

ALTERNATIVE FOR AVOIDING THE VOID: THE ICJ AS A TEMPORARY APPELLATE REVIEW MECHANISM IN WTO DISPUTES AMIDST THE APPELLATE BODY CRISIS*

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ABSTRACT

Article 23(1) of the World Trade Organization (WTO) Dispute Settlement Understanding (DSU) provides that members shall have recourse to the procedures provided for under the DSU. However, the absence of a standing Appellate Body within the WTO creates a significant gap in the DSU dispute resolution mechanism, leaving parties with no effective avenue for appeals of panel reports. Notably, under Article 36(1) of the Statute of the International Court of Justice (ICJ), the jurisdiction of the ICJ extends to all cases referred to it by parties, regardless of other agreements or treaties.

This Note posits that in light of the Appellate Body crisis, WTO member states that are parties to a dispute may submit appeals of panel reports to the ICJ, ensuring that they have a viable recourse for seeking redress for violations of obligations under WTO agreements. Without access to the broad jurisdiction of the ICJ in light of the Appellate Body Crisis, the right to appeal under the DSU becomes illusory, undermining the fundamental principles of fairness and justice within the multilateral trading system.

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“The mechanism should be designed so that as time goes on, greater and greater confidence will be placed in the system, and that it will more often be utilized, and gradually greater responsibilities may be given to it.”

— JOHN H. JACKSON¹

I. INTRODUCTION

The World Trade Organization (WTO) Dispute Settlement Body (DSB) has long been considered the cornerstone of the multilateral trading system,² providing a structured and impartial mechanism for resolving trade disputes between member states. In fact, the WTO’s DSB has been considered by many as the “jewel in the crown” of the WTO.³ However, the

¹ JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 134 (2nd ed. 1997).

² *Legal texts: the WTO agreements*, WORLD TRADE ORG. WEBSITE, at https://www.wto.org/english/docs_e/legal_e/ursum_e.htm (last accessed June 4, 2025).

³ Peter Van den Bossche, *Can the WTO Dispute Settlement System Be Revived?: Options for Addressing a Major Governance Failure of the World Trade Organization* 1 (WTO Working Paper No. 03/2023, 2023), at https://www.wti.org/media/filer_public/dc/68/dc6816ae-6d34-4f95-8d8d837597ce54f3/wti_wp_03_2023.pdf; Clifford Chance, *The WTO Appellate Body Crisis: A Way Forward* 2 (Briefings, 2019), at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/11/the-wto-appellate-body-crisis-a-way-forward.pdf>.

current paralysis of the WTO Appellate Body, caused by the Trump administration's blockage of the appointment and reappointment of appellate body members, has been ongoing since December 2019.⁴ This paralysis created a significant void in the dispute settlement system, leaving member states without a crucial avenue for appealing panel reports.⁵ This Note argues that, in light of this unprecedented situation, WTO member states should be permitted to submit appeals of panel reports to the International Court of Justice (ICJ) based on the broad jurisdiction granted to the ICJ under its Statute.⁶

The WTO dispute settlement system, established through the Dispute Settlement Understanding (DSU), was designed to provide a comprehensive and effective means of resolving trade disputes. At its core, this system relied on a two-tiered approach: initial adjudication by panels, followed by the possibility of appeal to the Appellate Body.⁷ This structure ensured that legal interpretations and factual findings could be thoroughly reviewed—promoting consistency, fairness, and confidence in the dispute resolution process.⁸

Unfortunately, for approximately four years, the WTO Appellate Body has been unable to hear new appeals due to an insufficient number of members, resulting from the blocking of new appointments by the United States. This impasse has effectively nullified the appellate function of the WTO dispute settlement system, leaving panel reports as the final word on complex and often contentious trade issues. Since December 2019, 24 panel reports have been appealed “into the void” on top of the eight pending appealed panel reports, amounting to a total of 32 panel reports notified for appeal.⁹ The absence of a functioning Appellate Body undermines the integrity and credibility of the dispute settlement process and threatens the stability and predictability of the entire multilateral trading system.

⁴ Van den Bossche, *supra* note 3, at 5.

⁵ *Id.* at 6.

⁶ Statute of the International Court of Justice [hereinafter “ICJ Statute”], 33 U.N.T.S. 993, art. 36 (1945).

⁷ Simon Lester, *Two Reasons for a Two-Tier WTO Dispute Settlement System*, INT'L ECON. L. POL'Y BLOG, May 20, 2024, at https://ielp.worldtradelaw.net/appellate_body.

⁸ See Matthias Oesch, *Standards of Review in WTO Dispute Resolution*, 6 J. INT'L ECON. L. 635, 639–40 (2003).

⁹ *Appellate Body*, WORLD TRADE ORG. WEBSITE, at https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last accessed June 18, 2024).

