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## **Abstract**

This article analyses the applicability of two legal principles that originate in municipal legal systems, namely res judicata and lis pendens, in World Trade Organisation ('WTO') disputes that involve a conflict of jurisdiction between dispute settlement mechanisms of the WTO and Regional Trade Agreements ('RTAs'). Ideally, the applicability of non-WTO norms in WTO disputes would be determined on the basis of explicit treaty language, as this would increase the legitimacy of the dispute settlement process. However, since there is no particular WTO provision that explicitly specifies the sources of applicable law in WTO disputes, it is virtually impossible to decisively verify whether WTO law allows the application of non-WTO norms like res judicata and lis pendens in WTO disputes. Thus, whether these norms can be enforced in WTO disputes largely depends on the discretion of WTO tribunals. On this basis, this article first develops a set of criteria against which the applicability of res judicata and lis pendens under WTO tribunals' inherent powers could be assessed. The article then uses this framework to evaluate whether res judicata and lis pendens can be applied in WTO disputes to resolve jurisdictional conflicts between WTO and RTA dispute settlement.

## **Keywords**

jurisdictional conflicts, law, regional trade agreements

## THE APPLICABILITY OF *RES JUDICATA* AND *LIS PENDENS* IN WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT

SON TAN NGUYEN\*

### ABSTRACT

*This article analyses the applicability of two legal principles that originate in municipal legal systems, namely res judicata and lis pendens, in World Trade Organisation ('WTO') disputes that involve a conflict of jurisdiction between dispute settlement mechanisms of the WTO and Regional Trade Agreements ('RTAs'). Ideally, the applicability of non-WTO norms in WTO disputes would be determined on the basis of explicit treaty language, as this would increase the legitimacy of the dispute settlement process. However, since there is no particular WTO provision that explicitly specifies the sources of applicable law in WTO disputes, it is virtually impossible to decisively verify whether WTO law allows the application of non-WTO norms like res judicata and lis pendens in WTO disputes. Thus, whether these norms can be enforced in WTO disputes largely depends on the discretion of WTO tribunals. On this basis, this article first develops a set of criteria against which the applicability of res judicata and lis pendens under WTO tribunals' inherent powers could be assessed. The article then uses this framework to evaluate whether res judicata and lis pendens can be applied in WTO disputes to resolve jurisdictional conflicts between WTO and RTA dispute settlement.*

### I INTRODUCTION

In the last several decades there has been an exponential growth in the number of RTAs.<sup>1</sup> In addition to creating a wide overlap of substantive rights and obligations with the WTO,<sup>2</sup> many RTAs are also equipped with legalised dispute settlement

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<sup>1</sup> As of 10 January 2013, 546 notifications of RTAs had been received by the GATT/WTO. Of these, 354 were in force; see World Trade Organisation, *Regional Trade Agreements Gateway* <[http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm)>.

<sup>2</sup> See, eg, Ignacio Garcia Bercero, 'Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 383, 400-1; World Trade Organisation, *World Trade Report 2011. The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (2011) 128-33; Henrik Horn, Petros C.

mechanisms,<sup>3</sup> which operate in parallel with the compulsory, automatic and exclusive system of dispute settlement under the WTO.<sup>4</sup> Various studies have recognised that this parallel of substantive commitments and legalised dispute settlement mechanisms may potentially result in conflicts of jurisdiction between dispute settlement mechanisms of the WTO and RTAs, where a single dispute is submitted in parallel or consecutively to both the WTO and RTA fora.<sup>5</sup> For example, suppose that countries A and B are members of both the WTO and an RTA, and that Country A imposes an import ban on a product of country B. In theory, country B can submit a dispute to the WTO to challenge the import ban. Since both countries are also parties to an RTA, it is also possible for country B to file a dispute at the RTA forum, either in parallel or consecutively to the WTO dispute. Even though this has not materialized in reality, various cases, including *Mexico - Taxes on Soft Drinks*,<sup>6</sup>

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Mavroidis and André Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' (2010) 33 (11) *The World Economy* 1565, 1565-88.

<sup>3</sup> See, eg, Amelia Porges, 'Dispute Settlement' in Jean-Pierre Chauffour and Jean-Christophe Maur (eds), *Preferential Trade Agreement Policies for Development* (World Bank, 2011) 467; David Morgan, 'Dispute Settlement under PTAs: Political or Legal?' in Ross P. Buckley et al (eds), *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (Wolters Kluwer, 2008) 241, 241-4; Kyung Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006) 465, 486-524.

<sup>4</sup> For a discussion on these key features of WTO dispute settlement see, eg, Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May, 2002) 119-208; David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (Cambridge, 2<sup>nd</sup> ed, 2004) 17-48.

<sup>5</sup> See Peter Drahos, 'Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution' (2007) 41(1) *Journal of World Trade* 191, 198; Kwak and Marceau, above n 3, 465; Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003) 8; Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: The WTO-NAFTA "Spaghetti Bowl" is Cooking' (2006) 9(1) *Journal of International Economic Law* 197, 197-206; Joost Pauwelyn and Luiz Eduardo Salles, 'Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions' (2009) 44 *Cornell International Law Journal* 77, 77-85.

<sup>6</sup> Panel Report, *Mexico - Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/R (7 October 2005) ('*Mexico - Taxes on Soft Drinks*'); Appellate Body Report, *Mexico - Taxes on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/AB/R (6 March 2006). In this case, for many years the US had been blocking the establishment of a NAFTA panel to examine Mexico's claim under NAFTA concerning the market access of its cane sugar to the US market. In response, Mexico imposed a tax on US's soft drinks

*Argentina - Poultry Anti-Dumping Duties*,<sup>7</sup> *US - Cattle, Swine and Grain*,<sup>8</sup> and *US - Tuna II*,<sup>9</sup> illustrate that multiple proceedings over the same dispute may occur before WTO and RTA fora.<sup>10</sup> In the context of WTO law, where the central constituting provision of RTAs, namely art XXIV of the *General Agreement on Tariffs and Trade* ('GATT'),<sup>11</sup> makes no reference to RTA mechanisms, and the Dispute Settlement Understanding ('DSU') also does not regulate relations between WTO and RTA dispute settlement,<sup>12</sup> if parties decide to submit a single dispute to more than one forum, multiple proceedings concerning the same dispute would be unavoidable.

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and other beverages; and this, in turn, led the US to initiating a dispute before the WTO to challenge the tax measures.

<sup>7</sup> Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WTO Doc WT/DS241/R (22 April 2003) ('*Argentina – Poultry Anti-Dumping Duties*'). In this case, Brazil requested the WTO panel to find Argentina's antidumping measures inconsistent with the WTO Anti-Dumping Agreement. However, prior to this WTO dispute, Brazil had already challenged the measures before a Mercosur tribunal.

<sup>8</sup> *United States – Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*, WTO Doc WT/DS144/1 (29 September 1998) (Request for Consultations from Canada) ('*US – Cattle, Swine and Grain*'). In this instance, Canada filed parallel requests for consultations under both the NAFTA and WTO procedures involving exactly the same US measures and similar WTO and NAFTA provisions. However, neither of these proceeding escalated to an adjudicative phase.

<sup>9</sup> *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/1(28 October 2008) (Request for Consultations by Mexico) ('*US – Tuna II*'); Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/R (15 September 2011); Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R (16 May 2012). In this case, Mexico initiated a WTO dispute to challenge the measures imposed by the US concerning the importation, marketing and sale of tuna and tuna products. However, the US strongly disagreed with Mexico's decision to bring the dispute to the WTO because in the US's view, the dispute must be adjudicated at NAFTA under NAFTA Article 2005.4. The US then filed a NAFTA dispute concerning Mexico's failure to move the tuna-dolphin dispute from the WTO to the NAFTA forum.

<sup>10</sup> Andrew D. Mitchell and Tania Voon, 'PTAs and Public International Law' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University Press, 2009) 114, 135-8.

<sup>11</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*') article XXIV.

<sup>12</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*Understanding on Rules and Procedures Governing the Settlement of Disputes*').

In municipal legal systems, multiple proceedings over the same dispute are normally regulated by, among other things, the principles of *res judicata* and *lis pendens*.<sup>13</sup> The principle of *res judicata* regulates consecutive proceedings by precluding a party from re-litigating a matter that it has already litigated, whereas the principle of *lis pendens* governs parallel proceedings by prescribing that, during the pendency of one set of proceeding, it is not permissible to initiate another set of competing proceedings concerning the same dispute. This ability of *res judicata* and *lis pendens* in regulating consecutive and parallel proceedings has led many international law scholars to suggest that these principles may be borrowed and applied in public international law. For example, Shany, in his comprehensive book discussing jurisdictional conflicts in international law, argued that *res judicata* and *lis pendens* could, and should, be applied to govern parallel and subsequent proceedings between international courts and tribunals.<sup>14</sup> Similarly, Lowe asserted that the application of certain municipal legal principles such as *res judicata* and *lis pendens* to address overlapping jurisdiction between international tribunals 'proceeds from requirements of good order that are applicable to each and every judicial system'.<sup>15</sup> Recently, Lim and Gao commented that the WTO may be justified in 'turning towards private international law analogies', because these norms are 'principles of legal reasoning based ultimately on logic, experience, and the developing practice and jurisprudence of WTO dispute settlement'.<sup>16</sup>

In light of these scholarly suggestions, this article seeks to analyse whether *res judicata* and *lis pendens* can satisfactorily apply in WTO disputes to regulate multiple proceedings before the WTO and RTA fora.<sup>17</sup> This question may arise when WTO tribunals find these jurisdiction-regulating norms useful and wish to apply them to

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<sup>13</sup> See, eg, James J. Fawcett (ed), *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law, Athens, August 1994* (Clarendon Press, 1995); Vaughan Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 *Australian Year Book of International Law* 191; Shany, *The Competing Jurisdictions*, above n 5.

<sup>14</sup> Shany, *The Competing Jurisdictions*, above n 5, 154-73, 239-54.

<sup>15</sup> Lowe, 'Overlapping Jurisdiction', above n 13, 202.

<sup>16</sup> C.L. Lim and Henry Gao, 'The Politics of Competing Jurisdictional Claims in WTO and RTA Disputes: The Role of Private International Law Analogies' in Tomer Broude, Marce L. Busch, and Amelia Porges (eds), *The Politics of International Economic Law* (Cambridge University Press, 2011) 282, 282-314, 313-4.

<sup>17</sup> This article deals specifically with the applicability of *res judicata* and *lis pendens* in WTO disputes and does not discuss the applicability of these norms in RTA disputes. The latter issue depends on the texts of individual RTAs; and hence a discussion on this issue would enlarge the scope of this article into an unmanageable extent.

resolve WTO-RTA jurisdictional conflicts. Moreover, in cases of multiple proceedings, it is also possible that disputing parties may invoke these principles to prevent a WTO tribunal from adjudicating a dispute that is being or has been considered by an RTA tribunal. In this case, WTO tribunals might need to address the applicability of these norms in WTO disputes. In the current author's opinion, regardless of how effective *res judicata* and *lis pendens* may be in municipal legal systems, their functionality in public international law should not be assumed. As far as WTO-RTA jurisdictional conflicts are concerned, it is important to confirm whether there is any basis to apply *res judicata* and *lis pendens* in WTO disputes, and crucially, even if there is such a basis, whether these norms are in themselves capable of being applied on that basis to resolve jurisdictional conflicts between WTO and RTA dispute settlement.

In order to address these issues, this article is divided into five parts. Following this introduction, the second part discusses possible bases to apply *res judicata* and *lis pendens* in WTO disputes. The third part develops a framework against which the applicability of *res judicata* and *lis pendens* under WTO tribunals' inherent powers could be assessed. The fourth part then uses this framework to evaluate whether *res judicata* and *lis pendens* can be applied in WTO disputes as tribunals' inherent powers to resolve WTO-RTA jurisdictional conflicts. The last part concludes the article.

## II POSSIBLE BASES TO APPLY RES JUDICATA AND LIS PENDENS IN WTO DISPUTE SETTLEMENT

*Res judicata* and *lis pendens* are non-WTO norms; they are not included in any WTO-covered agreement listed in Appendix 1 to the DSU.<sup>18</sup> Therefore, their applicability in WTO disputes is linked to one of the most controversial issues in WTO law, that is, whether and to what extent non-WTO law can be applied in WTO disputes. The DSU contains some provisions, such as Articles 1.1, 3.2, 7, 11, and 19.2, which outline the law that can be applied by WTO tribunals.<sup>19</sup> However, unlike some other international instruments,<sup>20</sup> there is no particular provision that explicitly specifies the sources of applicable law in WTO disputes. As a result, while it is undisputed that only claims arising from WTO-covered agreements can be brought to the WTO,

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<sup>18</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*Understanding on Rules and Procedures Governing the Settlement of Disputes*'), app 1.

<sup>19</sup> *Ibid*, arts 1.1, 3.2, 7, 11, 19.2.

<sup>20</sup> See, eg, *Statute of the International Court of Justice* art 38(1); *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 6 November 1994) art 293.

once the jurisdiction of WTO tribunals is properly established, 'it is less clear what laws panels and the Appellate Body may apply'.<sup>21</sup>

Scholarly opinions on this issue also diverge. Those in favour of a restrictive approach contend that only WTO-covered agreements and those rules referred to therein can be directly applicable in WTO dispute settlement.<sup>22</sup> Those in favour of a more liberal approach take the view that, in addition to WTO-covered agreements, all other sources of international law, as listed in Article 38(1) of the ICJ statute, should be potentially applicable in WTO disputes.<sup>23</sup> These extreme views do not seem to be fully consistent with the practice of WTO dispute settlement. In fact, WTO tribunals apply neither WTO-covered agreements alone, nor all norms of international law. Indeed, even though the recognition of international law in WTO disputes may be a

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<sup>21</sup> Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, 2009) 13.

