# TO JUDGE OR NOT TO JUDGE: NON LIQUET IN WTO ADJUDICATION

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## *I. Introduction*

The World Trade Organization (WTO) has been in legislative abeyance, with only two multilateral agreements being added to the WTO umbrella since its conception in 1995. Its dispute settlement (DS) system, sometimes called the "crown jewel" of the WTO, with compulsory adjudication and enforcement powers, served the international trading regime well. In instances, it also acted as a proxy for the necessary legislative actions that the WTO membership was not taking and engaged in "gap-filling". A slow and continuous irritation of the United States by such actions of the highest judicial chambers of the WTO (the Appellate Body) has led to the current crisis concerning the Appellate Body.

To satisfy the mandate set out by MC12 and restore a fully functional WTO DS by 2024, informal discussions on WTO DS reform led by Marco Molina as the Deputy Permanent Representative of Guatemala to the WTO, have been intensifying in Geneva over the past two years. The draft reform text of the discussions[1] reveals that several important issues remain to be addressed (such as whether at all to have an appellate review). It also seeks to clarify certain long-standing issues, such as the role of precedents. In addition, it has also proposed new elements of WTO DS, such as categorization of disputes based on their sensitivity, systematic discussion of rulings in substantive committees etc. But these focus areas do not form the central piece of our paper.

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[1] Special Meeting of the General Council, JOB/GC/385, 16 February 2024, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/Jobs/GC/385.pdf&Open=True.

Here, we explore the merits of a solution that is not currently reflected in the draft reform text.[2] We argue that fears of judicial overreach could in part be addressed by the adoption of the principle of "*non liquet*",[3] by which WTO adjudicators[4] can decline to give judgements in cases where the law is genuinely unclear. We argue that this would not be a panacea but it could reduce the perception of judges pre-empting the rights and obligations of member states. However, it would create other issues that need to be resolved—firstly, on when it could be used (no set of legal rules will ever exactly describe a given case); and secondly, what mechanism could be used to allow or require its use.

The paper proceeds thus. We first provide a background of the issues confronting the Appellate Body, that led to the allegations of judicial overreach. This context allows us to proceed to the heart of our argument, i.e., the potential of *non liquet* to reduce the risks of judicial overreach. To do so, we describe how *non liquet* has been approached in public international law broadly, in WTO law, and by commentators. The lack of any explicit approval of or bar against the concept, leaves much scope to define the outer limits of how it could be potentially used in WTO DS. We then present our arguments for *non liquet* in WTO DS, and the potential pitfalls of invoking this concept, thereby revealing the complexities that accompany its invocation in a dispute. A risk theory approach analyses the options available to WTO members, and enables us to conclude with potential pathways for members.

## *II. The Context: The Appellate Body's Dilemma*

Questions about whether the Appellate Body has engaged in judicial overreach have been common for some time. The United States and many leading commentators argue that the Appellate Body has made decisions which create new obligations on top of those agreed by members of the WTO. This has come about for a number of reasons. The WTO agreements may sometimes be incomplete, ambiguous or contradictory and the Appellate Body has to determine the correct meaning to decide cases. It must be remembered that the General Agreement on Tariffs and Trade (GATT) was agreed in 1947 and the WTO texts in 1994. Some issues were deliberately left ambiguous or ignored for diplomatic reasons. In some cases, texts were agreed by technical experts who overlooked the broader political significance. In other cases, new issues have arisen since the texts were agreed. At best, the agreements and the standard interpretative framework of the Vienna Convention on the Law of Treaties (VCLT)[5] can only give broad principles, as the WTO agreements are indeed incomplete contracts left to be interpreted using another incomplete contract, the VCLT.[6] Thus, the Appellate Body has faced the dilemma of either making the best interpretation it can or else ruling

[2] However, we cannot be certain whether *non liquet* has been indeed in discussion amongst members in the informal discussions.
[3] Our argument is inspired by and builds on that of Mavroidis. See Petros C. Mavroidis, *The Sources of WTO Law and their Interpretation* (Cheltenham, Edward Elgar Publishing 2022).
[4] By adjudicators, we refer to both panels as well as an appellate body if revived. *Non liquet* relates to a substantive matter which has bearing upon any adjudicator's duties and therefore, we do not limit this discussion to *non liquet* in only appellate review.
[5] The Vienna Convention of the Law of Treaties (VCLT) 1969 is an international treaty that guides the creation of binding international legal rules, their interpretation, as well as their termination.
[6] See generally for the argument, Petros C. Mavroidis, 'No Outsourcing of Law? WTO Law as Practiced by WTO Courts' (2008) 102(3) American Journal of International Law 421.

that there is no legal basis for a ruling on the case in hand. Its job has been made particularly difficult by the logjam in the membership who sit as the General Council or the Ministerial Council or the dispute settlement body, and are simply incapable of forming a consensus, let alone a clear unanimous decision. The result is that there have been no significant new laws or clarifications by the membership on matters left unclear after 1994. Nor can the membership settle old questions that re-emerge. This general legislative inertia fails to match the various objectives that members may want their economic policies to fulfil, leading to a general dissatisfaction with the system.