The origins of this crisis can be traced back to the Obama administration's blocking of the reappointment of an Appellate Body member in 2016.¹⁰ This move set a dangerous precedent that the Trump administration later expanded.¹¹ To justify their blocking of appointments and reappointments, the Trump administration raised concerns such as alleged judicial overreach,¹² the creation of precedents through Appellate Body decisions, the continued service of Appellate Body members beyond their terms, and the Appellate Body's failure to meet the 90-day deadline for issuing decisions.¹³ While these were legitimate subjects for discussion and reform,¹⁴ the Trump administration addressed them through a unilateral approach rather than through constructive engagement within the established WTO framework.

Given the foregoing, WTO member states find themselves in an unforeseen dilemma: they have the right to appeal panel reports under the DSU, but no functional mechanism currently operates to enable them to exercise this right. Thus, given these extraordinary circumstances, member states should be permitted to refer appeals of panel reports to the ICJ instead.

The crux of the issue lies in reconciling two seemingly conflicting provisions: Article 23(1) of the DSU, which obliges member states to use the procedures provided for under the DSU when seeking redress for violations of WTO agreements, and Article 36(1) of the ICJ Statute, which grants the ICJ jurisdiction over all cases referred to it by parties. While appearing incompatible, these provisions can and should be interpreted in a manner that allows for ICJ jurisdiction over appeals of WTO panel reports in the current impasse. This approach not only preserves the right of WTO member states to seek appellate review but also upholds the fundamental principles of fairness and justice in international trade relations.

¹⁰ Brandon Murrill, US Cong. Research Serv., *The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System"?* 2 (Legal Sidebar LSB10385, 2019), at <https://www.congress.gov/crs-product/LSB10385>.

¹¹ *Id.*

¹² Simon Lester, *Ending the WTO Dispute Settlement Crisis: Where to from here?*, INT'L INST. SUSTAINABLE DEV. WEBSITE, Mar. 2, 2022, at <https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis>.

¹³ Nina M. Hart & Brandon Murrill, US Cong. Research Serv., *The World Trade Organization's (WTO's) Appellate Body: Key Disputes and Controversies* 3 (Reports R46852, 2021), at <https://www.congress.gov/crs-product/R46852>.

¹⁴ Jennifer Hillman, *A Reset for the World Trade Organization's Appellate Body*, COUNCIL ON FOREIGN REL. (2020), at <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body>.

II. THE LEGAL FRAMEWORK

A. The WTO DSU

The DSU forms the backbone of the WTO's dispute resolution mechanism.¹⁵ Article 3(3) of the Marrakesh Agreement Establishing the World Trade Organization provides that one of the functions of the WTO is the administration of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").¹⁶ Adopted as part of the Marrakesh Agreement, the DSU provides a comprehensive framework for resolving trade disputes between WTO members, which establishes a two-tiered system comprised of panels at the first level and an Appellate Body for appeals.¹⁷ This "dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."¹⁸ The two-tiered structure, including appeals, was designed to ensure thorough and fair adjudication of trade disputes, promoting stability and predictability in the multilateral trading system. The fundamental importance of appeals for WTO member states can be seen in the data: between January 1, 1995, and October 1, 2020, there were 248 panel reports and 170 Appellate Body reports, amounting to almost 70% of panel reports having been appealed.¹⁹

The historical context of the Appellate Body's creation is pivotal to understanding its significance. Established as a groundbreaking innovation during the Uruguay Round negotiations, the Appellate Body has evolved into the "most important and authoritative organ" of WTO dispute settlement.²⁰ Its specific design aimed to provide legal security through a standing body of experts capable of developing a comprehensive body of WTO jurisprudence. As trade disputes often entail intricate legal questions and

¹⁵ See Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter "DSU"], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter "Marrakesh Agreement"], Annex 2, 1869 U.N.T.S. 401.

¹⁶ Marrakesh Agreement art. III, ¶ 3, Apr. 15, 1994, 1867 U.N.T.S. 154.

¹⁷ Lester, *supra* note 12.

¹⁸ DSU art. III, ¶ 2.

¹⁹ PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 173–74 (5th ed. 2021).

²⁰ Peter Van den Bossche, *From Afterthought to Centerpiece: The WTO Appellate Body and its Rise to Prominence in the World Trading System* 37 (Maastricht Faculty of Law Working Paper 2005/1, 2005), at <https://www.worldtradelaw.net/document.php?id=articles/vandenbosscheab.pdf>; James Bacchus & Simon Lester, *The Rule of Precedent and the Role of the Appellate Body*, 54 J. WORLD TRADE 183, 186 (2020).

sophisticated legal analysis beyond the capabilities of ad hoc panels, this design choice prioritized the need for a consistent and accurate application of WTO law.²¹ For developing countries, the Appellate Body also provided a platform where legal arguments could triumph over political or economic pressures, making its current dysfunction particularly challenging for nations with limited negotiating leverage in bilateral trade relations.

