

## Chapter 18

# The Use of Non-pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners

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### 1. INTRODUCTION

In recent years, arbitral practitioners have looked with increasing frequency to the World Trade Organization (WTO) for guidance. Arbitral tribunals constituted under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) have cited and discussed WTO principles and jurisprudence in their awards.<sup>1</sup> In addition, commentators have debated the relevance of WTO rules, such as nondiscrimination and most favored nation treatment, to investor-state arbitration.<sup>2</sup>

As further evidence of the apparent convergence between the worlds of international arbitration and WTO dispute settlement, a single government measure has in two instances given rise to parallel proceedings before the WTO and arbitral tribunals. The softwood

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<sup>1</sup> See, e.g., *ADM/Tate & Lyle v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, paras. 73-74, 85-99, 141, 189, 212-13 (26 September 2007); *Occidental Exploration & Production Co. v. Ecuador*, LCIA Case No. UN3467, paras. 153-55 (1 July 2004); *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, para. 177 (16 December 2002); *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, paras. 45-72 (10 April 2001); *S.D. Myers v. Canada*, Partial Award, paras. 221, 244-46, 291-98 (13 November 2000). For its part, the WTO Appellate Body recently cited an ICSID award (*Saipam S.p.A. v. The People's Republic of Bangladesh*) in support of its findings. Appellate Body Report, *US - Stainless Steel*, WT/DS344/AB/R, n. 313, adopted 20 May 2008.

<sup>2</sup> See, e.g., Nicholas DiMascio & Joost Pauwelyn, "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?", 102 *American Journal of International Law* 48 (2008); Walid Ben Hamida, "MFN Clause and Procedural Rights: Seeking Solutions from WTO Experiences," February 2008, available at <http://www.transnational-dispute-management.com>; Todd Weiler, "NAFTA Article 1105 and the Principles of International Economic Law," 42 *Columbia Journal of Transnational Law* 35 (2003).

lumber dispute between the United States and Canada, which arose out of the US imposition of countervailing and antidumping duties, yielded a politically-charged WTO case.<sup>3</sup> At the same time, Canadian investors initiated arbitral proceedings against the United States based on the same measures, seeking recovery under Chapter 11 of the North American Free Trade Agreement (NAFTA).<sup>4</sup> Likewise, a Mexican tax on sweeteners gave rise to both a successful WTO challenge by the United States and NAFTA claims by US investors.<sup>5</sup> The existence of such parallel disputes has prompted considerable debate over the extent to which findings in a WTO dispute are relevant to (or dispositive of) claims brought in an investor-state arbitration arising out of the same government measure, and vice versa.<sup>6</sup>

This chapter will briefly address an issue that has received scant attention in these debates – namely, whether the distinctive remedies available in the WTO dispute context offer any insights for arbitral practitioners. As commentators have observed, the creation of the WTO in 1995 as the successor to the GATT was “celebrated principally for its binding quality.”<sup>7</sup> The WTO dispute settlement mechanism is perhaps unique among inter-state tribunals in the extent to which it appears capable of meaningfully enforcing Member obligations.<sup>8</sup>

Part two of this chapter outlines the distinctive characteristics of the WTO remedial approach, which departs from traditional principles of state responsibility in public international law. We also discuss the limitations of the WTO remedial system, and introduce some of the many proposals to reform this system.

Part three then compares the WTO remedial system to the system that currently prevails in international commercial and investor-state

<sup>3</sup> See, e.g., Panel Report, *US – Final Lumber AD Determination* (21.5), WT/DS264/RW, adopted 1 September 2006.

<sup>4</sup> See *Canfor Corp. et al. v. United States*, Decision on Preliminary Question, 6 June 2006 (NAFTA Ch. 11 Consolidation Tribunal).

<sup>5</sup> Appellate Body Report, *Mexico Taxes on Soft Drinks*, WT/DS308/AB/R, adopted 24 March 2006; *ADM/Tate & Lyle v. Mexico*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007; *Corn Products Int'l, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, 15 January 2008. A final award was rendered in the *Corn Products* case on 18 August 2009, but was not released to the public. This final award was, in turn, subject to a request for correction and interpretation, which was denied on 23 March 2010.

<sup>6</sup> See, e.g., DiMascio & Pauwelyn.

<sup>7</sup> Chi Carmody, “Remedies and Conformity Under the WTO Agreement,” 5 *Journal of International Economic Law* 307, 307 (2002).