The WTO Agreements of 1994 had been signed under slightly unusual circumstances: the leading powers put their package of proposals to the membership who had no choice but to accept or reject the whole Single Undertaking. But this meant everyone had a veto on future structural decisions. For many years the Appellate Body's creative interpretation of the texts, breaking the political logjam, was a cause for great admiration in the face of paralysis in the council, but it was storing up trouble. The main bones of contention have been a U.S. refusal to accept the Appellate Body's decisions on the technicalities of anti-dumping and the Appellate Body's view that wherever possible past decisions should be used to guide future WTO adjudicators, despite *stare decisis* being ruled out in the texts[7]. The anti-dumping decisions were not a new issue but reflected the fact that *in the Appellate Body's eyes* the text of the 1994 WTO Agreement on Anti-dumping (ADA) gave it the right and in their view, the duty, to disallow a practice known as zeroing. Zeroing was a practice under which national agencies measured the average dumping margin on relevant trade by counting only transactions in which exports were sold below normal value whilst ignoring ones where no dumping was taking place, thus almost guaranteeing to find some dumping even if there was on average no dumping. The Appellate Body's ruling seems to have made economic sense even while having doubts as to the legal analysis involved. In the failed Doha negotiations, the United States demanded a return to the ADA as it read it while most other actors resisted what they believed to be a U.S. attempt to change the ADA away from what they had come to accept was its agreed meaning.

Meanwhile, the Appellate Body's adoption of de facto precedents or adhering to prior rulings absent "cogent reasons"[8] for departure, even if only to ensure predictability, made it impossible for the United States to call upon the Appellate Body or panels to reopen legal rulings which it considered flawed, and they became baked in due to the implicit precedential system.

Thus, the WTO dispute settlement system, in particular the Appellate Body faced an extraordinary challenge as the membership of the WTO proved incapable of taking decisions. The General Council and ministerial meetings could not reach consensus on major issues, including the issues for any future negotiations. The Appellate Body was perceived as filling in the gaps in the rules and in effect creating law where it did not exist. Most WTO members were ready to accept this as the price of a rules-based system. But what alternative was there? In an informal talk given in the 1990s, Prof. John Jackson told an audience at University of Sussex that he had been invited to address the Appellate Body as it began life and had given them advice to make a ruling on any case that came to

[7] The Appellate Body's approach has been more nuanced than the United States claims. See James Bacchus, Simon Lester, 'The Rule of Precedent and the Role of the Appellate Body' (2020) 54(2) Journal of World Trade 183.

[8] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, para. 160.

them, however difficult to judge, which they had accepted. The alternative would have been to decline to give a ruling in any case where the WTO agreements did not create a clear legal text to be drawn on. This would have been the use of the concept of "*non liquet*" ("There is no law."). Some observers thought[9] and still think this might have been a sensible path,[10] but its clear implication would have been to weaken the strength of WTO law and indeed, system. It would have led to decisions in favour of the respondent wherever there was any gap or ambiguity at all in the law. It also risked being misused by adjudicators to avoid rendering rulings at the slightest instance of lack of legal clarity or the issue at hand was politically fraught. The binding Dispute Settlement Understanding (DSU) of the WTO had been introduced precisely to avoid the U.S. 1980s practice of unilaterally using its own instruments against countries that breached what the United States thought the GATT rules were (or indeed should be) but where the GATT DS system could not be enforced.

In this paper, we examine whether the WTO would function better if the dispute settlement system adopted the *non liquet* principle, i.e., adjudicators declining to make a ruling where this would require it to fill a gap. By adjudicators, we refer to both panels as well as an appellate mechanism if revived. *Non liquet* relates to a substantive matter which has bearing upon any adjudicator's duties and therefore, we do not limit this discussion to *non liquet* in only appellate review. We argue that while it could ease concerns of judicial overreach in many contexts, but not all instances, its invocation also raises other questions. In order for it to work, rules for its use would have to be spelled out clearly and the mechanism for bringing it is not self-evident. There is a Catch-22, that to solve the underlying problem, namely lack of consensus among members of the WTO, there would have to be a consensus.[11]

### *III. Non liquet in Public International Law and WTO Law*

*Non liquet* has been a contentious point of discussion in the trade law and policy discourse on WTO dispute settlement and its reform. International trade law as a part of wider public international law (PIL) has followed certain general principles of international law. In the context of *non liquet*, this has also meant following the general prohibition against the ability of international courts to declare *non*

[9] Ernst-Ulrich Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948' (1994) 31 Common Law Market Review 1195, cited in Jacques Bourgeois, 'WTO Dispute Settlement in the Field of Anti-Dumping Law' (1998) 1(2) Journal of International Economic Law 271; Gabrielle Marceau has also identified other instances (not directly relevant to the issue focused on in this paper) where *non liquet* can play a useful role in WTO DS: "If panels and the Appellate Body conclude that the WTO provision claimed to have been violated has been superseded by another non-WTO provision, they may be obliged to conclude that no WTO provision seems applicable to the relations between the parties (because the WTO provision initially applicable would have been superseded by another treaty). But WTO panels and the Appellate Body arc prohibited from reaching any conclusion that would constitute an amendment to the WTO or that would add to or diminish rights or obligations under the WTO Agreement. In those rare situations where panels and the Appellate Body are not able to reconcile the provisions of the WTO Agreement with those of an MEA or other treaties through interpretation, they may not be capable of making any recommendations under WTO law, thus faced with a situation of *non liquet*." See Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35(6) Journal of World Trade 1081.