The DSU has been widely regarded as a significant improvement over the dispute settlement system of the General Agreement on Tariffs and Trade (GATT), by providing a more structured, rule-based approach to resolving trade conflicts.²² According to Van den Bossche, the DSU is generally considered to be one of the most significant achievements of the Uruguay Round negotiations.²³ In fact, the WTO dispute settlement system has been currently operational for more than twenty years, and it is arguably “the most prolific of all international State-to-State dispute settlement systems.”²⁴ Among the DSU’s significant improvements to the GATT dispute settlement system included features such as the establishment of panels to hear disputes, imposition of strict timeframes for various stages of the dispute settlement process, automatic adoption of reports absent a consensus rejection, and authorization of countermeasures in cases of non-compliance.²⁵ Most importantly, the DSU gives member states the right of appeal on issues of law and legal interpretations.²⁶

Central to the conflict in jurisdiction is Article 23(1) of the DSU, which states that “[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements, [...] they shall have recourse to, and abide by, the rules and procedures of this Understanding.”²⁷ This provision establishes an obligation for WTO members to utilize the DSU procedures when seeking to address violations of WTO agreements. For instance, in *United States – Sections 301-310 of the Trade Act of 1974*, this was interpreted by the DSU panel as an “exclusive dispute resolution clause.”²⁸

²¹ Bacchus & Lester, *supra* note 20.

²² *Id.* at 187.

²³ *Id.* at 186.

²⁴ VAN DEN BOSSCHE & ZDOUC, *supra* note 19.

²⁵ *Id.* at 186–87.

²⁶ *Id.* at 192.

²⁷ DSU art. 23, ¶ 1.

²⁸ Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, ¶ 313, WTO Doc. WT/DS152/R (adopted Jan. 27, 2000).

The intent behind Article 23(1) was to ensure that trade disputes would be resolved within the WTO framework, promoting consistency and avoiding fragmentation in the interpretation and application of WTO law.²⁹ However, it is crucial to interpret this provision in light of the current unprecedented situation of the Appellate Body's dysfunction. Interpreting Article 23(1) strictly to the exclusion of any recourse outside the DSU, even when the DSU's mechanisms are inoperative, would lead to an absurd result that denies members any meaningful avenue for appellate review.

B. ICJ Statute

The ICJ, established in June 1945 by the United Nations (UN) Charter as the principal judicial organ of the UN, plays a crucial role in resolving disputes between states and providing advisory opinions on legal questions.³⁰ The ICJ's jurisdiction and functions are governed by its Statute, which is an integral part of the UN Charter.³¹ Owing to its broad mandate and expertise in international law, the ICJ is highly qualified and well-suited to address complex legal issues arising from various domains of international relations, including trade disputes.

While the ICJ may not have specialized expertise in WTO law compared to the WTO Appellate Body, it already has established procedures, infrastructure, and a secretariat capable of handling complex cases efficiently. Further, the ICJ judges, while not specialized in trade law, are experienced in applying general principles of treaty interpretation under the Vienna Convention on the Law of Treaties—principles that also guide WTO treaty interpretation.

Article 36(1) of the ICJ Statute states: “[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”³² This provision explicitly grants the ICJ broad jurisdiction over all cases referred to it by parties. Importantly, the jurisdiction of the ICJ, as can be gleaned from the provision, contains no qualification as to the subject matter of cases it can hear. This broad grant of jurisdiction reflects the principle of consent in international dispute resolution, which is a

²⁹ Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 72–73 (2016).

³⁰ *The Court*, INT'L CT. OF JUST. WEBSITE, at <https://www.icj-cij.org/court> (last accessed June 18, 2024); see MALCOLM SHAW, INTERNATIONAL LAW 803–50 (8th ed. 2021).

³¹ See SHAW, *supra* note 30; ICJ Statute.

³² ICJ Statute art. 36, ¶ 1. (Emphasis supplied.)

fundamental aspect of the ICJ's role in the international legal order, as the ICJ can hear any case referred to it so long as the parties consent to the same.³³

Given the broad jurisdiction granted to the ICJ by Article 36(1), a robust legal basis exists for arguing that WTO member states can refer appeals of panel reports to the ICJ, particularly in the extraordinary circumstance of the absence of a functioning Appellate Body. This interpretation aligns with the ICJ's mandate to address a wide range of international legal disputes and promotes access to justice in international relations.

III. THE ARGUMENT FOR ICJ JURISDICTION

A. The Gap in the WTO Dispute Resolution Mechanism

The appellate process is a crucial component of any robust dispute resolution system, and as discussed, its importance in the context of WTO disputes cannot be overstated. The Appellate Body was designed to review panel decisions on issues of law and legal interpretations only, providing a safeguard against erroneous or inconsistent applications of WTO law.³⁴ The appeals process serves a variety of critical purposes, including the correcting legal errors, ensuring consistency in the interpretation and application of WTO law across different disputes, developing WTO jurisprudence, and enhancing the legitimacy of the dispute settlement system.

