JURISDICTIONAL HEADACHE: FINDING A SOLUTION TO THE LAYERS OF TRADE GOVERNANCE BETWEEN NEW ZEALAND AND CHINA

Hugh Goodwin*

I. Introduction

A. Overview

In 2008, New Zealand and China concluded a ground-breaking Free Trade Agreement (the FTA). The FTA was the first such trade agreement signed between China and a developed country. It was a further step in what has become a close economic relationship between the two nations. Since the signing of the FTA, the relationship between New Zealand and China has continued to strengthen, with two-way trade in goods doubling between 2008-2014,[1] ambitious new trade goals set by Prime Minister John Key and President Xi Jinping in recent years,[2] and with no significant trade disputes occurring. China is currently near level with Australia as New Zealand's largest trading partner.[3] Their relationship is set to become even closer with the potential introduction of the Regional Comprehensive Economic Partnership (RCEP), which, if completed, the two nations will both be part of.

While it bodes well that the trade relationship has been dispute-free since the signing of the FTA, there is substantial uncertainty over how a trade dispute between NZ and China would eventuate, given the current framework in which a dispute could be decided. New Zealand and China are members of the World Trade Organization (WTO), in addition to being part of the FTA. Both the WTO Agreements and the FTA include dispute resolution mechanisms, meaning they both establish a process through which a trade dispute between the countries can be resolved.[4] The problem is that there is no established link or relationship, within the agreements or otherwise, that specifies how these different mechanisms fit together. This could soon be further complicated by the potential introduction of the RCEP, a multi-national trade agreement being negotiated by New Zealand, China and many other Asian and Pacific nations, since this agreement is

* BCom, LLB (Hons), University of Canterbury. I am grateful to Dr Christian Riffel for his feedback on an earlier draft of this article. I also appreciate the comments of the two anonymous referees. All errors are my own.

1 New Zealand Government "China and New Zealand set ambitious trade goals" (press release, 19 March 2014) available online <www.beehive.govt.nz>.

2 New Zealand Government, above n 1.

3 The Treasury "Principle Trading Partners" (15 April 2015) *New Zealand Economic and Financial Overview 2015* <www.treasury.govt.nz>.

4 These will be outlined in detail in Part 2.

also likely to contain its own dispute resolution mechanism. Hence, there might be three different "layers" of governance for trade dispute settlement between NZ and China within the next few years, with no guidance as to how these layers fit together.

This article focuses on a direct consequence of the jurisdictional uncertainty that currently exists: the "duplicate litigation problem." The main object is to explore the likely outcomes of a dispute between NZ and China given the difficulty presented by this problem, and analyse solutions that could clarify the uncertainty that currently exists.

B. The Duplicate Litigation Problem

As noted above, the existence of multiple dispute settlement mechanisms that do not relate or even refer to each other creates potential problems when it comes to establishing jurisdiction for each mechanism. These problems can manifest in two primary ways. The first is when a dispute is heard and adjudicated on in one forum, and then one party, unsatisfied with the result, takes a dispute of the same subject matter to another forum to obtain a better result. This is possible when the hierarchy or relationship between the two forums is uncertain, as it is with the FTA and the WTO. This first occurrence shall be referred to as "subsequent proceedings." The second occurrence is when proceedings are concurrently pursued in different fora, also of an uncertain relationship, in regard to what is essentially the same subject matter. This situation will be referred to as "parallel proceedings." Together, these situations make up what this article calls the "duplicate litigation problem". This duplicate litigation is a possibility because of the incentives that exist for countries to either have another chance of success or to take advantage of the benefits of using a particular dispute forum such as preferable procedures used, preferable rules applied, more convenient time frames, or lower cost.

Both subsequent and parallel proceedings mean the same result: an uncertainty over which body's decision takes precedence or whether one body should hear the matter at all. The inevitable consequences of this are that parties to the dispute end up inefficiently litigating across multiple fora, and when the different bodies make decisions, they can be inconsistent with each other, sometimes dramatically. A stark illustration is the dispute between Ronald Lauder and the Czech Republic, which featured decisions by arbitral tribunals under two bilateral investment treaties.[5] Despite the fact that the two tribunals were deciding upon very similar rules, and substantively the

5 Final Award in the Matter of an UNCITRAL Arbitration: *Ronald S Lauder v The Czech Republic* (3 September 2001), reprinted in: 14 World Trade and Arbitration Materials (2002) 35; UNCITRAL Arbitral Tribunal: *CME Czech Republic BV v The Czech Republic* Partial Award (13 September 2001), reprinted in: 14 World Trade and Arbitration Materials (2002) 109. While this was not a dispute between states, it is a good example of what can happen.

same violations and facts as each other,[6] their decisions, which came out within ten days of each other, came to diametrically opposed conclusions. One tribunal found no liability for the Czech Republic while the other found it liable to pay $269,814,000 to the claimant.[7]

It is critical that this duplicate litigation problem is explored and resolved for a number of reasons. First, because of the tremendous costs involved in an international trade dispute, which both countries want to minimise. Taking a trade dispute to multiple fora involves huge financial costs, which are somewhat wasted when the result is conflicting rulings or remedies that ultimately help neither party. Another cost is the potential damage to the trading relationship between the countries. Neither country will want any obscurity to translate into a drawn out political and legal dispute that would sour their close partnership. Second, there is a wider significance coming from the fact that the New Zealand-China relationship is a "pioneer journey" in terms of a developed country having a free trade agreement with the world's new economic power. This means that any developments will be of great interest to other OECD countries, especially those seeking to build a relationship with China. Finally, the duplicate litigation problem in the NZ-China context is part of a global issue: the potential fragmentation of international dispute settlement through multiple dispute settlement mechanisms. Many new bilateral and multilateral trade agreements are being created each year as the global marketplace continues to rapidly expand. The WTO, which requires its members to notify it of any regional trade agreements created,[8] reports it has been notified of over 400 regional trade agreements (RTAs) that are currently in force.[9] This expansion of RTAs and consequently of dispute settlement mechanisms, is making international trade disputes more complex and uncertain around the world. Hence, in analysing this problem in the NZ-China context, this article will aid in the pursuit of similar solutions to the duplicate litigation problem in other contexts.

C. Outline

The article begins by analysing the relevant agreements in Part 2, concluding that in order to find a solution to the duplicate litigation problem in the NZ-China context the focus must be on the attitude of the WTO rather than an FTA Panel. Part 3 then looks at a critical preliminary issue: whether non-legal barriers are sufficient to prevent parallel or subsequent litigation scenarios from occurring between New Zealand and China. The conclusion is made

6 August Reinisch "The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes" (2004) 3 The Law and Practice of International Courts and Tribunals 37 at 39-41.

7 At 41.

8 General Agreement on Tariffs and Trade 55 UNTS 187 (opened for signature 30 October 1947, entered into force 1 January 1948), art XXIV(7).

9 World Trade Organization "Regional Trade Agreements: Facts and Figures" (2015) World Trade Organisation <www.wto.org>.

that this is not the case. Parts 4-7 then examine potential legal solutions to the duplicate litigation problem: "structural" legal changes, the res judicata and lis pendens principles and the exercise of judicial comity. Part 4 shows that while large structural changes to international law could fix this problem, such changes are not realistic in the short to medium term. Although there is an arguable case for res judicata and lis pendens, Part 5 demonstrates how the likely position taken by the WTO with respect to their status in international law, their requirements and their relationship with the Dispute Settlement Understanding means that they are unlikely to be adopted. Part 6 introduces the concept of comity and shows how it could be applied at the WTO. Part 7 analyses whether comity would be accepted at the WTO, having regard to past WTO jurisprudence, the effect of art 185 of the FTA, and policy factors. This Part concludes that the use of comity by WTO judges to show deference to art 185 of the FTA as a valid waiver of a right to a WTO panel would be a realistic solution to the duplicate litigation problem. Part 8 examines the consequences of the pending introduction of the RCEP, concluding that this new treaty would introduce significant complication to dispute settlement and certainly increase the likelihood of parallel or subsequent proceedings. The discussion shows that a dispute settlement mechanism similar to the FTA's would be preferable. Part 9 concludes.

II. The Current Agreements

A. Agreements Overview

There are two principal agreements or sets of agreements to consider in the NZ-China trading relationship: the FTA and the WTO Agreements, with a third agreement, the RCEP, a possible addition in the near future.

First in date of creation are the WTO Agreements. These agreements were negotiated during the Uruguay Round of multilateral trade negotiations conducted under the framework of the General Agreement on Tariffs and Trade (GATT) which took place from 1986-1994 and led to the creation of the WTO itself. The WTO has grown since this time and now boasts over 160 members, including New Zealand and China. The main body of the WTO Agreements came into effect in 1995. They essentially provide the WTO's "rules", spelling out members' rights and obligations. The complete set comprises about 30 agreements and separate commitments, including the Agreement Establishing the WTO, the GATT, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Dispute Settlement Understanding (DSU).[10] Most of the relevant provisions discussed in this article come from the DSU.

10 World Trade Organization "The WTO in Brief Part 3: The WTO Agreements" (2015) The World Trade Organization <www.wto.org>.

The FTA was signed between NZ and China on 7 April 2008 after approximately three years of negotiations and entered into force on 1 October 2008. The agreement is comprehensive and covers areas such as trade in goods, trade in services, intellectual property and investment.[11] Under the agreement, all tariffs for Chinese exports to NZ will be eliminated by 2016 and 96 per cent of NZ exports to China will be tariff-free by 2019.[12] It was New Zealand's biggest trade deal since the Closer Economic Relations agreement with Australia in the 1980s and since its signing the trade ties between the two nations have strengthened further, with the New Zealand Prime Minister announcing the "NZ Inc" strategy for trade with China in February 2012, a five year strategy which includes stronger political ties, doubling trade in goods, growing tourism by at least 60 per cent and education by 20 per cent, improving investment opportunities and collaborating on science and technology.[13] In March 2013 the NZ Prime Minister and Chinese President set a target of $30 billion in two-way trade by 2020.[14]

The RCEP is a free trade agreement negotiation that has been developed among 16 countries, including NZ, China, Japan, Korea, India, Singapore, Thailand and Vietnam; who between them make up a total population of over 3 billion people and make up around 27 per cent of global trade.[15] Negotiations began following the East Asia Summit on 20 November 2012, when it was announced that the RCEP would be "a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement establishing an open trade and investment environment in the region to facilitate the expansion of regional trade and investment".[16] At the time of writing, negotiations were continuing with the most recent ninth round occurring in August 2015. Based on negotiations so far, the RCEP is expected to cover a wide range of trade related issues including goods, trade in services, investment, intellectual property, and significantly for our purposes, dispute settlement.[17]

Because the WTO Agreements, the FTA and potentially the RCEP cover similar subject matter, there is great potential for a single dispute to involve multiple agreements. It is through this that duplicate litigation could arise.