[10] Petros C. Mavroidis, *The Sources of WTO Law and their Interpretation: Is the New OK, OK?* (Cheltenham, Edward Elgar Publishing 2022).

[11] Chapter 7, *Id*.

*liquet* over a matter before it.[12] Accordingly, WTO adjudicators have almost never declared *non liquet* in practice.[13] But academic commentary on the topic has been rich and diverse. Erudite PIL and trade law scholars, in their respective fields, have expressed divergent opinions on the desirability of *non liquet* in international disputes. Adding to the debate, we posit that the WTO Appellate Body crisis (and its significance for DS reform) has necessitated revisiting the utility of *non liquet* in WTO litigation, and its implications for the broader international trade law regime. To do so, we first examine the meaning of *non liquet*. We then contextualize its pros and cons in the backdrop of the WTO AB crisis and critiques. We conclude with our assessment and views regarding the future reform talks.

*Non liquet* as a legal principle allows a court to declare its inability to deliver a judgement due to a lacuna in the law before it. It is not the same as denying jurisdiction or admissibility; rather, the opportunity for a court to declare *non liquet* arises after the proceedings have begun and arguments made, when the court in its deliberations finds that there is no or insufficient relevant law for it to resolve the case.[14] While incompleteness of law or international treaties lends itself to a justification for judicial gap-filling, the acceptability of *non liquet* varies depending upon the nature of the legal system. For instance, in common law, judges must make law even when there is none, and therefore *non liquet* does not come into use. Similarly, in PIL, several believe that the general principles, rules of equity, and the presumption of permissibility absent positive prohibitions,[15] do not leave scope for *non liquet*.[16] On the other hand, in Roman law, there could be deferment of a case for insufficient information.[17] Evidently, there has been an evolution in the meaning of *non liquet*, which today refers to insufficient *law*.[18] We note that several opine that international trade law must follow the same pattern and not embrace the concept.[19] But the WTO DSU not only does not explicitly bar *non liquet*, but also can be interpreted and used to support its use, as explained below. Further, authoritative interpretations of WTO agreements can only be done by the legislative mechanisms,[20] strengthening the argument that WTO law provides succinctly for a division of powers between the legislative and the judiciary.

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[12] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of the International Court of Justice, July 8, 1996), 35 ILM 809 & 1343 (1996) para. 105(2)(E).

[13] Exceptions may be the dispute concerning Belgian Family Allowances, GATT Doc. G/32 BISD 1S/59, report of November 7, 1952, and Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997.

[14] It is important to distinguish non liquet from other scenarios, such as inappropriateness of a court to deliver rulings on politically sensitive matters (e.g., the political questions doctrine).

[15] S.S. Lotus (France v. Turkey), Permanent Court of International Justice, Series A, No. 10 (1927).

[16] H Lauterpacht, 'Some Observations on the Prohibition of Non liquet and the Competeness of the Law' in van Asbeck et al (eds) Symbolae Verzijl (The Hague 1958), 200. Contra Daniel Bodansky, 'Non liquet and the Incompleteness of International Law ', in Laurence Boisson De Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (CUP 2004) 153–170.

[17] Daniel Bodansky, 'Non liquet' in *Max Planck Encyclopedia of Public International Law* (2006).

[18] *Id*.

[19] William Davey, 'Has the WTO Dispute Settlement System Exceeded Its Authority?' (2001) 4 Journal of International Economic Law 79 at 85-88; Joost Pauwelyn, 'Cross-Agreement Complaints Before the Appellate Body: A Case Study of the EC–Asbestos Dispute' (2002) 1 World Trade Review 63–87.

[20] Article IX:2, Marrakesh Agreement Establishing the World Trade Organization arts. IX & X, Apr. 15, 1994, 1867 U.N.T.S. 154 (hereinafter the Marrakesh Agreement).

For a legal justification of *non liquet,* an analysis of certain provisions of the DSU helps. For instance, the requirement in Article 3.2 of the DSU that WTO adjudicators cannot add to or diminish the rights and obligations in the covered agreements can be read as prohibiting any manufacturing of law to fill legislative gaps.[21] Article 7 also demands that panels' rulings must *assist* the Dispute Settlement Body (DSB) in issuing recommendations to the disputing parties. Accordingly, it could be argued that if a panel is to rule that it is unable to *assist* the DSB in making recommendations, it can and should exercise self-restraint and declare *non liquet*. On the other hand, some argue that Articles 7.2 and 17.12 of the DSU leave panels and the Appellate Body with no choice but to address every issue before them.[22] But as noted by Bartels, these provisions have not stopped adjudicators from exercising judicial economy when deemed necessary and effectively not pronouncing judgments on claims raised before them.[23] In the view of Pauwelyn, *non liquet* may be resorted to in the rare and extreme cases where even conflict rules do not provide a suitable resolution. Thus, the DSU neither explicitly prohibits nor permits the use of *non liquet*, but certainly may be read in support of allowing its use,[24] if there are any doubts about the legality of using *non liquet*.