Clearly, the appellate process is an indispensable part of the WTO's dispute resolution system. The current lack of a functioning Appellate Body has created a significant gap in the WTO dispute resolution mechanism, with far-reaching consequences. WTO members are effectively deprived of their right to appeal panel reports—a right explicitly provided for in the DSU.³⁵ In fact, because of the lack of a standing Appellate Body, member states have prevented the adoption of a panel report by “appealing into the void” in an effort to delay its finality as the DSB cannot adopt panel reports pending appeal.³⁶

³³ SHAW, *supra* note 30, at 817–18.

³⁴ VAN DEN BOSSCHE & ZDOUC, *supra* note 19.

³⁵ *See* DSU, art. 17.

³⁶ VAN DEN BOSSCHE & ZDOUC, *supra* note 19; Peter Ungphakorn, *Technical Note: Appeals into the Void in WTO Dispute Settlement*, TRADE BETA BLOG, Feb. 12, 2021 at <https://tradebetablog.wordpress.com/technical-note-appeals-into-the-void-in-wto-dispute->

While there have been efforts to make a stopgap alternative through the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), it is an inferior substitute for the DSB.³⁷ 47 WTO members founded the MPIA,³⁸ which uses arbitration as allowed in Article 25 of the DSU to complete possible appeals in disputes between MPIA participants.³⁹ This aims to preserve the WTO dispute settlement system's binding character, and more importantly, the two levels of adjudication: a panel stage, which remains the same as before, and an appellate stage, now conducted through Article 25 arbitration.⁴⁰ To initiate an MPIA appeal, the parties must be MPIA participants, and they must enter into a dispute-specific appeal arbitration agreement.⁴¹

MPIA suffers from several significant limitations. First, it operates on an opt-in basis⁴² and excludes major trading nations like the United States, India, and South Africa.⁴³ In the ASEAN region, the Philippines and Singapore are the only countries that joined the MPIA.⁴⁴ This limited participation creates a fragmented system where different dispute resolution mechanisms apply depending on the parties involved. Second, the MPIA lacks the institutional infrastructure that an established body such as the ICJ has, signaling potential procedural inefficiencies. Third, its legal foundation, Article 25 of the DSU,⁴⁵ was not designed for appellate review and may create uncertainty about the scope and nature of review available. Finally, as an interim arrangement, the MPIA lacks the permanence and stability needed to build a coherent body of jurisprudence. In contrast, the ICJ—a permanent court with universal recognition, established procedures, and proven track

settlement (last updated Feb. 24, 2025); Alice Tipping, *Reforming the World Trade Organization*, INT'L INST. FOR SUSTAINABLE DEV. WEBSITE, Jan. 11, 2024, at <https://www.iisd.org/articles/policy-analysis/reforming-world-trade-organization>.

³⁷ Tipping, *supra* note 36.

³⁸ *Multi-Party Interim Appeal Arbitration Arrangement (MPIA)* [hereinafter "MPIA"], WTO PLURILATERALS WEBSITE, at https://wtoplurilaterals.info/plural_initiative/the-mpia/ (last accessed on June 11, 2025).

³⁹ Joost Pauwelyn, *The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?*, 22 WORLD TRADE REV. 693, 694 (2023).

⁴⁰ *Id.*

⁴¹ *Id.* at 696.

⁴² MPIA, *supra* note 38.

⁴³ *Id.* See also Tsuyoshi Kawase, *The Appellate Void in Indonesia's Trade Policy*, E. ASIA FORUM, Oct. 21, 2024, at <https://eastasiaforum.org/2024/10/21/the-appellate-void-in-indonesias-trade-policy>.

⁴⁴ Kawase, *supra* note 43.

⁴⁵ See DSU art. 25; MPIA, *supra* note 38.

record in handling complex international disputes—offers a more institutionally robust solution for WTO appellate reviews during this crisis.

These consequences highlight the urgent need for a solution to fill the gap left by the nonfunctioning Appellate Body. Allowing appeals to the ICJ thus represents a viable and legally sound approach to addressing this critical issue, given its competence and broad jurisdiction.

B. Interpretation of ICJ Statute Article 36(1)

Article 36(1) of the ICJ Statute grants the Court broad jurisdiction over “all cases which the parties refer to it.”⁴⁶ A reading of the provision indicates that the ICJ is meant to have a flexible and comprehensive jurisdiction. Several vital points support a broad interpretation of this provision.

First, unlike Article 36(2), which deals with compulsory jurisdiction,⁴⁷ Article 36(1) does not impose any restrictions based on the nature or subject matter of the dispute. Article 36(2) is qualified:

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.⁴⁸

The absence of these qualifications in Article 36(1) suggests that the framers of the ICJ Statute intended for the ICJ’s jurisdiction under Article 36(1) to be as wide as possible, encompassing any international dispute that parties choose to refer to the Court, including trade disputes.

⁴⁶ ICJ Statute art. 36, ¶ 1.

⁴⁷ Art. 36, ¶ 2.

⁴⁸ Art. 36, ¶ 2.