<sup>8</sup> See, e.g., Steve Charnovitz, “Rethinking WTO Trade Sanctions,” 95 *American Journal of International Law* 792, 792 (2001) (“The most salient feature of dispute settlement in the World Trade Organization (WTO) is the possibility of authorizing a trade sanction against a scofflaw member government.”).

arbitration. The most basic distinction is a conceptual one: WTO dispute settlement primarily emphasizes distributive justice, rather than the corrective justice that arbitral tribunals are tasked with dispensing. This conceptual distinction translates into different practical approaches to remedies. For instance, in contrast with arbitral tribunals, WTO panels can only provide non-pecuniary relief, and in a form which bears little resemblance to traditional non-pecuniary remedies awarded by arbitral tribunals. The parties are also more intimately involved in fashioning remedies in the WTO process.

Despite the substantial differences between the two systems, arbitral practitioners may nonetheless draw lessons from the WTO example. As discussed in Part four, the WTO remedial experience illustrates the value of non-pecuniary relief, and suggests ways in which both counsel and arbitrators might more frequently seek to include such relief in arbitral awards – either in addition to, or in lieu of, money damages. The WTO experience also highlights the circumstances in which the use of non-pecuniary relief may be most effective – for instance, where the parties have an ongoing relationship. Finally, echoing WTO practice, arbitral tribunals should consider ways to involve the parties in fashioning remedies, leading to a more facilitative – rather than directive, or top-down – approach to remedies.

This chapter does not attempt to provide a definitive treatment of the intersection between WTO and arbitral remedies – a vast topic that is incapable of being adequately explored in a single chapter. Instead, we attempt to introduce arbitral practitioners – to the distinctive characteristics of the WTO remedial system, and suggest possible lessons to be drawn. Rather than advocate the wholesale adoption of the WTO remedial approach by arbitral practitioners, this chapter concludes that a more nuanced analysis is in order – one that is sensitive to the different goals, actors, substantive obligations, and objectives of the two systems.

## **2. THE WTO SYSTEM: STRUCTURE AND REMEDIES**

### **2.1 The Dispute Settlement Understanding (DSU)**

The WTO dispute settlement mechanism has been described as “the most active and most advanced legal system in the larger field of public international law.”<sup>9</sup> As codified in the Dispute Settlement Understanding (DSU), any WTO Member may challenge a measure

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<sup>9</sup> N. David Palmeter & Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization* 305 (2d ed. 2004).

taken by another Member that allegedly violates one or more “covered agreements” (which together comprise the WTO Agreement) before a neutral panel.<sup>10</sup> Complaining parties are allowed to make written and oral submissions, and decisions are rendered within a relatively short time period (generally six months from the date the panel is composed).<sup>11</sup> Like domestic court systems, the DSU empowers parties to appeal an adverse ruling to a standing Appellate Body.<sup>12</sup> The DSU also contains a complex set of procedures for evaluating compliance with rulings, and ensuring enforcement.<sup>13</sup>

The DSU represents a substantial improvement over the GATT dispute mechanism which preceded it. Under the GATT, the losing party could block the establishment of a dispute settlement panel, veto the adoption of an adverse ruling, or refuse to implement it. This often yielded more politically-driven, compromise rulings, intended to make decisions more palatable to both sides.<sup>14</sup> By contrast, the DSU makes the adoption of panel reports essentially automatic. Under the “negative consensus rule,” the WTO Dispute Settlement Body (DSB) will adopt a panel report unless there is a consensus among WTO Members not to do so.<sup>15</sup> Moreover, unlike the GATT, the DSU prescribes extensive procedures to guide the dispute settlement process, and, as discussed above, allows recourse to a standing appellate body.

## 2.2 Overview of remedies and enforcement in the WTO system

One of the DSU’s principal – and most controversial – achievements was the establishment of a complex remedial and enforcement mechanism. A brief summary of this apparatus is described below.

After the parties have exchanged written submissions and participated in oral hearings, a three-member dispute settlement panel will issue its findings. According to Article 19 of the DSU, if the panel concludes that the challenged measure is inconsistent with one of the WTO covered agreements, the panel will “recommend that the

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<sup>10</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Articles 1, 3, 5-8. (hereinafter “DSU”).

<sup>11</sup> DSU, Article 12.8; WTO Secretariat, *A Handbook on the WTO Dispute Settlement System* 59 (2004) (hereinafter “WTO Handbook”).

<sup>12</sup> See generally DSU, Article 17.

<sup>13</sup> DSU, Articles 21-22.

<sup>14</sup> See, e.g., John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* 70-72 (1998); WTO Handbook, at 13-14.

<sup>15</sup> DSU, Article 16.4; WTO Handbook, at 15-16.