### *IV. Our Arguments for Non Liquet in WTO DS reform, but With Caution*

So why does *non liquet* matter in the WTO DS reform talks? In our view, *non liquet* may be one of the answers to several (but not all) of the criticisms levelled against the Appellate Body (and in its absence, what could be levelled against panels too). The Appellate Body has been accused of judicial overreach (by way of gap-filling and instituting a de facto precedent system),[25] and not all these allegations are completely unfounded, as indicated by DSU reform talks that have been underway since before the "crisis".[26] For instance, gap-filling undertakings by WTO adjudicators go against the rubric in Article 3.2 of the DSU mentioned above. Thus, *non liquet* can provide WTO adjudicators the necessary relief from pronouncing rulings in certain circumstances. We explain what these circumstances are, and why they call for *non liquet*.

Adjudicators may be faced with situations where the law is unclear, insufficient or simply absent. The absence of or inability to pronounce *non liquet* means that adjudicators are forced to rule on the basis of that incomplete, insufficient or absent state of the law. Doing so potentially upsets the balance of rights and obligations struck in the WTO contract, or adds to or diminishes them in the absence of clear legislative mandate, which Article 3.2 of the DSU disallows. In practice, we imagine these situations as those where the interpretation adopted by the adjudicators would effectively

[21] Bernard M. Hoekman & Petros C. Mavroidis, 'To AB or Not to AB?: Dispute Settlement in WTO Reform' (2020) 23 Journal of International Economic Law 703; Petros C. Mavroidis, *The Sources of WTO Law and their Interpretation: Is the New OK, OK?* (Cheltenham, Edward Elgar Publishing 2022).
[22] James Bacchus, 'The Bicycle Club: Affirming the American Interest in the Future of the WTO' (2003) 37 Journal of World Trade 439.
[23] Lorand Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism' (2004) 53 International and Comparative Law Quaterly 873.
[24] Footnote 85 in Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95(3) American Journal of International Law 535; See, Remarks by Peter Holmes *in* Mads Andenas & Federico Ortino eds., *WTO Law and Process* (British Institute of International & Comparative Law 2005) 518.
[25] Report on the Appellate Body of the World Trade Organization, United States Trade Representative, 2020.
[26] For example, see Report by the Chairman, Ambassador Ronald Saborío Soto, Special Session of the Dispute Settlement Body, TN/DS/26, 30 January 2015.

lead to reading new rights and obligations into WTO law. Moreover, we may find increasing occasion of these instances where the law seems inadequate, given the cross-cutting nature of modern trade issues and corresponding lack of conflict rules in several international agreements that may be invoked in WTO disputes involving cross-cutting issues.[27] Thus, *non liquet* has a preventive role to play where the law is incomplete, insufficient or absent such that ruling upon such law could lead to unwarranted addition or diminishing of rights and obligations.

In addition to incompleteness of law, lack of clarity in the law is another ground for encouraging panels to exercise a level of judicial restraint. But that is precisely what the VCLT seeks to address, in its provisions on treaty interpretation (Articles 31 - 33). If the laborious process of treaty interpretation using available mechanisms of the VCLT still renders no useful outcome, *non liquet* can find legitimate use. At the same time, extending *non liquet* to situations where normal recourse to the interpretative tools of the VCLT would suffice, seems less desirable. But what is this optimum, and how and when is it identified? We explain with the help of an example.

*Identifying the optimum: The Case of Zeroing*

The Appellate Body rulings on zeroing in anti-dumping disputes against the United States are widely considered as a key, if not the foremost, reason for the U.S. denouncement of the highest WTO tribunal. The zeroing controversy arose early in WTO jurisprudence. It refers to the way dumping margins are calculated for the purpose of imposing anti-dumping duties. Crudely speaking, zeroing means that when average dumping margins are calculated transactions where there is no dumping are ignored and only dumped products are included in the average, which many commentators feel exaggerates the estimate of overall dumping. This was the established practice of the United States and the EU before the ADA came into existence. Post 1995, both jurisdictions claimed that ADA allowed them to continue the practice, and specifically, Article 17.6 of the ADA which deals with reviewing domestic trade remedies authorities' approach to dumping margins. However, soon, the Appellate Body ruled that zeroing was against the new rules of the ADA. The EU and most WTO members agreed to this, but the United States did not. Most economists agree that the Appellate Body's interpretation makes economic sense, but many lawyers believe that the Appellate Body's interpretation was legally questionable as well as politically sensitive.

The key legally divisive issues are the following: first, whether Article 17.6 of the ADA[28] contains a standard of review that is different from that stated in Article 11 of the DSU. In other words, whether Article 17.6 of the ADA lays down a standard of review more deferential to domestic trade remedies authorities as opposed to the general standard in Article 11 of the DSU that requires panels to conduct an objective assessment of facts and law. In contrast, Article 17.6 of the ADA concerns whether the standard contained therein provides primacy to domestic authorities' relevant findings. The second issue is related to how panellists are to arrive at "more than one permissible

[27] While acknowledged, the concept of "harmonious interpretation" of international treaties is not discussed in this paper.