11 New Zealand Ministry of Foreign Affairs and Trade "New Zealand - China Free Trade Agreement" (2015) China FTA <www.chinafta.govt.nz>.

12 New Zealand Ministry of Foreign Affairs and Trade "Key Outcomes: Goods" (17 February 2015) China FTA <www.chinafta.govt.nz>.

13 New Zealand Ministry of Foreign Affairs and Trade "People's Republic of China" (8 June 2015) New Zealand Ministry of Foreign Affairs and Trade <www.mfat.govt.nz>.

14 Above n 13, "Trade".

15 For a full list of countries and further details see New Zealand Ministry of Foreign Affairs and Trade "Regional Comprehensive Economic Partnership: Overview" (31 August 2015) New Zealand Ministry of Foreign Affairs and Trade <www.mfat.govt.nz>.

16 Above n 15, "Background".

17 Above n 15, "Negotiating History".

B. Dispute Settlement Mechanisms

The logical starting point to analyse the duplicate litigation problem in the NZ-China context is to examine the current dispute settlement agreements that could potentially come into conflict. This article focuses on the two current agreements: Chapter 16 of the New Zealand-China Free Trade Agreement (FTA) and the Dispute Settlement Understanding (DSU) of the WTO. The possibility of a third mechanism from the RCEP will be discussed later in Part 8. Below is a comparison of the FTA and WTO dispute resolution provisions, with respect to procedure and choice of forum once it has been decided that the matter will be settled through formal proceedings.

The FTA's dispute settlement provisions are found in Chapter 16. Article 185 of the FTA recognises the existence of dispute settlement mechanisms under other agreements, stating that Chapter 16 is "without prejudice" to the parties' rights under these agreements. Article 185 states that the complaining party may select the forum to be used (meaning that a non-FTA forum can be selected if applicable), which is then to be used "to the exclusion of other possible fora."[18] There are no exceptions to this. The article provides for settlement of disputes through an arbitral tribunal, which is to be set up cooperatively. A tribunal will have three members, one appointed by each country, and a chairperson who will not be a national or resident of either country and who is to be appointed jointly. The tribunal's report is said to be "final"[19] and if its orders are not followed there can be a justified suspension of equivalent concessions and obligations by the party who has obtained the order.

Under the DSU, at first instance a panel of three members is set up to decide the dispute, similar to the FTA. The WTO Secretariat selects the panellists from a list of qualified individuals.[20] Unlike the FTA, the DSU does not recognise other dispute resolution forums and emphasises the use of its own. Article 23.2(a) states that:[21]

> [Members] may not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding.

Article 3.2 is also important. It states that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements," and this is reinforced in art 19.2. Once

18 Free Trade Agreement between the Government of New Zealand and The Government of the People's Republic of China [2008] NZTS 19 (opened for signature 7 April 2008, entered into force 1 October 2008) [FTA], art 185(3).

19 At art 194(4).

20 Marrakesh Agreement Establishing the World Trade Organization 1989 UNTS 401 (opened for signature 15 April 1994, entered into force 1 January 1995) Annex 2: Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes [DSU], art 8.

21 At art 23.2(a).

a panel report is made, this can be appealed to the Appellate Body, which will make a final ruling. Like the FTA, the "enforcement mechanism" as such is suspension of concessions and obligations towards the other party.[22]

Comparing these two dispute settlement mechanisms, it is clear the DSB has an elevated status over an FTA panel. The FTA clearly states that the first forum, selected by the complaining party, is to prevail. This in itself disadvantages the use of the FTA, because it means that a party, knowing of impending dispute proceedings, and not wanting a FTA panel for whatever reason,[23] could exclude the FTA panel by requesting a WTO panel first.[24] Article 189 of the FTA further elevates the WTO mechanism's status, by requiring co-operation between the parties in selecting FTA panel members. This means that a party who wants to avoid FTA proceedings can make matters difficult by refusing to nominate a member, as the US did in the NAFTA dispute preceding the *Mexico – Soft Drinks* case.[25]

In contrast to the FTA, the DSU strongly favours its own forum. Articles 3.2, 19.2 and 23.2 are explicit in stating the primacy of DSB proceedings over others and this has been picked up in WTO case law.[26] What this means is that New Zealand and China, when contemplating litigation in either of these two forums, will know that whenever they choose to go to the WTO, if they were to later pursue FTA arbitration (including if they took proceedings concurrently after starting under the WTO) an FTA panel is going to decline to hear the case by virtue of art 185. However, if they chose the FTA first, they would have no decisive legal barrier to re-litigating or concurrently litigating the matter at the WTO. As will be discussed below, it is unclear how the WTO would treat the FTA's art 185 or subsequent and parallel proceedings in general; however at the very least there is substantial uncertainty as to what would happen, compared to a seemingly clear result if the dispute was brought before the WTO and then before the FTA. This means that if the FTA is ever used, WTO proceedings will always be available as a "back-up option".[27]

The above conclusion is critical to the direction of the analysis in this article. Because of the WTO procedure's "elevated status" over the FTA's, secondary or parallel proceedings are far more likely to be applicable before the WTO in practice. Therefore, the main body of analysis below will focus on the possibility of a party taking either a parallel or subsequent proceeding to the WTO, given there has already been an action started or concluded under the FTA. Hence, this scenario will be assumed in the discussion in the following Parts.

22 At art 22.

23 See discussion above on reasons why a forum can be more advantageous (or conversely disadvantageous).

24 FTA, art 185 is activated by one party requesting proceedings.

25 *Mexico – Tax on Soft Drinks and Other Beverages* WT/DS308/AB/R, 6 March 2006 (Report of the Appellate Body) [*Mexico – Soft Drinks*], at 23.

26 See discussion below on WTO jurisprudence.

27 Even if, as mentioned above, it is the same country trying proceedings under both for "two chances", this dynamic applies because they have to file in one forum before the other.

III. Non-Legal Barriers

While the theoretical possibility of the duplicate litigation problem being relevant in the NZ-China context has now been outlined, it is important to establish that this could eventuate in practice, given the non-legal factors that might prevent these situations from occurring. This Part will show that while there are several disincentives for either country to take a second action to the WTO, they are insufficient for one to be confident that parallel or subsequent proceedings will not occur.

First, it must be pointed out that taking subsequent or parallel proceedings before the WTO violates art 185, because art 185 requires the first forum chosen to be used to the exclusion of others. The legal effects of this will be discussed later in this article, but in breaching art 185 a government would be risking adverse non-legal consequences. On a relational level, such a violation would sour political relations between New Zealand and China. This unlawful litigation would to an extent violate the spirit of the FTA, which, write Angelo and Xiong, "generally, through its individual chapters, emphasises dispute avoidance as much as settlement."[28] This could have a number of detrimental side effects in both the short and long term. A clear example is that any country taking such action would be undermining its future position for enforcing bilateral dispute resolution under the FTA, WTO or RCEP because it would have no "moral" standing to expect the other country to act in a manner that the country itself has failed to observe in the past. There would also be various related effects spilling into other areas of diplomatic and economic relations. This would be especially detrimental from a New Zealand perspective, since China is one of its largest trading partners.

On an economic level, since pursuing other litigation on the same matter is effectively failing to implement a finding that an FTA panel has made (subsequent proceedings) or a finding it will make in future (parallel proceedings), it means that, under art 198.2 of the FTA, the other country will ultimately be able to suspend concessions and obligations "of equivalent effect" under the treaty, which could have huge economic implications in export and/or import sectors in the country violating the FTA. While both countries may be negatively affected, the violating country would be particularly exposed since the aggrieved nation is able to choose exactly which benefits and concessions are suspended, within the constraints of art 198.2-198.5. Therefore there would potentially be a large economic cost for a party to go to the WTO due to art 198, in addition to the significant legal expenses associated with taking an action before the DSB normally.

Despite the consequences described above, there is still a very real possibility that a country would take a parallel or subsequent action to the WTO. First, the incentives that exist for countries to either have another chance of success

28 A H Angelo and P Xiong "Free Trade Agreement between the Government of the People's Republic of China and the Government of New Zealand" (2007-2008) 5 New Zealand Yearbook of International Law 65 at 74.

or to take advantage of the benefits of using a particular dispute forum should not be underemphasised. Further, past cases have shown that when a particular issue is of significant importance states are willing to risk adverse consequences through multiple litigation actions. For example, in the *Argentina – Poultry* case,[29] Brazil took a WTO action after obtaining an unsatisfactory result under closely related MERCOSUR proceedings, even though that the action created the same type of political risks outlined above. There is also the Softwood Lumber IV dispute, which was litigated before NAFTA, the WTO and the US Courts.[30] Before the dispute was eventually settled by political agreement, the US continued to pursue proceedings against Canada for dumping, despite the fact that its subsidy determination had been condemned five times by a NAFTA Chapter 19 panel and three times by the WTO during the dispute.[31] The repeated attempts at litigation are an example of how a state will take such measures when it believes it can afford it.[32] This dispute is also analogous in the sense that it shows how, when one party (such as the US, or China in our context) holds a greater level of economic power and influence compared to a trade partner, the disincentives described above may have a relatively smaller effect on restricting its actions. This effect is even more apparent between New Zealand and China due to the relative sizes of their economies and the fact that China is one of New Zealand's two largest trading partners.[33] Hence, the scenarios from the duplicate litigation problem are a real risk in the NZ-China trade relationship.

IV. "Structural-Change" Solutions

Now that it has been established that subsequent and parallel proceedings are a real threat to the NZ-China trade relationship, the question of solutions must be addressed. As this problem is relevant to many trade relationships worldwide, many answers have been proposed across these different contexts. These answers range from sweeping changes to the international community to more targeted solutions. They can be roughly broken down into "structural" and "non-structural" changes to international law. This distinction separates large-scale institutional changes from changes that can be implemented internally without needing such widespread change, such as the adoption of legal principles. The focus of this article is on the latter category. However, it is worth canvassing other possibilities in order to give some context to the duplicate litigation problem.

29 *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* WT/DS241/R, 22 April 2003 (Report of the Panel) [*Argentina – Poultry*].

30 D Quayat "A Forest for the Trees: A Roadmap to Canada's Litigation Experience in Lumber IV" (2009) 12 Journal of International Economic Law 115 at 115.