<sup>22</sup> See, eg, Joel Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 *Harvard International Law Journal* 333; Joel Trachtman, 'Jurisdiction in WTO Dispute Settlement' in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge University Press, 2005) 132, 132-43; Joel Trachtman, 'The Jurisdiction of the World Trade Organization' (2004) 98 *American Society of International Law* 135, 139-42; Gabrielle Marceau, 'A Call for Coherence in International Law: Praise for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement' (1999) 33(5) *Journal of World Trade* 87; Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35(6) *Journal of World Trade* 1081; Gabrielle Marceau and Anastasio Tomazos, 'Comments on Joost Pauwelyn's Paper: "How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?"' in Stefan Griller (ed), *At the Crossroads: The World Trading System and the Doha Round* (Springer Wien New York, 2008) 55, 56-81; Debra P. Steger, 'Jurisdiction of the World Trade Organization' (2004) 98 *American Society of International Law* 135, 142-6.

<sup>23</sup> See Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003); Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *American Journal of International Law* 535; Joost Pauwelyn, 'How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Question of Jurisdiction and Merit' in Stefan Griller (ed), *At the Crossroads: The World Trading System and the Doha Round* (Springer Wien New York, 2008) 1, 1-53; Joost Pauwelyn, 'Jurisdiction of the World Trade Organization' (2004) 98 *American Society of International Law* 135, 135-9; Lorand Bartels, 'Applicable Law in WTO Dispute Settlement' (2001) 35(30) *Journal of World Trade* 499; David Palmeter and Petros C. Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92(3) *American Journal of International Law* 398.



'painful process',<sup>24</sup> WTO tribunals have not 'shied away' from using international norms in disputes before them.<sup>25</sup> As far as the VCLT is concerned,<sup>26</sup> WTO tribunals have gone beyond the rules of interpretation to apply provisions on non-retroactivity,<sup>27</sup> successive treaties,<sup>28</sup> modification,<sup>29</sup> error,<sup>30</sup> termination or suspension by conclusion of a latter treaty,<sup>31</sup> termination as a consequence of breach, and consequence of termination.<sup>32</sup> In addition, WTO tribunals have also applied rules and principles of general international law, such as rules on judicial dispute settlement (standing, representation, *la competence de la competence*, burden of proof, the treatment of municipal law, the power to accept amicus curiae briefs and to exercise judicial economy), and state responsibility.<sup>33</sup> This practice suggests that the restrictive assumption that WTO-covered agreements are the only direct source of applicable law in WTO disputes does not seem to be tenable.

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<sup>24</sup> Tullio Treves, 'The International Tribunal for the Law of the Sea: Applicable Law and Interpretation' in Giorgio Sacerdoti, Alan Yanovich and Jan Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press, 2006) 490, 490.

<sup>25</sup> Anja Lindroos and Michael Mehling, 'Dispelling the Chimera of "Self-Contained Regimes" International Law and the WTO' (2006) 16(5) *European Journal of International Law* 857, 873.

<sup>26</sup> For a detailed analysis, see *ibid* 869-71, 876.

<sup>27</sup> See Appellate Body Report, *Canada – Terms of Patent Protection*, WTO Doc WT/DS170/AB/R (18 September 2000) ('*Canada – Patent Term*') [71]-[74].

<sup>28</sup> See Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WTO Doc WT/DS69/AB/R (13 July 1998) ('*EC – Poultry*') [79]; Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WTO Doc WT/DS44/R (31 March 1998) ('*Japan – Film*') [10.65].

<sup>29</sup> See Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WTO Doc WT/DS34/R (31 May 1999) ('*Turkey – Textiles*') [9.181].

<sup>30</sup> See Panel Report, *Korea – Measures Affecting Government Procurement*, WTO Doc WT/DS163/R (1 May 2000) ('*Korea – Government Procurement*') [7.123]-[7.126].

<sup>31</sup> See *EC – Poultry*, [79]; Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WTO Doc WT/DS69/AB/R, [79].

<sup>32</sup> See Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WTO Doc WT/DS46/AB/R (21 July 2000) ('*Brazil Aircraft (Article 21.5 – Canada)*') [3.10].

<sup>33</sup> For a discussion on the application of these rules and principles, see, eg, Pauwelyn, *Conflict of Norms*, above n 23, 205-12, 470-1; Andrew D. Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: Selected Application of Public International Law Required by Judicial Function' (2010) 31 *Michigan Journal of International Law* 559, 577-86; Andrew D. Mitchell, *Legal Principles in WTO Disputes* (Cambridge University Press, 2008).

However, the claim that all norms of international law are potentially applicable in WTO disputes may also be contested. Most of the rules and principles that have been applied by WTO tribunals belong to a set of procedural rules that any judicial system needs to formulate to properly perform its adjudicative function.<sup>34</sup> Substantive rules of international law, such as environmental law and human rights law, have not found their way easily into WTO disputes. At best, they have been taken into account in the interpretation and application of WTO-covered agreements,<sup>35</sup> such as the landmark reference by the Appellate Body to a number of environmental agreements in the interpretation of GATT Article XX(g) in *US - Shrimp*.<sup>36</sup> Beyond this, there has been no single case in which external substantive rules have been enforced side-by-side, or have overruled, substantive WTO provisions.<sup>37</sup> This selectivity undermines the argument that all international norms are applicable in WTO disputes.

Clearly, the interaction between WTO law and international law goes beyond the scope of customary rules of treaty interpretation specified in Article 3.2 of the DSU. Nevertheless, WTO tribunals have not applied all norms of international law. It follows that '[i]t is not a question of whether general international law applies, but when and how much general international law applies, and whether secondary and/or primary rules apply'.<sup>38</sup> There is simply 'no single test to determine this [question]'.<sup>39</sup> This means that, at this stage of development in WTO law when the degree to which external rules can be enforced in WTO disputes has not been decisively verified, there is no explicit treaty basis that can either confirm or eliminate the potential application of *res judicata* and *lis pendens* in WTO disputes. The question as to whether *res judicata* and *lis pendens* were intended by the drafters of WTO agreements to be applied in WTO disputes cannot be conclusively answered. Thus, the WTO must operate and interact with other rules of international law in this conceptual and institutional uncertainty.

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<sup>34</sup> Lindroos and Mehling, above n 25, 876.

<sup>35</sup> Ibid 876-7.

<sup>36</sup> Appellate Body Report, United States – *Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (6 November 1998) ('*US – Shrimp*') [130]. For an excellent discussion of this case, see Robert Howse, 'The Use and Abuse of International Law in WTO Trade/Environment Litigation' in Merit E Janow, Victoria Donaldson, and Alan Yanovich (eds), *WTO: Governance, Dispute Settlement and Developing Countries* (Juris Publishing, 2008) 635, 643-52.

<sup>37</sup> Lindroos and Mehling, above n 25, 877.

<sup>38</sup> Van Damme, above n 21, 21.

<sup>39</sup> Ibid.

In this context, a promising alternative basis for the application of *res judicata* and *lis pendens* in WTO disputes is the inherent power of WTO tribunals. The concept of inherent powers originated in the practice of national courts,<sup>40</sup> but it has gained relative familiarity in international law. Van Damme defines that 'inherent powers are powers that the judge enjoys by the mere fact of his or her status as a judge. They are functional powers, only to be exercised when necessary for the purpose of fulfilling the judicial function'.<sup>41</sup> Likewise, Brown characterizes inherent powers of a court as ones that 'derive from its nature as a court of law'.<sup>42</sup> In the same vein, Orakhelashvili states that 'the judicial nature of international tribunals and inherent powers following therefrom may produce a jurisdictional "supplement" not directly foreseen under a given jurisdictional clause'.<sup>43</sup> Significantly, international courts and tribunals have also recognised the existence of inherent powers.<sup>44</sup> For example, in *Legality of Use of Force*, Judge Higgins stated that '[t]he Court's inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the administration of justice [and] to protect the integrity of the judicial process'.<sup>45</sup>

Since the premise that all international judicial bodies have inherent powers has been firmly verified, it follows that WTO tribunals must also possess such powers because

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<sup>40</sup> See Chester Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007) 56 (noting that 'inherent powers appear to have the origin in the practice of English courts'); Georges Abi-Saab, 'Whither the Judicial Function? Concluding Remarks' in Laurence Boisson de Chazournes, Cesare P. R. Romano, and Ruth Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers, 2002) 241, 246.

<sup>41</sup> Van Damme, above n 21, 166.

<sup>42</sup> Brown, above n 40, 56.

<sup>43</sup> Alexander Orakhelashvili, 'Questions of International Judicial Jurisdiction in the LaGrand Case' (2002) 15 *Leiden Journal of International Law* 105, 115.

<sup>44</sup> In *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253, 259-60 [23], referring to *Northern Camerons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Rep 15, 29, the ICJ decisively confirmed that the Court possesses an inherent jurisdiction enabling it to take such action as may be required ... to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character'. ... Such inherent jurisdiction ... derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

<sup>45</sup> *Legality of Use of Force (Serbia and Montenegro v Belgium) (Preliminary Objections)* [2004] ICJ Rep 279, 338-9 [10], [12] (Judge Higgins).

as they can be reasonably classified as judicial bodies. Undeniably, WTO tribunals still bear some characteristics that are not typical of an international court. For example, the process begins with several political steps such as consultations, good offices, conciliation and mediation; panels are established on an ad-hoc basis; and rulings are in the form of recommendations that require political approval by the Dispute Settlement Body (DSB) to take effect rather than opinions or judgements.<sup>46</sup> Nevertheless, these features do not appear to affect the judicial status of WTO tribunals. According to Mitchell and Heaton:

[i]n determining claims, WTO Tribunals act independently, much like international courts. They fix the boundaries of the dispute before them, marshal the evidence, determine appropriate law, apply law to the facts, and reach a decision. Thus, WTO Tribunals are judicial tribunals that follow a judicial process.<sup>47</sup>

Moreover, under Articles 6.1, 16.4 and 17.14 of the DSU, many steps of the dispute settlement process, such as the establishment of a panel and the adoption of WTO tribunals' reports, are essentially automatic, through the negative consensus process. WTO tribunals' reports are also binding because remedies are available in the event of non-compliance.<sup>48</sup> WTO tribunals are thus judicial,<sup>49</sup> or 'a court in all but name'.<sup>50</sup> As a result, it may be concluded that, like other international judicial bodies, WTO tribunals also have inherent powers.<sup>51</sup> The ruling of the Appellate Body in *Mexico - Taxes on Soft Drinks* forcefully confirmed that 'WTO panels have certain powers that are inherent in their adjudicative function'.<sup>52</sup>

If it is accepted that WTO tribunals possess inherent powers, it follows that, where an application of non-WTO norms may be essential for the proper administration of adjudicative function, WTO tribunals might use these inherent powers as a basis to

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<sup>46</sup> Mitchell and Heaton, above n 33, 567.

<sup>47</sup> Ibid 565-6.

<sup>48</sup> See, eg, *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*Understanding on Rules and Procedures Governing the Settlement of Disputes*'), arts 21, 22.

<sup>49</sup> Donald McRae, 'What is the Future of WTO Dispute Settlement?' (2004) 7(1) *Journal of International Economic Law* 3, 8.

<sup>50</sup> J.H.H. Weiler, 'The Rule of Lawyers and Ethos of Diplomats-Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 *Journal of World Trade* 191, 201.

<sup>51</sup> Mitchell and Heaton, above n 33, 566-71; Van Damme, above n 21, 166; Brown, above n 40, 71.

<sup>52</sup> Appellate Body Report, *Mexico - Taxes on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/AB/R, [45].

apply these norms in WTO disputes.<sup>53</sup> Ideally, the application of non-WTO norms should be done on the basis of explicit treaty language, as this would increase the legitimacy of the dispute settlement process. However, since there is currently, as discussed above, no explicit treaty language in this regard, it is natural and inevitable that WTO tribunals must use their inherent powers to decide on a case-by-case basis which external rules they can or cannot apply. It follows that Lindroos and Mehling are correct in observing that, 'whether international law may serve as an equal source of law in trade disputes is, in the end, a question which can only be answered conclusively by those shaping the actual ... rulings of the world trade regimes'.<sup>54</sup> Obviously, in the absence of explicit treaty language specifying the scope of applicable law in WTO disputes, inherent powers might be a practical alternative basis on which non-WTO norms, including *res judicata* and *lis pendens*, can be applied in WTO disputes. The advantage of this approach is that by filtering the rules that can and cannot be applied, WTO tribunals can strike the right balance between an unconditional incorporation of non-WTO rules and a total shield against these sources.<sup>55</sup> In this way, WTO tribunals might be able to avoid importing norms that are not suitable to the WTO dispute settlement system, and at the same time ensure that the WTO will not operate as a self-contained regime in which external norms are entirely excluded.<sup>56</sup>

However, the possession of inherent powers does not mean that WTO tribunals can bring into WTO disputes any rule that they wish to apply. Inherent powers are, by their very nature, limited powers, because they stem directly from the judicial function, rather than any explicit treaty language, where state consent is written down. Therefore, the norms intended to be applied under WTO tribunals' inherent powers must also possess certain qualities so that they can fit squarely within the limit of tribunals' inherent powers. The next section will discuss in detail essential features that a non-WTO norm might need to have in order to be applied in WTO disputes as an element of tribunals' inherent powers.

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<sup>53</sup> Mitchell and Heaton, above n 33, 97-103.

<sup>54</sup> Lindroos and Mehling, above n 25, 866.

<sup>55</sup> Panagiotis Delimatsis, 'The Fragmentation of International Trade Law' (Discussion Paper No 2010-010, Tilburg Law and Economics Center, 2010) 14-5.