[28] Language of Article 17.6(i) of the ADA says: "the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned."

interpretation" allowed under Article 17.6(ii) of the ADA.[29] The U.S. frustration with the Appellate Body rulings rendering the zeroing practice as WTO-incompatible arises from its perception that it is denied the deferential standard of review that it believed it agreed to when signing on to the ADA (as a part of the Uruguay Round Agreements).[30] Further, the Appellate Body did not find U.S. interpretations on zeroing as resting on a permissible interpretation. The Appellate Body rulings, which have almost always found only one permissible interpretation after applying the VCLT,[31] have indeed been met with scholarly criticism, but at the same time, have also gained support from many member states.

In our opinion, Article 17.6 of the ADA likely constitutes *lex specialis*[32] in relation to Article 11 of the DSU, and therefore arguably lays down a different standard of review. One could reasonably argue that the text of the law is clear enough and that an application of the VCLT by reasonable judges could lead to the same conclusion. Indeed, the first Multi-Party Interim Arrangement (MPIA) arbitrators in *Colombia – Frozen Fries* attempted to correct the existing legal interpretation (the one perceived as erroneous) by diverging from previous Appellate Body rulings on how to arrive at permissible interpretations, although it maintained silence on the differences demanded by Article 11 of the DSU and Article 17.6 of the ADA. However, some opine that cases involving Article 17.6 of the ADA present missed opportunities for earlier panels to declare *non liquet*.[33] We appreciate the call for *non liquet* in such circumstances, given the clarity it could potentially bring to the currently messy case law. But it also begs the question on when *non liquet* is to be exercised—in the absence of law or when the law is ambiguous, and if the latter, what level of ambiguity justifies *non liquet*. Can and should panels account for WTO members' criticism of previous rulings, and declare *non liquet* on grounds of inadequate agreement amongst members on the interpretation of a provision in a new dispute? Or must the ability to exercise *non liquet* be subject to a high threshold of a genuine lack of law?

In our view, the former question is akin to the political questions doctrine in the U.S. domestic legal system, which does not have a formal place in WTO dispute settlement thus far. Some argue that WTO judges have still used a variety of legal tools (such as judicial economy) to avoid ruling on politically sensitive matters,[34] but to our knowledge, *non liquet* remains unused. On the other hand,

[29] Language of Article 17.6(ii) of the ADA says: "the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

[30] See Report on the Appellate Body of the World Trade Organization, United States Trade Representative, 2020, p. 103.

[31] Petros C. Mavroidis, *The Sources of WTO Law and their Interpretation: Is the New OK, OK?* (Cheltenham, Edward Elgar Publishing 2022) 108.

[32] *Lex specialis* is a principle that means that if two conflicting laws govern a matter, the law that governs the specific subject matter prevails.

[33] Petros C. Mavroidis, *The Sources of WTO Law and their Interpretation: Is the New OK, OK?* (Cheltenham, Edward Elgar Publishing 2022).

[34] William Davey, 'Has the WTO Dispute Settlement System Exceeded its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and its Use Of Issue-Avoidance Techniques' (2001) 4(1) Journal of International Economic Law 79; See also Joost Pauwelyn, 'The Sutherland

the latter approach of confining *non liquet* to a high threshold of a genuine lack of law, does not take care of the problem such as the one described in the context of Article 17.6 of the ADA, since the issue would remain unresolved.[35] Thus, while on one hand, we agree with the principled utility of *non liquet* in this issue (as advocated by Prof. Mavroidis),[36] we also find merit in restricting the permissibility of *non liquet* to rare and well-reasoned circumstances, if all other rules of interpretation or gap-filling fail, in order to guarantee dispute settlement. The question therefore boils down to practical feasibility and acceptance amongst a heterogenous set of WTO members, an issue that must include discussion of "legal and political theory, linguistics, and economics, *to reflect upon the limits of and interconnection among legislative and judicial activities*, the concept of lawmaking, *the role of judges in a world of sovereign states*, and other factors. (emphasis added)" [37]

Thus, underlying the concept of *non liquet* are deeper questions that lie at the heart of legal philosophy. While we as academic commentators find that *non liquet* can serve a utility, two points are clear: *non liquet* can be a tool to control judicial overreach, and that it is a quandary for the WTO membership to consider and resolve. On one hand, the effectiveness of an already flailing international judiciary might be put at further risk if it exercises *non liquet* for political questions without members' authorization. On the other hand, if ruling upon contentious matters is perceived by some to be done in excess of authority, such rulings will continue to be criticized. However, we are also mindful of the consequences of pronouncing *non liquet* in a dispute and the political divisions it may create, in favour of WTO law offenders. We discuss this issue next, against the backdrop of the role of WTO DS in supporting security and predictability of the international trade system.

## *V. Application of Risk Theory to Non Liquet*

At the heart of the role of *non liquet* is the issue of what it implies for the decision-making process. The WTO membership needs to address the question of what matters more: to avoid wrongly finding a breach of the rules where this is none, or allowing a state which has broken the rules to get away with it. *Non liquet* increases the risk of the second type of error while reducing the risk of the first type.

