regional trade agreements that have been notified to the WTO and their systemic implications to the multilateral trading system.<sup>15</sup>

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ization, 180; Prabhaskar Ranjan, 'Applicable law in the Dispute Settlement Body of the WTO' 44 (15) *Economic and Political Weekly* (2009) 23.

<sup>9</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 2 and Article 17.

<sup>10</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 8.

<sup>11</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 17.

<sup>12</sup> European Union - *Countervailing measures on certain polyethylene terephthalate from Pakistan*, WT/DS486/AB/R/Add.1, Appellate Body Report (28 May 2018), para 5.16.

<sup>13</sup> Gabrielle Marceau, *News from Geneva on RTAs and WTO-Plus, WTO-More, and WTO-Minus*, Proceedings of the 116 AFSIL Annual Meeting, American Society of International Law, 2009, 124.

<sup>14</sup> General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, 1867 UNTS 190, Article XXIV; General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organisation, 15 April 1994, Annex 1B, 1869 UNTS 183, 33 ILM 1167 (1994).

<sup>15</sup> World Trade Organisation General Council, 'Committee on Regional Trade Agreements', WT/L/127, Decision of 6 February 1996; Marceau, 'News from Geneva on RTAs and WTO-Plus, WTO-More, and WTO-Minus', 125.

These agreements are encouraged since they benefit the multilateral process by facilitating openness and competitive liberalisation in international trade relations.<sup>16</sup> Consequently, many WTO members continue to engage in multiple bilateral and plurilateral agreements that give rise to hundreds of regional trade agreements (RTAs).<sup>17</sup> As of 15 June 2021, over 350 RTAs were in force.<sup>18</sup> In the South American Region alone, seventy (70) regional trade agreements were notified to the WTO and, were in force as reported on 30 June 2021.<sup>19</sup> These regional mechanisms have been lauded for increasing transparency, information exchange, and predictability in international trade law, among other reasons.<sup>20</sup>

However, most of these RTAs provide for their dispute settlement procedures.<sup>21</sup> The existence of these dispute settlement fora often creates jurisdictional overlaps against the established WTO dispute settlement mechanisms.<sup>22</sup> These overlaps occur where the regional trade agreements and the WTO provide similar obligations, which can be enforced under the RTA mechanism and the WTO dispute settlement mechanisms as well.<sup>23</sup>

Against this background of multiple and alternative dispute resolution fora, criticism has been lodged with respect to the holding of

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<sup>16</sup> Marceau, 'News from Geneva on RTAs and WTO-Plus, WTO-More, and WTO-Minus', 124.

<sup>17</sup> WTO, 'Regional Trade Agreement', *World Trade Organisation*, 2 September 2021.

<sup>18</sup> WTO, 'Regional Trade Agreement', *World Trade Organisation*, 2 September 2021.

<sup>19</sup> WTO, 'Facts and figures - Regional trade agreements 1 January-30 June 2021' 1 January 2021, *World Trade Organisation*, on 28 October 2023.

<sup>20</sup> Laura Gomez-Mera and Andrea Molinari, 'Overlapping institutions, learning and dispute initiation in regional trade agreements: Evidence from South America' 58(2) *International Studies Quarterly*, 2014, 270.

<sup>21</sup> Ana Cristina Molina and Vira Khoroshavina, 'How regional trade agreements deal with disputes concerning their TBT provisions?' Staff Working Paper ERSD-2018-09, World Trade Organisation Economic Research and Statistics Division, 14 September 2018, 3.

<sup>22</sup> Molina and another, 'How regional trade agreements deal with disputes concerning their TBT provisions?', 3.

<sup>23</sup> Molina and another, 'How regional trade agreements deal with disputes concerning their TBT provisions?', 3.

disharmonious duplicative proceedings,<sup>24</sup> whose final determinations threaten the doctrine of *res judicata*.<sup>25</sup> Such was the case identified by the Panel in the *Mexico – Taxes on soft drinks* case, where both the North American Free Trade Agreement (NAFTA) and the WTO provided recourse to the Applicant;<sup>26</sup> and, in *Argentina – Poultry*, where the Applicant, Brazil, had similar recourse before both the Southern Common Market (MERCOSUR) ad hoc Tribunal and the WTO Dispute Settlement Body against the same anti-dumping measures.<sup>27</sup>

In the first case, both the North American Free Trade Agreement (NAFTA) and the WTO were available as means of recourse to the United States against Mexico's tax measures. The two fora shared jurisdiction over the subject matter.<sup>28</sup> Although only the WTO system was approached, the Appellate Body approved of the Panel's finding that under the Dispute Settlement Understanding, a Panel did not have the discretion to decline to exercise its validly established jurisdiction.<sup>29</sup>

In the *Argentina – Poultry* case, the Applicant, Brazil, challenged Argentina's anti-dumping measures before the WTO after the Southern Common Market (MERCOSUR) Tribunal had already decided on the same measures.<sup>30</sup> Although the Respondent did not argue primarily for the application of *res judicata* directly, it sought to rely on the fact that

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<sup>24</sup> Jagdish Bhagwati, *Free trade today*, Princeton University Press, 2002, 112-13; Jagdish Bhagwati and Anne O Krueger, *The dangerous drift to preferential trade agreements*, AEI Press, 1995, 2-3.

<sup>25</sup> J Hillman, 'Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO-What should WTO do?' 42 *Cornell International Law Journal* (2009) 193.; Gabrielle Marceau, 'Conflicts of norms and conflicts of jurisdictions the relationship between the WTO Agreement and MEAs and other treaties' 35(6) *Journal of World Trade* (2001) 1081-1131.

<sup>26</sup> *Mexico - Tax measures on soft drinks and other beverages*, WT/DS308, AB-2005-10, Appellate Body Report, 6 March 2006.

<sup>27</sup> *Argentina - Definitive anti-dumping duties on poultry from Brazil*, WT/DS241, Panel Report, 22 April 2003.

<sup>28</sup> *Mexico - Soft drinks and other beverages*, Appellate Body Report, para 47.

<sup>29</sup> *Mexico - Soft drinks and other beverages*, Appellate Body Report, para 53.

<sup>30</sup> *Argentina - Definitive anti-dumping duties*, Panel Report, para 7.17.

the matter had already been determined by an international tribunal, and the doctrine's applicability was raised by third parties.<sup>31</sup>

The Applicant, Brazil, challenged the applicability of the doctrine based on: the lack of basis for the doctrine in the DSU; the authority of the *India – Autos*<sup>32</sup> case to distinguish between the dispute before the regional mechanism and the dispute before the WTO; and the exclusive nature of the jurisdiction of the WTO.<sup>33</sup> The Respondent contested the applicability of the *India – Autos* jurisprudence since the case differed materially in that while it concerned the approaching of multiple WTO panels on the same subject matter, the instant dispute concerned the Applicant approaching a regional tribunal and the WTO.<sup>34</sup>

The Panel in the instant dispute restrained itself from addressing the main arguments made by the Respondent and did not make a determination on the question of *res judicata*. As elaborated below, the doctrine of *res judicata* would be of great systematic importance in remedying the arising jurisdictional conflicts.<sup>35</sup> However, the DSU does not provide for the application of this internationally recognised principle.<sup>36</sup> Although one may seek to rely on WTO jurisprudence in applying the doctrine, the Panel in *Argentina – Poultry* was categorical that panels are not bound to follow rulings contained in adopted WTO panel reports.<sup>37</sup> In any case, present WTO jurisprudence on *res judicata* fails to establish the applicability of the doctrine in the WTO and does not address the jurisdictional overlap between the WTO and regional trade agreement mechanisms.