31 J Pauwelyn "Adding Sweeteners to Softwood Lumber – The NAFTA Spaghetti Bowl is Cooking" (2006) 9 Journal of International Economic Law 197 at 197.

32 For example, see discussion of the US' attitude in Quayat, above n 31, at 149.

33 This is not to say New Zealand could not be the country to start subsequent or parallel litigation at the WTO.

One example of a structural change is an expanded use of the International Court of Justice (ICJ). In theory at least, this court could play an important role in resolving international disputes, for example, if it was made a supreme court of appeal for international matters. Although this is unlikely in practice, it would create a hierarchy among international courts that could go a long way to reducing the uncertainty that results from our duplicate litigation problem. Another potential solution would be to create a "conflict tribunal" that could give decisive rulings on jurisdictional issues. This would be a very direct way of solving the duplicate litigation problem. A final structural option is to explicitly define in each international agreement the scope of their jurisdiction or align the clauses that resolve jurisdictional conflict (such as the FTA's art 185) so they form a unified system. Clauses such as art 185 do improve the situation, but without applying them globally, we are left with the current patchwork of often-incompatible mechanisms.

The solutions above are not limited for their potential to resolve jurisdictional clashes. However, it is clear that these wide-ranging solutions not only involve a large amount of change, but also are unlikely to be implemented in the present international law climate or even the near future. For one thing, the ICJ is severely limited by its optional jurisdiction. Only 70 countries recognise its authority with some notable exceptions including, significantly, the People's Republic of China. There is also the hurdle of all relevant international bodies such as the WTO assenting to this, making it further unlikely. For an international conflict tribunal, a similar problem is apparent. While it might be less intrusive and more tailored to solving jurisdictional issues in trade disputes, it is still unlikely that such a body would be universally accepted in the near future. The aborted MAI agreement by the OECD is an example of such a failure.[34] Finally, a solution involving explicitly defining jurisdiction in the various international agreements also provides difficulties. If this were to be applied across all free trade agreements to create a workable system, then in addition to the international cooperation problem identified above, there would also be a huge degree of complexity required to make this work; not only in changing current agreements, but future ones also, in a way that creates a workable system.

The structural changes described above are long-term solutions: possible eventually but unlikely in the foreseeable future. Perhaps the Doha Declaration negotiating mandate to clarify and improve "disciplines and procedures under the existing WTO provisions applying to regional trade agreements"[35] can serve as a basis for a structural solution to be created. As this article focuses on the duplicate litigation problem in the New Zealand-China context, shorter-term solutions will be analysed. All are non-structural. These solutions are more realistic because they require change from judges of the relevant forums

34 Reinisch, above n 6, at 75.

35 World Trade Organization *Ministerial Declaration of 14 November 2001* WTO WT/MIN(01)/DEC/1 (2001).

or the parties themselves, with a low amount of infrastructure needed for their implementation. However, as will be shown below this in itself is a significant challenge.

V. Res Judicata and Lis Pendens

A. Judge-Made Solutions

The next Parts of the article examine legal principles as solutions to the duplicate litigation problem. To this effect, two sets of principles are analysed: res judicata and lis pendens in this Part and judicial comity in the following two Parts. They have been selected for analysis because their direct purpose is to combat subsequent and parallel proceedings, and because they operate differently, thus providing alternate possibilities for navigating the trouble of being applied by the WTO. Res judicata and lis pendens are legal principles that are widely used around the world to deal with multiple proceedings at a national level and which could arguably be used to apply in international law as well.[36] Courts use these principles to decline jurisdiction when their three requirements are met. Comity, by contrast is not a clear and precise legal principle in a strict sense, but is when courts of one jurisdiction (nationally or internationally) show a degree of deference to the law and judicial bodies of another jurisdiction.[37] One application of this deference would be to decline jurisdiction in a duplicate litigation scenario. Both options have merits as solutions, as will be demonstrated below. While these particular solutions have been selected, it is noted that other legal principles have been considered as solutions for duplicate litigation in international law, for example good faith,[38] lex specialis[39] and abuse of process.[40]

B. Introduction to Lis Pendens and Res Judicata

The first option is for the DSB to use the twin principles of res judicata and lis pendens to resolve subsequent and parallel proceedings respectively. These principles originate from common law, where they have traditionally been used to regulate multiple proceedings on a national level. Despite being of national law origin, several scholars have considered them applicable

36 T S Nguyen "The applicability of *Res Judicata* and *Lis Pendens* in World Trade Organization Dispute Settlement" (2013) 25 Bond Law Review 123 at 126.

37 See generally Jörn Kämmerer "Comity" (December 2006) *Max Planck Encyclopaedia of Public International Law* <www.opil.ouplaw.com>.

38 N Lavranos *On the Need to Regulate Competing Jurisdictions between International Courts and Tribunals* (2009) European University Institute Working Paper 2009/14 at 46.

39 August Reinisch "International Courts and Tribunals, Multiple Jurisdiction" (April 2011) *Max Planck Encyclopedia of Public International Law* <http://opil.ouplaw.com> at [27].

40 T S Nguyen "Towards a Compatible Interaction between Dispute Settlement under the WTO and Regional Trade Agreements" (2008) 5 Macquarie Journal of Business Law 113 at 131-132.

in international proceedings as well[41] and other critics have highlighted the utility of municipal legal principles in WTO disputes. For example, Lim and Gao have said that the WTO may be justified in using private international law analogies, as these norms are principles of legal reasoning based ultimately on logic, experience, and the developing practice and jurisprudence of WTO dispute settlement.[42] Res judicata was discussed in the Panel decision in *India – Autos*,[43] however no WTO decision has considered whether either principle could actually be applied in a WTO proceeding.

The general principle underlying res judicata is that "a right, question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed".[44] If applied, the principle requires a refusal to hear proceedings because the matter has already been substantially decided in another forum. Hence, if a FTA panel ruled on a particular dispute and then a materially similar matter was brought before the WTO (constituting subsequent proceedings), res judicata would stop this matter from being heard.

Lis pendens has been described as a "corollary principle" of res judicata.[45] According to the lis pendens or lis alibi pendens rule, it is not permissible to initiate new proceedings if litigation between the same parties and involving the same dispute is already pending.[46] A forum that applies lis pendens, being the second forum to which proceedings have been brought, will at first instance stay its proceedings until jurisdiction in the other forum is established. If jurisdiction is successfully established, then the second forum will decline jurisdiction.[47] The principle would apply in either a situation where both NZ and China concurrently chose a different forum out of the WTO and FTA to hear a materially similar dispute, or if one country went to both simultaneously (both of these constituting parallel proceedings).

41 E Petersmann "Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralization of Dispute Settlement in International Trade" (2006) 27 *University of Pennsylvania Journal of International Law* 273 at 355; Y Shany *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, Oxford, 2003) at 154-173 and 239-254.

42 C L Lim and H Gao "The Politics of Competing Jurisdictional Claims in WTO and RTA Disputes: The Role of Private International Law Analogies" in T Broude, M L Busch and A Porges (eds) *The Politics of International Economic Law* (Cambridge University Press, Cambridge, 2011) 282 at 314.

43 *India – Measures Affecting the Automobile Sector* WT/DS146/R, 21 December 2001 (Report of the Panel) [*India – Autos*].

44 *Amco Asia Corp v Indonesia* (1988) 89 ILR 368, at 560.

45 Reinisch, above n 6, at 43.

46 At 43.

47 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1262 UNTS 153 (opened for signature 27 September 1968, entered into force 1 February 1973). Section 8 is an example.

Res judicata and lis pendens are considered twin principles in the sense that they support the same core outcome of preventing duplicate litigation and work to the same effect, albeit in different circumstances. This is supported by Reinisch, who points out that:[48]

> As a matter of legal logic it would be inconsistent to permit parallel proceedings between the same parties in the same dispute before different dispute settlement organs 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.

C. Status Under WTO & International Law

Res judicata and lis pendens are non-WTO norms as they are not included in any WTO covered agreement listed in Appendix 1 to the DSU. Beyond this, there is no direct rule governing their application. However, they could be used as "relevant rules of international law applicable in the relations between the parties" under art 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) and the WTO has applied many general rules and principles of international law in this way.[49] Hence, the principles could qualify as "relevant rules" by being accepted as general principles of international law under art 38(1)(c) of the Statute of the ICJ, which is the widely accepted minimum standard.[50]

Res judicata is firmly established as a widely accepted rule of international law,[51] which has been articulated in a number of international decisions. A prominent one is the *Trail Smelter* arbitration between the US and Canada that finished in 1941, where it was said that "the sanctity of res judicata that attaches to a final decision of an international tribunal is an essential and settled rule of international law."[52] A more recent vindication of the principle was in the ICSID case of *Waste Management v Mexico* in 2002, where it was noted 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 of the [ICJ]."[53]

Unlike res judicata, there is scarce evidence of the application of lis pendens in international proceedings, leading to doubts over whether it can be considered as a general principle of international law. In the *Mox Plant* case, one judge described the legal status of lis pendens in international law as a "completely open" issue.[54] Other courts have used estoppel rather than

48 Reinisch, above n 6, at 50. This same reasoning would apply if one were to use lis pendens but not res judicata.

49 Nguyen, above n 40, at 129.

50 J Waincymer *WTO Litigation: Procedural Aspects of Formal Dispute Settlement* (Cameron May, London, 2002) at 374.

51 Nguyen, above n 40, at 142.

52 *Trail Smelter (US v Canada)* (1941) 3 RIAA 1905 at 1950.

53 *Waste Management v United Mexican States (Mexico's Preliminary Objection concerning the Previous Proceedings) (Decision of the Tribunal)* ICSID ARB(AF)/00/3, 26 June 2002 at [39].

54 *The MOX Plant Case (Ireland v United Kingdom) (Request for Provisional Measures)* ITLOS 10, 3 December 2001 Separate Opinion of Judge Treves at [5].

lis pendens when dealing with parallel proceedings.[55] However, substantial weight must be placed on the notion that it is a corollary principle of res judicata. The fact that they have the same broad objective and same base criteria (see below) makes it somewhat illogical to apply one without the other. There is also substantial critical recognition of the principle.[56]

Therefore, while it is likely that a WTO body would accept res judicata as a general principle of international law, the position is uncertain when it comes to lis pendens. There are further barriers to the introduction of these principles, which are discussed below.

D. Requirements of the Principles

Even if these principles were accepted as usable at the WTO, the specific requirements of res judicata and lis pendens have to be satisfied. This section will address whether these requirements could be fulfilled in the context of a NZ-China trade dispute.