Member concerned bring the measure into conformity with that agreement.”<sup>16</sup> The panel may also “suggest” specific ways in which the Member could implement the panel’s recommendations (this suggestion is non-binding).<sup>17</sup>

The Member may then appeal the panel’s ruling to the Appellate Body. If the Member decides to lodge an appeal, the Appellate Body may reverse, modify, or uphold the panel ruling. Applying the negative consensus rule (defined above), the DSB will adopt the Appellate Body report.<sup>18</sup> Alternatively, if the Member decides not to appeal, the DSB will adopt the panel’s report unless there is a consensus not to do so.<sup>19</sup>

The Member is then given a “reasonable period of time” (RPT) in which to comply with the panel’s ruling (as modified by the Appellate Body).<sup>20</sup> If the parties cannot agree on the length of the RPT, an arbitrator or arbitrators will decide the appropriate length (up to 15 months).<sup>21</sup> Once an RPT has been established, the Member must submit periodic reports to the DSB describing steps taken to comply with a ruling.<sup>22</sup>

Article 21.5 of the DSU allows the prevailing Member to bring panel proceedings if it believes the losing party has not complied with the ruling. If the so-called “21.5 panel” – whose findings are themselves subject to appeal – determines that compliance has not occurred, the prevailing party may negotiate with the other side to receive compensation in the form of trade concessions (*e.g.*, reduced tariffs on certain products).<sup>23</sup> This compensation, which almost never takes monetary form,<sup>24</sup> is entirely voluntary; as a result, losing parties almost never agree to provide it.

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<sup>16</sup> The DSU also contemplates the filing of “non-violation” and “situation” complaints, which do not require a party to establish the violation of a WTO covered agreement (as opposed to the “nullification or impairment” of benefits under that agreement). DSU, Article 26; GATT 1994, Article XXIII:1; Jackson, at 92-93; Petros C. Mavroidis, “Remedies in the WTO Legal System: Between a Rock and a Hard Place,” 11 *European Journal of International Law* 763, 790-92 (2000).

<sup>17</sup> DSU, Article 19.1; Palmetier & Mavroidis, at 299-300.

<sup>18</sup> DSU, Article 17.14.

<sup>19</sup> DSU, Article 16.4.

<sup>20</sup> DSU, Article 21.3.

<sup>21</sup> DSU, Article 21.3(c).

<sup>22</sup> DSU, Article 21.6.

<sup>23</sup> DSU, Article 22.2.

<sup>24</sup> WTO Handbook, at 80. Exceptionally, the United States agreed to pay the European Communities (EC) \$3 million per year in compensation in connection with the settlement of US – Section 110(5) of the US Copyright Act. See Carmody, at 319-20.

As a last resort, the prevailing party may seek authorization to retaliate against the losing party for failure to comply with the ruling.<sup>25</sup> Under Article 22.2 of the DSU, the prevailing party may “suspend the application to the Member concerned of concessions or other obligations under the covered agreements.” For instance, the prevailing party may raise tariffs on the other Member’s goods.<sup>26</sup> Like compensation, retaliation is temporary, and only intended to induce compliance with the ruling.<sup>27</sup>

If the losing party objects to the level of retaliation sought, the matter may be referred to arbitration. Under Article 22.6 of the DSU, the arbitrator or arbitrators (again, typically the members of the original three-member panel) will decide the appropriate level of retaliation. The arbitrators will fix the level of retaliation at an amount equivalent to the level of “nullification or impairment” (*i.e.*, the extent to which benefits under the WTO Agreement are nullified or impaired by the offending measure).<sup>28</sup> Their decision is final, and not subject to appeal.<sup>29</sup>

### 2.3 WTO remedies and public international law

To place the distinctive features of the WTO remedial system in proper context, it is useful to compare this system with the customary approach to remedies under public international law.<sup>30</sup> As discussed below, the WTO departs from traditional principles of state responsibility in key respects, and for purposes of remedies establishes a *lex specialis* regime.

The *Articles on State Responsibility* prepared by the International Law Commission (“ILC Articles”)<sup>31</sup> offer the most influential treatment

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<sup>25</sup> See generally Stanimir Alexandrov and David Palmetier, “‘Inducing Compliance’ in WTO Dispute Settlement,” in *The Political Economy of International Trade Law* 646 (Daniel L. M. Kennedy & James D. Southwick, eds. 2002).

<sup>26</sup> Articles 22.3 and 22.4 of the DSU set out principles and procedures regulating the manner in which retaliation is conducted.

<sup>27</sup> DSU, Articles 3.7, 22.1, 22.8.