Second, the provision emphasizes party consent as the primary basis for the ICJ's jurisdiction, provided that the consent is voluntary and indisputable.⁴⁹ In fact, the ICJ, in *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, merely inferred consent from the acts of a state and ruled that consent may be manifested in any manner.⁵⁰ This suggests that Article 36(1) applies to the jurisdiction of the ICJ based on the consent of both parties, regardless of how it is expressed. Thus, if two WTO member states agree to refer appeals of panel reports to the ICJ, and both member states consent voluntarily and indisputably, such referral would fall squarely within the ICJ's mandate. Further, the parties to an actual dispute can jointly decide that seeking judicial settlement through the court would be the wisest solution.⁵¹

This allows the ICJ to play a complementary or substitute role to specialized dispute resolution mechanisms and helps the ICJ to adapt to new challenges in international relations, such as the current WTO Appellate Body crisis. The broad jurisdiction of the ICJ provides a solid legal basis for arguing that member states can refer appeals of panel reports to the ICJ, particularly, given the extraordinary circumstances created by the dysfunction of the Appellate Body.

C. Balancing WTO Obligations with Access to Justice

The principle of effective treaty interpretation, or *ut res magis valeat quam pereat*, is a well-established rule of international law.⁵² This principle requires that treaties be interpreted in a manner that gives effect to their terms and not in a way that renders its provisions meaningless or ineffective.⁵³ Given the ongoing WTO dispute settlement crisis, this principle supports an interpretation that allows the ICJ to acquire jurisdiction over appeals of panel reports despite the DSU seemingly being an "exclusive dispute resolution mechanism."⁵⁴

The principle of effective treaty interpretation provides a solid legal foundation for granting the ICJ jurisdiction over WTO panel appeals during the Appellate Body crisis. Codified in Article 31(1) of the Vienna Convention

⁴⁹ SHAW, *supra* note 30, at 818.

⁵⁰ *Id.*

⁵¹ THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 742 (Andreas Zimmermann, et al. eds., 3rd ed. 2019).

⁵² RICHARD GARDINER, TREATY INTERPRETATION 179–81 (2nd ed. 2015).

⁵³ *Id.* at 179.

⁵⁴ DSU, art. 23.

on the Law of Treaties, it mandates that treaties be interpreted “in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in its context and *in light of its object and purpose*.”⁵⁵ The International Law Commission, in its commentary on the draft articles of the Vienna Convention, emphasized the importance of treating treaties to have “appropriate effects” rather than allowing them to lose their meaning.⁵⁶

The ICJ itself has applied this principle in numerous cases, including in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* where it stated that interpretation must ensure the harmonious application of all treaty provisions.⁵⁷ In the WTO context, the Appellate Body recognized this principle in *Japan—Alcoholic Beverages II*, noting that “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.”⁵⁸ Applying this principle to the current crisis, a strict interpretation of Article 23(1) of the DSU that prohibits any appellate review outside the WTO dispute settlement system would render Article 17 of the DSU, which establishes the right to appeal, entirely ineffective and nugatory. This type of absurdity is precisely the outcome that the principle of effective treaty interpretation seeks to prevent. Therefore, allowing ICJ jurisdiction is not in conflict with the DSU but rather enhances its provisions in extraordinary circumstances, such as the Appellate Body crisis, by preserving the fundamental right of appeal that would otherwise be nullified.

Applying this principle to the DSU and the ICJ Statute leads to several important conclusions. First, the right to appeal under the DSU should not be rendered illusory due to the nonfunctioning of the Appellate Body. Second, Article 23(1) of the DSU should be interpreted in a manner that does not preclude access to alternative forums when the DSU’s mechanisms are inoperative. Third, Article 36(1) of the ICJ Statute should be given full effect, allowing it to serve as a basis for jurisdiction over WTO appeals in extraordinary circumstances such as the non-operation of the Appellate Body.

⁵⁵ Vienna Convention on the Law of Treaties [hereinafter “VCLT”] art. 31, ¶ 2, May 23, 1969, 1155 U.N.T.S. 311 (1969). (Emphasis supplied.)

⁵⁶ 2 Y.B. Int’l L. Comm’n 219, U.N. Doc. A/CN.4/SER. A/1966/Add.1 (1966).

⁵⁷ *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, 1994 I.C.J. Rep. 6, ¶ 41 (Feb. 3).

⁵⁸ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* 12, WTO Doc. WT/DS8/AB/R (adopted Nov. 1, 1996).

This interpretation is more in line with effective treaty interpretation as it ensures that both the DSU and the ICJ Statute retain their effectiveness and purpose, even in the face of unforeseen challenges to the WTO dispute settlement system. This also ensures the right of access to justice, a principle that has emerged with the progressive development of international law.⁵⁹

In the current situation, where WTO members are deprived of their right to appeal panel reports, allowing recourse to the ICJ upholds this right. This approach preserves the integrity of the dispute resolution process by providing an alternative avenue for appeals, maintains the rule of law in international trade, and fulfills the object and purpose of the DSU by providing a secure and predictable multilateral trading system.