There are three elements that need to be established for these principles to apply in a given international dispute. There must be: (1) the same parties, (2) the same subject matter and (3) the same legal claims.[57] All are required. These elements are the same for both principles: as shown above, while they apply in different circumstances, both are drawn from the same doctrine.[58] Hence, in considering the requirements below, the principles can be said to "rise and fall" together.

1. Parties

The first requirement is that the parties are the same. Prima facie, this should not be onerous because both the FTA and WTO only feature state-to-state dispute resolution. The FTA only concerns China and New Zealand and a subsequent WTO dispute would presumably be between these countries also. There would be no "identity" issues involving private parties (as is often the case with res judicata in international law), despite the fact that it could ultimately be private parties behind the litigation.

One potentially difficult situation could be if the subsequent WTO action involved multiple claimants, such that NZ or China was only one of a number of complainants in a panel proceeding. However, art 9 of the DSU is worded "a single panel *may* be established", hence not requiring this to happen. Therefore, it would be open to a panel to decline a request for joining proceedings, which it may be inclined to do if the respondent is strongly against this. It has also been WTO practice to examine multiple complaints together, yet keep them separate.[59]

55 Shany, above n 41, at 240.

56 See the comments of Reinisch, above n 6, at 48; and Lavranos, above n 38, at 45.

57 Pauwelyn, above n 31, at 200.

58 Hence reference to the "res judicata doctrine" below should also be taken to be inclusive of lis pendens.

59 *China – Raw Materials* is an illustrative example, where the Appellate Body both joined Mexico and the United States as appellees, but kept the European Union as a separate appellee. Full citation is: *China – Measures Related to the Exportation of Various Raw Materials*

2. Subject Matter

The second requirement is that the subject matter is the same, which means that the measures complained about must be the same. This requirement is not prima facie onerous if it is genuinely the same dispute before the WTO, but as highlighted by Pauwelyn, it can be difficult to determine where to draw the line. In discussing the similar WTO and NAFTA cases that were encompassed in the *Softwood Lumber IV* dispute, Pauwelyn notes that the NAFTA case in 2002 was concerned with the US' determination on what constituted a material injury from Canada's lumber imports, but then the 2004 WTO case was based on a *re-determination,* concerning the same period of investigation but made on the basis of a different (ie reopened) record.[60] This raises the question of how liberally the requirements of res judicata should be applied. Different national jurisdictions have interpreted the requirements differently, with common law systems tending to be more formalistic and civil law systems more broad-based.[61] Choosing between these approaches will inevitably mean a trade-off between allowing the principle to operate in deserving cases (even though the measures for example may not be exactly the same) and avoiding abuse of the doctrine in genuinely different matters. The WTO would have to choose where to draw the line between a broad and a narrow approach, although critics such as Nguyen highlight that simply due to the fact that the WTO has to make this choice, it lessens the strength of this principle because of the uncertainty about which precise form of res judicata will be applied.[62]

3. Legal Claims

The final requirement is that the legal claims the same, meaning that the two claims concerned are based on the same rights and legal arguments. This is the most contentious of the three. As with subject matter, this is a requirement that the WTO would have to choose how narrowly to construe, however the current international practice seems to indicate that a tighter approach would be taken. In the only case where a WTO body has discussed res judicata, the Panel in *India – Autos* said that "to argue that the claims are the same merely because the same provision is in issue would be a strained usage of the notion of claim" for the purposes of res judicata, going on to say that the Panel would have to "at the very least accurately identify the precise legal basis for the claimed violation".[63] While the Panel did not decide whether res judicata could in fact be applied by the WTO, these dicta indicate that a strict approach would be taken.[64] Another example is in the *Lauder–Czech Republic* dispute (discussed above), where the tribunal based in Stockholm

WT/DS394/AB/R WT/DS395/AB/R WT/DS398/AB/R, 30 January 2012 (Reports of the Appellate Body).

60 Pauwelyn, above n 31, at 201.

61 Nguyen, above n 40, at 144.

62 Nguyen, above n 40, at 150.

63 *India – Autos*, above n 43, at [7.89].

64 At [7.88]-[7.89].

gave as one of the reasons for denying res judicata that the two arbitrations were based on different bilateral investment treaties, with comparable but not identical provisions.[65] This also implies that near to identical provisions are necessary.[66] Kwak and Marceau also ascribe to this position, highlighting the problem that "certain specific defences may be available only in one treaty; or time-limits, procedural rights and remedies may differ."[67] This would make it difficult to apply res judicata and lis pendens in the NZ-China context when the FTA measures are not essentially identical to WTO provisions.

While the above may be regarded as the generally established position, there have been suggestions that a less restrictive approach could be taken. For example, in the *Southern Bluefin Tuna* case, similar measures across two different conventions, the Convention for the Conservation of Southern Bluefin Tuna (CCSBT) and the UN Convention on the Law of the Sea (UNCLOS), were considered. While neither res judicata nor lis pendens had to be applied in the case, the tribunal declared that:[68]

> [T]he Parties to this dispute [...] are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.

In addition to this, critics such as Shany,[69] Reinisch[70] and Lavranos[71] have advocated for a flexible, substantive approach to this question in international proceedings.

If a "substantively similar" test were used, this would open the door for res judicata to be applicable. Kwak and Marceau highlight how "many RTAs have (substantive) rights and obligations that are parallel to those of the WTO Agreement,"[72] and the NZ–China FTA is one of these. Article 1 of the FTA declares the treaty to be consistent with art XXIV GATT and art V GATS. Further, important sections of the GATT are specifically incorporated into the FTA, such as the national treatment obligation under art III GATT and the exceptions under art XX GATT and art XIV GATS.[73]

This section has shown that if a narrow construction is taken of the three requirements for res judicata and lis pendens to apply, then they are unlikely to succeed in a WTO dispute. While there may be merit in adopting a more

65 *CME Czech Republic BV (The Netherlands) v The Czech Republic (Final Award)* Svea Court of Appeals, 14 March 2003.

66 W Dodge "Res Judicata" (January 2008) *Max Planck Encyclopedia of Public International Law* <www.opil.ouplaw.com>.

67 Kyung Kwak and Gabrielle Marceau "Overlaps and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements" (paper presented to Conference on Regional Trade Agreements and World Trade Organization, 26 April 2002) at 9.

68 *Southern Bluefin Tuna case (Australia and New Zealand v. Japan) (Award on Jurisdiction and Admissibility)* Arbitral Tribunal 39 ILM 1359, 4 August 2000 at [54].

69 Shany, above n 41, at 271.

70 Reinisch, above n 6, at 64.

71 Lavranos, above n 38, at 45-46.

72 Kwak and Marceau, above n 67, at 2.

73 See arts 6 and 200 of the FTA respectively.

substantive approach, the current consensus is that the narrow approach is to be preferred by international bodies and would likely be taken by the WTO.[74] This further damages the applicability of these principles in the NZ-China context.

E. WTO Jurisprudence

Even if the requirements could be established in the NZ-China context, there is another major hurdle to be overcome; that the principles conflict with certain provisions of the DSU.[75] These provisions on their face appear to specifically preclude application of res judicata and lis pendens, because the principles require an abdication of jurisdiction in favour of another forum. This seems to be the view taken by the DSB.

Most instructive in this matter is the Panel decision in *Argentina – Poultry*[76] in 2003. The respondent Argentina did not argue on the basis of res judicata in the case, although Paraguay as a third party did do so. However, the decision by the Appellate Body is highly relevant to the potential application of the principle. Its most illuminating comments were made in response to an argument by Argentina that the Panel should take the dispute settlement framework of MERCOSUR into account when interpreting the WTO agreements, as a rule of international law under 31(3)(c) VCLT. Argentina argued that in doing so, the Panel should be bound by "previous MERCOSUR rulings regarding the measure at issue."[77]

The Panel found that Argentina was not really arguing for the Panel to interpret the DSU in a particular way, it was actually asking the Panel to rule in a particular way. It went on to say: "there is no basis in Article 3.2 of the DSU, or any other provision, to suggest that we are bound to rule in a particular way, or apply the relevant WTO provisions in a particular way."[78] This is a clear statement that the Panel did not believe it would ever be possible to bind a DSB in any way, given the lack of support for this in the DSU. The Panel then went even further, saying that "we are not even bound to follow rulings contained in adopted WTO panel reports, so we see no reason at all why we should be bound by the rulings of non-WTO dispute settlement bodies".[79] This statement by implication signals the Panel would not consider itself bound by res judicata or lis pendens, as both principles require a Panel to "rule in a particular way,"[80] when there is parallel or subsequent litigation.

This contrary interpretation is a major obstacle for the implementation of these principles. It might be challenged as merely one interpretation, especially since it is only at the panel level. One could point to the fact

74 See further the discussion in Nguyen, above n 40, at 151-153.
75 As mentioned above, arts 3.2, 19.2 and 23.2 are clear in giving a preference to WTO dispute settlement over other mechanisms.
76 *Argentina – Poultry*, above n 29.
77 At [7.21].
78 At [7.41].
79 At [7.41].
80 At [7.41].

that despite there being no indication in the DSU that the res judicata doctrine could be applied, there is nothing that specifically precludes it. Also, the Panel did not address res judicata at all, even though it was raised by Paraguay, perhaps meaning it was reluctant to specifically denounce it. This also occurred in *India – Autos,* where the Panel, despite discussing res judicata at length with respect to the facts of the case, said that, "[t]he Panel does not seek to rule on whether the doctrine could potentially apply to WTO dispute settlement."[81] However, there is still the problem that applying the doctrine is at odds with art 3.2, which says that, "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements," which could be held to include the right to have a case heard substantively. Again, this is not specifically stated in the DSU, although art 23 does say, "[w]hen Members seek the redress of a violation of obligations … they shall have recourse to … the rules and procedures of this Understanding" and that Members shall "not make a determination to the effect that a violation has occurred … except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding". These words indicate that to prevent a Panel from substantively hearing a case would be "diminishing" a country's rights as per 3.2. The Appellate Body in *Mexico – Soft Drinks*, which is discussed in the following part, has taken up this interpretation.

The somewhat unsatisfactory conclusion to be drawn from this is that based on the current interpretations of the DSB bodies, res judicata and lis pendens are inconsistent with the DSU provisions. This couples with the difficulty of the status of lis pendens under international law and the specific requirements of the principles, especially the legal claims requirement. Given these difficulties, the principles, while not definitely precluded as solutions, seem unlikely to be applied by the WTO in the NZ-China context. They may retain relevance however in that a broader form of the principles could serve as a basis for applying judicial comity, the second solution discussed below.