A consequence of *non liquet* is that a complainant is left with no judgement and a potentially trade-distortive measure is allowed to continue without ramifications. The dilemma is that described in

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Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO' (2005) 8(2) Journal of International Economic Law 329, stating "Effective use must be made of common judicial techniques that translate political sensitivities into legal results (such as deference, judicial minimalism, putting the burden of proving an obligation on the complainant and even declaring a non liquet)".

[35] We have been discussing *non liquet* in the context of substantive issues. In such cases *non liquet* inevitably means deciding the respondent has not infringed a WTO rule since there is none. But it is not clear to us how it would apply in procedural matters such as whether non-parties to a dispute can file *amicus curiae* briefs. Here if the Appellate Body had decided it could not rule whether silence in DSU on the matter of *amicus* briefs would still require it to allow submission or not.

[36] Petros C. Mavroidis, *The Sources of WTO Law and their Interpretation: Is the New OK, OK?* (Cheltenham, Edward Elgar Publishing 2022) 108.

[37] Ulrich Fastenrath and Franziska Knur, 'Non liquet' in *Oxford Bibliographies* (31 March 2016), https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0130.xml <last accessed 25 November 2023>.

statistical decision theory of the trade-off between Type 1 and Type 2 errors, or between false positives and false negatives.[38] A Type 1 error or a false positive occurs when a hypothesis, in this context that a violation of WTO rules, has occurred is accepted, when it actually has not. A Type 2 error, a false negative occurs when a violation is erroneously not found to have occurred when it actually has happened. Statistical hypothesis tests can be set up to minimise either Type 1 or Type 2 errors. But it is a fact of life that, for a given test methodology and data set, any move to reduce one type of error increases the risk of the other type. Any system that declines to rule on claims when the law is unclear will facilitate violations (just as tightening loopholes risks catching some innocent respondents). Statisticians note that tests should be calibrated according to the "loss function": which is worse—too many violators being allowed to use illegal measures, or too many cases where sovereignty is violated? This problem cannot easily be solved if different parties have different loss functions, i.e., some care more about ensuring a rules-based system, others care more about sovereignty—since all must accept the same judicial system.

A natural approach is to put the burden of proof on the side of the party asserting an infringement. WTO DS does not prescribe any one standard of proof and places itself on a continuum between "beyond reasonable doubt" standard and the "balance of probabilities" standard. The use of *non liquet* would *strengthen* the implicit presumption that false positives are a more serious error than false negatives, which is already built into the system, and therefore tilt the standard toward "beyond reasonable doubt". But there are legitimate objections possible to a proposal to increase this tilt. In reality, most cases brought to DS are won by the complainant, because in most instances only very strong cases are brought. Some might even argue that when the rules-based system is very weak, it would be dangerous to make it even harder to pursue infractions. We merely raise this to show how nuanced the issues are and we must acknowledge that parties could in good faith object to the use of *non liquet* on the grounds that it would weaken multilateral disciplines too much.

WTO members may thus find the uncertainty and unpredictability a significant transaction cost in their contractual obligations towards the WTO membership if *non liquet* were used. But there are ways to reduce such costs, as we discuss below. On the other hand, in the absence of *non liquet* and through the de facto practice of following prior rulings absent "cogent reasons"[39] for departure, disputing parties could be bound by decisions through judge-made law that they had not signed up to in the first place. Moreover, due to the concept of de facto precedents in WTO adjudication, there are chances that such judgements would then get entrenched in future rulings as well.

At the same time, it is necessary to address the consequences of false negatives since the complainant would be likely left without a resolution. The complaining party, having thereby lost the dispute, could choose to rectify the situation using unilateral trade retaliation and balancing measures, or negotiate other favourable terms through issue-linkage, although these options are still sub-optimal. Indeed, inappropriate or unauthorized countermeasures or retaliation could even

[38] European Union Competition Law, New York Law School, https://www.eucomplaw.com/error-types/.
[39] The Appellate Body, in US – Stainless Steel (Mexico), laid down the "cogent reasons" standard which has been equated with laying down a system of stare decisis in WTO adjudication. See Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, para. 160, stating "Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, *absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case*." (emphasis added)

lead to fresh disputes. But the resort to *non liquet* by a WTO panel should send strong signals to the WTO membership to resolve the ambiguity with urgency. On the other hand, false positives have dire consequences for the legitimacy of the international court in question, as the current Appellate Body crisis demonstrates. This reflects the conundrum that the WTO faces as an institution today, and that the membership must tackle to make the WTO DS fully functional.

Of the various reform options, the explicit recognition of *non liquet* has been suggested as a necessary addition to the DSU by academics and even member states. For example, Honduras has proposed introducing guidelines relating to *non liquet* to reduce the scope for gap-filling.[40] This is the only publicly available official proposal per the WTO website; in the absence of transparency of the recent informal discussions, it is difficult to be certain whether it has been under discussion since. Regardless, in the run-up to MC13, we submit that members should seriously consider the benefits of *non liquet* in WTO dispute settlement, and by identifying the risks of the same, introduce narrowly defined guardrails to curtail such risks. We next discuss the ways this can be done.