This paper focuses on the existence of both the WTO Dispute Settlement Body and South American RTA mechanisms, which gives rise

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<sup>31</sup> *Argentina – Definitive anti-dumping duties*, Panel Report, para 7.17, 7.18 and 7.28.

<sup>32</sup> *India – Measures affecting the automotive sector*, WT/DS146/R WT/DS175/R, Panel Report (21 December 2001).

<sup>33</sup> *Argentina – Definitive anti-dumping duties*, Panel Report, para 7.38.

<sup>34</sup> *Argentina – Definitive anti-dumping duties*, Panel Report, para 7.38.

<sup>35</sup> *India – Automotive sector*, Panel Report, para 7.57.

<sup>36</sup> *India – Automotive sector*, Panel Report, para 7.58.

<sup>37</sup> *Argentina – Definitive anti-dumping duties*, Panel Report, para 7.41.

to jurisdictional overlaps and conflicts between the two fora. The paper also acknowledges the present legal framework of the WTO Dispute Settlement Body under the Dispute Settlement Understanding, which does not provide for the application of the *res judicata* principle in the WTO. The paper further notes that the jurisprudence of panels and the Appellate Body in the WTO has not settled the question of jurisdictional overlaps between the WTO and regional trade agreements. To this end, the paper suggests durable solutions to incorporate *res judicata* in solving and avoiding jurisdictional conflicts.

### **The need to address jurisdictional overlaps between the WTO and regional trade agreement mechanisms**

The WTO dispute system has significantly contributed to the growth of international trade and the development of international trade law.<sup>38</sup> Concerning adjudicative powers, the Appellate Body has asserted that the jurisdiction of a panel and the scope of such jurisdiction lies squarely within the adjudicative powers and discretion of the panel.<sup>39</sup> This discretion is governed by the DSU, based on consideration of conditions such as whether the Understanding covers the dispute between the members and, whether such a dispute has been fully resolved or still requires to be examined.<sup>40</sup>

This reasoning is defended by Marceau and Trachtman who posit that adjudicative powers are delineated by WTO law and Panels and the Appellate Body may only apply rules as set out in the relevant WTO agreements; as interpreted according to the rules of customary international law on the interpretation of treaties.<sup>41</sup> Despite the clear

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<sup>38</sup> Jeffrey M Lang and John H Jackson, 'The WTO: Is it working?' 90 *Proceedings of the Annual Meeting (American Society of International Law) Are international institutions doing their job?* (1996) 423; Lockhart and another, 'Reviewing appellate review in the WTO dispute settlement system', 14.

<sup>39</sup> Mexico –*Soft drinks and other beverages*, Appellate Body Report, para 45.

<sup>40</sup> European Union – *Countervailing measures*, Appellate Body Report, para 5.59.

<sup>41</sup> G Marceau, 'A call for coherence in international law: Praises for the prohibition against 'clinical isolation' in WTO dispute settlement' 33(5) *Journal of World Trade* (1999)



position on the laws on jurisdiction, Davey notes that the exercise of the WTO adjudicative powers has not been without setbacks.<sup>42</sup> J Hillman also identifies conflicts between dispute settlement mechanisms in the regional trade agreements and those under the WTO in terms of duplicative proceedings, *res judicata*, forum choices, and other occurrences of overlap.<sup>43</sup>

As of 1 August 2023, the WTO received 593 notifications of RTAs, with 360 of these being in force.<sup>44</sup> According to Songling, these jurisdictional conflicts are attributable to the continuing membership of states in the WTO and RTAs, which often share international obligations that states undertake.<sup>45</sup> The DSB under the WTO and the DSMs (Dispute Settlement Mechanisms) under the RTAs both have jurisdiction over disputes arising from such obligations.<sup>46</sup>

As a result, Yuval identifies that more similar and even identical factual and legal claims are submitted before various dispute settlement fora,<sup>47</sup> causing confusion and chaos in the WTO system as noted by

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87, para 109-115; Trachtman, 'The domain of WTO dispute resolution' 40(2) *Harvard International Law Journal* (1999) 342, n 41. For case law, see United States – *Standards for reformulated and conventional gasoline*, WT/DS2, AB-1996-1, Appellate Body Report (29 April 1996), 23; Japan – *Alcoholic beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996, Appellate Body Report (1 November 1996), 104;

<sup>42</sup> William J Davey, 'Has the WTO dispute settlement system exceeded its authority? A consideration of deference shown by the system to member government decisions and its use of issue-avoidance techniques' 4(1) *Journal of International Economic Law* (2001) 79-110.

<sup>43</sup> Hillman, 'Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO-What should WTO do?', 193; Marceau, 'Conflicts of norms and conflicts of jurisdictions the relationship between the WTO Agreement and MEAs and other treaties' pp. 1081-1131; Pauwelyn, 'Conflict of norms in public international law: How WTO law relates to other rules of international law'.

<sup>44</sup> WTO, 'Regional trade agreements: Facts and figures', *World Trade Organisation*, 4 October 2023.

<sup>45</sup> Songling Yang, 'The settlement of jurisdictional conflicts between the WTO and RTAs: The *forum non conveniens* principle' 23(1) *Willamette Journal of International Law and Dispute Resolution* (2015) 234.

<sup>46</sup> Yang, 'The settlement of jurisdictional conflicts between the WTO and RTAs: The *forum non conveniens* principle', 23.

<sup>47</sup> Yuval Shany, *The competing jurisdictions of international courts and tribunals*, Oxford University Press, 2003.

Jagdish Bhagwati.<sup>48</sup> The latter describes the disharmony as a ‘spaghetti bowl’ consisting of a maze of bilateral treaties and regional agreements in addition to WTO law that overlap in jurisdiction.<sup>49</sup> This lack of harmony has manifested in various WTO cases including the *Mexico - Soft drinks* case and the *Argentina - Poultry* case as noted above.<sup>50</sup>

There is a need to assess the jurisdictional overlaps between the WTO and RTA mechanisms to find a solution to prevent duplicative proceedings and conflicting rulings between the two types of fora. This paper seeks to highlight the jurisdictional overlaps between the WTO and RTA mechanisms in South America whilst elaborating on the necessity and applicability of *res judicata* as a solution to the jurisdictional conflicts.

### **Dispute settlement jurisdiction of the WTO and of RTAs: The nature and scope of overlaps**

The previous section has enunciated the jurisdictional overlaps, and conflicts, that arise from the existence of dispute settlement fora under the WTO and RTAs. This section seeks to paint a clearer picture of the contentious jurisdiction of the WTO mechanisms, with a focus on the obligations of states under WTO agreements that fall within RTA mechanisms in the South American region as well. The approach taken will first highlight the objective of the WTO dispute settlement jurisdiction before limiting the discussion to the jurisdiction likely to overlap with RTAs.

This section will give particular regard to the mandatory and exclusive nature of WTO jurisdiction and its implications on the presence of RTAs mechanisms. This section will also give regard to the objectives of South American RTAs and their dispute settlement mechanisms.

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<sup>48</sup> Bhagwati, *Free trade today*, 112-13; Bhagwati and another, *The dangerous drift to preferential trade agreements*, 2-3.

<sup>49</sup> Bhagwati, *Free trade today*, 112-13; Bhagwati and another, *The dangerous drift to preferential trade agreements* 2-3.

<sup>50</sup> *Mexico - Soft drinks and other beverages*, Appellate Body Report, para 47; *Argentina - Definitive anti-dumping duties*, Panel Report, para 7.38.