VI. Judicial Comity I: The Concept and Potential Models

A. Introduction

The second proposed solution is the use of comity by WTO judges. Judicial comity (or just "comity") involves courts in one jurisdiction showing a degree of deference to the law and legal institutions of another jurisdiction. Reinisch defines comity as when international dispute settlement institutions "adhere to the persuasive authority of decisions rendered by other courts or tribunals which are not formally binding on them in order to avoid

81 *India – Autos*, above n 43, at [7.103].

substantive conflicts."[82] When applied, comity has a similar effect to both res judicata and lis pendens, but operates quite differently, relying primarily on judicial discretion.[83] It has been described as a legal principle,[84] but as noted by D'Alterio, despite its ubiquitous use the term has been used to refer to a wide range of juridically diverse definitions and practices, "thus creating much confusion and a questionable overlapping of significations."[85]

There are two ways in which judicial comity could be introduced by WTO judges in a NZ-China dispute that involves parallel or subsequent proceedings with a dispute under the FTA. The first is as a general principle of international law as per art 38 of the ICJ Statute to be applied to determine whether the WTO Body should decline to hear a dispute. There is evidence to argue that comity would qualify as a general principle: it is widely used in the US,[86] has been used in different forms by various European Courts[87] and has received positive treatment in an ICSID decision.[88] Further, it is well recognised as a general principle of law by international law commentators. Shany describes the principle as having the potential to create "a framework for jurisdictional interaction" that will enable international courts and tribunals to apply rules originating in other judicial institutions.[89] Lavranos submits that it is part of the "principles of justice" in accordance with which international courts and tribunals must make their decisions.[90] However, others have doubted whether it is yet to elevate to the status of a general principle of international law. As noted above, D'Alterio has recognised the confusion caused by the various practices being referred to as comity,[91] and Kämmerer, writing for the *Max Planck Encyclopaedia of International Law*, is hesitant to label comity as a principle of international law, with "its limits with international law remain[ing] in many regards unclear".[92]

If judicial comity could not be accepted as a general principle of international law by itself, it could alternatively be introduced as emanating from the principle of good faith. Good faith is undisputably a general

82 Reinisch, above n 39, at [26].
83 In the case of *Hilton v Guyot* [1895] 159 US 113 at 163-164, comity was described as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other".
84 Lavranos, above n 38, at 47.
85 E D'Alterio "From Judicial Comity to Legal Comity: A Judicial Solution to a Global Disorder?" (paper presented to The New Public Law in a Global (Dis)Order – A Perspective from Italy, Jean Monnet Working Paper 13/10, 2010) at 8.
86 See generally C N Jansen "Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings" (2006) 27 University of Pennsylvania Journal of International Economic Law 601.
87 See discussion below.
88 *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* [1985] 3 ICSID Rep 112 at 129.
89 Lavranos, above n 38, at 46 (repeating comments of Professor Yuval Shany on open citation).
90 At 48.
91 D'Alterio, above n 85, at 8.
92 Kämmerer, above n 37, at [1].

principle of international law as per art 38 of the ICJ Statute.[93] It is also contained in the DSU; art 3.10 states that "if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute." Kämmerer highlights the "proximity" of comity to good faith,[94] stating that "comity can in individual cases determine what is required by good faith, which takes into account reliability based on tradition and expectations of courtesy".[95] Hence, WTO judges can use comity as an extension of good faith to determine what is required of them in a situation involving parallel or subsequent proceedings.

A useful recent illustration of judicial comity comes from a Dominican Republic-Central America FTA (CAFTA-DR) Panel[96] ruling in November 2014. The Panel had to decide how to address, as a matter of procedure, a request by Guatemala for a preliminary ruling. In coming to its decision, the Panel decided to take WTO dispute settlement practice into account, expressing that it was "mindful of the practice of [WTO] panels."[97] Importantly, it did so despite recognising that this practice had developed under different international agreements, not the CAFTA-DR.[98] It said:[99]

> Since both disputing Parties see such practice as relevant here, it is not inappropriate for us to consider how WTO dispute settlement panels have dealt with preliminary ruling requests and how they have taken account of due process in doing so.

By taking the practice of WTO bodies as a consideration in making its decision, the Panel exercised comity. It was not obligated under the CAFTA-DR to consider WTO practice, but decided to take it into account simply because it was appropriate in the case at hand. Similarly, what is sought in our NZ-China context is that WTO bodies, while not obligated to do so, recognise that an FTA panel has made a decision on a materially similar matter, and take this into account when deciding whether to exercise jurisdiction. That is, they show a degree of deference to FTA proceedings just like the CAFTA-DR panel showed to WTO proceedings.

By comparison with res judicata and lis pendens, the question of precisely how to apply comity to the NZ-China context is an open one due to its discretionary nature. Critics discussing the principle tend to do so in a descriptive rather than prescriptive way. For example Lavranos, describing what the principle entails for judges and arbitrators, says that "[e]ssentially, it means delivering justice towards: (i) the parties involved in a dispute,

93 M Kotzur "Good Faith (Bona Fide)" (January 2009) *Max Planck Encyclopedia of Public International Law* <www.opil.ouplaw.com>.

94 Kämmerer, above n 37, at [11].

95 At [7].

96 This panel was set up under the Dominican Republic-Central America Free Trade Agreement.

97 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) (Ruling on the Procedure for Addressing Guatemala's Request for a Preliminary Ruling)* Arbitral Panel Established Pursuant to Chapter Twenty of the CAFTA-DR, 20 November 2014 at [54].

98 At [54].

99 At [54].

(ii) other international courts and tribunals, and (iii) the rule of law."[100] He does not go further than this. Calamita writes that "in exercising this comity-based discretion, the courts … are empowered to craft rules based upon the fundamental concerns addressed by principles of comity and raised in international cases."[101] This shows that flexibility, along with deference, is the defining factor of comity. The principle encourages judges and arbitrators to use their discretion to create an appropriate set of rules or principles for settling jurisdictional problems. Therefore it is not the place of this article to strictly define the way in which comity should be applied, as this would be removing part of its merits as a solution. It is hoped that WTO judges could apply comity in a way that evolves to balance the competing needs of enforcing the WTO's authority and respecting the jurisdiction of other international bodies.

B. Models

Despite the flexibility emphasised, it is still pertinent to provide some sort of framework within which comity can be approached in the NZ-China context. Without this, judicial comity could be misunderstood for simply "unbounded judicial discretion," which has been criticised. For example, Calamita has said that "unless principles of comity are used to fashion legal rules that may be understood and applied by courts and litigants, mere invocations of "comity" can lead to undesirable ad hoc decision-making."[102] This section shall examine two quite different comity methods that could be used or adapted by the WTO. While neither can presently be considered as "relevant rules of international law" under art 31(3)(c) VCLT to be used to interpret the WTO Agreements, these methods are sufficient to serve as persuasive authority for a WTO body to develop its own model of judicial comity for the WTO-FTA context, once it has accepted the use of comity in principle.

1. *Solange* Method

The first model to examine is known as the *Solange* method. This method has been put forward by Lavranos who, significantly, has claimed that the method has been, and can be used at the WTO. German for "as long as", the *Solange* method was first employed by the Federal Constitutional Court of Germany (BVerfG) in 1974 to determine the jurisdiction in regards to fundamental rights between itself and the Court of Justice of the European Union (CJEU), then known as the European Court of Justice (ECJ). The method as developed by the BVerfG involves the maintenance of a "reserve jurisdiction," such that if the competing court (being the ECJ in this instance)

100 Lavranos, above n 38, at 47-48.

101 N J Calamita "Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings" (2006) 27 University of Pennsylvania Journal of International Economic Law 601 at 606.

102 At 652.

in its case law offers effective protection[103] for fundamental rights, the BVerfG will cede jurisdiction to that court, accepting its decisions as authoritative and final.[104] However if this is not done then the BVerfG exercises its reserve jurisdiction to intervene, even if the matter has been litigated at the other court. Lavranos describes how the BVerfG's use of the method has been "wavelike", adjusting according to the level of rights protection given by the CJEU.

Lavranos claims the doctrine can not only be used between national and international forums on a vertical basis, but also between international forums like the WTO horizontally.[105] He claims that the WTO Panel in *Brazil – Tyres*,[106] without expressing it as such, used the method when it "accepted the findings of the MERCOSUR Arbitral Tribunal as a fact of the case" and "did not review Brazil's defense strategy before that tribunal."[107] He explains that even though the WTO panel exercised its jurisdiction in the case, it respected the jurisdiction of the MERCOSUR Arbitral Tribunal and took its award adequately into account by concluding that Brazil did not violate its WTO obligations when implementing the MERCOSUR Arbitral Tribunal decision.[108]

Lavranos then explains how the *Solange* method could have been used in another WTO case, *Mexico – Soft Drinks*:[109]

> In the Mexico soft drinks case, the Solange method could have been used in order to force the parties involved in the dispute to find a solution within the NAFTA dispute settlement body rather than litigate the same dispute again before another body. As mentioned above, the Mexico soft drinks dispute is closely related to the much broader and long-standing sugar dispute between the US and Mexico. The WTO panel and Appellate Body had already found Mexico in breach of similar measures, so there was no need to re-litigate the dispute again before the WTO …

Lavranos' claims about the *Solange* method are intriguing, especially the purported applicability at the WTO. However he does not comment on how the "reserve jurisdiction" component would be specifically applied. The BVerfG's reserve jurisdiction was with respect to fundamental rights against the acts of public organs.[110] There is a big conceptual gap between this use and use of a reserve jurisdiction by the WTO, which does not deal with rights to be used against states, but rather the rights *of states* that are set out under the WTO Agreements. The most logical application would be that the WTO exercises a reserve jurisdiction in order to be satisfied that the

103 Meaning in this case to a minimum level as guaranteed by the German Constitution.
104 Lavranos, above n 38, at 50.
105 At 49.
106 *Brazil – Measures Affecting Imports of Retreaded Tyres* WT/DS332/R, 12 June 2007 (Report of the Panel).
107 Lavranos, above n 38, at 54.
108 At 54.
109 At 54.
110 At 50.

substantive rights of its members are protected,[111] although this is not clear from Lavranos' analysis. As shown in the above extract regarding *Mexico – Soft Drinks*, he describes the ultimate actions of what a WTO body should do in using the method, without discussing how it would apply conceptually. If this is the case, then it is questionable whether this should be the sole criterion appropriate to the WTO, which ultimately adjudicates between states rather than individuals.