## *VI. So, What Can and Should WTO Members Do?*

Based on the above analysis, we submit that *non liquet* as a concept can be a useful tool in the WTO judiciary's arsenal, to meet the mandate to resolve disputes while not overstepping bounds into the lawmaker's territory. We do not advise that the specific substantive circumstances in which *non liquet* may be used be predetermined. Doing so would be an immensely uphill political battle with very little chances of ever attaining consensus. What we propose instead is a *principled* approach to understanding the utility and the limits of *non liquet*, such that WTO members first agree on the utility and permissibility of *non liquet*; second, prescribe certain principles that ought to be followed to limit the risks of *non liquet*; and third, use the WTO mechanisms to instrumentalise these principles. In our opinion, *non liquet* should be pronounced only when all other rules of interpretation or gap-filling fail, with detailed justifications by the adjudicators on the choice to pronounce *non liquet*, the exact lacuna in the law, with indication to the membership of what needs to legislatively change or be added, for a proper resolution of the dispute.

*Institutional pathways to introducing non liquet in WTO adjudication*

There are two possible ways in which members of the WTO could authorize adjudicators to use *non liquet* and provide any clarifications regarding the legitimate use of *non liquet*. One option could take the form of "decisions" by the General Council. Alternatively, there could be "amendments" to the DSU, for which specific rules are laid out in the Marrakesh Agreement. On *decisions*, Article IX:1 of the Marrakesh Agreement provides that decisions by the General Council or the Ministerial Conference shall be taken by consensus of all WTO members, failing which voting may be resorted to. But majority voting remains unused and highly unpopular in WTO practice and is unlikely to be used in the future. Moreover, the Marrakesh Agreement is also unclear on *how* votes are called. For instance, Article IX:1 provides that "Except as otherwise provided, where a decision cannot be

[40] Fostering A Discussion on the Functioning of the Appellate Body, Addressing the Issue of Alleged Judicial Activism by the Appellate Body, Communication from Honduras, WT/GC/W/760, 29 January 2019, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/W760.pdf&Open=True.

arrived at by consensus, the matter at issue shall be decided by voting". But surely, there must be an additional procedural step whereby members *agree* to decide a matter by voting, and *not* by consensus—a step which must occur after consensus has not been achieved. The WTO rulebook is unclear on this procedural step.[41] It is also possible for WTO members to adopt authoritative interpretations by a three-fourths majority, but being careful to not undermine the more stringent amendment provisions in Article X.

Similarly, Article X:8 of the Marrakesh Agreement is specifically relevant for *amendments* to the DSU contained in Annex 2 of the WTO Legal Texts, and states that "[a]ny Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 *shall be made by consensus* and these amendments shall take effect for all Members upon approval by the Ministerial Conference. Decisions to approve amendments to the Multilateral Trade Agreement in Annex 3 shall take effect for all Members upon approval by the Ministerial Conference." (emphasis added) Unfortunately, the ever-elusive consensus remains key.

*Practical challenges to negotiating on non liquet*

Achieving consensus in the WTO has never been easy, and *non liquet* promises to be a controversial, political area of engagement for WTO members, although we believe it should be pursued. *Non liquet*[42] is understood differently in different legal systems, with most nations generally prohibiting its usage, whether explicitly in their civil code (such as in France) or implicitly as in Swiss law.[43] Further, domestic law is usually well-developed and the well-established general principles of law in a singular society are better applicable for gap-filling purposes. However, given the heterogeneity of domestic legal systems of WTO members who then reflect their preferences at the international stage, several members such as the EU may be reluctant to support the use of *non liquet*. Some believe that the general principles of law (such as the principle of estoppel[44]) can serve as better agents of gap-filling than the rather controversial concept of *non liquet*, in the international setting. However, where the WTO adjudicators have resorted to general principles they have tended to relate to procedural aspects, and not for the purpose of gap-filling where WTO law is silent, for instance, the principles the acceptability of *amicus curiae* briefs submitted by NGOs.[45]

[41] This is in contrast to the European procedural rules that allowed for voting in 1987, thereby ending the so-called "Luxembourg Compromise" under which any member state could insist on indefinite prolongation of debate.

[42] Yilin Wang, 'The Origins and Operation of the General Principles of Law as Gap Fillers' (2022) 13(4) Journal of International Dispute Settlement 560.

[43] W. M. Reisman, 'International Non-Liquet: Recrudescence and Transformation' (1969) 3(4) The International Lawyer 770.

[44] See Emmanuel Voyiakis, 'Estoppel' (2012) Oxford Bibliographies, <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0058.xml> last accessed on 7 January 2023. "Estoppel is a rule of international law that bars a party from going back on its previous representations when those representations have induced reliance or some detriment on the part of others."

[45] Anja Lindroos and Michael Mehling, 'Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO' (2005) 16 European Journal of International Law 857.