<sup>28</sup> DSU, Article 22.7. For a discussion of the role of arbitration in WTO dispute settlement, see Hunter Nottage & Jan Bohanes, “Arbitration as an Alternative to Litigation in the WTO: Observations in the Light of the 2005 Banana Tariff Arbitrations,” in *The WTO in the Twenty-first Century* 212 (Yasuhei Taniguchi et al., eds. 2007).

<sup>29</sup> DSU, Article 22.7.

<sup>30</sup> The relationship between the WTO covered agreements and public international law is a hotly contested area, and exceeds the scope of this chapter. See, e.g., Patricio Grané, “Remedies Under WTO Law,” 4 *Journal of International Economic Law* 755, 757 (2001); Charnovitz, at 793-94; Mavroidis, at 764-68.

<sup>31</sup> *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (James Crawford, ed. 2002) (hereinafter “ILC Articles”).

of remedies under public international law.<sup>32</sup> According to the ILC Articles, an internationally wrongful act requires the responsible State to take two categories of action: cessation and reparation.

With respect to *cessation*, the responsible State must “cease that act, if it is continuing,” as well as “offer appropriate assurances and guarantees of non-repetition, if circumstances so require.”<sup>33</sup> In the interstate context, the tribunal in the *Rainbow Warrior* arbitration held that it had inherent authority to issue an order for cessation of conduct in violation of international obligations, where two conditions are met — namely, that “the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued.”<sup>34</sup> The obligation of cessation may also arise where, instead of a continuing wrongful act, the State has repeatedly violated the international obligation in question, suggesting the possibility of repetition.<sup>35</sup>

Cessation is not concerned with the consequences of wrongful conduct, and thus offers what has been described as a “purely legal” remedy.<sup>36</sup> As one commentator has observed, “cessation targets the wrongful conduct per se, irrespective of its consequences,” and is normally prospective in nature.<sup>37</sup>

By contrast, *reparation* directly addresses the consequences of illegal conduct. As the ILC Articles explain, the responsible State must “make full reparation for the injury caused by the internationally wrongful act.”<sup>38</sup> Accordingly, reparation is retrospective in nature, and addresses the obligation to repair injury already caused by wrongful conduct.<sup>39</sup> A State can effect reparation by several means: restitution, compensation, and satisfaction.

*Restitution* seeks the complete effacement of the consequences of an illegal act. The responsible State must restore the situation which would have existed had the breach of duty not occurred.<sup>40</sup> This can be done either by the State fulfilling its primary international obligation, by the award of damages, or both. Although this remedy — *restitution*

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<sup>32</sup> See, e.g., *ADM/Tate & Lyle v. Mexico*, para. 116.

<sup>33</sup> ILC Articles, Article 30.

<sup>34</sup> *Rainbow Warrior*, R.I.A.A., vol. XX (1990), p. 270 (quoted in ILC Articles, Article 30 (official commentary)).

<sup>35</sup> ILC Articles, Article 30 (official commentary).

<sup>36</sup> Carmody, at 314.

<sup>37</sup> Carmody, at 314.

<sup>38</sup> ILC Articles, Article 31.

<sup>39</sup> Carmody, at 314.

<sup>40</sup> ILC Articles, Article 35; Ian Brownlie, *Principles of Public International Law* 445-46 (6th ed. 2003); Grané, at 758.

*in integrum* — is often viewed as the preferred remedy in international law, it is often impossible to achieve in practice.<sup>41</sup>

As explained in the ILC Articles, restitution is generally not awarded in cases where it would be materially impossible to effect in practice, or where it involves a burden that is wholly disproportionate to the benefit deriving from restitution instead of compensation.<sup>42</sup> The first exception — material impossibility — would occur in cases where, for instance, property has been completely destroyed or lost all of its value.<sup>43</sup> Likewise, the second exception only applies where there is a "grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach."<sup>44</sup>

*Compensation* typically entails the payment of money, as a proxy for the injury or damage caused by the wrongful act.<sup>45</sup> The practical difficulties associated with restitution have led compensation to become the most widely used mode of reparation.<sup>46</sup>

*Satisfaction* is any additional form of reparation that the State is bound to take, and typically involves the acknowledgment of wrongdoing and an expression of regret for the harm caused.<sup>47</sup>

The WTO departs from these traditional principles of state responsibility in several respects.<sup>48</sup>

First, the DSU casts aside the classic binary approach to remedies. A violation of the *WTO Agreement* does not require the responsible State to effect both cessation and reparation. It is generally agreed that a WTO panel can only identify a violation of the *WTO Agreement*, and recommend that the responsible Member bring the challenged measure into conformity with its obligations (cessation of the violation). In contrast with international arbitral tribunals, which predominantly

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<sup>41</sup> ILC Articles, Articles 31, 34-36 (official commentary); Brownlie, at 445-46; Grané, at 758.