2. New Jersey Method

A different framework has been proposed by the courts of New Jersey in the United States for dealing with parallel proceedings involving a domestic and an international dispute (although it could also be used for subsequent proceedings). Under the "New Jersey rule" once it is established that (1) there is a first-filed action in another jurisdiction, (2) involving similar parties, claims, and legal issues and (3) in which the proponent of the later-filed domestic action will have (or did have) the opportunity for adequate relief, the burden of proof shifts to the party seeking to bring the belated action to establish that there are "special equities" that nonetheless favour retention of the case by court.[112] It is notable that requirement (2) of this method contains the same basic three requirements of res judicata. The salient difference between this model and the res judicata doctrine is the further step where the burden of proof shifts and "special equities" are considered. These "special equities" could encompass a range of potential factors that WTO bodies could use to decide whether to stay proceedings. Such factors in the NZ-China context might include whether there have been any procedural defects in a FTA dispute, or whether a party has used the FTA's art 185 abusively, for example if they unconscionably broke off negotiations to go to the WTO so as to exclude the possibility of FTA arbitration.[113] These factors could evolve and develop through subsequent cases.

As this model subsumes the res judicata and lis pendens requirements, it naturally suffers from the same problems associated with those principles, especially the "legal cause" requirement. However, with an option to consider "special equities" of the case, there is more space to give broader meanings to the three requirements, because any deviation from the traditional requirements could be taken into account at this later stage. The similarity with the res judicata doctrine also means that the negative treatment by the WTO could be applied to this method. But again, the discretionary nature of this comity model separates it from res judicata and lis pendens. This discretion would mean the WTO bodies would not feel bound to abdicate their discretion under certain rules, which in theory should cause them to

111 With the exception being the absolute right to have a case substantively heard by the DSB that is arguably given under art 23 of the DSU.

112 *American Home Products Corporation* (1995) NJ Super Ct App Div a5209-94; *Exxon Research and Engineering Co v Industrial Risk Insurers* (2001) NJ Super Ct App Div a4812-99.

113 This would be possible because of the fact art 185 gives preference to the first forum selected.

be less inclined to exclude these principles altogether. However, as will be explained in the next section, even the introduction of a discretionary power may face opposition from DSB bodies.

3. Conclusion

Both of the two models have certain weaknesses as identified. In comparison, given the uncertainty over how a "reserve jurisdiction" would be applied in practice for the *Solange* model on the one hand, and the ability of the New Jersey model to give a broad consideration to the equities of the case on the other hand, the New Jersey model is likely the better comity model for the WTO. It allows a more specific focus on the case at hand, which is important considering that FTA disputes, based on the current record, are likely to be rare. However, this model is just a starting point for how the WTO might develop a framework for using comity in the face of parallel or subsequent proceedings.

VII. Judicial Comity II: Application by WTO

Now that it has been explained how judicial comity might work, the question remains whether it is actually a viable solution that a WTO Panel would apply. There are three key factors to consider here. Firstly, past WTO jurisprudence has featured discussion relevant to the possible use of comity. Secondly, the impact that art 185 of the FTA, as a choice of forum clause, would have on the WTO accepting comity. Finally, there are some general policy considerations that will likely play a large part in whether comity is adopted. Each of these factors shall be addressed in turn.

A. Past WTO Jurisprudence

As discussed above, certain provisions in the DSU militate against the WTO bodies being bound to decline jurisdiction, which was reinforced in the *Argentina – Poultry* case. In theory, comity could circumnavigate the difficulties for a WTO Panel of applying res judicata and lis pendens, because it does not have strict requirements or compel a Panel to abdicate jurisdiction. However given WTO jurisprudence, it is still unclear whether a Panel would be willing to even show deference to a FTA proceeding. This section analyses *Mexico – Soft Drinks*, a critical WTO Appellate Body decision that sheds light on this.

1. Mexico Soft Drinks

Mexico – Soft Drinks was brought before the Appellate Body in 2006. Mexico, in attempting to stay proceedings brought by the US, argued that WTO panels, like other international bodies and tribunals, have certain "implied jurisdictional powers" that derive from their nature as adjudicative bodies.[114] These powers included the ability to refrain from exercising

114 *Mexico – Soft Drinks*, above n 25, at [10].

jurisdiction, which, they asserted, should be exercised in the case at hand because the US' claims under art III of the GATT were "inextricably linked to a broader dispute concerning the conditions provided under the NAFTA" and therefore "only a NAFTA panel could resolve the dispute between the parties."[115] Mexico argued that this was notwithstanding rules in the WTO that seem to imply this cannot be done, highlighting that such a power was not specifically excluded by the DSU.

While formally this argument is based on "inherent powers,"[116] this is similar to a plea for the exercise of judicial comity (even though "comity" is not mentioned in the arguments or the judgment). Mexico asked for deference to be shown to the NAFTA adjudication process, which they submitted was the more appropriate forum to deal with the case given the "broader dispute". Following on from this similarity, several parts of the Appellate Body's judgment are highly relevant for our purposes.

In its decision, the Appellate Body agreed that WTO panels had certain inherent powers, including the right to determine whether they have jurisdiction, and to exercise judicial economy by refraining to rule on certain claims. But it said that it "does not necessarily follow" that WTO panels have the ability to decline jurisdiction to rule on the entirety of claims once jurisdiction has been validly established.[117] It pointed to several provisions of the DSU that it said precludes such a power. First, it noted that art 7.2 says "[p]anels shall address the relevant provisions in any covered agreement …". It said that the word "shall" indicates that panels are required to address relevant provisions.[118] Second, it discussed art 11, which says: "a panel should make an objective assessment of the matter before it …". It deduced that "should" in this context implies an obligation, given that "the Appellate Body has repeatedly ruled that a panel would not fulfil its mandate if it were not to make an objective assessment of the matter."[119] Moving to art 23, which says Members "*shall* have recourse to the rules and procedures of the DSU," the Appellate Body used this as support for a "comprehensive" right of members to resort to WTO dispute settlement to preserve their rights and obligations.[120] Finally, it said that to deny a substantive hearing would be inconsistent with arts 3.2 and 19.2,[121] which state that recommendations and rulings of the DSB cannot "add to or diminish rights" provided in the WTO agreements.

115 At [10].

116 International courts have widely claimed the availability of certain procedural powers that derive purely from their existence as a judicial organ established by the consent of States. The ability to decline jurisdiction is arguably one of these powers. A classic statement to this effect was given by the ICJ in the *Nuclear Tests* case (1974) ICJ 253, at [23].

117 At [46].

118 At [49].

119 At [51].

120 At [52].

121 At [53].

Mexico – Soft Drinks is most relevant in considering the WTO's likely legal approach to using judicial comity to decline to hear a case. However, there are other cases that shed light on the WTO's general attitude to showing deference to other dispute settlement bodies' decisions. A prominent example was during the *Softwood Lumber IV* dispute mentioned above in Part 3. Towards the end of the dispute, a WTO Panel accepted a US finding that Canadian imports of softwood lumber threatened to cause material injury to US competitors,[122] following a decision by a NAFTA Extraordinary Challenge Committee earlier in the year that concluded that the evidence did not support this.[123] It was not argued that the Panel decline jurisdiction in this case, but significantly, the Panel did not make a single reference to the concurrent NAFTA Chapter 19 proceedings. This lack of acknowledgement, despite the fact that the NAFTA proceedings were obviously relevant to the matter before the WTO, shows a clear choice not to show comity, which was picked up by Pauwelyn at the time.[124] There is also the *Brazil – Tyres* case discussed above, where arguably the Panel showed comity by concluding that Brazil did not violate its WTO obligations when implementing the MERCOSUR Arbitral Tribunal decision, although the Appellate Body reversed this finding on appeal.[125]

2. Analysis

On its face, the *Mexico – Soft Drinks* decision is damaging to the potential use of judicial comity. In a similar vein to *Argentina – Poultry,* it emphasises reluctance for WTO panels being able to decline jurisdiction, given the provisions of the DSU that were said to prevent them from doing so. It is also important to note that the Appellate Body has stated that: "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case,"[126] which means the reasoning is likely to be followed in future cases. While damaging, this decision is not impregnable however.

Despite the above, there are substantial question marks over the precedential value of the case in relation to judicial comity. Mexico did not disagree with the Panel 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."[127] Mexico also stated that it "could not identify a legal basis that

122 *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada* WT/DS277/RW, 15 November 2005 (Report of the Panel).

123 *In the Matter of Certain Softwood Lumber Products from Canada* ECC-2004-1904-01USA, 10 August 2005 (Opinion and Order of the Extraordinary Challenge Committee) [ECC Opinion].

124 Pauwelyn, above n 31, at 202.

125 *Brazil - Measures Affecting Imports of Retreaded Tyres* WT/DS332/AB/R, 3 December 2007 (Report of the Appellate Body) at 228.

126 *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WT/DS344/AB/R, 30 April 2008 (Report of the Appellate Body) at [160].

127 *Mexico – Soft Drinks*, above n 25, at [54].

would allow it to raise, in a WTO dispute settlement proceeding, the market access claims it [was] pursuing under the NAFTA."[128] Although the focus here is not on res judicata requirements (however broadly interpreted), the fact that Mexico conceded on these issues throws doubt on whether these were genuine "parallel proceedings" as defined,[129] such that judicial comity was warranted. Therefore, arguably a more deserving case could have led to a different result.

The next issue regarding precedential value is that, despite strongly grounding their decisions in the DSU, both the Panel and Appellate Body appeared very hesitant to rule out the possibility of declining jurisdiction entirely. The Panel, after ruling against Mexico on the point, said that even if it had discretion to decline jurisdiction, it "did not consider that there were facts on record that would justify the Panel declining to exercise its jurisdiction in the present case".[130] One would think that if the position were clear, the Panel would have no need to add this. Subsequently, the Appellate Body said that "we express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it." It went on to say that, having upheld the Panel's decision on the issue, "we find it unnecessary to rule in the circumstances of this appeal on the propriety of exercising such discretion."[131] These statements are strange given their reasoning that the aforementioned provisions of the DSU precluded it from declining jurisdiction, interpreting words such as "shall" and "should" to imply an obligation to rule on a case without discretion.