<sup>56</sup> The ILC Study Group forcefully warns against this potential isolation between WTO law and international law. See International Law Commission, *Report of the Study Group on the Fragmentation of International Law, Finalized by Martti Koskenniemi*, 58<sup>th</sup> sess, UN Doc A/CN.4/L.682 (13 April 2006) [44] – [45]. Similarly, the Appellate Body stated clearly in its first case that the WTO agreements are 'not to be read in clinical isolation from public international law', see Appellate Body Report, *United States – Standards of Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (20 May 1996) ('US – Gasoline') 16.

### III TOWARDS A FRAMEWORK

This section seeks to determine factors that might be relevant in evaluating the applicability of *res judicata* and *lis pendens* in WTO dispute settlement as WTO tribunals' inherent powers. Since these long-standing principles of municipal law are non-WTO norms, the applicability of these principles in WTO disputes will depend on various factors, particularly their legal status, determinacy, ability to operate in WTO disputes, and consistency with WTO law. The following sections will explain in detail the meaning and the relevance of these factors.

#### *A The Legal Status*

The first criterion that might assist in assessing the applicability of *res judicata* and *lis pendens* in WTO disputes under the tribunals' inherent powers is their legal status. *Res judicata* and *lis pendens* are non-WTO norms; they are not included in any WTO-covered agreement. Therefore, from the perspective of inherent powers,<sup>57</sup> the minimum requirement for them to be considered in WTO disputes is that they qualify as general principles of law within the meaning of Article 38(1)(c) of the ICJ Statute, which has been traditionally considered as providing a 'universal, or at least dominant perception as to the sources of international law'.<sup>58</sup> In fact, even scholars who consider that the applicable law in WTO disputes is not limited to WTO-covered agreements do not advocate for an application of sources other than those provided in Article 38(1)(c).<sup>59</sup> Mitchell has pointed out that a principle can only be used on the basis that it falls within the WTO tribunals' inherent powers if, among other conditions, it is recognized as a general principle of law.<sup>60</sup> This is because, in Mitchell's view, '[i]nherent jurisdiction does not provide a vehicle for applying any

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<sup>57</sup> It is worth reemphasizing that this section and the following sections look at the applicability of *res judicata* and *lis pendens* from the perspective of WTO tribunals' inherent powers, rather than explicit treaty language. The preceding section notes that it is uncertain whether and to what extent various provisions of the DSU such as Articles 1.1, 3.2, 7, 11, and 19.2 would allow the application of non-WTO norms in WTO disputes. In addition, the practice of WTO dispute settlement is also inconclusive in this regard.

<sup>58</sup> This is because, while Article 38(1) refers explicitly to the ICJ, it lists the sources of law that the Court whose function is to decide disputes 'in accordance with international law' has to apply. See Waincymer, above n 4, 374.

<sup>59</sup> See Pauwelyn, *Conflict of Norms*, above n 23; Pauwelyn, 'The Role of Public International Law', above n 23; Pauwelyn, 'How to Win a WTO Dispute Based on Non-WTO Law', above n 23, 1-53; Pauwelyn, 'Jurisdiction of the World Trade Organization', above n 23, 135-9; Bartel, above n 23; Palmetier and Mavroidis, 'The WTO Legal System', above n 23.

<sup>60</sup> Mitchell and Heaton, above n 33, 572.

rule an international tribunal wishes to apply'.<sup>61</sup> The merit in Mitchell's approach is that it helps draw the boundary of WTO tribunals' inherent powers, which are not explicitly written down in the constitutive instrument. While Damme appears correct in observing that 'the essence of the judicial function lies in its limitations',<sup>62</sup> Mitchell has moved a step further in articulating what may constitute such a limitation.

The limitation that international tribunals can only use their inherent powers to apply rules that have qualified as general principles of law seems to originate in the requirements of legitimacy. Specifically, if legitimacy could be roughly understood as implicating 'an actor's normative belief that a rule or institution ought to be obeyed',<sup>63</sup> then setting out the requirement that a rule must achieve the status of general principles of law to be applied as WTO tribunals' inherent power appears to be an optimal choice. This is because if a rule is accepted as a general principle of law, it would gain more 'compliance pull', in the sense that an actor would feel more compelled to obey the rule.<sup>64</sup> To put it simply, as observed by Franck, 'few persons or states wish to be perceived as acting in flagrant violation of a generally recognized rule of conduct'.<sup>65</sup> It may be reasoned by analogy that, in the context of WTO and RTA dispute settlement, were a WTO tribunal to apply a jurisdiction regulating norm to resolve a jurisdictional conflict, the persuasiveness of that application would depend, among other things, on whether the norm has been widely accepted as a general principle of law within the meaning of Article 38(1)(c).

Therefore, it would be appropriate to clarify that, among other conditions specified later, *res judicata* and *lis pendens* must be qualified as a general principle of law within the meaning of Article 38(1)(c) in order to be applied as WTO tribunals' inherent powers. Even though there may still be difficulties in verifying when a norm can meet this requirement,<sup>66</sup> it is arguable that the more accepted a norm is as a general

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<sup>61</sup> Ibid.

<sup>62</sup> Van Damme, above n 21, 160.

<sup>63</sup> Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press, 2007) 7.

<sup>64</sup> See Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990) 24-6 (describing the 'compliance pull').

<sup>65</sup> Ibid 54.

<sup>66</sup> See Christopher A. Ford, 'Judicial Discretion in International Jurisprudence: Article 38(1)(c) and "General Principles of Law"' (1994) 5 *Duke Journal of Comparative and International Law* 35, 66-75; Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff, 2008).

principle of law, the greater the legitimacy that norm will have when applied as an exercise of inherent power by the WTO.<sup>67</sup>

### *B Determinacy*

The requirement of determinacy is suggested by Franck's analysis on the legitimacy of international law. To Franck, determinacy reflects the ability of a rule to 'convey a clear message', and is one of the key indicators of a rule's legitimacy.<sup>68</sup> A rule that has a 'readily accessible meaning', and spells out clearly what it expects the addressees to comply with, is 'more likely to have real impact on conduct'.<sup>69</sup> Conversely, an ambiguous rule would make 'it harder to know what conformity is expected', and thus potentially provide some justification for non-compliance.<sup>70</sup> In a nutshell, '[t]he greater its determinacy, the more legitimacy the rule exhibits and the more it pulls towards compliance'.<sup>71</sup> Determinacy appears to be an internal feature of a rule and 'central to its powers to promote commitment'.<sup>72</sup> Thus, the ability of a norm in fulfilling its intended function may depend largely on whether the meaning, scope, and applicable conditions of that norm are determinable.

Determinacy appears to be a relevant factor in evaluating the applicability of *res judicata* and *lis pendens* in WTO disputes. If a norm is undetermined and controversial, its application in WTO disputes would, in terms of principle, face more obstacles. At the simplest level, it would be challenging for adjudicators to determine the exact content, scope and applicable requirements of a norm to apply it in WTO disputes. More importantly, indeterminacy would 'give rise to different and even contradictory interpretations and the possibility of arbitrariness'.<sup>73</sup> Although WTO

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<sup>67</sup> Even though *res judicata* and *lis pendens* were originally developed in municipal legal systems, in determining the legal status and content of these norms in international law, this article makes reference to not only national law, but also decisions of international courts and arbitral tribunals. This is because decisions of international courts and arbitral tribunals may indicate the recognition and reception of these norms in international law, and hence can be evidence as to whether these norms have, or have not, achieved the status of general principles of law.

<sup>68</sup> Thomas M. Franck, *Fairness in International Law and Institutions* (Clarendon Press-Oxford, 1995) 30.

<sup>69</sup> *Ibid* 31.

<sup>70</sup> *Ibid*.

<sup>71</sup> Franck, *Fairness in International Law and Institutions*, above n 68, 32-3.

<sup>72</sup> Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010) 53.

<sup>73</sup> Dencho Georgiev, 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law' (1993) 4 *European Journal of International Law* 1, 9.



tribunals' inherent powers might be a legitimate basis upon which to apply certain general principles of law in WTO disputes, it would be a step too far for these powers to accommodate norms that may be in themselves a major source of contradiction and arbitrariness. Obviously, the determinacy of a jurisdiction-regulating norm may decisively affect its applicability in WTO disputes. Even though determinacy might be a matter of degree, as 'all rules of law are by definition to some extent general',<sup>74</sup> and that certain level of indeterminacy may also be useful to provide flexibility to law,<sup>75</sup> it could still be arguable that the more determinate the rule is, the easier it could be applied, and the greater its contribution to the formulation of legitimate expectations as to what rule would be applied.

To different extents, determinacy seems to be an issue with both *res judicata* and *lis pendens*. Even if WTO tribunals decide to apply these principles, important questions as to their exact content, scope and application requirements may still remain. These issues will be explored in Part IV of this article.

### *C The Ability to Operate in WTO Dispute Settlement*

Uncertainty as to the applicability of *res judicata* and *lis pendens* in WTO disputes arises as a result of differences between the municipal legal systems in which these norms developed, on the one hand, and the system of public international law, on the other. It is widely accepted that the international legal system does not possess as high a level of systemic coherence as most municipal legal systems do. Municipal legal systems ordinarily possess a complete set of secondary rules of change and adjudication, and a unifying rule of recognition specifying sources of law and providing general criteria for the identification of its rules.<sup>76</sup> In contrast, international law is essentially a non-hierarchical legal system in which, with the exception *jus cogens*, 'the principle of the sovereign equality of states excludes all forms of hierarchical differentiation of norms'.<sup>77</sup> Few would deny the presence of secondary rules of international law, especially when one looks at the rules that govern the

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<sup>74</sup> Ibid.

<sup>75</sup> Franck, *The Power of Legitimacy*, above n 64, 53.

<sup>76</sup> See Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) 209-10; see also Franck, *The Power of Legitimacy*, above n 64, 183-94.

<sup>77</sup> Combacau, 'Le droit international: bric-à-brac ou système?' (1986) 31 *Archives de philosophies du droit* 85, 88; see also Ignaz Seidl-Hohenveldern, 'Hierarchy of Treaties' in Jan Klabbers and R. Lefeber (eds), *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag* (Martinus Nijhoff Publishers, 1998) 7, 7-9; International Law Commission, *Report of the Study Group on the Fragmentation of International Law, Finalized by Martti Koskenniemi*, 58<sup>th</sup> sess, UN Doc A/CN.4/L.682, [324]-[409].

conditions for validity and enforcement of primary rules, or the detailed list of sources of international law found in Article 38 of the ICJ Statute. Nevertheless, it is hard to establish that these secondary rules, especially rules of recognition, are complete, or have been sufficiently developed to convert international law into a unified legal system.<sup>78</sup> Therefore, international law is generally viewed as a loosely structured system with a basic level of systemic unity.<sup>79</sup> Thus, it is unclear whether jurisdiction-regulating norms, such as *res judicata* and *lis pendens*, which normally have detailed and technical applicable requirements, can operate in the loosely connected system of international law.

Moreover, the jurisdiction of international courts and tribunals is 'by no means plenary'.<sup>80</sup> Specifically, in the municipal context, 'somewhere within any legal system there will be one court or another' before which a claim can be brought.<sup>81</sup> Thus, the risk of denying justice as a result of declining jurisdiction may be significantly minimised. In contrast, this may not be the case in international law. Even though it may be possible in some situations for an international tribunal to redirect a case to another forum without taking away the applicant's 'central cause of action', in some other cases, redirection may be entirely impossible because of the risk of depriving the parties of their right to have a full and fair day in court.<sup>82</sup> These sorts of differences raise the question whether jurisdiction-regulating norms developed in municipal legal systems can operate in the context of WTO dispute settlement.

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<sup>78</sup> Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17(3) *European Journal of International Law* 483, 496.

<sup>79</sup> Ibid 499 (considering international law as 'a minimal system, resembling in many respects a *bric-à-brac* rather than an organized whole'); Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70(1) *Modern Law Review* 1, 16 (noting that 'here is a battle European jurisprudence seems to have won. ... or in the words of the first conclusion made by the ILC Study Group, "International law is a legal system"'); Zemanek, 'Cours général de droit International Public' (1997) 266 *Recueil Des Cours* 9, 61-5 ('international law forms one legal order', but its universality is quite limited); Gerhard Hafner, 'Pros and Cons Ensuring from Fragmentation of International Law' (2004) 25 *Michigan Journal of International Law* 849, 850 (regarding international law as an 'unorganized system'); Pauwelyn, *Fragmentation of International Law*, above n 377 (suggesting that international law forms 'an operating system'); International Law Commission, *Conclusions of the Work of the Study Group*, 58<sup>th</sup> sess, UN Doc A/CN.4/L.702 (18 July 2006) Conclusion No 1.

<sup>80</sup> Lowe, 'Overlapping Jurisdiction', above n 13, 198-9.

<sup>81</sup> Ibid 199.

<sup>82</sup> Ibid.

There may be many factors reflecting the operability of jurisdiction regulating norms in WTO disputes. In the case of *res judicata* and *lis pendens*, their operability may be determined by examining whether the conditions for their application, particularly, the identities of parties, object, and grounds can be met, where there is a conflict of jurisdiction between WTO and RTA. These issues will be examined in more detail in Part IV of this article.