The section will finally conclude with an elaboration of the potential and actual jurisdictional overlaps between the WTO and the RTAs in dispute settlement.

## Dispute settlement jurisdiction under the WTO

The DSU lays the basis for dispute settlement in the WTO.<sup>51</sup> The system is aimed at the prompt settlement of disputes between WTO Member States regarding their rights and obligations under WTO law.<sup>52</sup> According to the DSU, the purpose of the dispute settlement system is to provide security and predictability to the multilateral trading system preserving the rights and obligations of Member States.<sup>53</sup> The system is also expected to clarify the provisions of WTO Agreements under customary rules of public international law.<sup>54</sup> However, such clarification of WTO can only be called upon in the context of an actual dispute.<sup>55</sup>

As highlighted in *Guatemala – Cement I*, the Understanding establishes a single, coherent, and integrated system of rules and procedures for the settlement of disputes arising under any of the covered agreements.<sup>56</sup> One of the fundamental pillars of this system is the rationale that Members ought to settle disputes through a multilateral system rather than through unilateral action.<sup>57</sup> The Appellate Body emphasised this obligation in the *US – Certain EC products* with reference to Article 23 of the Understanding. In the first instance, the Panel in this case interpreted the provision of the Understanding to be prohibiting any form

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<sup>51</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 12.

<sup>52</sup> Bossche and others, *The law and policy of the World Trade Organization*, 171.

<sup>53</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.2; Panel Report, *US – Section 301 Trade Act*, para 7.75; Bossche and others, *The law and policy of the World Trade Organization*, 171.

<sup>54</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.2; Bossche and others, *The law and policy of the World Trade Organization*, 171.

<sup>55</sup> *US – Wool shirts and blouses*, Appellate Body Report, 340.

<sup>56</sup> *Guatemala – Cement I*, Appellate Body Report, para 64.

<sup>57</sup> *US – Certain EC products*, Appellate Body Report, para 111.

of unilateral action 'because such unilateral actions threaten the stability and predictability of the multilateral trade system' necessary for 'market conditions conducive to individual economic activity in national and global markets' which consist a fundamental goal of the WTO.<sup>58</sup>

It is therefore not surprising that the DSU primarily prefers the settlement of disputes through consultations,<sup>59</sup> a negotiation mechanism under which conflicting parties consult each other in good faith within a determined period to achieve a mutually amicable solution.<sup>60</sup> Additionally, Article 3.7 enunciated the aim of the dispute settlement to be the securing of a positive solution to a dispute, with a preference for a mutually acceptable solution.<sup>61</sup>

Where consultations and negotiations fail, parties are then allowed to seek alternative resolution mechanisms under the Understanding. These include arbitration;<sup>62</sup> good offices, conciliation, and mediation;<sup>63</sup> and adjudication by panels and the Appellate Body.<sup>64</sup> The Dispute Settlement Body, established by the Understanding, forms the panels and the Appellate Body to hear and give recommendations on trade disputes to meet the objectives of the dispute settlement system.<sup>65</sup> This paper shall focus on the jurisdiction of the WTO to 'preserve the rights

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<sup>58</sup> US - *Certain EC products*, Appellate Body Report, para 6.14; US - *Section 301 Trade Act*, Panel Report, para 7.71.

<sup>59</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Articles 22.6 and 23.2(c).

<sup>60</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 4.3.

<sup>61</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.7.

<sup>62</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 25.

<sup>63</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 5.

<sup>64</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Articles 6-20.

<sup>65</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 1 and 6; Gregory Shaffer, Manfred Elsig and Sergio Puig, 'The extensive (but fragile) authority of the WTO Appellate Body' 79(1) *Law and Contemporary Problems* (2016) 237.

and obligations of Members under the covered agreement'. To this end, this section will evaluate the nature and scope of the adjudicative powers of the WTO dispute settlement system.

### Nature of WTO adjudicative jurisdiction

The jurisdiction of WTO dispute settlement is peculiar in that it is not only contentious but also compulsory and exclusive.<sup>66</sup>

#### *Contentious jurisdiction*

As highlighted above, the jurisdiction of the WTO is contentious and not advisory. The adjudicative powers of the WTO under Article 3 of the DSU can only be invoked in the context of a dispute between parties. The Appellate Body in *US – Wool shirts and blouses* was clear that Article 3.2 is not meant to 'encourage either the panels or the Appellate Body to make law by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute'.<sup>67</sup> Similarly, the Panel in *EC – Commercial vessels* declined to make a finding on an issue that it considered 'an abstract ruling on hypothetical measures' that was neither necessary nor helpful for the resolution of the dispute at hand.<sup>68</sup>

#### *Compulsory jurisdiction*

According to Article 23.2 of the Understanding, Members seeking redress for the 'violation of obligations of other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements' shall have recourse to and abide by the WTO system and its procedures.<sup>69</sup>

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<sup>66</sup> Bossche and others, *The law and policy of the World Trade Organization*, 178.

<sup>67</sup> *US – Wool shirts and blouses*, Appellate Body Report, 340.

<sup>68</sup> *EC – Commercial vessels*, Panel Report, para 7.30.

<sup>69</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 23.2.

The enabling provisions of the Understanding are phrased in mandatory terms. The effect is that, where a dispute arises under the covered agreements, a Member is obligated to bring it before the WTO dispute settlement system.<sup>70</sup> Similarly, once a dispute has been submitted before the system, the responding Member has no option but to accept the jurisdiction of the adjudicative system.<sup>71</sup>

The Members, therefore, need not sign an additional agreement to indicate their consent to the jurisdiction of the WTO, nor can they decline such jurisdiction.<sup>72</sup>

### *Exclusive jurisdiction*

In addition to being compulsory, the jurisdiction of the WTO adjudicative mechanisms is exclusive against other international fora.<sup>73</sup> As noted before, Article 23.1 of the Understanding prohibits unilateral conduct, in that Members are not allowed, by themselves, to make a declaration or a determination that a violation has occurred or that benefits have been nullified or impaired.<sup>74</sup>

More importantly, as highlighted by the Panel in *EC – Commercial vessels*, apart from protecting the multilateral system from unilateral conduct, the Understanding excludes determinations by any other fora regarding the rights and obligations of Members in the covered agreements.<sup>75</sup> In the *US – Section 301 Trade Act* the Panel referred to Article 23.1 as the ‘exclusive dispute resolution clause’ that requires Members not to approach any other system when enforcing their rights and obligations under the WTO.<sup>76</sup>

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<sup>70</sup> Bossche and others, *The law and policy of the World Trade Organization*, 178.

<sup>71</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 6; Bossche and others, *The law and policy of the World Trade Organization*, 178.

<sup>72</sup> Bossche and others, *The law and policy of the World Trade Organization*, 179.

<sup>73</sup> Bossche and others, *The law and policy of the World Trade Organization*, 179.

<sup>74</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 23.1.

<sup>75</sup> *EC – Commercial vessels*, Panel Report, para 7.193.

<sup>76</sup> *US – Section 301 Trade Act*, Panel Report, para 7.43.