Further evidence of this hesitancy is the WTO's reluctance to rule on "choice of forum" in treaties like the FTA's art 185. This is evidenced in both the *Argentina – Poultry* and *Mexico – Soft Drinks* cases in regard to the Protocol of Olivos and NAFTA art 2005.6, respectively, which are roughly equivalent to art 185. In the former case the Panel said that "[t]he Protocol of Olivos, however, does not change our assessment, since that Protocol has not yet entered into force",[132] leaving the reverse implication that, if it had, their decision might have been different. In the latter case, upon addressing NAFTA art 2005.6, the Appellate Body said that "[w]e do not express any view on whether a legal impediment to the exercise of a panel's jurisdiction would exist," if the requirements of the article had been met. Additionally, following *Mexico – Soft Drinks*, WTO bodies have shown positive treatment of the idea that parties can waive their right to a WTO panel, which is discussed in the next section. All of this is difficult to reconcile with the Appellate Body's earlier analysis of the various DSU provisions that it said

128 At [54].
129 As no previous decision under the NAFTA had been made, this is a case of parallel rather than subsequent proceedings.
130 *Mexico Soft Drinks*, above n 25, at [4].
131 At [57].
132 *Argentina – Poultry*, above n 29, at [7.38].

implied there is no discretion to decline to hear a case. If they truly have no discretion then it should not matter whether any other "legal impediments to the exercise of a panel's jurisdiction" exist anyway.

What the above evidence shows is that the Appellate Body's interpretation of the DSU is just that: an interpretation. A different interpretation is certainly available to WTO panels. Lavranos reinforces this conclusion, opining that "[o]f course, a different approach is clearly imaginable in which a WTO panel or Appellate Body relinquishes its jurisdiction …".[133]

Militating against a contrary interpretation is the "principle of effectiveness" which is well established in WTO law. The principle was described in the early case of *US – Gasoline* as follows:[134]

> One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

Arguably, a contrary interpretation to that of *Mexico – Soft Drinks* would not give meaning and effect to the clauses in the DSU that were used by the Appellate Body in coming to their decision. This is especially so with art 23 which seems to imply a right to have recourse to dispute resolution under the WTO and by connection art 3.2 as well, since if Members have a right to have a case substantively heard, declining jurisdiction under any circumstances would be diminishing that right to some extent.[135] Employing judicial comity would restrict any such right to a limited right: limited to when judicial comity does not apply. Therefore the key determination, as per the above definition, is whether making the right to a substantive hearing a limited right rather than an absolute right would reduce art 23 to a nullity. On the words of the Appellate Body in the above cases, they seem to think that this would be the case. However, not all of the DSU can be applied strictly like this. If art 23.2(a) is interpreted as a strict obligation not to make a determination that a violation has occurred except through recourse to the DSU, all regional and bilateral trade agreements that have their own dispute resolution mechanisms would violate this obligation, which would be absurd.[136] Therefore, flexibility must be applied in some areas.

The above analysis has shown that there are ways of interpreting the DSU other than to exclude showing deference to dispute settlement bodies like an FTA art 185 panel. The WTO adjudicatory bodies themselves have shown a hesitancy to categorically exclude this and the strict interpretation they

133 Lavranos, above n 38, at 26.

134 *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/9, 20 May 1996 (Report of the Appellate Body and Report of the Panel) at 23.

135 Articles 7.2 and 11 have less strength in this regard, because if Members do not have an absolute right to have a case heard, then they could simply be construed as guidelines for normal procedure than absolute requirements.

136 Kwak and Marceau, above n 67, at [45].

have given to the DSU cannot always be applied. A different interpretation could be applied in order to allow a comity method to address the duplicate litigation problem.

B. Article 185 of the FTA

The influence of art 185 of the FTA is another vital consideration as to whether a WTO body would apply judicial comity in the NZ-China context. To recap from Part 2, once a complaining party in an FTA dispute has chosen a forum, art 185(3) requires that "the forum selected shall be used to the exclusion of other possible fora." Given the analysis in Part 2 above, if there are subsequent or parallel proceedings before the WTO involving NZ and China, it will be because one of the parties has prima facie violated art 185. Both the Panel in *Argentina – Poultry* and the Appellate Body in *Mexico – Soft Drinks* showed a clear reluctance to rule out the possibility of a "choice of forum" clause (like art 185) causing a WTO body to decline to hear a case. Given this hesitancy and recent WTO jurisprudence on the concept of waiver, art 185 could play a crucial role in a WTO body deciding to use comity to decline jurisdiction in a deserving case.

It is now established in WTO jurisprudence that two states may agree between themselves to waive rights to a WTO hearing in some circumstances.[137] In the case of *EC – Bananas III (Article 21.5 – Ecuador II),* the Appellate Body accepted that it would have been open to the parties to waive their rights to a WTO hearing if they had done so "either explicitly or by necessary implication" in the "Understandings on Bananas" that they had signed.[138] These "Understandings" were formal agreements that had been notified to the DSB as "mutually agreed solutions" within the meaning of art 3.6 of the DSU.[139] The Appellate Body added that, "the relinquishment of rights granted by the DSU cannot be lightly assumed" and that "the language in the Understandings must clearly reveal that the parties intended to relinquish their rights".[140] The Appellate Body has further elaborated on this in the recent case of *Peru – Agricultural Products*, where it said that "we do not exclude the possibility of articulating the relinquishment of the right to initiate WTO dispute settlement proceedings in a form other than a waiver embodied in a mutually agreed solution, as in *EC – Bananas III* (Article 21.5 – Ecuador II / Article 21.5 – US)" with the caveat that "any such relinquishment

137 This is in keeping with art 45 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which states that the responsibility of a State may not be invoked if the injured State has validly waived the claim.

138 *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Second recourse to article 21.5 of the DSU by Ecuador)* WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, 26 November 2008 (Reports of the Appellate Body) [*EC – Bananas III (Article 21.5 – Ecuador II)*] at [217].

139 At [8]. Article 3.6 allows parties to make "mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements".

140 *EC – Bananas III (Article 21.5 – Ecuador II)*, above n 138, at [217].

must be made clearly."[141] This was in response to an argument made by Peru that Guatemala had waived its right to a WTO hearing by agreeing to allow the measure they were complaining about in a regional trade agreement between the two countries. While the Appellate Body rejected a waiver on the facts, this statement in response to Peru's argument about a trade agreement waiver leaves open the possibility of waiving rights through treaties like the FTA. The question is then whether, and if so how, art 185 could be held as waiving rights between the parties.

It is clear from the Appellate Body's comments in the two above cases that for any waiver to be accepted, it will have to be clear, and a WTO Body will adopt a narrow approach in considering whether to allow it. Article 185 is clear in stating that the first forum chosen is to be used to the exclusion of the other, but less clear on stipulating which specific dispute brought under FTA dispute settlement proceedings would then be unable to be taken before the WTO. In *EC – Bananas III (Article 21.5 – Ecuador II),* the waiver under discussion was a specific Understanding relating to that particular dispute. In *Peru – Agricultural Products*, the claimed waiver came out of a particular acceptance of a specific measure contained in their regional trade agreement. This throws some doubt on whether a WTO body would be willing to accept a general waiver that does not focus on a particular dispute or a particular measure. However, the Appellate Body did not require this in its judgment and it would likely have had choice of forum clauses in mind given the prior case law and scholarly discussion on the matter (discussed above). Article 185 can be considered specific to the extent that it can be construed as a *pactum de non petendo* or an agreement not to sue, which activates once the complaining party has chosen a forum to resolve the matter. The only uncertainty is then how to determine whether, if the chosen forum is an FTA panel, the dispute before the WTO is the same as that decided under the FTA (or in other words parallel or subsequent proceedings), given the likely claims by the party taking the matter to the WTO that their dispute is different such that art 185(3) cannot apply. This is where comity can prove useful in determining which matters deserve the WTO body to refuse jurisdiction.

A party proposing the use of comity based on an art 185 waiver would be well placed to succeed at the WTO. They could ask the WTO body to show deference to the FTA dispute resolution process by recognising that giving a full hearing to the matter before it would result in parallel or subsequent proceedings. The WTO body could then adopt an approach like the New Jersey model discussed above to determine whether the situation merited the exercise of the use of comity. The New Jersey method is a possible framework for how the WTO might go about deciding whether the "dispute" under art 185(3) is the dispute before them, but as noted above, the flexible nature of comity means the WTO body would be free to use whatever method it

141 *Peru – Additional Duty on Imports of Certain Agricultural Products* WT/DS457/AB/R, 20 July 2015 (Report of the Appellate Body) at [5.25].

chooses. In this way, art 185 bolsters the potential of a comity argument succeeding at the WTO. Judicial comity does not require a waiver like this, but art 185 would provide a useful "hook" that would allow a WTO body to accept a comity argument without having to go against past jurisprudence such as that in *Mexico – Soft Drinks*.

C. Policy Issues

Ultimately, while the legal issues discussed above are critical, policy issues will also heavily influence the future approach of the Appellate Body, despite the fact that these have not been discussed in the above cases. The discussion in this article has had a specific NZ-China focus, but the changes caused by the introduction of the above legal principles would certainly have much wider implications and it is unlikely they would be applied between these two countries without being applied similarly in other contexts. Therefore it is also worth discussing these factors.

The starting point of a policy discussion is that the DSB is a world standard in terms of timely resolution of international disputes and in terms of judgments that are followed with reasonable certainty. It is understandable that the DSB would be reluctant to threaten this success by opening up the possibility of declining jurisdiction, which could damage international confidence in the WTO dispute resolution mechanism through the uncertainty that this would create. Uncertainty would be generated by Members being unable to be certain of a right to have WTO-relevant disputes decided before the WTO in all circumstances. While this would only exist when Members have already been involved in a similar dispute in a different international forum, there would likely be apprehension until clear methods were articulated as to how the WTO bodies would decline jurisdiction. This would be unpopular for many countries, and in fact China argued against just such uncertainty as a third party in *Mexico – Soft Drinks*.[142] On another level, arguably if the WTO was to decline jurisdiction on a regular basis due to comity this would be a substantial departure from jurisprudence such as *Mexico – Soft Drinks*, and *Argentina – Poultry*, which is rare for the WTO. As evidenced in *US – Stainless Steel* above, while there is no formal system of precedent, the same legal questions will generally be answered the same. Therefore a sharp change in jurisprudence could arguably lead to a lessening of confidence in the system.