<sup>42</sup> ILC Articles, Article 35.

<sup>43</sup> ILC Articles, Article 35 (official commentary); *see also id.* ("[T]he mere fact of political or administrative obstacles to restitution does not amount to impossibility.").

<sup>44</sup> ILC Articles, Article 35 (official commentary). Where this balancing process does not indicate a clear preference for compensation as compared to restitution, there is a preference for the position of an injured State seeking restitution, especially in circumstances where failure to provide restitution would "jeopardize its political independence or economic stability." *Id.*

<sup>45</sup> ILC Articles, Article 36 (official commentary); Brownlie, at 446-47.

<sup>46</sup> *See, e.g.*, ILC Articles, Article 36 (official commentary); *see generally* Christine Gray, "The Choice Between Restitution and Compensation," 10 *European Journal of International Law* 414 (1999).

<sup>47</sup> ILC Articles, Article 37 (official commentary); Brownlie, at 443-45.

<sup>48</sup> *See* ILC Articles, Article 55 (official commentary) (citing the DSU as an example of a *lex specialis* system that displaces general international law norms of State responsibility).



award compensation in the form of money damages, a WTO panel cannot award any form of reparation for injury caused by a violation.<sup>49</sup>

It is only where the responsible State has failed to comply with a panel's conformity recommendation that the other two categories of remedy available in the DSU – compensation and retaliation – come into play. As discussed above, trade compensation is entirely voluntary, and must be negotiated between the parties. Retaliation acts as a remedy of last resort, and like compensation, is intended to be temporary. The ultimate goal is to bring the responsible State into compliance with its treaty obligations (cessation of the violation). Compensation and retaliation are intended to induce the State to comply with this primary obligation.

Second, the relief afforded by WTO panels is entirely prospective in nature. In contrast with traditional principles of state responsibility, which call for reparation to remedy the past consequences of wrongful conduct, a WTO panel issues relief that is inherently forward-looking. A conformity recommendation calls for future treaty-consistent conduct, not retrospective relief for past harm. Likewise, compensation and retaliation do not attempt to compensate or address past injury, but only to induce compliance going forward.<sup>50</sup>

These features reflect the unique conceptual underpinnings and history of the WTO system. Like its predecessor, the GATT, the WTO remains rooted in an essentially mercantilistic conception of reciprocity. The WTO is traditionally conceived as a web of reciprocal trade “concessions” among Members. Any violation of the WTO Agreement upsets this “balance of concessions.”<sup>51</sup>

In the WTO, the goal of dispute settlement is to restore this “balance of concessions” – not to compensate an injured party.<sup>52</sup> This

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<sup>49</sup> See, e.g., Grané, at 759-63. Article 4.7 of the *WTO Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) constitutes a possible exception to this rule. In *Australia – Automotive Leather* (21.5), the panel held that Article 4.7 (which calls for the “withdrawal of the subsidy,” where a subsidy is deemed “prohibited” under the *SCM Agreement*) required full reimbursement of an export subsidy granted by Australia. This decision, which was not appealed to the Appellate Body, has been severely criticized by WTO Members. Grané, at 767-69.

<sup>50</sup> See, e.g., William J. Davey, *Enforcing World Trade Rules: Essays on WTO Dispute Settlement and GATT Obligations* 95 (2006); Grané, at 759-63. As discussed above, the *Australia – Leather* (21.5) panel decision, which has been severely criticized, suggested a possible retrospective component to WTO remedies. Grané, at 767-69.

<sup>51</sup> See, e.g., Robert E. Hudec, “Broadening the Scope of Remedies in WTO Dispute Settlement,” in *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* 387-88 (F. Weiss ed., 2000).

<sup>52</sup> See, e.g., DiMascio & Pauwelyn, at 53-54. As a general matter (and with the exception of “actionable subsidy” claims under the *SCM Agreement*), any WTO Member can pursue

reflects, in part, the origins of the GATT as an essentially diplomatic instrument that placed a premium on forward-looking solutions.<sup>53</sup> This structure also reflects the inherent difficulty of quantifying and meaningfully compensating past injury in the trade context.<sup>54</sup>

Thus, the WTO remedial system is concerned with promoting a kind of distributive justice — not corrective justice.<sup>55</sup> That is, the focus is on ensuring the systemic benefits that come from compliance with treaty obligations, and not compensation for specific harm incurred.