Still, permitting appeals to the ICJ is a mere stopgap measure to alleviate the current situation. It should not be seen as a permanent replacement and alteration of the WTO dispute settlement system, which, as established, was effective when operational. Moreover, such recourse to the ICJ is not mandatory, nor would it be an imposition on all WTO member states who wish to use the appellate process; it is available for those who mutually consent to the same as embodied in Article 36(1) of the ICJ Statute.⁶⁰ Allowing the ICJ to take cognizance of appeals brought before it would balance the need to respect WTO obligations with ensuring their access to justice.

IV. ADDRESSING COUNTERARGUMENTS

A. Exclusive Jurisdiction of the WTO over Trade Disputes

A possible deterrent to this Note's argument is that the WTO has exclusive jurisdiction over trade disputes. This claim is based on a strict interpretation of Article 23(1) the DSU which requires members to have recourse to DSU procedures when seeking redress for violations of WTO agreements. As previously mentioned, the panel in *US – Section 301 Trade Act* interpreted Article 23(1) as an obligation to recourse to the DSB to the

⁵⁹ See FRANCESCO FRANCONI, ACCESS TO JUSTICE AS A HUMAN RIGHT 1–3 (2007).

⁶⁰ ICJ Statute art. 36, ¶ 1.

exclusion of any other system.⁶¹ This interpretation ensures exclusivity and protects the multilateral system from unilateral conduct.⁶²

However, a careful analysis of the DSU's intent and purpose reveals that this interpretation needs to be more flexible and account for the current extraordinary circumstances. For example, Article 3(7) provides that "the dispute settlement mechanism aims to secure a positive solution to a dispute."⁶³ A narrow interpretation of the DSU that would preclude appellate review when the Appellate Body is non-functional would undermine and contradict the fundamental purpose of securing positive solutions to disputes. This is especially true if both states mutually consent to the ICJ's jurisdiction over their case. If it occurs to them that the ICJ deciding upon the appeal would produce "a positive solution," then such should be given effect. This is a more holistic and effective interpretation of the DSU, as Article 23(1) is guided by the principles in Article 3(7).

Furthermore, the DSU in Article 3(7) also states that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred."⁶⁴ Thus, if both parties to a WTO dispute mutually consent to the jurisdiction of the ICJ for their appeal, then this solution is "clearly to be preferred" and their will, as expressed by their consent, should be respected and be given effect.

Moreover, the DSU aims to create a secure and predictable system for dispute resolution.⁶⁵ The denial of access to the member states to any form of appellate review contradicts this goal of creating a predictable and reliable dispute resolution system, potentially leading to inconsistent and unfair outcomes. While the drafters of the DSU did not anticipate the current Appellate Body crisis, the agreement should be interpreted in a manner that allows for adaptation to unforeseen challenges.

Thus, a more flexible interpretation of the DSU's provisions is not only permissible but necessary. The principle of effectiveness supports a reading of the DSU that preserves the right to appeal, even through alternative means. A good faith interpretation of the DSU, as required by

⁶¹ *United States – Sections 301-310 of the Trade Act of 1974*, *supra* note 28, at 313.

⁶² Panel Report, *European Communities – Measures Affecting Trade in Commercial Vessels*, 120, WTO Doc. WT/DS301/R (adopted June 20, 2005).

⁶³ DSU, art. 3, ¶ 7.

⁶⁴ Art. 3, ¶ 7.

⁶⁵ Art. 3, ¶ 2.

Article 31 of the Vienna Convention on the Law of Treaties,⁶⁶ would not insist on exclusive WTO jurisdiction when doing so would deprive members of their right to appeal.

Moreover, international courts and tribunals have recognized that treaties should be interpreted in light of evolving circumstances.⁶⁷ This crisis in the WTO dispute settlement system justifies an evolutionary approach to interpreting the DSU. Allowing appeals to the ICJ does not necessarily undermine WTO's jurisdiction over trade disputes. Instead, it is a complementary measure that supports the overall goals of the WTO dispute settlement system in extraordinary circumstances.

B. The Indispensability of Appellate Review in the WTO Dispute Settlement System

The EU and other major players in the WTO, including China, Brazil, and India, have stressed that the WTO dispute settlement system must be a system that provides for an effective appellate review of panel reports.⁶⁸ In fact, many members believe that the blocking of the US of the Appellate Body appointment process was not justified.⁶⁹ This is further highlighted by how WTO members, in every regular DSB meeting within the past years, have requested the appointment system to commence without delay; in the September 2023 DSB meeting alone, 130 WTO members supported such a request.⁷⁰

Without an effective appellate review mechanism, the Philippines faces potentially significant challenges in addressing trade barriers imposed by larger economies, as this can prevent the resolution of disputes vital to Philippine economic interests. This concern is particularly relevant to the Philippines' agricultural exports, which face various non-tariff barriers in key markets.⁷¹ For example, in a dispute involving Philippine agricultural exports

⁶⁶ VCLT art. 31, ¶ 1.