## Scope of WTO adjudicative jurisdiction

To begin with, access to the adjudicative mechanisms in the WTO is limited to Member States – government-to-government – and not to individuals, international organisations, non-governmental organisations, or industry associations.<sup>77</sup> Even then, only Members party to a dispute or with a substantial interest in a dispute have recourse before the system.<sup>78</sup>

In terms of cause of action, Article 3.3 of the Understanding offers guidance in terms of the general provisions that Members may submit situations where any benefits accruing to them directly or indirectly under the covered agreements are being impaired by measures taken by another Member.<sup>79</sup> This provision is mirrored in other covered agreements such as Articles XXII and XXIII of the GATT, which provides for the scope of the material jurisdiction of the WTO.<sup>80</sup> Article XXIII: 1 of the GATT 1994 gives examples of circumstances that may result in benefits accruing to a Member directly or indirectly under an agreement being impaired.<sup>81</sup> These include where a Member fails to carry out its obligations under a covered agreement, where a Member applies a measure (whether or not it conflicts with the provisions of a covered agreement), or in any other situation. In *India – Quantitative restrictions*, the Appellate Body considered all of these circumstances and noted, particularly, that the United States considered that a benefit accruing to it under the GATT 1994 was nullified or impaired as a result of India's alleged failure to carry out its obligations regarding balance-of-payments restrictions under XVIII: B of the GATT, and, therefore, the US was entitled to access redress before the WTO.<sup>82</sup>

<sup>77</sup> US – *Shrimp*, Appellate Body Report, para 101; Bossche and others, *The law and policy of the World Trade Organisation*, 182.

<sup>78</sup> US – *Shrimp*, Appellate Body Report, para 101.

<sup>79</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, Article 3.3.

<sup>80</sup> General Agreement on Tariffs and Trade 1994, Articles XXII and XXIII.

<sup>81</sup> General Agreement on Tariffs and Trade 1994, Article XXIII:1.

<sup>82</sup> *India – Quantitative restrictions*, Appellate Body Report, para 84.

Such covered agreements are listed in Appendix 1 of the Understanding and include the following agreements:<sup>83</sup> Agreement Establishing the World Trade Organisation; Multilateral Agreement on Trade in Goods; General Agreement on Trade in Services; Agreement on Trade-Related Aspects of Intellectual Property Rights; Understanding on Rules and Procedures Governing the Settlement of Disputes; Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement; and the International Bovine Meat Agreement.<sup>84</sup>

The above-covered agreements further contained special and additional rules for the application of the WTO adjudicative powers.<sup>85</sup> This essentially includes agreements such as the Agreement on the Application of Sanitary and Phytosanitary Measures; the Agreement on Textiles and Clothing; the Agreement on Technical Barriers to Trade; the Agreement on Subsidies and Countervailing Measures; the General Agreement on Trade in Services among others, under the Understanding and the WTO dispute settlement procedures.<sup>86</sup>

From the above, it is clear that the contentious, exclusive, and compulsory dispute settlement jurisdiction of the WTO spans a wide scope in terms of subject matter. The covered agreements comprehensively govern the interaction of States in goods and services in most forms.

### **Dispute settlement jurisdiction under South American RTAs**

Regional trade agreements (RTAs) are described as engines for trade liberalisation and the promotion of economic growth.<sup>87</sup> Consequently,

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<sup>83</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 1.1.

<sup>84</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Appendix 1.

<sup>85</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 1.2.

<sup>86</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 1.2, Appendix 2.

<sup>87</sup> Yenkong Ngangjoh-Hodu, 'Regional trade courts' in the shadow of the WTO dispute settlement system: The paradox of two courts' 28 *African Journal of International and Comparative Law* (2020) 45.



Article XXIV of the General Agreement on Trade and Tariff and Article V of the General Agreement on Trade in Services allow Member States of the WTO to form RTAs.<sup>88</sup> The Appellate Body has also noted that Member States have the right to form RTAs.<sup>89</sup>

In recent decades, these RTAs have increased not only in number but also in complexity: most of the RTAs in recent years have sophisticated enforcement regimes with dispute settlement mechanisms.<sup>90</sup> South American countries particularly stand out in establishing and signing preferential trade agreements of varying scope and institutional density.<sup>91</sup> Empirical evidence from the WTO and the ECLAC Integrated Database of Trade Disputes indicates that South American countries have been more active in regional dispute settlement fora rather than multilateral fora such as the WTO.<sup>92</sup>

Examples of RTAs in South America include the Latin American Integration Association (ALADI); the Southern Common Market (MERCOSUR); and the Andean Community (ANCOM) among other inter-country economic complementation agreements.

The next section will focus on elaborating the nature and scope of the jurisdiction of dispute resolution measures within the Andean Community of 1969. This is because the MERCOSUR has since 2001 adopted the Protocol of Olivos, which, in entering into force in January 2004, remedied the threat of jurisdictional conflict by providing a forum

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<sup>88</sup> General Agreement on Tariffs and Trade 1994, Article XXIV and General Agreement on Trade in Services 1994, Article V.

<sup>89</sup> Peru - *Additional duty on imports of certain agricultural products*, WT/DS/457/AB/R, Appellate Body Report (31 August 2015), 276; Turkey - *Restrictions on imports of textile and clothing products*, WT/DS34/AB/R, Appellate Body Report (19 November 1999), para 58.

<sup>90</sup> Andrea, 'Overlapping institutions, learning, and dispute initiation in regional trade agreements', 269.

<sup>91</sup> Andrea, 'Overlapping institutions, learning, and dispute initiation in regional trade agreements', 269.

<sup>92</sup> Andrea, 'Overlapping institutions, learning, and dispute initiation in regional trade agreements', 272.

choice clause to prevent Member States from approaching both the WTO and the MERCOSUR dispute settlement mechanisms.<sup>93</sup>

### Jurisdiction of the Andean Community

The Andean Subregional Integration Agreement of 1969, signed by Bolivia, Colombia, Chile, Ecuador, and Peru, establishes the Agreement on Andean Subregional Integration ('Cartagena Agreement').<sup>94</sup> This regional agreement was formed to create a customs union to:<sup>95</sup> eliminate all tariff barriers and quantitative restrictions on goods within the Community and promote sectoral industrial development programmes to achieve a higher level of economic development.<sup>96</sup>

In 1979, the Community adopted the Treaty Creating the Court of Justice of the Cartagena Agreement, establishing the Community's dispute settlement mechanism.<sup>97</sup> The dispute settlement procedure under the Andean Community has the reputation of being quite open to litigation.<sup>98</sup> This is inferred from the fact that the system grants both treaty parties and private actors the right to initiate disputes.<sup>99</sup>

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<sup>93</sup> Protocol of Olivos, 18 February 2002, 42 ILM 2, Article 1; Ljiljana Biukovic, 'Dispute resolution mechanisms and regional trade agreements: South American and Caribbean modalities' *UC Davis Journal of International Law and Policy* (2008) 289.

<sup>94</sup> Andean Sub-Regional Integration Agreement, 26 May 1969, 8 ILM, 910.

<sup>95</sup> Biukovic, 'Dispute resolution mechanisms and regional trade agreements', 266; Maria Alejandra Rodriguez Lemmo, 'Study of selected international dispute resolution regimes, with an analysis of the decisions of the Court of Justice of the Andean Community' 19 *Arizona Journal of International and Comparative Law* (2002) 863, 902.

<sup>96</sup> Andean Sub-Regional Integration Agreement, Article 72.

<sup>97</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, 10 March 1996, Articles 19-33.

<sup>98</sup> Andrea, 'Overlapping institutions, learning, and dispute initiation in regional trade agreements', 271.

<sup>99</sup> Andrea, 'Overlapping institutions, learning, and dispute initiation in regional trade agreements', 271.