Countering this is a number of contrary policy arguments. First and foremost are the reasons identified as the duplicate litigation problem: the widespread uncertainty that exists because of potential parallel and subsequent litigation and the huge costs to states taking multiple proceedings as a result of this uncertainty. Second, while some may fear the uncertainty arising from the prospect that a WTO body might decline jurisdiction, this could also strengthen the WTO's position in the international environment. Other international bodies such as the CAFTA-DR Panel (discussed above)

142 *Mexico - Soft Drinks*, above n 25, at [34].

have already shown deference towards WTO jurisprudence, and if WTO bodies reciprocate, then this is likely to encourage more such deference to be shown. Foltea has supported this idea, opining that greater institutional sensitivity will lead to greater legitimacy of the WTO as a whole.[143] Thirdly, it can be argued that championing WTO rights such as the absolute right to hear a case, at the expense of trampling on rights to have decisions of other forums upheld, will be a harder position to hold as the proliferation of international forums outside the WTO continues (and consequently the number of decisions that will come into conflict with the WTO's jurisdiction also increases). Finally, given the decisions since *Mexico – Soft Drinks* on waiver, especially *Peru – Agricultural Products*, the WTO is more accepting of the notion of declining jurisdiction than it once was; hence it would not be a drastic change in jurisprudence for this to happen.

Evaluating these considerations, the concerns over uncertainty are outweighed by many factors going the other way. Therefore not only is it feasible legally for the DSB bodies to change their jurisprudence to introduce the above principles, but the balance of policy factors shows they should do so.

D. Conclusion

This Part has shown that while the decision in *Mexico – Soft Drinks* seems strongly against the possibility of the WTO declining jurisdiction through comity, given the Appellate Body's interpretation of arts 3.2, 7.2, 11, 19.2 and 23, there are limits to the application of this precedent and it is reasonable that a different interpretation to the DSU could be applied. Furthering this, art 185 of the FTA lends strong support to the introduction of comity as it could be construed as a *pactum de non petendo* such that NZ and China have agreed to waive their right to a WTO proceeding once proceedings have already begun under the FTA. WTO bodies could thus use comity to show deference to the FTA procedures and adopt a model such as the New Jersey method to determine whether the two disputes are materially the same. Finally, despite the uncertainty that might be created by adopting judicial comity, the balance of policy factors clearly favours this as a positive change.

VIII. Introduction of the RCEP

The final issue for discussion is the upcoming introduction of the RCEP Agreement. It is uncertain when negotiations for this agreement will conclude. While negotiations accelerated in 2014, with Ministers from the participant nations predicting talks would conclude by the end of 2015,[144] they have continued steadily in 2015 without any indication of completion

143 M Foltea *International Organizations in WTO Dispute Settlement: How Much Institutional Sensitivity?* (Cambridge University Press, Cambridge, 2012) at 291-292.

144 "China-led RCEP talks to conclude in 2015" (28 August 2014) *The Brics Post* <http://thebricspost.com>.

in the immediate future. If and when the RCEP is completed, it is likely to contain a dispute settlement mechanism as there have been talks on this in most of the negotiating rounds.[145]

If the RCEP does have a dispute settlement mechanism, it could take a range of forms. Hillman has identified that there are generally three different categories which most RTA dispute mechanisms fall into: (1) choice of forum agreements, such as art 185, (2) exclusive jurisdiction agreements, which best describes the DSU and (3) preferred forum agreements, which specify a preferred forum that can be changed to an alternative forum only upon agreement among the parties.[146] If it were a choice of forum agreement, then the same parallel and subsequent litigation problems between NZ and China would exist as they do for the FTA, except their likelihood would be theoretically doubled. The decision of precedence between the FTA and RCEP forums would be straightforward and depend on time of initiating proceedings, but they would both always be subject to a possible future or concurrent WTO case if one of the proposed solutions in this article were not applied. If it were an exclusive jurisdiction agreement, its exclusive jurisdiction would most likely be conditional on a defined set of circumstances, since the 16 negotiating parties will be aware of their WTO obligations when drafting the Agreement. Such a clause would create potential for a direct clash of jurisdiction with the WTO. If this did happen, the main difference to the present situation would be that the RCEP could accept substantive jurisdiction after a WTO body has made a decision or is still pending, just as the WTO can currently do regarding FTA decisions and could do for RCEP decisions. This means the unsettling possibility of two forums, both claiming exclusive jurisdiction, deciding opposing outcomes. Similar problems would apply if it was a preferred forum agreement although it would depend on how the particular clause is worded. Given all three possibilities, the underlying problem would not change, but the chances of parallel or subsequent proceedings would increase further, since both the WTO and RCEP could both be the "second body" before which proceedings are commenced that create parallel or subsequent proceedings.

The above discussion shows that whether the dispute mechanism gives a fair amount of deference to the other bodies such as the FTA's art 185, or no deference such as the DSU, the possibility of subsequent or parallel proceedings will increase. Hence, no matter the form of the RCEP dispute settlement mechanism, unless it unequivocally takes a lower status than other international forums, which is unlikely, increased potential for jurisdictional

145 New Zealand Ministry of Foreign Affairs and Trade "Regional Comprehensive Economic Partnership (RCEP)" (Monday, 15 September 2014) New Zealand Ministry of Foreign Affairs and Trade <http://www.mfat.govt.nz>.

146 J Hillman "Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO-What Should the WTO Do?" (2009) 42 Cornell International Law Journal 193 at 195.

conflict will eventuate. This is because when the new agreement is added to the current dynamic that exists, any dispute resolution mechanism that could potentially take precedence over the FTA or WTO will only add to the potential for "clash" between forums. This could cause significant complications, because the number of jurisdictional relationships would go from one (between FTA and WTO) to three (FTA/WTO, FTA/RCEP and RCEP/WTO). There is even the possibility of a single dispute being litigated across all three forums, which would be an even more extensive waste of resources, time, and political goodwill.

This means that the need to address the duplicate litigation problem would become amplified by the introduction of the RCEP. Therefore there is just as much need for any new forum set up under the RCEP to employ judicial comity to avoid subsequent or parallel proceedings as well as the existing forums to show deference to RCEP proceedings. Doing so will be more complicated if three forums are in play. Comity would still be a viable solution due to the flexibility that it allows, but using comity to stop proceedings when the original case is before the RCEP would be more difficult if the RCEP mechanism does not contain a clause excluding other fora once one is chosen. This is because a waiver argument on which to base the use of comity, as discussed above, could not be made.

While the RCEP remains under negotiation, opportunity exists for NZ and China (as well as other negotiating countries facing similar problems with their own RTA relationships) to find a way to regulate jurisdiction across all the relevant fora. However, an agreement to do so would fall into the structural changes category discussed in Part 4. There would be significant complication to this, as while all negotiating states are WTO members, most states (such as NZ and China and the ASEAN nations) would be parties to agreements outside RCEP that others are not. The European Union has shown that a solution of this nature can be made to work, agreeing that matters regarding EU law go exclusively to the CJEU, and their framework has resulted in no disputes being litigated at the WTO between two EU countries. However this system has seen jurisdictional conflict outside of WTO disputes, with the *Mox Plant* case being a prime example.[147] Further, the RCEP nations are a long way off the legal and economic integration enjoyed by EU countries that enables this system to work. It would thus be optimistic to hope for such regulation. A more realistic solution would be that the RCEP's dispute settlement mechanism contains a choice of forum clause parallel to the FTA's. This would mean the least amount of complexity when deciding jurisdiction between the forums and it would also allow a waiver argument to be made at the WTO for the purposes of comity. Encouragingly, there is a strong chance of this happening since most current RTAs contain a choice of forum clause of this type.[148]

147 Case C-459/03 *Commission v Ireland (MOX Plant Case)* [2006] ECR I-4635.
148 Hillman, above n 146, at 196.

IX. Summary

This article has analysed the duplicate litigation problem in the NZ-China trade context. It has shown that, as large-scale changes to the international legal sphere are unlikely to be made in the foreseeable future, judge-made solutions are the most realistic answer to this problem. Two potential solutions have been analysed: the twin principles of res judicata and lis pendens, and the practice known as judicial comity. It has been demonstrated that given the schemes of Chapter 16 of the FTA and the WTO's DSU, it will be up to the WTO to implement these solutions in the face of subsequent or parallel proceedings, as they are likely to be the "second" body before which a duplicate dispute is taken.

Lis pendens and res judicata are widely accepted principles of law at a national level at least. Several scholars see them as solutions to the duplicate litigation problem in international law generally. However, this article has shown that the principles are unlikely to be applied at the WTO for three main reasons. First, there is doubt as to whether lis pendens can be regarded as a general principle of international law, so that it can be applied in a WTO case. Second, the three requirements of the principles would have to be interpreted broadly in order for the principles to apply, but doing this requires a trade-off with certainty and ensuring the principles are not abused. This is especially so with the legal claims requirement. Finally, previous WTO jurisprudence, especially the case of *Argentina – Poultry*, also indicates that a WTO body would be reluctant to apply res judicata or lis pendens due to them conflicting with the WTO provisions.

Comity, by contrast, is a more flexible solution, requiring WTO judges to show a degree of deference towards the FTA and its dispute resolution process. It would be open to WTO judges to adopt a model of comity that suits WTO proceedings, and it was shown that a method similar to that applied by the courts of New Jersey in the US could be appropriate. While the Appellate Body in *Mexico – Soft Drinks* indicated that to decline jurisdiction would be contrary to multiple provisions in the DSU, there are several indicators that comity would be an efficacious solution to duplicate litigation that could be used at the WTO. One of these is that the *Mexico – Soft Drinks* case has a limited precedent in respect to the WTO's ability to decline jurisdiction and is one of several examples where a WTO body has been reluctant to rule against a choice of forum clause, like the FTA's art 185. Following this, another favourable indication is the existence of art 185 itself. This is because art 185 can be construed as a *pactum de non petendo* such that the parties waive rights to a WTO hearing after commencing proceedings in another forum, and DSB bodies, which have treated the possibility of waiver favourably in recent cases, could show comity to recognise and give effect to this. Finally, given the policy arguments for and against declining jurisdiction, the balance is clearly in favour of the WTO allowing for this possibility.

If the RCEP negotiations are concluded and an agreement comes into force, the change to the dispute settlement landscape will depend on what type of mechanism is used in the new treaty. What is clear is that the potential for duplicate litigation will increase, and therefore there is an increased need for judges to show comity to resolve this. It was found that the most preferable type of mechanism would be one containing a choice of forum clause parallel to that in the FTA because this would mean the least complexity and would allow for a waiver argument to be made at the WTO.

It is only a matter of time before a WTO panel is faced directly with proceedings that may constitute duplicate litigation between New Zealand and China or a similarly governed trade relationship, given the number of WTO cases that have come close to this. When this happens, it will have to make a decision on how to resolve the problem of duplicate litigation. It is hoped that WTO judges will decide to use comity to decline jurisdiction in deserving cases, and hence remedy the substantial jurisdictional uncertainty that currently exists.