#### *D The Consistency with WTO Law*

This criterion is comprehensively developed by Mitchell, who suggests that an essential condition for a non-WTO norm to be applied, as an exercise of WTO tribunals' inherent powers, is its consistency with WTO law, especially, the DSU and Marrakesh Agreement.<sup>83</sup>

The justification for this requirement lies in the fact that, even though possessing inherent powers that in this case may provide a legal basis to incorporate jurisdiction-regulating norms into WTO disputes, these powers, at the very least, must be weighed and balanced against requirements in the constitutive instrument. The basic nature of international dispute settlement is state consent;<sup>84</sup> as a result, an international court or tribunal cannot exercise its powers in a manner that is incompatible with what states have expressly agreed and included in the constitutive instrument. In other words, 'international courts cannot simply assert the existence of inherent powers as a type of *carte blanche* to do whatever they want',<sup>85</sup> but they could exercise an inherent power if there is no 'contradictory language in the constitutive document'.<sup>86</sup> In this regard, Alvarez succinctly remarks that 'adjudicative law-making may be barred or limited in some respect by sources of law that are available or authorised to the dispute settlers'.<sup>87</sup> Similarly, Judge Jennings emphasises that

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<sup>83</sup> Mitchell and Heaton, above n 33, 563, 575. Specifically, these authors suggest that '[i]nherent jurisdiction permits WTO Tribunals to apply only international law rules that satisfy three conditions. First, the application of the international law rule must be necessary for the WTO Tribunal to properly exercise its adjudicatory function. Second, the rule in question must have no substantive content of its own. Third, its application must not be inconsistent with the Covered Agreements'. Ibid 563.

<sup>84</sup> Gérardine Meishan Goh, *Dispute Settlement in International Space Law: A Multi-door Courthouse for Outer Space* (Martinus Nijhoff Publishers, 2007) 88; see also J. G. Merrills, *International Dispute Settlement* (Cambridge University Press, 4th ed, 2005).

<sup>85</sup> Brown, above n 40, 78 (emphasis added).

<sup>86</sup> Van Damme, above n 21, 167.

<sup>87</sup> Jose E. Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005) 561.

'[e]ven where a court creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction, the decision must be seen to emanate *reasonably and logically* from existing and previously ascertainable law. A court has no purely legislative competence'.<sup>88</sup> In the words of the WTO Appellate Body, '[n]othing in the DSU gives a panel the authority either to disregard or to modify ... explicit provisions of the DSU'.<sup>89</sup> Therefore, if WTO tribunals use inherent powers to apply non-WTO norms that are inconsistent with WTO law, they would add to or diminish the rights and obligations of WTO Members. This is plainly contrary to the requirements set out in articles 3.2 and 19.2 of the DSU, and was forcefully warned against by the Appellate Body in *India – Patent (US)*.<sup>90</sup>

It now seems well established that inherent powers could not be exercised in a manner that is inconsistent with the explicit provisions of the constitutive instrument. This means that, if *res judicata* and *lis pendens* can be proven inconsistent with WTO law, they cannot be applied as an exercise of WTO tribunals' inherent powers to resolve conflicts of jurisdiction between WTO and RTA dispute settlement. This is because, as mentioned above, the enforcement of non-WTO norms that are inconsistent with WTO law in WTO disputes would amount to adding to or diminishing the rights and obligations of WTO Members. In a nutshell, [t]he provisions of Covered Agreements and their objects and purposes may ... have the effect of rendering inapplicable in the WTO a principle that has been applied elsewhere'.<sup>91</sup>

#### IV APPLICABILITY OF *RES JUDICATA* AND *LIS PENDENS* AS AN EXERCISE OF WTO TRIBUNALS' INHERENT POWERS

##### *A Res Judicata*

*Res judicata* is a long-standing legal principle 'deriv[ing] from the Roman Law ideals of legal security and finality of decisions which was widely followed in common law and civil law countries and is sometimes considered as inherent to any legal

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<sup>88</sup> Sir Robert Jennings, 'The Judicial Function and the Rule of Law' (1987) III *International Law at the Time of its Codification, Essays in Honour of Roberto Ago* 139, 145 (emphasis added).

<sup>89</sup> Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc WT/DS50/AB/R (5 September 1997) ('*India – Patents (US)*') [92].

<sup>90</sup> *Ibid* [45]-[46]. The Appellate Body warns that panels and the Appellate Body 'must not add to or diminish rights and obligations provided in the *WTO Agreement*'.

<sup>91</sup> Mitchell and Heaton, above n 33, 576.

system'.<sup>92</sup> The basic meaning of *res judicata* has been described in a relatively consistent manner by commentators. Bin Cheng, an authoritative writer on *res judicata*, has suggested that '[r]ecognition of an award as *res judicata* means nothing else more than recognition of the fact that the terms of that award are definitive and obligatory'.<sup>93</sup> Similarly, Barnett considers that

[a] *res judicata* is a judicial decision of special character because, being pronounced by a court or tribunal having jurisdiction over the subject-matter and the parties, it disposes finally and conclusively of the matters in controversy, such that - other than on appeal - that subject-matter cannot be re-litigated between the same parties or their privities. Instead, the subject-matter becomes - as the Latin reveals - 'a thing adjudicated', with *res judicata* thereafter standing as the final and conclusive resolution of the parties' dispute.<sup>94</sup>

The recent *ILA Interim Report on Res Judicata and Arbitration* states that

[t]he term of *res judicata* refers to the general doctrine that an earlier and final adjudication by a court or arbitration is conclusive in subsequent proceedings involving the same subject-matter or relief, the same legal grounds, and the same parties ....<sup>95</sup>

Evidently, the essence of *res judicata* is that 'a party should not be allowed to re-litigate a matter that it has already litigated'.<sup>96</sup>

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<sup>92</sup> August Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3(37) *The Law and Practice of International Courts and Tribunals* 37, 43; see also, Peter R. Barnett, *Res Judicata, Estoppel and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law* (Oxford University Press, 2001) 8-9.

<sup>93</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons Limited, London, 1953) 336-7, quoting *Société Commerciale De Belgique (Belgium v Greece)* [1939] PCIJ (ser A/B) No 78, 175.

<sup>94</sup> Barnett, above n 92, 8. This section only introduces the definition of *res judicata* generally. The discussion as to whether the applicable conditions of *res judicata* could be established in the context of the WTO and RTAs will be discussed in detail in section IV.A.3 below.

<sup>95</sup> International Commercial Arbitration Committee of the International Law Association (ILA), *Interim Report: Res Judicata and Arbitration* (Berlin Conference, 2004) ('ILA Interim Report: Res Judicata') 36 <<http://www.ila-hq.org/download.cfm/docid/446043C4-9770-434D-AD7DD42F7E8E81C6>>.

<sup>96</sup> Yuval Sinai, 'Reconsidering Res Judicata: A Comparative Perspective' (2011) 21 *Duke Journal of Comparative and International Law* 253, 253. Admittedly, parallel and consecutive proceedings between the WTO and RTA fora might also be handled by a treaty clause regulating parties' choice of forum. However, while the WTO does not

The applicable conditions of *res judicata* consist of two elements, that is, identity of parties and identity of issues.<sup>97</sup> The latter is often further broken down into identity of 'object' (*petitum*) and identity of 'grounds' (*causa petendi*).<sup>98</sup> Identity of object stipulates that 'the same type of relief is sought in different proceedings', whereas identity of grounds indicates that 'the same rights and legal arguments are relied upon in different proceedings'.<sup>99</sup> The most controversial issue, as seen below, is not whether these conditions are relevant,<sup>100</sup> but how strictly or broadly they should be construed.

### ***B The Legal Status of Res Judicata***

*Res judicata* is inherent in all municipal legal systems,<sup>101</sup> in the sense that 'every legal system has produced a body of *res judicata* law'.<sup>102</sup> In international law, *res judicata* is widely considered a general principle of law.<sup>103</sup> Bin Cheng observes that '[t]here seems little, if indeed any question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings'.<sup>104</sup> International courts and tribunals, such as the PCIJ<sup>105</sup> and its successor - the ICJ,<sup>106</sup> the European Court of

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contain any such clause, it has been widely accepted that jurisdiction clauses included in various RTAs may not be enforceable in WTO disputes. See also, Pauwelyn, 'How to Win a World Trade Organization Dispute', above n 23 (arguing for application of RTA jurisdiction clauses in WTO disputes); Kwak and Marceau, above n 3, 470-1 (doubting whether exclusive choice of forum clauses 'would be sufficient to allow a WTO panel to refuse to hear the matter' where the process under these RTAs has been initiated).

<sup>97</sup> Cheng, above n 93, 339-47; Vaughan Lowe, 'Res Judicata and the Rule of Law in International Arbitration' (1996) 8 African Journal of International and Comparative Law 38, 40-1; Shany, *The Competing Jurisdictions*, above n 5, 23-8; Reinisch, above n 92, 61-73.

<sup>98</sup> Cheng, above n 93, 339-47; Vaughan Lowe, 'Res Judicata and the Rule of Law in International Arbitration' (1996) 8 African Journal of International and Comparative Law 38, 40-1; Shany, *The Competing Jurisdictions*, above n 5, 23-8; Reinisch, above n 92, 61-73.

<sup>99</sup> Reinisch, above n 92, 63.

<sup>100</sup> In addition to the identity of 'object' and 'grounds', Shany and Reinisch suggest that the 'same fact pattern', or 'identical facts' may also be an important condition. See Shany, *The Competing Jurisdictions*, above n 5, 23-8; Reinisch, above n 92, 70-2.

<sup>101</sup> Barnett, above n 92, 8.

<sup>102</sup> Robert C. Casad and Kevin M. Clermont, *Res Judicata: A Handbook on its Theory, Doctrine, and Practice* (Carolina Academic Press, 2001) 5.

<sup>103</sup> This observation is made by Reinisch; see Reinisch, above n 92, 44.

<sup>104</sup> Cheng, above n 93, 153, 336.

<sup>105</sup> See, eg, *Societe Commerciale De Belgique (Belgium v Greece) (Judgment)* [1939] PCIJ (ser A/B) No 78, 175; *Polish Postal Service in Danzig (Advisory Opinion)* [1925] PCIJ (ser B) No 11, 30; *Interpretation of Judgements Nos. 7 and 8 concerning the case of the Factory at Chorzow*

Justice (ECJ),<sup>107</sup> and arbitral tribunals,<sup>108</sup> have also confirmed that *res judicata* is a legally binding principle. In *Chorzow Factory*, for example, Judge Anzilotti referred to *res judicata* as one of the 'general principles of law recognised by civilised nations'.<sup>109</sup> Similarly, in *Waste Management v Mexico (No 2)*, the tribunal held that '[t]here is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38(1)(c) of the Statute'.<sup>110</sup> Reinisch appears correct, therefore, in stating that '[d]oubts about the existence of *res judicata* as a rule of international law seem to be unfounded'.<sup>111</sup>

The qualification of *res judicata* as a general principle of law has important implications for its potential application in WTO disputes. In light of the framework set out in section III, the broad acceptance of *res judicata* as a general principle of law would add a significant amount of legitimacy and persuasiveness to the application of this principle in WTO disputes. The legitimacy and persuasiveness of the exercise of WTO tribunals' inherent powers is supported by the legal status of *res judicata* as a general principle of law. This may explain why Mitchell perceives the application of general principles of law in WTO disputes on the basis of inherent powers as a

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(*Germany v Poland*) 1927 PCIJ (ser A) No 11, 21; *Factory at Chorzow (Germany v Poland) (Merits)* [1928] PCIJ (ser A) No 17, 75 (Judge Ehrlich).

<sup>106</sup> See, eg, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)* [1954] 47 ICJ Rep 47, 53; *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v Nicaragua) (Judgment)* [1960] ICJ Rep 192; *South West Africa Case (Ethiopia v South Africa) (Second Phase, Judgment)* [1966] ICJ Rep 4, 240; *Requests for Interpretation of the Judgement of 11 June 1998 in the Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Judgment)* [1999] ICJ Rep 31, 39.

<sup>107</sup> See, eg, *Mrs Emilia Gualco v High Authority of the European Coal and Steel Community (C-14/64)* [1965] ECR 51; *Hoogovens Groep v Commission (C-172, 226/83)* [1985] ECR 2831; *France v Parliament (C-358/85, 51/86)* [1988] ECR 4846, 4849-4850.

<sup>108</sup> See, eg, *Trail Smelter (Award)* (1950) 3 RIAA 1905, 1950; *The Orinoco Steamship Company Case (US v Venezuela) (Award)* (1910) 11 RIAA 227, 239; *Company General of the Orinoco Case (France v Venezuela) (Award)* (1905) 10 RIAA 184, 276; *Pinus Fund (US v Mexico)* (1902) 9 RIAA 11, 12; *Waste Management (Inc. v United Mexican States (No 2)) (Decision on Preliminary Objection)* (ICSID Arbitral Tribunal, 26 June 2002, ICSID Case No ARB (AF)/00/3) [38].

<sup>109</sup> *Interpretation of Judgements Nos. 7 and 8 concerning the case of the Factory at Chorzow (Germany v Poland) (Judgment)* [1927] PCIJ (ser A) No 11, 27 (Judge Anzilotti).

<sup>110</sup> *Waste Management (Inc. v United Mexican States (No 2)) (Decision on Preliminary Objection)* (ICSID Arbitral Tribunal, 26 June 2002, ICSID Case No ARB (AF)/00/3) [38].

<sup>111</sup> Reinisch, above n 92, 44.

'principled' way to exercise WTO tribunals' inherent powers.<sup>112</sup> Here, the discretion of WTO tribunals is substantially channelled by general principles of law. This is clearly a two-way interaction, where general principles of law need a legal basis to be applied in WTO disputes,<sup>113</sup> and inherent powers need to be 'wrapped' by general principles of law to bridge their gap of legitimacy and persuasiveness.

The wide acceptance of *res judicata* as a general principle of law means that it would have little difficulty in meeting the requirement of legal status set out above. However, as discussed below, this does not mean that *res judicata* can easily satisfy other conditions to be applied in WTO disputes under WTO tribunals' inherent powers.