### *Nature and scope of the Andean Community dispute resolution jurisdiction*

The Court has compulsory jurisdiction to render prejudgement or preliminary interpretations on the provision of the Andean legal system; to decide on the validity of decisions of the Council of Foreign Ministers and the Commission; and on the validity of resolutions of the Secretariat. Disputes before the Court may be brought by member states, the institutions of the Community, and by private parties in certain situations.<sup>100</sup> The jurisdiction of the Court of Justice is wide in that it has the mandate to decide all disputes concerning the interpretation of all Andean Treaty norms.<sup>101</sup>

The Andean Community treaties that fall within the jurisdiction of the Court of Justice are the Andean Subregional Integration Agreement, its protocols, and additional instruments.<sup>102</sup> The additional instruments include the Modifying Protocol of the Andean Subregional Integration Agreement, the Quito Protocol, the Trujillo Protocol, and the Sucre Protocol. These instruments regulate trade in goods and services within the Community, giving the Court jurisdiction over subject matter that is similarly within the jurisdiction of WTO covered agreements.

### **Jurisdictional overlaps and conflicts**

Overlaps of jurisdictions are situations where aspects of the same disputes can be brought before two distinct dispute settlement systems.<sup>103</sup>

In line with the Member States' right to form RTAs under WTO law, a State would be justified in invoking the dispute settlement mechanisms in an RTA to enforce obligations under the RTA even if

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<sup>100</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, Articles 19-33.

<sup>101</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, Articles 19-33.

<sup>102</sup> Treaty Creating the Court of Justice of the Cartagena Agreement, Article 1.

<sup>103</sup> Kyung Kwak and Gabrielle Marceau, 'Overlaps and conflicts of jurisdiction between the WTO and RTAs' 41 *Canadian Yearbook of International Law* (2004) 83, 86.

the subject matter could also consist of a WTO violation.<sup>104</sup> Similarly, the Dispute Settlement Understanding of the WTO grants States wide discretion in deciding whether to bring a case against another member:<sup>105</sup> WTO panels are not authorised to question or review a Member's decision to bring a matter.<sup>106</sup>

From the above analysis of jurisdictions, it is clear that the contentious, exclusive, and compulsory dispute settlement jurisdiction of the WTO spans a wide scope in terms of subject matter. The covered agreements in the WTO govern the interaction of States in good faith and services in most forms comprehensively. Similarly, the Andean Community treaties and protocols regulate trade in goods and services within the South American region extensively. Both levels of agreement therefore provide South American States with rights and obligations in international trade. Where a South American State party to both fora adopts a measure or acts in an arbitrary manner likely to infringe both the Andean Community and the WTO, a jurisdictional overlap will occur.

This was the case in *Argentina – Poultry* where the Applicant, Brazil, had similar recourse to and approached both the Southern Common Market ad hoc Tribunal and the WTO Dispute Settlement Body against the same anti-dumping measures.<sup>107</sup> This resulted in conflicting decisions between the RTA mechanisms and the WTO. It is important to note, however, that the Protocol of Olivos, which provides for a forum-choice clause, was not in force at the time the Panel was ruling in the case of *Argentina – Poultry*, on 22 April 2003, therefore, nothing would

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<sup>104</sup> Gabrielle Marceau, 'The primacy of the WTO dispute settlement system, is the settlement of trade disputes under regional trade agreements undermining the WTO dispute settlement mechanism and the integrity of the world trading system?' 1 *Questions of International Law* (2014) 5.

<sup>105</sup> European Communities – *Regime for the importation, sale and distribution of bananas*, DSR 1997: II, 591, Appellate Body Report (25 September 1997), para 135; Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.7.

<sup>106</sup> Mexico – *Corn syrup (Article 21.5 – US)*, Appellate Body Report, para 74; Bossche and others, *The law and policy of the World Trade Organization*, 183.

<sup>107</sup> *Argentina – Definitive anti-dumping duties*, Panel Report.

stop Brazil from approaching both fora with the same matter.<sup>108</sup> With the Protocol in force presently, Members of the Southern Common Market and the WTO are not allowed to approach multiple fora.

This is, however, not the case in the Andean Community. The Court of Justice of the Andean Community has compulsory jurisdiction vis-à-vis the compulsory jurisdiction of the WTO and does not have any clause limiting States from approaching multiple fora. Therefore, where the action of a Member State such as Peru contravenes the national treatment obligation under Article 8 of Decision 439 of the Andean Community Commission and, simultaneously, contravenes the national treatment obligation under Article III of the GATT both regimes would provide recourse. Nothing in the provisions of the Andean Community or the WTO precludes the affected Member States such as Ecuador and Colombia from approaching both the Court of Justice of the Andean Community and the Dispute Settlement Body under the WTO.

This Section set out to elaborate on the nature and scope of dispute settlement jurisdiction within the WTO and within South American RTAs. Accordingly, it has established that the WTO has wide compulsory jurisdiction over matters of international trade law. This is similarly the case with the Court of Justice of the Andean Community. A Member State in the WTO would be entitled to a hearing before the WTO by simply alleging that a measure affects or impairs its trade benefits, hence excluding the jurisdiction of any other mechanism over the same subject matter.<sup>109</sup> Since the jurisdictions of these two fora overlap, and States are not precluded from approaching both fora in case of a dispute, there is the risk of jurisdictional overlaps and conflicts between the two forms of dispute settlement mechanisms.

Although one may argue for the adoption of a forum-choice clause as the solution to these potential conflicts, this paper proposes *res judicata* as a more appropriate solution as demonstrated below.

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<sup>108</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.28.

<sup>109</sup> Kwak and another, 'Overlaps and conflicts of jurisdiction between the WTO and RTAs', 85.

## ***Res judicata* as an applicable solution for jurisdictional conflicts**

The previous section elaborated on the actual and potential jurisdictional overlaps between the WTO dispute settlement mechanisms and the dispute settlement mechanisms under South American RTAs, particularly the Andean Community. This analysis demonstrates the need for a solution to the jurisdictional overlaps and conflicts. Various scholars have provided propositions such as ‘choice of forum’ clauses in the RTAs,<sup>110</sup> and the *forum non conveniens* principle to be exercised by the WTO panels.<sup>111</sup>

The proposition on ‘choice of forum’ that would require States party to both the WTO and RTAs to choose only one forum has been criticised based on the compulsory and exclusive nature of the WTO jurisdiction against all other bodies.<sup>112</sup> Essentially, therefore, the WTO’s jurisdiction of a matter cannot be limited by the provisions of a regional trade agreement.

The *forum non conveniens* principle, on the other hand, would require WTO panels to refrain from ruling on matters that they consider would be better handled before RTA dispute settlement mechanisms.<sup>113</sup> This principle can be challenged based on the jurisprudence of the Appellate Body, which provides that, where a panel declines to exercise validly established jurisdiction, then it diminishes the right of the complaining Member to seek redress.<sup>114</sup>

The WTO’s Dispute Settlement Understanding, under Article 3.2, prohibits the Dispute Settlement Body, and the panels in extension,

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<sup>110</sup> C Chase, A Yanovich, JA Crawford and P Ugaz, ‘Mapping of dispute settlement mechanisms in regional trade agreements – innovative or variations on a theme?’, WTO Staff Working Paper ERSD-2013-07, 2013.

<sup>111</sup> Yang, ‘The settlement of jurisdictional conflicts between the WTO and RTAs’, 234.

<sup>112</sup> Marceau, ‘The primacy of the WTO dispute settlement system’, 6; EC – *Commercial vessels*, Panel Report, para 7.193; US – *Section 301 Trade Act*, Panel Report, para 7.43; Bossche and others, *The law and policy of the World Trade Organization*, 179.

<sup>113</sup> Yang, *The settlement of jurisdictional conflicts between the WTO and RTAs*, 240.