## 2.4 Criticisms and reform proposals

The WTO remedial system has proven controversial. Alternately described as a heroic achievement and colossal failure, the system has been the subject of a dizzying array of reform proposals. Although this topic exceeds the scope of this paper, we will briefly address a few of the more salient criticisms and proposals.

First, as several commentators have observed, the DSU's remedy and enforcement apparatus gives losing parties ample opportunity to delay implementation of an adverse ruling for domestic policy reasons.<sup>56</sup> Once a panel finds that a violation has occurred, the losing party can appeal the ruling. If the panel decision is upheld, the losing party can then seek a separate arbitration on the reasonable period of time in which it may comply with that ruling (a maximum of 15 months). The Member can then take some measure short of full compliance, prompting yet another round of panel proceedings under Article 21.5, and a subsequent appeal. Finally, the losing party may pursue arbitration proceedings to determine the appropriate level of retaliatory trade sanctions. Each layer of proceedings further delays implementation.

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dispute settlement against another Member, even if the complaining Member's industry is unaffected by the offending Member's actions. *See, e.g., Mavroidis*, at 777-78.

<sup>53</sup> Hudec, at 383.

<sup>54</sup> This conceptual approach is reflected in the lack of a standing requirement in WTO dispute settlement. *See, e.g., Davey*, at 30-32.

<sup>55</sup> Carmody, at 310-12, 316. Distributive justice calls for relief that "is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead it is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees." *Id.* at 310 (quoting Abraham Chayes, "The Role of the Judge in Public Law Litigation," 89 *Harvard Law Review* 1281, 1302 (1976)).

<sup>56</sup> *See, e.g., Davey*, at 147 & n.19; Jackson, at 97; Mavroidis, at 794, 799.

The exclusively prospective nature of WTO remedies provides an additional incentive for delay.<sup>57</sup> A losing party faces no penalty for dragging out the implementation process. For instance, since panels do not award money damages, they cannot charge interest (which acts as an incentive to comply and compensates the victim for delayed implementation). Nor does the WTO system allow for provisional remedies, which could encourage compliance and protect the complaining Member from some of the harm caused by delay.<sup>58</sup>

The remedy of retaliation has been subjected to particularly severe criticism. From an economic perspective, a country invariably “shoots itself in the foot” by pursuing retaliation. Any retaliatory measure is bound to harm some portion of the retaliating Member’s economy. Moreover, from the perspective of the global economy, retaliation generally results in a lower level of overall trade liberalization than existed before the complaining party initiated dispute settlement proceedings. Trade flows are doubly distorted — once by the challenged measure, and again by retaliation.<sup>59</sup>

Moreover, retaliation is generally not a viable option for poorer WTO members. It will be far more difficult for El Salvador to compel the United States to comply with a panel ruling through retaliation than the European Union. The negative economic repercussions of adopting retaliatory measures also may be too great for a smaller country to absorb. As a result, poorer countries are less likely to pursue WTO dispute settlement proceedings in the first place, creating an imbalance that undermines the WTO’s credibility.<sup>60</sup>

Finally, the WTO does not compensate victims of trade-distorting conduct.<sup>61</sup> As previously discussed, the “compensation” called for by the DSU is voluntary, and would come in the form of trade concessions. It does not purport to remedy past harm.

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<sup>57</sup> Davey, at 95; Mavroidis, at 794-95.

<sup>58</sup> Although the record of compliance under the DSU is generally good, examples of delay tactics are not hard to find. See, e.g., Bruce Wilson, “Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date,” 10 *Journal of International Economic Law* 397 (2007).

<sup>59</sup> See Charnovitz, at 808-23; Marco Bronckers & Naboth van Broek, “Financial Compensation in the WTO,” 8 *Journal of International Economic Law* 101, 103-04 (2005).

<sup>60</sup> See, e.g., Davey, at 95-96; Carmody, at 320; Bronckers & van Broek, at 104-06. The creation of the Advisory Centre on WTO Law in 2001 has helped promote developing country involvement in WTO dispute settlement by providing free advice and assistance to these countries. See generally [http://www.acwl.ch/e/index\\_e.aspx](http://www.acwl.ch/e/index_e.aspx) (visited 30 September 2008). However, the underlying structural imbalance (i.e., the inability of many developing countries to pursue retaliation) remains.

<sup>61</sup> Bronckers & van Broek, at 103.