### C The Determinacy of Res Judicata

Although *res judicata* may be considered a general principle of law, important issues, such as its scope, content, and applicable conditions, remain 'far from consistent and settled'.<sup>114</sup> Common law systems tend to favour a broad-scope *res judicata*, whereas continental civil law systems normally follow a more formalistic approach.<sup>115</sup> Notably, variations may even exist between legal systems that belong to the same legal family such as between the English and US Common Law.<sup>116</sup>

In English common law, the principle of *res judicata* has two main forms, namely, cause of action estoppel, and issue estoppel.<sup>117</sup> Similarly, in the US legal system, *res judicata* also consists of claim preclusion (similar to cause of action estoppel) and issue preclusion (similar to issue estoppel).<sup>118</sup> However, there are some important differences between the two systems. In English Common Law, the estoppel applies

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<sup>112</sup> Mitchell and Heaton, above n 33, 568.

<sup>113</sup> This is because there is, as explained previously, no explicit treaty language to either confirm or eliminate the application of general principles of law in WTO disputes. Therefore, inherent powers become a practical basis on which tribunals may determine on a case by case basis whether a general principle of law can be applied in WTO disputes.

<sup>114</sup> *ILA Interim Report: Res Judicata*, above n 95, 39; see also Luca G. Radicati di Brozolo, 'Res Judicata and International Arbitral Awards' (Catholic University of Milan, 15 April 15 2011) 3 <<http://ssrn.com/abstract=1842685>>.

<sup>115</sup> For detailed discussions, see eg, Sinai, above n 96.

<sup>116</sup> Radicati di Brozolo, above n 114, 5.

<sup>117</sup> Sinai, above n 96, 41.

<sup>118</sup> American Law Institute, *Restatement of the Law (Second) of Judgments* (American Law Institute Publishers, 1980) Ch.3, § 13- 33; *ILA Interim Report: Res Judicata*, above n 95, 46-7; Sinai, above n 96, 359-60.



not only to the points that have actually been determined but also to the points that properly belong to the subject of litigation, and which the parties could and should have brought before the court in the earlier proceedings.<sup>119</sup> This extended application is also known as the doctrine of abuse of process,<sup>120</sup> and it is not recognised in the US Common Law. As explained in the Second Restatement of the Law, 'there are many reasons why a party might have chosen not to raise an issue, or to contest an assertion, in a particular action'.<sup>121</sup> For example, the issue may be too small, the litigation cost may outweigh the value of the lawsuit, or the forum in the earlier proceeding may be an inconvenient one.<sup>122</sup> Crucially, the Restatement considers that the interests of issue preclusion such as the conservation of judicial resources, or the maintenance of consistency, 'are less compelling when the issue on which preclusion is sought has not actually been litigated'.<sup>123</sup> Importantly, unlike the English Common Law, *res judicata* in the US may extend to third parties.<sup>124</sup>

The doctrine of *res judicata* in civil law countries is more restricted.<sup>125</sup> There is no concept of issue estoppel (issue preclusion), and thus the doctrine is applied to claims only. Civil law countries also do not recognise the doctrine of abuse of process as in English common law.<sup>126</sup> In the German civil system, for example, parties are not prevented from litigating claims that have not been submitted for adjudication.<sup>127</sup> In addition, the effect of *res judicata* does not extend to reasoning as it does in the English Common Law,<sup>128</sup> but is generally limited to the formal order of judgments. Importantly, the applicable conditions are normally construed stringently.<sup>129</sup> For

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<sup>119</sup> Ibid.

<sup>120</sup> Barnett, above n 92, 225-44; *ILA Interim Report: Res Judicata*, above n 95, 43.

<sup>121</sup> American Law Institute, *Restatement of the Law (Second) of Judgments* above n 118, Ch.3, § 27, 256-7. In American jurisprudence, the Restatements of the Law are a set of treatises on legal subjects that seek to inform judges and lawyers about general principles of common law. There have been three series of Restatements to date, all published by the American Law Institute, an organization of legal academics and practitioners founded in 1923. See <<http://www.ali.org/index.cfm?fuseaction=about.overview>>.

<sup>122</sup> Ibid 256.

<sup>123</sup> Ibid. This point will be discussed in the context of the WTO and RTAs in section IV.A.3 below.

<sup>124</sup> *ILA Interim Report: Res Judicata*, above n 95, 46.

<sup>125</sup> Ibid 49-50.

<sup>126</sup> Ibid 50.

<sup>127</sup> Sinai, above n 96, 384.

<sup>128</sup> *ILA Interim Report: Res Judicata*, above n 95, 42.

<sup>129</sup> For a detailed discussion on the principle of *res judicata* in civil law countries, especially in France and German, see *ILA Interim Report: Res Judicata*, above n 95, 49-54; Sinai, above n 96, 384-7.

instance, under the French model, the thing claimed must be identical, as must the legal basis of that claim. The identity of the parties is also interpreted narrowly to mean the same party, or their universal successors (for example, in the case of a legal merger), or successors with a specific title (such as assignee).<sup>130</sup>

The application of *res judicata* is also far from settled in international law. The hottest debate revolves around the identity test: the same parties, the same object, and the same grounds. It is sometimes argued that 'the excessive insistence' on formal identity of the parties is unsatisfactory, as this will preclude the application of *res judicata* in most cases.<sup>131</sup> Therefore, some authorities suggest that the identity of the parties needs to be considered liberally so as to also encompass proceedings involving essentially the same parties.<sup>132</sup> Even though some international courts and tribunals also adopt this liberal interpretation,<sup>133</sup> 'other authorities which point to the opposite direction, and embrace a more formal "identity of parties"', also exist.<sup>134</sup> For example, the tribunal in *CME Czech Republic BV v The Czech Republic* found that *res judicata* did not apply to the earlier award since, inter alia, the claimants in each arbitration were not the same.<sup>135</sup> Similarly, conflicting authorities also exist as to the interpretation of the same issues requirement. Some scholars advocate for a flexible approach, which asks whether 'essentially the same issue' is raised.<sup>136</sup> Reinisch, for example, considers that parallel proceedings based on 'substantially identical provisions found in different instruments' should be seen as involving the same grounds.<sup>137</sup> However, while some courts and tribunals have moved in this

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<sup>130</sup> *ILA Interim Report: Res Judicata*, above n 95, 52.

<sup>131</sup> Yuval Shany, 'Jurisdictional Competition between National and International Courts: Could International Jurisdiction-Regulating Rules Apply?' (2006) 37 *Netherlands Yearbook of International Law* 3, 21.

<sup>132</sup> *Ibid* 24; Reinisch, above n 92, 57-60.

<sup>133</sup> See, eg, *Martin v Spain* (1992) 73 Eur Comm HR 120, 134 (the Commission adopting a 'substantially the same' parties standard).

<sup>134</sup> Shany, 'Jurisdictional Competition between National and International Courts', above n 131, 23.

<sup>135</sup> *CME Czech Republic BV (The Netherlands) v The Czech Republic (Final Award)* (UNCITRAL Arbitration Proceedings, 14 March 2003) [432]; see also *ILA Interim Report: Res Judicata*, above n 95, 59.

<sup>136</sup> Shany, 'Jurisdictional Competition between National and International Courts', above n 131, 26; Lowe, 'Res Judicata and the Rule of Law', above n 97, 41; Reinisch, above n 92, 61-72.

<sup>137</sup> Reinisch, above n 92, 65.

direction,<sup>138</sup> others apply a formal identity test, and require the object and grounds of the two proceedings to be exactly the same.<sup>139</sup> The existence of these conflicting views demonstrates that the scope of *res judicata* in international law remains uncertain, and that neither the formal nor the liberal approach represents the current status of the law (*lex lata*).

The existence of diverging approaches between legal systems, and in international law, means that no meaningful universal principle of *res judicata* can be articulated. Many fundamental questions are still open. To name just a few: Should the broader notion of *res judicata* (in common law countries) or the narrow doctrine (in civil law countries) be followed? Does the preclusive effect apply only to the dispositive part or also to the reasoning of the award? How strictly should the identity test be construed? Does *res judicata* apply also to claims and issues that could and should have been raised in the earlier proceedings? Are third parties also bound by the *res judicata* effect of an award? Are there situations in which the principle of *res judicata* does not apply? Is *res judicata* part of public policy?<sup>140</sup>

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<sup>138</sup> See, eg, *Martin v Spain* (1992) 73 Eur Comm HR 120, 134-5 (applying ‘the substantially the same subject-matter’ standard); *Gubisch Maschinenfabrik v Palumbo* (C-144/86) [1987] ECR 4861, 4876 (stating that competing claims need not be entirely identical); *SGS Société Générale de Surveillance SA v Republic of the Philippines (Decision on Objections to Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/02/6, 29 January 2004) [132(c)] (holding that ‘d]rawing technical distinctions between causes of action arising under the BIT and those arising under the investment agreement is capable of giving rise to overlapping proceedings and jurisdictional uncertainty. [Thus,] such distinction ... should be avoided to the extent possible, in the interests of the efficient resolution of investment disputes by the single chosen forum’).

<sup>139</sup> *CME Czech Republic BV (The Netherlands) v The Czech Republic (Final Award)* UNCITRAL Arbitration Proceedings, 14 March 2003) [433] (noting that ‘[b]ecause the two bilateral investment treaties create rights that are not in all respects exactly the same, different claims are necessarily formulated’). See also Yuval Shany, ‘Jurisdictional Competition between National and International Courts’, above n 131, 24-5, and citations therein.

<sup>140</sup> For a more detailed discussion, see Radicati di Brozolo, above n 114, 3-4; Audley Sheppard, ‘Res Judicata and Estoppel’ in Bernardo M. Cremades and Julian D.M. Lew (eds), *Parallel State and Arbitral Procedures in International Arbitration* (ICC Publishing, 2005) 219, 229- 37.

It is not the purpose of this article to propose solutions to these fundamental questions.<sup>141</sup> The point is simply that, although *res judicata* may be identified as a general principle of law, its scope is far from settled. This may not entirely negate, although it undoubtedly diminishes, the chance that *res judicata* will be applied in WTO disputes. Indeed, as Sheppard observes, 'the differences in scope and application of *res judicata* as between legal systems and even between countries make the present state of the law unsatisfactory'.<sup>142</sup> Sheppard does not provide an explanation for this proposition, but it is clear that dissatisfaction may result from the fact that different models of *res judicata* may produce very different outcomes. In the words of Brozolo, 'applying one law rather than another may lead to dissimilar results, which is a questionable outcome'.<sup>143</sup>

In the context of WTO disputes, the indeterminacy of *res judicata* may lower the chance of it being applied on the basis of inherent powers. At the simplest level, it may be difficult for WTO adjudicators to decide which version of the principle they should apply. Even if WTO adjudicators can choose a particular model, the choice tends to be controversial. This is because, as mentioned above, the differences in the application outcomes of different models are not insignificant, and thus it is doubtful whether WTO tribunals can persuasively justify their preference for one model over others. In any event, such a choice seems to imply a great deal of discretion. In the context of the WTO, where the dominant trend is 'strict constructionism, insisting heavily that [WTO tribunals] must remain very close to the text ... of the agreements and not add to or diminish from the rights and the obligations of the contracting parties, not fill any gap, et cetera',<sup>144</sup> it is unlikely that WTO adjudicators would make

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<sup>141</sup> The International Law Association has meaningfully moved in this direction. See *ILA Interim Report: Res Judicata*, above n 95; International Commercial Arbitration Committee of the International Law Association (ILA), *Final Report: Res Judicata and Arbitration* (Toronto Conference, 2006) 27-38 <<http://www.ilahq.org/download.cfm/docid/C5443B2B-406F-4A42-9BE49EE93FB92A4C>> ('*ILA Final Report on Res Judicata*').

<sup>142</sup> Sheppard, above n 140, 237.

<sup>143</sup> Radicati di Brozolo, above n 114, 6.

<sup>144</sup> Daniel Terris, Cesare P. R. Romano, and Leigh Swigart, 'Profile: Georges Abi-Saab' in Daniel Terris, Cesare P. R. Romano, and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford University Press, 2007) 139. For a discussion on judicial restraints at the WTO, see also, eg, Gavin Goh and David Morgan, 'Political Considerations and Outcomes in WTO Dispute Rulings' (2007) 30 *University of New South Wales Law Journal* 477; Jose E. Alvarez, 'The Factors Driving and Constraining Incorporation of International Law in WTO Adjudication' in Merit E. Janow, Victoria J. Donaldson and Alan Yanovich (eds), *The*

a decision that might yield an impression of judicial law making. As a result, it appears that WTO tribunals would not apply *res judicata*, since such an application requires a far-reaching decision as to which version of the principle is applicable.

Importantly, the fact that there remain unsettled issues on the scope and application of *res judicata* means that it is difficult to predict how that principle would be formulated and applied by WTO tribunals to respond to the issue or dispute that has already been decided by an RTA tribunal.<sup>145</sup> This is 'hardly satisfactory for the parties, who obviously need to rely on uniform and especially predictable solutions'.<sup>146</sup> Obviously, from the perspective of determinacy, *res judicata*, at its current stage of development, is 'a rather unpredictable tool'<sup>147</sup> to regulate consecutive proceedings over the same dispute before the WTO and RTA fora.

#### *D The Ability of Res Judicata to Operate in WTO Disputes*

The operationality of *res judicata* in the context of WTO disputes involving a conflict of jurisdiction between WTO and RTA fora depends on whether its applicable conditions can be satisfied in this situation. It is well established that it is possible for substantially the same disputes, involving the same parties, substantially the same types of relief, and based on similar provisions, to be submitted to both the WTO and RTA fora.<sup>148</sup> Therefore, if WTO tribunals adopted the liberal construction of the identity of object and grounds, *res judicata* could operate in WTO disputes with little difficulty.