<sup>114</sup> Mexico – *Soft drinks and other beverages*, Appellate Body Report, para 53 and 41.0

from making recommendations and rulings that diminish the rights of Members under the covered agreements, including the right to access redress.<sup>115</sup> Panels are therefore, cautioned from ‘judicial activism’<sup>116</sup> and the relinquishment of rights granted by the Understanding is only acceptable when made clear.<sup>117</sup> In addition, Article 23 of the Dispute Settlement Understanding provides that the WTO’s mechanism shall be the most appropriate forum for matters concerning the violation of WTO obligations, to the exclusion of other fora.<sup>118</sup>

Considering the above, this section proposes the *res judicata* principle as a solution to the jurisdictional conflicts eminent from the present jurisdictional overlaps. This is because, from a third-world-centred approach, the RTAs offer more accessible and more contextual dispute settlement mechanisms that should thus be prioritised over the global WTO DSB. Particularly, this section shall assess the nature of the principle; and, how it has featured in jurisdictional conflicts. This assessment shall take the form of an evaluation of WTO jurisprudence, in two main cases, on *res judicata*, its scope, and elements, which shall cumulate into the conclusion that this principle is applicable as a solution in addressing jurisdictional conflicts and preventing duplicative judgements.

## The principle of *res judicata* in the WTO

*Res judicata*: A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. (...) In addition, to be applicable requires identity in the thing sued for as well as identity of cause of action, of persons and parties to the action, and of quality in persons for or

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<sup>115</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.2.

<sup>116</sup> Bossche and others, *The law and policy of the World Trade Organization*, 179.

<sup>117</sup> Peru – *Agricultural products*, Appellate Body Report.

<sup>118</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 23.

against whom the claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided (...).<sup>119</sup>

The principle of *res judicata* is the doctrine providing that the final judgement by a court of competent jurisdiction, conclusively adjudging the rights or obligations of disputing parties, shall constitute an absolute bar to a subsequent action involving the same parties, the same claim, or the same cause of action. The recommendations of WTO panels and the Appellate Body as discussed below re-emphasise the need for *res judicata* as discussed throughout this paper. More importantly, the cases highlight the statutory and jurisprudential gap with regard to the applicability of the principle and, eventually, guide the applicability of the principle in the WTO dispute settlement system.

### India – Measures affecting the automotive sector

In this matter, a panel was established to look into complaints raised by the European Communities and the United States against India's licensing regime and measures affecting the automotive sector. The case did not address the issue of jurisdictional overlaps between the WTO dispute settlement system and similar systems under RTAs since it concerned the handling of similar matters by two WTO panels. However, the Panel discussed the question of *res judicata* in the WTO system as pleaded by the parties and contributed significantly to the jurisprudence on the matter.

The principle of *res judicata* was pleaded by India in *India – Measures affecting the automotive sector*, where India, as the Respondent, asked the Panel to apply the principle and decline to exercise its jurisdiction since the matter raised by the United States had already been adjudicated upon by another panel in *India – Quantitative restrictions on imports of agricultural, textile and industrial products* (WT/DS90).<sup>120</sup> India traced the basis of this principle in the old maxim, *interest reipublicae ut sit finis*

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<sup>119</sup> *Black's Law Dictionary*, West Publishing Company, 1990, 1305.

<sup>120</sup> *India – Automotive sector*, Panel Report, para 3.7 and 4.55.



*litigium*, which essentially means that there must be an end to litigation.<sup>121</sup> The rationale being that ‘if matters which have been solemnly decided are drawn again to controversy; if facts, once solemnly affirmed, are to again be denied whenever the affirmant sees his opportunity, there can never be an end to litigation and confusion.’<sup>122</sup>

The Panel noted that *res judicata* has not been explicitly provided for in any guiding instrument, nor has it been referred to or endorsed by any panel or by the Appellate Body.<sup>123</sup> It however took note of two cases where panels were formed successively over the same or similar subject matter but noted that *res judicata* was not applicable in either of the cases.<sup>124</sup> The European Communities, as a Respondent in this case, whilst urging the Panel, if at all, to apply the principle with much circumspection elaborated on the elements of *res judicata*.<sup>125</sup> These are that there must be complete identity between the parties and between the ‘matters’ at issue.<sup>126</sup>

In this case, ‘matters’ includes both the impugned measure or conduct, and the claim against such a measure.<sup>127</sup> The Panel sided with this elaboration of the scope of *res judicata*,<sup>128</sup> stating that the principle, if applicable, would presumably relate to the effect of a previously adopted panel report on a subsequent dispute involving the same matter between the same parties.<sup>129</sup>

Essentially, the Panel established a two-tier test to be applied where a party seeks to rely on *res judicata*, namely: an investigation of the applicability of the principle to WTO dispute settlement, and whether

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<sup>121</sup> India – *Automotive sector*, Panel Report, para 4.55.

<sup>122</sup> India – *Automotive sector*, Panel Report, para 4.55; Herman, *Commentaries on the law of estoppel and res judicata*, 8.

<sup>123</sup> India – *Automotive sector*, Panel Report, para 7.57.

<sup>124</sup> India – *Automotive sector*, Panel Report, para 7.58.

<sup>125</sup> India – *Automotive sector*, Panel Report, para 4.67.

<sup>126</sup> India – *Automotive sector*, Panel Report, para 4.67.

<sup>127</sup> India – *Automotive sector*, Panel Report, para 4.67.

<sup>128</sup> India – *Automotive sector*, Panel Report, para 7.65 and 7.66.

<sup>129</sup> India – *Automotive sector*, Panel Report, para 4.68.

the conditions of the principle had been met in the facts.<sup>130</sup> Noting that the Dispute Settlement Understanding did not make any provisions with regard to the application of the principle, the Panel stated that the principle could only be ‘potentially’ invoked where ‘its commonly understood conditions of application’ were met in the facts.<sup>131</sup>

Thus, referring back to the elements of *res judicata*, the Panel noted that the question of applicability of the principle would only be pertinent where it was clear that the matter ruled on by the *India – Quantitative restrictions* Panel is identical to the matter before it.<sup>132</sup> It conducted this evaluation based on the specific measures at issue and the claims – the legal basis of the complaints.<sup>133</sup>

Consequently, the Panel adopted a strict approach in examining the terms of reference of the *India – Quantitative restrictions* Panel vis-à-vis those of itself and found that while the former ruled on the EXIM licensing policy by India, the latter was required to rule on Public Notice No. 6 and therefore the measures at issue were not identical.<sup>134</sup> Similarly, the Panel opted to investigate the specific legal basis of the claims before each panel and found that the *India – Quantitative restrictions* Panel did not rule on Article XI as the instant Panel was tasked to and therefore the claims were not identical.<sup>135</sup> This echoes the criticism lodged against *res judicata* as a solution for jurisdictional conflicts, that though the parties may be the same and the subject matter similar, formally the rights of the parties and the applicable law between RTAs and the WTO are different, and would preclude the application of *res judicata*.<sup>136</sup>

Accordingly, the Panel found that the doctrine of *res judicata* could not apply to that dispute and declined to rule on whether the

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<sup>130</sup> *India – Automotive sector*, Panel Report, para 7.57.

<sup>131</sup> *India – Automotive sector*, Panel Report, para 7.59.

<sup>132</sup> *India – Automotive sector*, Panel Report, para 7.60.

<sup>133</sup> *India – Automotive sector*, Panel Report, para 7.80.

<sup>134</sup> *India – Automotive sector*, Panel Report, para 7.83 and 7.86.

<sup>135</sup> *India – Automotive sector*, Panel Report, para 7.87 and 7.90.