In light of these criticisms, commentators and WTO Members have offered numerous reform proposals. These include:

- *Streamlining the enforcement process by collapsing various stages in the process (e.g., by allowing the panel to determine the level of “nullification and impairment” caused by a measure in its original report, as opposed to a later arbitration concerning the appropriate level of retaliation).*<sup>62</sup>
- *Empowering panels to issue provisional measures.*<sup>63</sup>
- *Introducing retrospective relief – for instance, by allowing panels to calculate retaliation from a date prior to the date set for implementation, or for increasing levels of retaliation over time.*<sup>64</sup>
- *Introducing a system of collective retaliation, whereby a panel ruling would allow every WTO Member (and not merely the complaining party) to retaliate.*<sup>65</sup>
- *Suspending recalcitrant parties’ WTO membership rights, such as the right to initiate dispute settlement proceedings.*<sup>66</sup>
- *Allowing panels to award monetary compensation or levy fines to induce compliance.*<sup>67</sup>

Given current political realities, most of these proposals have little near-term prospect of adoption.<sup>68</sup> However, they highlight dissatisfaction

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<sup>62</sup> See, e.g., Davey, at 84-85.

<sup>63</sup> See, e.g., Georges A. Cavalier, “A Call for Interim Relief at the WTO Level: Dispute Settlement and International Trade Diplomacy,” 22 *World Competition* 103 (1999); Davey, at 95; Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding. Proposal by Mexico, TN/DS/W/23, 4 November 2002; see also Diego-Fernandez & Herran, “The Reform of the WTO Dispute Settlement Understanding: A Closer Look at the Mexican Proposal,” 1 *Manchester Journal of International Economic Law* 4 (2004).

<sup>64</sup> See, e.g., Davey, at 95; Mavroidis, at 794-95.

<sup>65</sup> Joost Pauwelyn, “Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach,” 94 *American Journal of International Law* 335 (2000).

<sup>66</sup> See, e.g., Charnovitz, at 827-28; Davey, at 96-97.

<sup>67</sup> See generally Bronckers & van den Broek; see also Text for the African Group Proposals on Dispute Settlement Understanding Negotiations - Communication from Kenya, TN/DS/W/2; Charnovitz, at 825-27; Grané, at 769-771; Victor Mosoti, “In Our Own Image, Not Theirs: Damages as an Antidote to the Remedial Deficiencies in the WTO Dispute Settlement Process; A View from Sub-Saharan Africa,” 19 *Boston University International Law Journal* 231 (2001).

<sup>68</sup> See, e.g., Hudec, at 400; Grané, at 771-72.

with certain aspects of the WTO remedial system, and the limitations of the WTO model.

### 3. COMPARISON WITH REMEDIAL APPROACH IN INTERNATIONAL ARBITRATION

How does the WTO approach to remedies compare with the practice of international arbitral tribunals? The differences are conceptual and practical. As discussed below, the WTO's focus on distributive justice yields distinctive, exclusively non-pecuniary remedies and, ultimately, a more party-driven approach.

#### 3.1 Conceptual distinctions

First, the conceptual framework for remedies in the two systems is fundamentally different. In international arbitration, the model is explicitly one of corrective justice, aimed at remedying individual disputes and concrete harm. Arbitral tribunals are not charged with effecting a kind of distributive justice.

Investor-state arbitration is perhaps closer to the WTO model than international commercial arbitration, in that state entities and treaty obligations are involved. But, again, the model is plainly one of corrective justice. Whereas the goal of the WTO system is to liberalize trade flows and thereby achieve systemic efficiency and welfare gains, investment protection treaties are concerned with the protection and promotion of foreign investment. As one commentator put it, "the traditional investment regime is about fairness grounded in customary rules on treatment of aliens, not efficiency. It is about protection, not liberalization, and about individual rights, not state exchanges of market opportunities."<sup>69</sup>

#### 3.2 Exclusively non-pecuniary relief

Reflecting these conceptual differences, the two systems – international arbitration and WTO dispute settlement – offer different remedies. As discussed above, the primary relief in the WTO is non-pecuniary – *i.e.*, a recommendation that a Member bring its measures into conformity with its treaty obligations. Compensation and retaliation are intended to induce compliance with those obligations.

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<sup>69</sup> DiMascio & Pauwelyn, at 56; *see also id.*, at 53-54. The conceptual differences between the WTO system and investor-state arbitration also translate into distinct (yet related) approaches to the concept of "national treatment." *See id.*, at 58-89.