However, the liberal construction of the identity test would significantly widen the preclusive effect of *res judicata*. In this case, not only identical, but also substantially the same, issues or claims that have been decided by an RTA tribunal will be prevented from being re-litigated (or litigated in the case of substantially the same issues or claims) before the WTO forum. There is a clear tension between, on the one

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WTO Governance, Dispute Settlement & Developing Countries (Juris Publishing, 2008) 611.

<sup>145</sup> As noted previously, this article deals specifically with the applicability of *res judicata* in WTO disputes; and does not discuss the applicability of this principle in RTA disputes. The latter issue depends on the texts of individual RTAs; and hence a discussion on this issue would enlarge the scope of this article into an unmanageable extent.

<sup>146</sup> Radicati di Brozolo, above n 114, 18.

<sup>147</sup> William Thomas Worster, 'Competition and Comity in the Fragmentation of International Law' (2008) 34(1) *Brook Journal of International Law* 119, 130.

<sup>148</sup> Kwak and Marceau, above n 3, 465-7; see also Marceau, 'Conflicts of Norms', above n 22, 1109; Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13(4) *European Journal of International Law* 753, 812-3.

hand, finality and its implications such as party convenience, judicial economy, and systemic coherence and, on the other hand, procedural fairness and the interests of justice as reflected in the constant search for truth, the proper legal outcome, and the right to have a dispute decided by a court.<sup>149</sup> The liberal construction undoubtedly favours the former over the latter, and this may be unsatisfactory. In fact, the interests brought about by finality, such as party convenience and the conservation of judicial resources, which may be in themselves minor concerns in inter-state disputes,<sup>150</sup> 'are less compelling when the issue on which preclusion is sought has not actually been litigated'.<sup>151</sup> Indeed, if the disputes are not exactly the same, there is a risk of justice being denied because parties may be denied the right to have a dispute decided in the court of law. Sinai thus must be correct to suggest that *res judicata* is 'a drastic measure, it should be applied only in clear cases when a matter has been specifically litigated and a litigant has had his actual day in court'.<sup>152</sup> Multiple proceedings may be undesirable from an efficiency perspective, but, from a fairness standpoint, parties 'should be able to maintain claims before various tribunals if that is what is required for them to be made whole'.<sup>153</sup>

Given this tension, the minimal concept of *res judicata* with narrow applicable conditions seems to represent a more balanced approach because it only targets disputes in which 'a matter has been specifically litigated and a litigant has had his actual day in court'.<sup>154</sup> In this case, the preclusive effect may be justified since it can save resources for disputing parties and judicial systems, as well as enhance legal consistency and predictability. At the same time, since exactly, rather than substantially, the same dispute, is restricted, no party is in reality deprived of its fundamental right to have a dispute determined by a court. It might not be coincidental that the International Law Association, after a thorough examination of different ways to interpret the triple-identity test,<sup>155</sup> has recommended that the traditional construction requiring 'the same claim or relief', the 'same cause of actions', 'between the same parties' should be maintained.<sup>156</sup> However, despite

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<sup>149</sup> Shany, *The Competing Jurisdictions*, above n 5, 164.

<sup>150</sup> Lowe, 'Overlapping Jurisdiction', above n 13, 200-1.

<sup>151</sup> American Law Institute, *Restatement of the Law (Second) Judgments*, above n 118, Ch.3, § 27, 256.

<sup>152</sup> Sinai, above n 96, 372.

<sup>153</sup> Andrea K. Bjorklund, 'Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working' (2007) 59 *Hastings Law Journal* 101, 159.

<sup>154</sup> Sinai, above n 96, 372.

<sup>155</sup> *ILA Interim Report: Res Judicata*, above n 95, 57-9.

<sup>156</sup> *ILA Final Report on Res Judicata*, above n 141, 32-5.

representing a more balanced approach, the critical issue with narrow *res judicata* is its operability in WTO disputes. Except for the identity of parties,<sup>157</sup> other conditions, namely the object and grounds, are unlikely to be satisfied. On this point, Davey and Sapir observe that,

[e]ven though the same parties would be involved, the underlying issue would be different - in one case, a WTO violation would be claimed; in the other case, a violation of some other agreement would be claimed. Even if the provisions at issue were identical, the setting in which the cases arose would be different, and to the extent that proper interpretation requires consideration of context and of the object and purpose of the agreement, it is inevitable that the WTO agreement and the other agreement would not be identical in those respects. Thus, since the same interpretative result would not be inevitable, the claims could not be viewed as identical. Moreover, different remedies would typically be available and enforced in a different matter (i.e., in a multilateral, as opposed to a bilateral, setting).<sup>158</sup>

Clearly, under the narrow construction, the applicable conditions of *res judicata* could not be satisfied in the context of WTO and RTA dispute settlement, and thus the doctrine would not be operational.

There is evidence that WTO dispute settlement bodies would favour the narrow over the broad *res judicata*. In *India - Autos*,<sup>159</sup> the panel had to 'clarify whether the conditions on which India considered *res judicata* to be raised as a defence are met'.<sup>160</sup> It emphasised that,

[b]ecause the policy underlying *res judicata* is to bring litigation of a particular nature to an end at an appropriate stage, the key to its application should be to compare what has already been ruled on to what is being brought before the adjudicating body in the subsequent proceedings.<sup>161</sup>

The stress on the need to 'compare what has already been ruled on to what is being brought' signifies that the panel was mindful about the scope of *res judicata*. This is also evident in the panels subsequent statement, that

for *res judicata* to have any possible role in WTO dispute settlement, there should, at the very least, be in essence identity between the matter previously

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<sup>157</sup> This is because there is a wide overlap of the membership between the WTO and RTAs.

<sup>158</sup> William J. Davey and André Sapir, 'The Soft Drinks Case: The WTO and Regional Agreements' (2009) 8(1) *World Trade Review* 5, 14-5 (footnote omitted).

<sup>159</sup> Panel Report, *India - Measures Affecting the Automotive Sector*, WTO Doc WT/DS146/R, WT/DS175/R (21 December 2001) ('*India - Autos*').

<sup>160</sup> *Ibid* [7.43].

<sup>161</sup> *Ibid* [7.64] (emphasis added).

ruled on and that submitted to the subsequent panel. This requires identity between both the measures and the claims pertaining to them. There is also, for the purposes of *res judicata*, a requirement of identity of parties, which is clearly met with regard to the United States in this instance.<sup>162</sup>

Evidently, the panel considered that *res judicata* can only be relevant in WTO dispute settlement if the 'matter', which consists of 'the specific measures at issue and the legal basis of the complaint (or the claims)',<sup>163</sup> and the parties are the same. This is obviously a formal requirement as to the identity of disputes. This approach is justified because, as noted above, it can better balance conflicting interests, ensuring that the preclusive effect does not extend to a matter that has not actually been litigated. Nevertheless, it also means that the opportunity for *res judicata* to be applied between WTO decisions would be limited.

Even though *India - Autos* discusses the applicability of *res judicata* between WTO decisions only, the case may also have important implications for jurisdictional interaction between regimes because it reveals how a WTO tribunal may generally approach the principle of *res judicata*. Certainly, it is unrealistic to expect that, while WTO tribunals already strictly interpret the identity test for WTO decisions, they would construe the test liberally in disputes where the jurisdiction of WTO dispute settlement bodies appears to be in tension with the jurisdiction of a non-WTO tribunal. In *Mexico - Taxes on Soft Drinks*,<sup>164</sup> Mexico argued that 'the United States' claims under Article III of the GATT 1994 were inextricably linked to a broader dispute' under NAFTA.<sup>165</sup> The Appellate Body pointed out that 'neither the subject matter nor the respective positions of the parties are *identical* in the dispute under the NAFTA ... and the dispute before us.'<sup>166</sup> Specifically, it noted that in the alleged NAFTA dispute, the complainant and respondent were Mexico and the US respectively, but that in the WTO case, the situation was reversed. Moreover, in the NAFTA dispute, Mexico complained about US quotas, whereas in the WTO dispute, the US complained about a Mexican tax.<sup>167</sup> Impliedly, the panel and the Appellate

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<sup>162</sup> Ibid [7.66].

<sup>163</sup> Ibid [7.65].

<sup>164</sup> Panel Report, Mexico – Tax Measures on Soft Drinks, WTO Doc WT/DS308/R; Appellate Body Report, Mexico – Tax Measures on Soft Drinks and Other Beverages, WTO Doc WT/DS308/AB/R

<sup>165</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/AB/R, [54].

<sup>166</sup> Ibid (emphasis added).

<sup>167</sup> Ibid (the AB referred to Panel Report in the same case at [7.14]).



Body in this case would only view the NAFTA and WTO disputes as ‘inextricably linked’ to each other if the parties and the subject matter were ‘identical’.

These rulings suggest that, in both cases—where *res judicata* is raised between WTO decisions, and across regimes—WTO tribunals would adopt the formal identity tests. This suggests that the applicable conditions of *res judicata* would never be satisfied in WTO disputes where there is a conflict of jurisdiction between WTO and RTA dispute settlement because, as discussed above, it is hard to describe these disputes as identical.<sup>168</sup>

### *E The Consistency of Res Judicata with WTO law*

Were *res judicata* to apply in WTO disputes, WTO tribunals may have to decline jurisdiction on disputes that are conceived as having been resolved by an RTA tribunal. This might mean that WTO tribunals entitle Members to settle WTO disputes at an outside forum. This would be inconsistent with the fundamental principle set out in Article 23 DSU, which requires that,

[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.<sup>169</sup>

It is widely accepted that, in addition to its original purpose of constraining unilateral actions, Article 23 also impliedly confers upon WTO dispute settlement bodies the exclusive jurisdiction to determine WTO disputes.<sup>170</sup> Were *res judicata* to have the

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<sup>168</sup> It is worth noting that the preceding discussion concerns violation complaints where a WTO Member has violated a WTO agreement. However, in some situations, a WTO Member can initiate a dispute even when an agreement has not been violated (the so-called ‘non-violation complaint’). In such cases, the identity of the legal basis between disputes would be impossible to be established because no substantive provision of WTO law has been breached. Thus, it is also particularly difficult for *res judicata* to be applied in WTO disputes where a non-violation complaint is involved. See DSU, article 26; GATT, articles XXIII(1)(b), XIII(1)(c). For a discussion, see Christophe Larouer, ‘WTO Non-Violation Complaints: A Misunderstood Remedy in the WTO Dispute Settlement System’ (2006) 53 *Netherlands International Law Review* 97.

<sup>169</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (‘*General Agreement on Tariffs and Trade 1994*’) article XXIV, art 23.1.

<sup>170</sup> Morgan, above n 3, 256; Van Damme, above n 21, 8-10; John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (MIT Press, 2<sup>nd</sup>, 1997) 124; Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and*

effect of allowing Members to settle WTO disputes at an outside forum this implication would be undermined. The inconsistency with WTO law of declining of jurisdiction was decisively confirmed in *Mexico - Taxes on Soft Drinks*, in which the Appellate Body agreed with the Panel that various provisions of the DSU, particularly Articles 3.2, 7.1, 7.2, 11, 19.2, and 23, prevent a WTO tribunal from declining its jurisdiction in a case properly before it.<sup>171</sup>

It follows that, insofar as a conflict of jurisdiction between WTO and RTA dispute settlement is concerned, *res judicata* cannot be applied in WTO disputes. As noted previously, the legal basis on which *res judicata* may apply in WTO disputes is not the explicit treaty language, but inherent powers of WTO tribunals. As a result, the inconsistency with WTO law brought about by the application of *res judicata* may render the norm inapplicable in WTO disputes. Even though WTO tribunals possess inherent powers, these powers cannot extend so far as to allow WTO tribunals to apply rules or principles that are inconsistent with provisions in the constitutive instrument, that is, the DSU. As Damme observes, WTO tribunals can generally 'enjoy' an inherent power if there is no 'contradictory language in the constitutive document'.<sup>172</sup> As a result, if *res judicata* is in tension with WTO law, *res judicata*, rather than WTO law, may have to give way.

### F *Lis Pendens*

*Lis pendens*, literally 'a law suit pending',<sup>173</sup> is a concept describing a factual 'situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different States at the same time'.<sup>174</sup> From a policy perspective, it is widely accepted that *lis pendens* is undesirable because duplicative proceedings may lead to a waste of resources and undermine legal certainty and predictability.<sup>175</sup> It is unsurprising, therefore, that most civil law and common law

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*Materials* (Cambridge University Press, 2005) 180-81; Marceau, 'WTO Dispute Settlement and Human Rights' above n 148, 760.

<sup>171</sup> Appellate Body Report, *Mexico - Taxes on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/AB/R, [44]-[57].

<sup>172</sup> Van Damme, above n 21, 167.

<sup>173</sup> Norah Gallagher, 'Parallel Proceedings, *Res Judicata* and *Lis Pendens*: Problems and Possible Solutions' in Loukas A. Mistelis and Julian D.M. Lew QC (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International, 2006) 329, 338.

<sup>174</sup> Fawcett, above n 13, 27.

<sup>175</sup> *Ibid*; Shany, *The Competing Jurisdictions*, above n 5, 161; Gallagher, above n 173; Gregoire Andrieux, 'Declining Jurisdictions in a Future International Convention on Jurisdiction and Judgments - How Can We Benefit from Past Experiences in Conciliating the

countries 'view parallel litigation, when arising between courts of the same legal system, as an intolerable tactic and apply rules to abate the situation'.<sup>176</sup>

In many countries, declining jurisdiction is the most common response to parallel proceedings,<sup>177</sup> though the techniques vary significantly between legal traditions.<sup>178</sup> In civil law countries, declining jurisdiction is generally achieved by utilising a mechanical first-in-time rule, which holds that during the pendency of one set of proceedings, it is not permissible to initiate another set of competing proceedings concerning the same dispute.<sup>179</sup> In contrast, in common law countries, declining jurisdiction could be obtained as part of the application of the *forum non conveniens* doctrine, in which *lis pendens* is only one factor within the courts' assessment of the appropriate forum.<sup>180</sup> The fact that a proceeding has been commenced in a foreign court will not be relevant if it has been clearly initiated for tactical purposes. Only in a situation where the litigation has progressed to an advanced stage, and is likely to resolve the whole dispute, will it be given greater weight.<sup>181</sup> In this sense, *lis pendens* is a self-standing doctrine in civil law countries but only a 'facet, albeit an important one, of the doctrine of *forum non conveniens*' in common law countries.<sup>182</sup> Some studies take this divergence into consideration,<sup>183</sup> but many others seem to equate the mechanical first-in-time rule found in many civil law countries with the general meaning of the doctrine of *lis pendens*.<sup>184</sup>

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Doctrines of *Forum Non Conveniens* and *Lis Pendens*' (2005) 27 *Loyola of Los Angeles International and Comparative Law Review* 323, 349.