<sup>136</sup> Marceau, ‘The primacy of the WTO dispute settlement system’, 10, 11.

principle could potentially apply to WTO dispute settlement.<sup>137</sup> The significance of this case is that though the Panel did not express itself on the applicability of the principle in the WTO, it proceeded to evaluate the principle's elements of identity of parties and identity of issues to refute such applicability. This recommendation thus implies that one, *res judicata* is not prohibited in the WTO and that second, where the conditions in the fact justify, potentially, *res judicata* 'would' be applicable to bar the jurisdiction of a WTO panel over a matter.

### Argentina – Definitive anti-dumping duties on poultry from Brazil<sup>138</sup>

This matter concerned Brazil's challenge against Argentina's anti-dumping measures. Argentina submitted a preliminary request to the effect that the Panel refrains from ruling on the matter based on grounds including that a Southern Common Market (MERCOSUR) ad hoc tribunal had already decided on the anti-dumping measures. Argentina's main argument was that Brazil's conduct in bringing the matter first to the regional dispute settlement ad hoc Tribunal and then to the WTO was contrary to the principle of good faith, warranting an invocation of estoppel, and alternatively, that the Panel ought to be bound by the decision of the regional ad hoc tribunal.<sup>139</sup>

The Panel rejected Argentina's request on the reasoning that the conditions for estoppel had not been established,<sup>140</sup> and that the Panel was not bound by non-WTO dispute settlement bodies.<sup>141</sup> Though the Panel did not address *res judicata*, and despite Argentina's unwillingness to invoke *res judicata*,<sup>142</sup> other parties to the dispute proceeded to submit on the principle. It is these submissions that are instrumental in exploring the applicability of *res judicata*. Paraguay, as a third party, submitted preliminarily that the matter was *res judicata* as it had already

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<sup>137</sup> India – *Automotive sector*, Panel Report, para 7.103.

<sup>138</sup> Argentina – *Definitive anti-dumping duties*, Panel Report.

<sup>139</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.18.

<sup>140</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.39.

<sup>141</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.41.

<sup>142</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.18 and para 13.

been brought before a RTA dispute settlement procedure, particularly the Brasilia Protocol of the Southern Common Market.<sup>143</sup> Its argument was based on Article 21 of the Brasilia Protocol, which rendered the decision of the ad hoc Tribunal binding and excluded from appeal.<sup>144</sup> Additionally, Paraguay argued that the Southern Common Market's Protocol of Olivos, albeit not in force then, excluded members from initiating a dispute in multiple fora.<sup>145</sup>

Though not with regards to *res judicata*, the Panel stated that the adoption of the Protocol of Olivos indicated that the parties recognised that before the Protocol, a Southern Common Market dispute could be followed by a WTO dispute settlement proceeding regarding the same subject matter.<sup>146</sup> Despite Argentina's unwillingness to invoke *res judicata*,<sup>147</sup> according to Brazil, its argument that the ad hoc Tribunal ruling is binding has the effect of *res judicata*.<sup>148</sup> To this, the Applicant referred to the definition of *res judicata* as the 'rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action'.<sup>149</sup>

The Applicant then relied on the two-part test set in *India – Measures affecting the automotive sector*<sup>150</sup> that the Panel ought to satisfy itself on the applicability of the principle to WTO dispute settlement, and on whether the conditions of the principle had been met in the facts.<sup>151</sup> On the first requirement, Brazil stated that Argentina did not cite any

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<sup>143</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.28.

<sup>144</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.28.

<sup>145</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.29.

<sup>146</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.38.

<sup>147</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 7.18.

<sup>148</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 4.

<sup>149</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 19; *Black's Law Dictionary*, 1305.

<sup>150</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 20; *India – Automotive sector*, Panel Report.

<sup>151</sup> *India – Automotive sector*, Panel Report, para 7.57.

WTO legal texts to justify an invocation of *res judicata*.<sup>152</sup> On the second requirement, Brazil distinguished, factually, the claims raised before the regional ad hoc Tribunal from those raised before the WTO in that the former concerned the Southern Common Market's legal framework and the latter concerned WTO obligations.<sup>153</sup>

In response, Argentina first distinguished the instant dispute from that in *India – Measures affecting the automotive sector*,<sup>154</sup> in that while the latter involved the listening of successive complaints under the same forum, the instant dispute was first before a RTA forum and then the WTO.<sup>155</sup> The Respondent then highlighted more substantive distinctions from the cited jurisprudence that would justify an application of *res judicata*.<sup>156</sup> Particularly, sticking to the known elements, Argentina argued the requirement of identity of parties had been fulfilled as the parties in the regional proceedings were the same as these; that the identity of the issues was fulfilled as the measure being challenged before both proceedings was the same; and that the legal basis of the claims was also fulfilled due to the 'high degree of similarity between the arguments' made before both proceedings.

Thus, the Respondent in this matter, while using the same test as in *India – Measures affecting the automotive sector*, adopted a more liberal approach, particularly when looking into the identity of the legal basis of the claims at issue. Despite the Panel's decision not to address *res judicata*, this case is significant in indicating the position of present WTO jurisprudence on *res judicata* and what this means to Member States and their arguments.

From the cases above, it is clear that the principle of *res judicata* is not an alien concept in WTO dispute settlement. Additionally, though implicitly, panels have acknowledged the applicability of this principle,

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<sup>152</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 11.

<sup>153</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 24.

<sup>154</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 20; *India – Automotive sector*, Panel Report.

<sup>155</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 12.

<sup>156</sup> Argentina – *Definitive anti-dumping duties*, Panel Report, para 12.

and its effect in precluding jurisdiction and, in certain cases, remedying the challenges caused by jurisdictional overlaps and duplicative proceedings. These cases confirm that *res judicata*, as established and defined in international law is compatible with the structure of WTO albeit with formalistic limitations, and, provided all its requirements are met. This section therefore concludes that the principle of *res judicata* would be applicable in the WTO dispute settlement system.

### ***Res judicata* as the key element in resolving jurisdictional conflicts**

This section recommends the *res judicata* principle as a solution to the jurisdictional conflicts that occur where a Member seeks to institute a matter before the WTO dispute settlement system for resolution after it has been determined by a competent RTA dispute resolution mechanism. Having established the applicability of the principle in WTO dispute settlement, this section addresses the question of how this solution is to be applied. Particularly, this section will recommend the trite use of general principles of international law and the exercise of the inherent discretion of WTO panels as the fundamental basis for the application of this solution. It will recommend a subjective approach to the interpretation of the elements of *res judicata* to ensure the effective resolution of jurisdictional conflicts and the prevention of duplicative proceedings. In doing so, this section will also recommend ways to counter or mitigate against possible limitations and criticism against *res judicata*.

### **Application of *res judicata* as a solution**

Application of *res judicata* by panels would essentially mean that panels be allowed under the dispute settlement to decline to exercise their jurisdiction, even where it is well established. For this to be justifiable, such conduct would need a basis in the Understanding. The following section proposes that the Understanding does grant panels the discretion to act in this manner.