⁶⁷ Dispute regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213 at ¶¶ 64, 66 (July 13).

⁶⁸ Van den Bossche, *supra* note 3, at 20.

⁶⁹ *Id.* at 10.

⁷⁰ *Id.*

⁷¹ PAMELA ANNE BAYONA & MATTHIEU LORIDAN, INT'L TRADE CTR., PHILIPPINES: COMPANY PERSPECTIVES—AN ITC SERIES ON NON-TARIFF MEASURES 11-12 (David Watkiss ed. 2016), at https://intracen.org/sites/default/files/uploadedFiles/intracenorg/Content/Publications/Philippines_NTMs_final_new_Hi_res.pdf; Editorial, *Nontariff barriers hurt PHL exports*, BUS. MIRROR, Apr. 4, 2017, at <https://businessmirror.com.ph/2017/04/04/the-winner-all-the-time-2>.

where substantial economic interests are at stake, the absence of an Appellate Body could mean that the Philippines would have to accept a panel ruling with questionable legal reasoning or face an unresolved dispute that is appealed “into the void,” wasting valuable time. This hypothetical scenario starkly illustrates how the Appellate Body’s paralysis hinders developing countries’ ability to effectively participate in the rules-based trading system.

Clearly then, the appellate review process in the DSU is indispensable to the member states. Therefore, to give effect to all provisions of the DSU, including the right to appeal, Article 23(1) should not be interpreted in a way that completely precludes alternative avenues for appellate review when the DSU’s mechanisms are inoperative.

Notably, the wording of Article 23(1) explicitly states that members “shall have recourse to, and abide by, the rules and procedures of this Understanding.”⁷² Nothing in this provision nor in the DSU itself precludes the member states from having recourse to other mechanisms so long as the condition of “hav[ing] recourse to” and “abid[ing] by” the DSU is first satisfied. Having recourse to the DSB which resulted in the circulation of a panel report can be reasonably interpreted to already fulfill the condition of “hav[ing] recourse to” the DSU, because no functioning appellate body is available. Thus, recourse to the ICJ for appeals aligns with the DSU’s goal of promoting a rule-based system for dispute resolution.

C. Safeguards Available to the WTO DSB

One valid concern on the proposal that the ICJ has jurisdiction to hear appeals from WTO member states is that the ICJ’s jurisdiction would be overbroad and too large—so much so that it may affect the jurisdiction of the Appellate Body should it be functional again. However, several safeguards are available not just in the ICJ Statute itself but in international law.

Article 36(6) of the ICJ Statute clearly provides that “in the event of a dispute as to whether the [ICJ] has jurisdiction, the matter shall be settled by the decision of the Court.”⁷³ Thus, the ICJ itself can limit its jurisdiction and can decline to take cognizance of such appeals by the WTO member states should the Appellate Body be reconstituted.

⁷² DSU art. 23, ¶ 1.

⁷³ ICJ Statute art. 36, ¶ 6.

Further, international courts have an inherent right to decline to exercise jurisdiction, such as when to do otherwise would undermine their judicial function and legitimacy.⁷⁴ As Yuval Shany has argued, the ICJ's decisions in *Northern Cameroons* fall into this category.⁷⁵ Notably, an international court, which has been granted a jurisdictional title to adjudicate a particular dispute, may nonetheless rely on its inherent powers and decline to exercise this legal authority in situations it would conflict with another applicable norm or rule of international law.⁷⁶ Such is the case when the exercise of the power would violate an exclusive jurisdiction clause.⁷⁷ Relevant here is the view of the panel in *US – Section 301 Trade Act*: that Article 23(1) of the DSU is an “exclusive dispute resolution clause.”⁷⁸ Thus, should the Appellate Body be once again in operation, the ICJ can decline to exercise the jurisdiction in order to preserve its legitimacy, as the extraordinary circumstances would have already ceased.

V. THE IMPORTANCE OF MAINTAINING AN APPELLATE MECHANISM

Given the complex and often technical nature of international trade disputes, the maintenance of an appellate mechanism, even if through recourse to the ICJ, is crucial for upholding the principles of fairness and justice in international trade relations, as trade disputes may and often have significant economic and political consequences.

For the Philippines specifically, access to an appellate mechanism is not merely a procedural convenience but a vital safeguard for its economic interests. As a developing country heavily dependent on international trade, with trade accounting for approximately 67% of its GDP,⁷⁹ the Philippines relies on the rules-based multilateral trading system to ensure fair treatment by larger trading partners.⁸⁰ Again, without a functioning appellate mechanism, the Philippines faces a significant power imbalance in trade

⁷⁴ YUVAL SHANY, *Chapter 4: Jurisdictional Powers and Issues of Admissibility*, in *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* 78–79 (2014).

⁷⁵ *Id.* at 86.

⁷⁶ *Id.* at 86–87.