<sup>176</sup> Shany, *The Competing Jurisdictions*, above n 5, 162.

<sup>177</sup> Fawcett, above n 13, 28.

<sup>178</sup> International Commercial Arbitration Committee of the International Law Association (ILA), *Final Report: Lis Pendens and Arbitration* (Toronto Conference, 2006) 4 <<http://www.ila-hq.org/download.cfm/docid/C5443B2B-406F-4A42-9BE49EE93FB92A4C>> (*ILA Final Report on Lis Pendens*).

<sup>179</sup> Shany, *The Competing Jurisdictions*, above n 5, 22; *ILA Final Report on Lis Pendens*, above n 178, 7; Reinisch, above n 92, 43-4.

<sup>180</sup> Fawcett, above n 13, 29; Campbell McLachlan, 'Lis Pendens in International Litigation' (2008) 336 *Recueil Des Cours* 199, 313, 337.

<sup>181</sup> McLachlan, above n 180, 313, and citations therein.

<sup>182</sup> Fawcett, above n 13, 29.

<sup>183</sup> See, eg, *ILA Final Report on Lis Pendens*, above n 178; McLachlan, above n 180; Gilles Cuniberti, 'Parallel Litigation and Foreign Investment Dispute Settlement' (2006) 21 *ICSID Review- Foreign Investment Law Journal* 381.

<sup>184</sup> See, eg, Reinisch, above n 92, 43-4; Lowe, 'Overlapping Jurisdiction', above n 13, 202; Kwak and Marceau, above n 3, 480; Gallagher, above n 173, 338; Shany, *The Competing Jurisdictions*, above n 5, 22 (though Shany is fully aware of the divergence of *lis pendens* between common law and civil law countries).

The extent to which the doctrine of *lis pendens* can apply internationally is a longstanding question.<sup>185</sup> The debate has recently ‘taken on renewed urgency and complexity’ as a result of the multiplicity of international courts and tribunals, and the more frequent and closer interaction between these judicial bodies.<sup>186</sup> In this context, potential parallel proceedings before the WTO and RTA fora are undoubtedly a useful case study to discuss the relevance of *lis pendens* in international law. It appears that, as established in section III above, the applicability of *lis pendens* in WTO disputes to resolve a conflict of jurisdiction between WTO and RTA dispute settlement may depend on various factors, particularly its legal status, determinacy, operationality, and WTO-consistency. The following sections will provide a detailed discussion on these issues.

### *G The Legal Status of Lis Pendens*

Unlike *res judicata*, whether *lis pendens* is a general principle of law is a controversial issue. The relevant case law is ‘too scarce and non-determinative’ to confirm the existence of such a general principle.<sup>187</sup> Indeed, the question was left undecided by the Permanent Court of International Justice. In *Certain German Interests in Polish Upper Silesia*,<sup>188</sup> the Court was asked to rule on an application by Germany for a declaration of rights concerning the alleged expropriation of a factory owned by a German company at Chorzow in Poland.<sup>189</sup> In considering the effect of the pending claim brought by the owner of the factory before a Mixed Arbitral Tribunal, the court stated that it was unnecessary for it to decide whether *lis pendens* is a general principle of law because ‘the essential elements which constitute [*lis pendens*] are not present’.<sup>190</sup> In *Factory at Chorzow*,<sup>191</sup> which presented a similar set of facts to *Certain*

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<sup>185</sup> In 1925, the PCIJ commented that ‘[i]t is a much disputed question in the teaching of legal authorities and in the jurisprudence of the principal countries whether the doctrine of *lis pendance*, the object of which is to prevent the possibility of conflicting judgements, can be invoked in the international relation’ in *Certain German Interests in Polish Upper Silesia (Germany v Poland) (Judgment)* [1925] PCIJ (ser A) No 6, 20.

<sup>186</sup> McLachlan, above n 180, 264.

<sup>187</sup> Shany, *The Competing Jurisdictions*, above n 5, 244; see also McLachlan, above n 180, 456-67.

<sup>188</sup> *Certain German Interests in Polish Upper Silesia (Germany v Poland) (Judgment)* [1925] PCIJ (ser A) No 6.

<sup>189</sup> For a detailed discussion on the case law on *lis pendens*, see Shany, *The Competing Jurisdictions*, above n 5, 239-45; McLachlan, above n 180, 456-67.

<sup>190</sup> *Certain German Interests in Polish Upper Silesia (Germany v Poland) (Judgment)* [1925] PCIJ (ser A) No 6, 20.

<sup>191</sup> *Factory at Chorzow (Germany v Poland) (Jurisdiction)* 1927 PCIJ (ser A) No 9.

*German Interests in Polish Upper Silesia*, the Court rejected an application by the Polish Government asking the Court to declare that it had no jurisdiction to deal with the dispute initiated by the German Government.<sup>192</sup> Notably, in doing so, the Court made reference, albeit indirectly, to the principle of estoppel,<sup>193</sup> rather than the *lis pendens* doctrine.<sup>194</sup> Clearly, the PCIJ jurisprudence neither supports nor repudiates the relevance of *lis pendens* as a rule applicable to international courts and tribunals.<sup>195</sup>

The jurisprudence of other international courts and tribunals is also inconclusive.<sup>196</sup> Judge Treves, in a Separate Opinion in *Mox Plant*, viewed the legal status of *lis pendens* as a 'completely open' issue.<sup>197</sup> Importantly, in the *Pyramids* case,<sup>198</sup> the tribunal explicitly stated that '[w]hen the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising jurisdiction'.<sup>199</sup> This statement implies that, in this specific situation, the tribunal did not find itself bound by any preclusive rule, arguably including *lis pendens*.<sup>200</sup> This holds true even though the tribunal immediately emphasized that 'in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending the decision by the other tribunal'.<sup>201</sup> Clearly, the stay of jurisdiction in this case is treated as a matter of discretion and comity rather than obligation imposed by *lis pendens*.<sup>202</sup> In a few ECJ cases,<sup>203</sup> *lis pendens* was applied to preclude attempts to bring multiple proceedings before the ECJ.<sup>204</sup> However, the relevance of these cases to the current discussion is limited because they do not involve the jurisdictional conflicts between different international fora,

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<sup>192</sup> Ibid 32-4.

<sup>193</sup> Ibid 31.

<sup>194</sup> Shany, *The Competing Jurisdictions*, above n 5, 240.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid 242-2.

<sup>197</sup> *Ireland v United Kingdom ('MOX Plant Case') (Request for Provisional Measures)* (International Tribunal of the Law of the Sea, Case No 10, 3 December 2001) [5] (Judge Treves).

<sup>198</sup> *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (the Pyramids Case) (Award on the Merits)* (1995) 3 ICSID Rep 45.

<sup>199</sup> Ibid 129.

<sup>200</sup> Shany, *The Competing Jurisdictions*, above n 5, 243.

<sup>201</sup> Ibid 129.

<sup>202</sup> McLachlan, above n 180, 464.

<sup>203</sup> See, eg, *Hoogovens Groep v Commission* (C-172, 226/83) [1985] ECR 2831; *France v Parliament* (C-358/85, 51/86) [1988] ECR 4846, 4849-4850.

<sup>204</sup> Shany, *The Competing Jurisdictions*, above n 5, 243.

but the management of proceedings before a single judicial body.<sup>205</sup> In any event, it could be reasonably concluded that the practice of international courts and tribunals is too limited and inconclusive to either confirm or dismiss the existence of an international rule of *lis pendens*.

In academic circles, the legal status of *lis pendens* is also a controversial issue. Reinisch, for example, asserts that

it can hardly be disputed that *lis pendens* is also a rule of international law applicable in international proceedings. The widespread use and similarity of the concept of *lis pendens* in the national procedural laws of states of all traditions as well as its inclusion in a number of bi-and multilateral agreements is evidence that *lis pendens* can be regarded as a general principle of law in the sense of Article 38 of the ICJ Statute.<sup>206</sup>

However, this conclusion is troublesome. To Reinisch, *lis pendens* is strictly a first-in-time rule because, in his view, it is a rule preventing an initiation of a new proceeding, where 'litigation between the same parties and involving the same dispute is already pending'.<sup>207</sup> As noted above, however, this narrow interpretation of the rule is not reflected in the national procedural laws of states of 'all traditions'.<sup>208</sup> Common law countries, at least, do not generally apply the mechanical first-in-time rule. The convergence between civil law and common law countries is essentially limited to the idea that parallel proceedings need to be taken into account and governed. Beyond that, the two legal traditions do not share the same legal response to parallel proceedings. Consequently, *lis pendens*, in the form of a first-in-time rule, does not seem to be applicable across legal traditions,<sup>209</sup> and cannot therefore be regarded as a general principle of law in the sense of Article 38(1)(c) of the ICJ Statute.<sup>210</sup> It may not be entirely coincidental, therefore, that *lis pendens* 'does not even merit a mention in Cheng's classic 1953 study, or in Sir Hersch Lauterpacht's earlier work on private law sources'.<sup>211</sup>

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<sup>205</sup> Ibid.

<sup>206</sup> Reinisch, above n 92, 48 (citations omitted).

<sup>207</sup> Ibid 43-4.

<sup>208</sup> Ibid.

<sup>209</sup> For a discussion on this requirement, see, e.g., Jaye Ellis, 'General Principles and Comparative Law' (2011) 22(4) *European Journal of International Law* 949, 955; see also, Fabian O. Raimondo, 'General Principles of Law as Applied by International Criminal Courts and Tribunals' (2007) 6 *The Law and Practice of International Courts and Tribunals* 393, 400.

<sup>210</sup> See Cuniberti, above n 183.

<sup>211</sup> McLachlan, above n 180, 460 (citation omitted).

In addition, Reinisch argues that the existence of *lis pendens* as a general principle of law 'follows from the applicability of *res judicata*'.<sup>212</sup> He believes that it would be illogical to allow parallel proceedings to occur before different fora 'up to the point where one of them has decided the case and then prevent the other ('slower') one from proceeding as a result of *res judicata*.'<sup>213</sup> This may not necessarily be so. The application of *res judicata* means that, in any case, parties will end their dispute with one valid judgment. Nevertheless, 'declining jurisdiction on the ground that another proceeding is pending does not necessarily guarantee that the other proceeding will ultimately resolve the dispute'.<sup>214</sup> Thus, the right to have a dispute decided by a court of competent jurisdiction is more secure where *res judicata* rather than *lis pendens* is applied. Clearly, there might be compelling reasons to apply *res judicata* but not *lis pendens*.

In general, it is on the one hand undeniable that *lis pendens* 'is a fundamental principle of procedural fairness and justice that is normally considered to form part of procedural public policy in most legal systems'.<sup>215</sup> Indeed, though the legal techniques vary across legal traditions, there is 'a strong indication of the near universal opposition' to the phenomenon of parallel proceedings where they occur in the same legal system.<sup>216</sup> On the other hand, it is still far from settled whether *lis pendens* has graduated to be a general principle of law. It was established in section III.A above that if a rule cannot be unambiguously qualified as a general principle of law, it is unlikely that it will be applied in WTO disputes on the basis of inherent powers. This is because if WTO tribunals were to use their inherent powers to apply a rule that has not been clearly established as a general principle of law, the decision would yield a strong impression of judicial law making, which is obviously not the policy pursued by WTO judicial bodies. Therefore, given the above-mentioned controversy regarding the legal status of *lis pendens*, it is improbable that WTO adjudicators will use their inherent powers to apply this principle in WTO disputes.

### *H The Determinacy of Lis Pendens*

Even if there were an international *lis pendens* doctrine applicable to international courts and tribunals, the content, scope and applicable conditions of that rule would

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<sup>212</sup> Ibid 50.

<sup>213</sup> Ibid.

<sup>214</sup> Pauwelyn and Salles, above n 5, 108.

<sup>215</sup> Kaj Hober, 'Parallel Arbitration Proceedings – Duties of the Arbitrators' in Bernardo M. Cremades and Julian D.M. Lew, *Parallel State and Arbitral Procedures in International Arbitration* (ICC Publishing, 2005) 243, 253.