*Use of inherent discretion of panels as the basis for the principle*

It has become accepted that panels have powers inherent to their adjudicative function to determine whether they have jurisdiction and to determine the scope of their discretion as well.<sup>157</sup> This discretion is guided by Article 3.7 of the DSU, which provides for the aim of dispute settlement under the WTO to be to 'secure a positive solution to a dispute'.<sup>158</sup>

The Appellate Body in *US – Wool shirts and blouses* thus ruled that the Understanding does not require panels to address all legal claims raised by a party.<sup>159</sup> The Appellate Body emphasised this position in *India – Patents (US)*, where it reiterated that a panel has the discretion to determine the claims it must address in order to resolve a dispute.<sup>160</sup> This exercise of judicial economy is permissible within the confines of transparency.<sup>161</sup>

Essentially, therefore, panels are empowered to rule on only what is necessary to ensure they find a 'positive solution to a dispute'. On this ground, panels may apply the principle of *res judicata* to guard their jurisdiction. This would entail panels evaluating, in substance, the extent to which a WTO dispute before them has already been resolved at an RTA level. Where the panel can conclude that the substance of a conflict, or part of it, has been determined by an RTA body it would no longer be necessary 'to secure a positive solution' under Article 3.7 of the DSU for the panel to proceed to re-evaluate the conflict. In such a case, the panel could exercise judicial economy by deeming that particular aspect of the conflict *res judicata*. This can only apply where the conflict before the RTA and the one before the panel are similar in substance, in that

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<sup>157</sup> Mexico – *Soft drinks and other beverages*, Appellate Body Report, 45; US – *1916 Act*, Appellate Body Report, para 54; Mexico – *Corn syrup (Article 21.5 – US)*, Appellate Body Report, para 53.

<sup>158</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.7.

<sup>159</sup> US – *Wool shirts and blouses*, Appellate Body Report, para 19 and 340.

<sup>160</sup> India – *Patents (US)*, Appellate Body Report, para 87.

<sup>161</sup> Canada – *Autos*, Appellate Body Report, para 117.

they concern the same rights in substance and the RTA determination has granted a remedy to such a right already.

#### *Permitted use of general principles of international law*

The Panel in *India – Measures affecting the automotive sector* found that widely recognised principles are applicable in WTO Dispute Settlement with regard to fundamental procedural matters.<sup>162</sup> It cited the principle of good faith<sup>163</sup> and the presumption against conflict as examples of such principles.<sup>164</sup> This import of general principles of international law has a basis in Article 3.2 of the Understanding that provides for the use of such principles by WTO panels.<sup>165</sup> On the same note, the principle of *res judicata* would be justifiably applicable in the WTO dispute settlement system.

#### **Criticisms against the principle of *res judicata***

Two main criticisms can be identified against the *res judicata* as a solution to jurisdictional conflicts. One, the exercise of *res judicata* may diminish the rights of complaining parties to get redress through the WTO dispute settlement system; and, two, formally, the rights of the parties and, the applicable law between RTAs and the WTO are different and would preclude the application of *res judicata*.<sup>166</sup> This section gives recommendations on how each of these criticisms can be addressed or mitigated.

#### *Rights of complaining Members*

As highlighted by the European Communities in *India – Measures affecting the automotive sector*, there is a risk of denial of justice or denial

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<sup>162</sup> *India – Automotive sector*, Panel Report, para 7.57.

<sup>163</sup> *India – Automotive sector*, para 7.57; *US – Shrimp*, Appellate Body Report, para 158.

<sup>164</sup> *India – Automotive sector*, para 7.57; *Indonesia – Autos*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para 14.28.

<sup>165</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Article 3.7.

<sup>166</sup> Marceau, 'The primacy of the WTO dispute settlement system', 10,11.



of the rights of a complaining member with the application of *res judicata*.<sup>167</sup> This issue is adequately addressed by the justification of the judicial economy. This is the allowance that panels have to rule only on what they consider necessary to resolve a dispute in accordance with Article 3.7 of the Dispute Settlement Understanding.<sup>168</sup> According to the Appellate Body, the exercise of judicial economy does not diminish the rights of Members but rather it is a fulfilment of a panel's obligations under the Understanding.<sup>169</sup> Accordingly, where a panel applies *res judicata* under the justification of judicial economy the rights of the complaining member cannot be said to be diminished.

*Formal difference between applicable laws regionally and in the WTO*

This is the fundamental challenge in the application of *res judicata*.<sup>170</sup> It particularly relates to the second condition of *res judicata*; that the matters decided upon should be identical to the matters already decided upon, not only in terms of the claim but also in terms of the legal basis.<sup>171</sup> Since the legal basis, in a strict sense, of regional trade agreements and that of the WTO are not the same, this formalistic view renders *res judicata* practically inapplicable. Thus, if a panel, as was the case in *India – Quantitative restrictions*,<sup>172</sup> adopts a strict approach to examining the legal basis in terms of the laws relating to the matter at issue, then the challenge of jurisdictional conflict will remain unsolved.

For this reason, this paper recommends a more subjective approach, pegged on Articles 3.4 and 3.7 of the Dispute Settlement Understanding

<sup>167</sup> *India – Automotive sector*, Panel Report, para 4.67; *Mexico – Soft drinks and other beverages*, Appellate Body Report, 53.

<sup>168</sup> *Australia – Salmon*, Appellate Body Report, para 223; *Japan – Agricultural products II*, Appellate Body Report, para 111; *US – Wheat gluten*, Appellate Body Report, para 183; *US – Lamb*, Appellate Body Report, para 194; *Brazil – Retreated tyres*, Appellate Body Report, para 256.

<sup>169</sup> *India – Patents (US)*, Appellate Body Reports, para 87; *Canada – Autos*, Appellate Body Report, para 117.

<sup>170</sup> Marceau, 'The primacy of the WTO dispute settlement system', 10, 11.

<sup>171</sup> *India – Automotive sector*, Panel Report, para 7.57.

<sup>172</sup> *India – Automotive sector*, Panel Report, para 7.83-7.90.

that prioritises the positive resolution of a dispute as a function of panels.<sup>173</sup> This approach would require that panels interpret a ‘matter’ not based on the specific laws invoked by the parties but rather based on the rights and obligations invoked. That way, the settlement of a right or obligation at the RTA level will be duly considered in establishing the similarity of subject matter and applying *res judicata*.

## Conclusion

This paper has coursed a journey through the comprehensive dispute resolution system that has been established by the WTO and its agreements. In doing so, it has highlighted the compulsory and exclusive nature of WTO dispute settlement jurisdiction and the practical challenges these features pose to the efficient implementation of the WTO provisions, which allow for the formation of RTAs. Particularly, though the WTO allows for the establishment and running of RTAs, the compulsory and exclusive nature of WTO dispute settlement jurisdiction causes jurisdictional conflicts with the RTAs’ dispute settlement mechanisms where jurisdictional overlaps exist. With the example of the South American region and the Andean Community in particular, this paper has highlighted the jurisdictional overlaps and recommended the application of *res judicata* by WTO panels as the solution.

Through the analysis undertaken, it is clear that *res judicata* is applicable as a remedy where a Member seeks to institute a matter before the WTO dispute settlement system for resolution after it has been determined by a competent regional trade agreement dispute resolution mechanism, thus resulting in jurisdictional conflicts and duplicative proceeding. In terms of how this recommendation is to be applied, this paper has recommended two approaches: one, the trite use of general principles of international law; and two, the exercise of the inherent discretion of WTO panels as the fundamental basis for the application of

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<sup>173</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, Articles 3.4 and 3.7.

this solution. This is not to mean that this application would be seamless. This paper has identified the major criticisms and hence challenges to the application of *res judicata*. To these, it recommends the justification of judicial economy by panels, and the employment of a subjective interpretation approach when considering the elements required to apply *res judicata*. With the implementation of these recommendations, the international trade challenges posed by jurisdictional overlaps and jurisdictional conflicts between regional trade agreements dispute settlement mechanisms and the WTO dispute settlement system would be well addressed.