⁷⁷ *Id.* at 86.

⁷⁸ *United States – Sections 301-310 of the Trade Act of 1974*, *supra* note 28, at 313.

⁷⁹ *Trade (% of GDP)*, WORLD BANK DATA, at <https://data.worldbank.org/indicator/NE.TRD.GNFS.ZS> (last accessed June 11, 2025).

⁸⁰ *PH pushes digital innovation, open trade and sustainable growth at 2025 APEC MRT*, DEP'T OF TRADE AND INDUS. WEBSITE, May 19, 2025, at <http://dti.gov.ph/news/ph-pushes-digital-innovation-open-trade-sustainable-growth-2025-apec-mrt/>.

disputes, potentially forcing it to accept unfavorable panel decisions due to limited leverage in bilateral negotiations with larger economies.

Moreover, access to an appellate mechanism ensures that all WTO members, regardless of their size or economic power, have equal opportunities to seek review of unfavorable panel decisions. This equality before the law is essential for maintaining the legitimacy and fairness of the international trading system. In fact, developing-country members have made a lot of use of the WTO dispute settlement system.⁸¹ In the years since 2000, developing-country members, as a group, have brought more disputes to the WTO than developed-country members.⁸² The creation of the WTO dispute settlement system contributed to the objective that within the WTO, “right prevails over might.”⁸³ Thus, while the system works to the advantage of all members, it especially gives security to developing-country members who have often, in the past, lacked the political or economic clout to enforce their rights and to protect their interests.⁸⁴

The integrity and effectiveness of the multilateral trading system also hinged on an effective appellate review system, which helps ensure consistency in the interpretation and application of WTO agreements across different disputes.⁸⁵ This consistency is crucial for providing predictability and security to the trading system. It allows businesses and governments to make informed decisions based on a clear understanding of WTO rules and their application.

VI. CONCLUSION

In light of the extraordinary circumstances created by the nonfunctional WTO Appellate Body, this paper has argued that WTO member states should be permitted to refer appeals of panel reports to the ICJ. This argument is grounded in a careful analysis of the legal framework, including a holistic reading of Article 36(1) of the ICJ Statute and a flexible interpretation of the WTO Dispute Settlement Understanding.

⁸¹ VAN DEN BOSSCHE & ZDOUC, *supra* note 19.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUR. J. INT'L L. 605, 614 (2009).

The Appellate Body crisis presents a pivotal moment for the multilateral trading system, posing profound questions about resolving trade disputes without a functional appellate mechanism. Developing countries such as the Philippines have historically relied on the rules-based system to safeguard their interests against more powerful trading partners. While alternative solutions, such as the MPIA, bilateral arbitration agreements, or simply forgoing appeals, have been proposed, the ICJ offers distinct advantages as a temporary solution. The ICJ's universal legitimacy, established procedures, experienced judges, and robust institutional framework make it exceptionally well-suited to serve as an interim appellate mechanism during this extraordinary period. Unlike the MPIA, which faces challenges in participation and lacks institutional permanence, or bilateral arrangements that risk fragmenting WTO jurisprudence, the ICJ provides a universally accessible forum that can maintain consistency in interpreting WTO agreements while the underlying political issues are being resolved.

The broad jurisdiction granted to the ICJ under Article 36(1) of its Statute provides a strong legal basis for accepting appeals of WTO panel reports. This interpretation is supported by the principle of effective treaty interpretation, which requires that both the DSU and the ICJ Statute be given meaningful effect, even in the face of unforeseen challenges. Moreover, allowing appeals to the ICJ aligns with the fundamental principles of fairness, justice, and access to effective dispute resolution in international trade relations.

While concerns about the WTO's exclusive jurisdiction and potential conflicts with DSU Article 23(1) are valid, they can be addressed through a nuanced and purposive interpretation of the relevant provisions. The extraordinary nature of the current situation warrants a less stringent and restrictive reading of the law that prioritizes the WTO dispute settlement system's overarching goals over the strict letter of the law.

It is crucial to emphasize that the proposal to allow appeals to the ICJ is intended as a temporary measure to address the immediate crisis. This solution should not be seen as a permanent replacement for the WTO Appellate Body, but as a stopgap measure to ensure the continued functioning of the appellate process while efforts to reform the WTO dispute settlement system continue. In any case, the conferment of jurisdiction over appeals of panel reports to the ICJ is not absolute, and the ICJ itself can decline to exercise jurisdiction should there be a conflict with an international norm or rule.

In conclusion, allowing appeals of WTO panel reports to the ICJ represents a temporary but legally sound and pragmatic response to the current Appellate Body crisis. This approach upholds the fundamental principles of international trade law, preserves the right of WTO members to seek appellate review, and contributes to the stability and predictability of the multilateral trading system. As the international community grapples with this unprecedented challenge, member states who have the right to appeal should not be left without recourse and in limbo. Embracing this solution would demonstrate a commitment to adaptability, fairness, and the rule of law in international trade relations.

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