<sup>216</sup> Shany, *The Competing Jurisdictions*, above n 5, 154-63.

still pose difficulties. Aside from the general requirement that parallel proceedings should be avoided and governed by appropriate rules,<sup>217</sup> no further requirements associated with the *lis pendens* rule apply uniformly across legal traditions. The ILA spent the first 23 pages of its 26 page examining the meaning, scope, and applicable conditions of *lis pendens*.<sup>218</sup> However, it could not distil a universal definition of the doctrine, and ended its examination with the admission that ‘decisions of arbitral tribunals on *lis pendens* are “generally too sparse and contradictory to constitute in any way representative statements of an accepted practice amounting to a procedural rule”’.<sup>219</sup> The ILA thus agreed with Houtte that ‘there does not yet exist a clear and global transnational *lis alibi pendens*’ rule.<sup>220</sup>

One consequence of this divergence is that, if WTO tribunals were to apply *lis pendens*, they would first have to define a *lis pendens* rule for their own purposes. Such a rule may draw on the mechanical first-in-time rule applied in most civil law countries, the more flexible common law model which forms part of the doctrine of *forum non conveniens*, or an entirely new model of the *lis pendens* rule. If the latter occurs, excessive discretion could be exercised, and the application of *lis pendens* might become less predictable. This is because, as explained in section III.B above, the meaning, scope, and applicable conditions of *lis pendens* in this case would depend largely on the discretion of adjudicators, rather than clearly predefined rules. The third option would expose WTO tribunals to criticisms of judicial activism, but adopting the civil law or common law model does not necessarily present a better option. The civil law and common law techniques are vastly different and, as noted above, may lead to very different outcomes. Essentially, if the first-in-time rule is applied, the court second-seized must decline its jurisdiction in favour of the court first-seized. However, this may not be the case where the common law version, which is far less preclusive, is utilised. Under the common law framework, the court in which the second proceeding is initiated has inherent powers to either decline or

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<sup>217</sup> McLachlan, above n 180, 461, 500. In the current author’s opinion, this commonality is almost unhelpful as it does not indicate any particular solution for dealing with parallel proceedings.

<sup>218</sup> *ILA Final Report on Lis Pendens*, above n 178.

<sup>219</sup> *Ibid* 23, citing Douglas Reichert, ‘Problems with Parallel and Duplicative Proceedings: The Litispendence Principle and International Arbitration’ (1992) 8 *Arbitration International* 237, 238.

<sup>220</sup> *ILA Final Report on Lis Pendens*, above n 178, 23, citing Hans van Houtte, ‘Parallel Proceedings before State Courts and Arbitration Tribunals: Is There a Transnational *lis alibi pendens* Exception in Arbitration or Jurisdiction Convention?’ in Pierre A. Karrer (ed), *Arbitral Tribunals or State Courts: Who Must Defer to Whom? Swiss Arbitral Association Special Series No 15* (2001) 35, 53-4.



continue to rule on the dispute, and would only consider declining jurisdiction if the first litigation is far advanced and likely to decide the whole dispute.<sup>221</sup> In any event, it would be extremely challenging for WTO tribunals, as in the case of *res judicata*, to justify why they would prefer a particular model, be it a civil law or common law rule, over another one.

For the various reasons outlined above, the indeterminacy of *lis pendens* at the international level appears to seriously undercut its potential to govern parallel proceedings before international fora, particularly in the context of the WTO where, as mentioned above, adjudicators are conscious of their limited mandate and inclined to avoid decisions that are suggestive of adjudicative law making.

### *I The Ability of Lis Pendens to Operate in WTO Dispute Settlement*

Even if the difficulties concerning the legal status and determinacy might be overcome, it is still doubtful whether the current civil law and common law rules on *lis pendens* can operate in WTO disputes. For the civil law first-in-time rule, it is widely accepted that the applicable conditions are similar to that of *res judicata*, that is, identity of parties, object, and grounds between two proceedings.<sup>222</sup> The last of these conditions could never be satisfied in WTO disputes to resolve a jurisdictional conflict between WTO and RTA dispute settlement. Certainly, as analysed in section IV.A.3 above, the parties in parallel WTO and RTA proceedings may be the same, and the relevant relief provided in the WTO and RTAs may be similar, but the grounds of disputes could never be identical as they are based on different agreements. Conversely, if the identity of disputes were construed liberally to encompass also essentially the same disputes, the applicable conditions of *lis pendens* would be met in the context of WTO and RTA dispute settlement because, as mentioned above, it is possible for essentially the same disputes to be brought in parallel in both the WTO and RTA fora.

Even if the applicable requirements were satisfied, however, there might still be other reasons preventing the doctrine from operating in WTO disputes. The report of the International Law Association states that '[t]he application of *lis pendens* ... assumes that the parallel proceedings are before *fora* of equal status'.<sup>223</sup> To understand this requirement, it is worth emphasizing that *lis pendens* was originally designed to regulate parallel proceedings before municipal courts of the same legal system, where

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<sup>221</sup> McLachlan above n 180, 313 and citations therein.

<sup>222</sup> Reinisch, above n 92, 50-1.

<sup>223</sup> *ILA Final Report on Lis Pendens*, above n 178, 13.

the competing adjudicators were very similar, and very hard to distinguish from each other. They had all been instituted by the same legal order and had therefore the same authority. They would, at least in non federal countries, apply the same procedures. For political reasons, it had to be assumed that the judges would be equally skilled to try the dispute.<sup>224</sup>

The first-in-time rule is useful in the municipal context because it helps to distinguish between adjudicators who are very similar in most aspects. Cuniberti has observed that

[a]s it would not have been acceptable to find that one given first instance court was superior to or more legitimate than another first instance court of the same country, it was only natural that the institution would ultimately rely on a test that would be as neutral as possible [that is, a simple time factor] to distinguish between them and design the one that should retain jurisdiction.<sup>225</sup>

However, the situation may be different in international law. Even though international courts and tribunals might exist within a single system of international law,<sup>226</sup> their treaty-based jurisdiction suggests that there may be significant differences in 'institutional and historical context, proceeding, applicable law, remedies, expertise, and legitimacy' between international courts and tribunals.<sup>227</sup> As a consequence, it would be almost impossible to conclude that two international fora are the same or comparable.<sup>228</sup> Clearly, the equality of different fora, a condition developed in the municipal context for the application of *lis pendens*, may not be sufficient at the international level to enable a meaningful transfer of *lis pendens* from the former to the later. Pauwelyn and Salles are thus correct to suggest that the application of *lis pendens* in international law may be 'artificial'.<sup>229</sup>

These observations seem particularly true for WTO and RTA dispute settlement. Even though many RTA dispute settlement mechanisms resemble the WTO dispute settlement model, the two mechanisms are unlikely to be considered equal. The existence of certain common procedural features does not guarantee that the two processes will provide the same, speed, automaticity, enforcement mechanisms, rule-based process, and legally binding decisions. RTA dispute settlements also lack the

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<sup>224</sup> Cuniberti, above n 183, 384.

<sup>225</sup> Ibid 383.

<sup>226</sup> Shany, *The Competing Jurisdictions*, above n 5, 65-127; Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191.

<sup>227</sup> Pauwelyn and Salles, above n 5, 107.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

well-developed appeal process applicable in WTO disputes.<sup>230</sup> Thus, it seems likely that an essential prerequisite for the application of *lis pendens*, that the 'the parallel proceedings are before *fora* of equal status',<sup>231</sup> is not met in the WTO and RTA context. Thus, an adoption of *lis pendens* into this environment may not yield the desirable outcome. For example, even if the WTO tribunal had applied *lis pendens* in *Mexico - Taxes on Soft Drinks* and dismissed the case in favour of the earlier-initiated NAFTA dispute, the defect of the NAFTA process (the possibility for a NAFTA party to block the establishment of a panel by refusing to appoint a panellist), which was actually exercised by the US in this case, 'would have left the case in limbo'.<sup>232</sup>

The preceding analysis suggests that the civil law version of *lis pendens* - either construed formally or informally - may not be suitable in the context of WTO and RTA dispute settlement. This raises an interesting question as to whether the common law counterpart could operate in this context. As mentioned above, *lis pendens* does not exist as a self-standing legal doctrine in common law countries, but rather as a facet of the *forum non conveniens* doctrine.<sup>233</sup> If a genuine proceeding has been started and progressed to an advanced stage, and is likely to decide the whole dispute, then it may be a relevant, but not necessarily decisive, factor in the determination of the appropriate forum.<sup>234</sup> Obviously, in order to determine whether such a consideration is possible in WTO disputes, it is necessary to examine whether the broader doctrine of the *forum non conveniens* could be applied in WTO disputes.

The greatest advantage of the *forum non conveniens* doctrine is its flexibility.<sup>235</sup> The crucial factor for its operation is whether 'another court has jurisdiction over the action and is more appropriate than the forum before which it was brought',<sup>236</sup> rather than whether the two proceedings involve the same parties, objects, and grounds.<sup>237</sup> The *forum non conveniens* doctrine compares the processes of different courts to determine the convenience to the parties; it does not compare actions.<sup>238</sup> This means

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<sup>230</sup> For a comparison, see, eg, Davey and Sapir, above n 158, 16-7; William J. Davey, 'Dispute Settlement in the WTO and RTAs: A Comment' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreement and WTO Legal System* (Oxford University Press, 2006) 343, 354-7; Morgan, above n 3, 248-57.

<sup>231</sup> *ILA Final Report on Lis Pendens*, above n 178, 13.

<sup>232</sup> Pauwelyn and Salles, above n 5, 107.

<sup>233</sup> Fawcett, above n 13, 29.

<sup>234</sup> McLachlan, above n 180, 313; Fawcett, above n 13, 29-31; *ILA Final Report on Lis Pendens*, above n 178, 6.

<sup>235</sup> Fawcett, above n 13, 29.

<sup>236</sup> Cuniberti, above n 183, 406.

<sup>237</sup> Fawcett, above n 13, 30.

<sup>238</sup> Cuniberti, above n 183, 406.

that the use of the *forum non conveniens* doctrine in WTO disputes to assess the relevance of an RTA pending dispute would not face the technical hurdles concerning the identity of disputes as in the case of *res judicata* or the civil law version of *lis pendens*.

Nevertheless, other factors may prevent the adoption of the *forum non conveniens* doctrine. For one thing, a municipal court will only consider itself to be an inconvenient forum if the alternative forum would have jurisdiction over the whole dispute before it.<sup>239</sup> This would be difficult in the WTO and RTA context because, while WTO Members are not allowed to bring WTO disputes to the outside forum in accordance with Article 23 of the DSU, the WTO dispute settlement system is also unauthorised to 'determine rights and obligations outside the covered agreements'.<sup>240</sup> To put it another way, WTO and RTA dispute settlement systems do not have jurisdiction over the dispute before the other forum. Thus, to refer a WTO case to an RTA forum and vice versa would mean sending a dispute to a forum where it could not be resolved, depriving the parties of their fundamental right to have a dispute decided by a court of competent jurisdiction. Cuniberti succinctly observes the point as follows:

[i]t would not be permissible, for any adjudicator, to decline jurisdiction without ensuring that the competing adjudicator would have jurisdiction over the whole dispute. Any decision to the contrary would amount to a denial of justice.<sup>241</sup>

Importantly, *forum non conveniens* is a discretionary abstention doctrine.<sup>242</sup> In order to determine the appropriate forum judges must exercise their discretion in order to balance and weigh the interests of the plaintiffs and those of defendants and the administration of justice more generally.<sup>243</sup> Such a highly discretionary doctrine does not seem to fit well with the tendency of judicial restraint at the WTO, where adjudicators are acutely aware of their limited mandate, and 'have been cautious at making rulings that could be perceived as "pushing the envelope" or judicial adventurism'.<sup>244</sup>

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<sup>239</sup> Pauwelyn and Salles, above n 5, 111, and citations therein.

<sup>240</sup> Appellate Body Report, Mexico – Tax Measures on Soft Drinks and Other Beverages, WTO Doc WT/DS308/AB/R, [56].

<sup>241</sup> Cuniberti, above n 183, 421 (citation omitted).

<sup>242</sup> Pauwelyn and Salles, above n 5, 112.

<sup>243</sup> Ibid.

<sup>244</sup> Goh and Morgan, above n 144, 488.

The above considerations reveal that neither the first-in time rule nor the common law version of *lis pendens* are ideal in the context of WTO and RTA dispute settlement.

### *J The Consistency of Lis Pendens with WTO Law*

In order to assess the consistency of *lis pendens* with WTO law, it is first necessary to envision its potential outcomes. If applying the first-in-time rule, WTO tribunals would have to decline jurisdiction if the RTA case is initiated before the WTO case. Similarly, if the broader *forum non conveniens* doctrine were applied, and the WTO tribunal were to agree that the proceeding had been genuinely initiated, advanced to a substantial stage, and potentially resolved, the WTO tribunal may be required to decline its jurisdiction. The outcomes are thus the same between the civil law and common law versions, that is, the dispute would have to be adjudicated solely by an RTA tribunal. This, as explained in section IV.A.4 above, effectively amounts to allowing WTO Members to settle WTO disputes outside the framework of the WTO, which is directly inconsistent with the fundamental principle set out in Article 23 of the DSU. Under the framework established in section III, if a non-WTO rule is inconsistent with WTO law, and the legal basis for its application stems from the WTO tribunals' inherent powers, that rule could not prevail over the explicit provisions of WTO law. Given its potential WTO-inconsistency, *lis pendens* would appear to be inapplicable in WTO disputes.

## V CONCLUSION

This article has examined the principles of *res judicata* and *lis pendens* to assess their applicability in WTO dispute settlement as WTO tribunals' inherent powers to resolve jurisdictional conflicts between dispute settlement mechanisms of the WTO and RTAs. The article first established that the applicability of jurisdiction-regulating norms such as *res judicata* and *lis pendens* in WTO disputes under tribunals' inherent powers might depend on various factors, particularly, the legal status, determinacy, ability to operate in WTO disputes, and WTO-consistency of these norms. The article then used these criteria to closely evaluate the applicability of *res judicata* and *lis pendens*. It concluded that the legal status, determinacy, ability to operate in WTO disputes, and WTO-consistency vary substantially between *res judicata* and *lis pendens*, and most importantly, that none of these norms appears to satisfy all of these criteria to an acceptable degree. As a result, neither *res judicata* nor *lis pendens* might be satisfactorily applied in WTO disputes under tribunals' inherent powers to resolve jurisdictional conflicts between dispute settlement mechanisms of the WTO and RTAs.