As a result, *non liquet* has not been addressed head on by WTO members in recent reform talks, if anything, the 2019 Walker proposal that nearly had consensus proves as much. The relevant language on judicial overreach that it contained in the draft decision was limited to the following: "As provided in Articles 3.2 and 19.2 of the DSU, findings and recommendations of Panels and the Appellate Body and recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[46] This merely repeats what already exists, without codifying any other discussions that may have been conducted on crystallizing the exact meaning of overreach. It also does not demonstrate any appetite for the use of *non liquet*. Similarly, Marco Molina's draft text before MC13 also does not mention *non liquet*. However, the text introduces, in its Title VI, the need for systematic consideration of rulings in relevant WTO bodies and separately, also seeks to pave the way for members to "to discuss, build consensus and provide guidance on legal interpretations developed by adjudicators." If reforms reflecting the spirit of this idea were implemented, the need to invoke *non liquet* would be significantly reduced, especially in disputes bearing close resemblance to political questions. But this text does not clarify what is to be done by a panel confronting a situation where the law is absent or unclear. The difference remains that *non liquet* could ex ante clarify the law before the ruling is rendered, whereas the proposed reforms are ex post (i.e., after a ruling has been rendered) in nature. Thus, the questions on whether or not to authorize the use of *non liquet*, and in what situations should it be used, hold potential for further clarity in WTO DS and should be discussed amongst members.

On the practical front, the potential success of a reform proposal depends on the potential gains from it, the resistance to it, and the exchange of concessions. However, the utility of *non liquet* is confined to very select cases—where the law is incomplete, insufficient or absent such that ruling upon such a state of the law could lead to unwarranted addition or diminishing of rights and obligations. Thus, we imagine that there could still be political appetite amongst the WTO membership to discuss this issue and attain some level of agreement on circumstances warranting *non liquet*. We acknowledge the difficulty in prescribing the level of ambiguity needed in the law, for panels to legitimately resort to *non liquet* without being criticized for evading their judicial responsibilities. But at the minimum, WTO members could agree to explicitly authorize the use of *non liquet* by panels, leaving it to judges to exercise it at their discretion but with well-reasoned justifications for doing so.[47] Members should also discuss the ramifications of not having *non liquet*, and what approaches panels could legitimately pursue in the case of ambiguity in law or lack of law, without being subject to allegations of overreach. The recourse to be had by panels in the absence of *non liquet*, that would not upset the balance of members' rights and obligations, should be prescribed by members.

Another criticism of *non liquet* is that there could be prolongation of the dispute without satisfactory results. There are possible solutions to this that the membership could explore. One way this issue might be addressed would be by introducing complementary rules that WTO members should resolve the legal lacuna amongst themselves within a predefined period of time (post the

[46] Draft Decision, Functioning of the Appellate Body, WTO General Council, WT/GC/W/791, 28 November 2019.

[47] Alternatively, a final option could be for panelists to exercise self-restraint and declare *non liquet* where necessary, since the relevant DSU provisions appear to neither explicitly allow nor disallow *non liquet.* However, this approach is not free of legitimacy challenges.

declaration of *non liquet* by adjudicators), failing which, the adjudicators would issue their rulings based upon interpretations they opine as correct or necessary (status quo, in other words). Doing so could provide opportunities to panels to exercise *non liquet* and also to WTO members to bring legislative legitimacy to the issue, while creating clear deadlines when the said opportunities are not utilised. But this proposal is also subject to the difficulties posed by the consensus-based decision-making process.

As part of the DSU reform package, the WTO membership appears keener to resolve sensitive topics such as the use of precedents or treatment of the meaning of municipal law, whether at all to have a two-tier mechanism, and accordingly reinstate a fully functioning mechanism (as Marco Molina's draft text makes clear). We think not discussing *non liquet* at this stage is a missed opportunity for the membership. But it is an effort still worth pursuing. Accordingly, there could be review clauses setting the agenda for future decisions that could include *non liquet,* thus providing members some time to examine the pros and cons of *non liquet*, weigh their options and make a decision. On the other hand, it is also conceivable that achieving agreement on *non liquet* might facilitate consensus on issues relating to judicial overreach. But the road ahead for the WTO membership is clear, if it has to meet the mandate it set for itself at MC12, i.e., to have a fully functioning dispute settlement system by 2024. MC13 is around the corner, and we dare to remain optimistic that members will restore the old glory of WTO dispute settlement.

## *VII. Conclusion*

We argue in this paper that the use of the *non liquet* rule in WTO DS could solve some of the problems arising from what is seen by many as judicial overreach by the Appellate Body and deserves deeper consideration. However, we also recognize that it would not solve all of the problems in this area and raises many complex issues in order to be made possible. In the absence of explicit instruction regarding *non liquet* in the relevant WTO law, i.e. the DSU, previous commentators have presented divergent opinions on when to use it. With prior academic positions ranging from absolute opposition to it to normatively requiring judges to exercise it more frequently, we contextualize the problem of overreach and the abstinence from *non liquet* thus far as part of the broader concerns with the Appellate Body and WTO DS, applying a risk theory analysis. While we advocate the use of *non liquet*, we also raise important questions about when it should be used, i.e., legal absence or ambiguity, or political questions. Members may choose to align with our suggestion to explore ways to invoke *non liquet* while framing the limits to its use. They may decide and implement this through decisions or amendments, as we have suggested can be done by making use of existing WTO tools and mechanisms.

However, it is telling that WTO members have thus far not considered *non liquet* seriously in their reform discussions. We ascribe this to the fundamental differences in their legal systems and approaches, which lend the issue immense political sensitivity. While we acknowledge the difficulties in attaining consensus amongst members, we stress the necessity and urgency to discuss the issue in continuing reform talks.

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