By contrast, the dominant remedy in both international commercial and investor-state arbitration is compensation, typically in the form of money damages. Awards almost always include a retrospective (as opposed to prospective) component. Non-pecuniary relief – including orders for specific performance, contractual reformation, and pure declaratory relief – is far less common.<sup>70</sup>

The traditional practice of awarding damages is a function of several factors, including the terms of the relevant contract or treaty, applicable law, and the greater ease of enforcing monetary awards. Moreover, claimants frequently request damages, and tribunals are constrained by the doctrine of *ultra petita* from employing remedies that differ in kind from that which has been requested.<sup>71</sup>

Examples of non-pecuniary relief are particularly rare in investor-state arbitration. In the vast majority of cases, investors request damages, as opposed to non-pecuniary relief. This preference for damages often reflects practical considerations, such as the difficulty of obtaining restitution of property that has already been liquidated. Moreover, the filing of an investor-state arbitration often signals the end of the relationship between the parties; investors may fear that they can no longer operate in what is perceived to be a hostile environment.<sup>72</sup> In many cases, restoring the *status quo ante* by ordering a State to rescind a tax regulation or restore confiscated property may be of little use.

Non-pecuniary awards against States may also face enforcement difficulties. The State's court system may be unwilling or unable to enforce an award of specific performance or restitution against its own government. Moreover, whereas the Washington Convention requires all contracting members to enforce the pecuniary obligations of ICSID

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<sup>70</sup> See, e.g., Alan Redfern, et al., *Law and Practice of International Commercial Arbitration* 356-65 (4th ed. 2004); Martin Endicott, "Remedies in Investor-State Arbitration: Restitution, Specific Performance and Declaratory Awards," in *New Aspects of International Investment Law* 520 (P. Kahn and T. Wälde, eds., 2007); Campbell McLachlan, et al., *International Investment Arbitration: Substantive Principles* 341 (2007).

<sup>71</sup> See, e.g., *Enron Corp. v. Argentina* (Request for Rectification and/or Supplementary Decision), ICSID Case No. ARB/01/3, para. 42, October 25, 2007; Chittharanjan Amerasinghe, *Jurisdiction of International Tribunals* 422-23 (2003); Thomas W. Wälde and Borzu Sabahi, "Compensation, Damages and Valuation in International Investment Law," 4 *Transnational Dispute Management* (2007), at 7 (available at: [www.transnational-dispute-management.com](http://www.transnational-dispute-management.com)); see also Redfern, at 360 ("An award of monetary compensation is generally the best available remedy, particularly in commercial disputes.").

<sup>72</sup> See, e.g., Christoph Schreuer, *The ICSID Convention: A Commentary* 1126 (2001); Wälde & Sabahi, at 7.

awards as they would domestic court decisions,<sup>73</sup> this obligation does not apply to non-pecuniary awards.<sup>74</sup>

These practical concerns are often allied with more theoretical concerns for state sovereignty. Although several tribunals have affirmed the authority of tribunals to issue injunctions and other non-pecuniary relief against States, others have been much more reluctant to provide such relief.<sup>75</sup> The latter view is based, in part, on the traditional (yet now controversial) assumption that non-pecuniary relief constitutes a greater intrusion on state sovereignty than a damages award.<sup>76</sup>

### 3.3 No clear analogies in arbitral practice

In addition to providing exclusively non-pecuniary relief (as opposed to damages), WTO panels also differ from arbitral tribunals by providing unique forms of non-pecuniary relief. The remedies

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<sup>73</sup> The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *entered into force* 14 October 1966, U.N.T.S. vol. 575, at 159, Article 54(1) (the "ICSID Convention").

<sup>74</sup> Alternatively, it is conceivable that non-pecuniary ICSID awards may be enforceable through the New York Convention, which does not contain a restriction to pecuniary obligations. In any event, the non-pecuniary obligation imposed by an ICSID award has *res judicata* effect, and constitutes a binding obligation. *See, e.g.,* Schreuer, at 1124-26; UNCTAD, "International Centre for Settlement of Investment Disputes: Binding Force and Enforcement," Module 2.9, at 12-14 (2003). Failure to comply with an ICSID award constitutes a breach of the host State's treaty obligations, and may result in the use of diplomatic protection or the initiation of ICJ proceedings. *See, e.g.,* ICSID Convention, Articles 27, 64; Schreuer, at 1124-26, 1263.

<sup>75</sup> Compare, *e.g.,* *Occidental Petroleum Corp. v. Republic of Ecuador (Provisional Measures)*, ICSID Case No. ARB/06/11, 17 August 2007, paras. 78-85 (refusing to consider award specific performance, noting *inter alia* sovereignty concerns), *LG&E Energy Corp., et al. v. Argentine Republic (Damages)*, ICSID Case No. ARB/02/1, 25 July 2007, paras. 86-87 (same), with *Micula v. Romania*, ICSID Case No. ARB/05/20, 24 September 2008, paras. 166-68 (arbitral tribunal has authority to order non-pecuniary relief, including restitution), *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, 13 May 2008, para. 27 (arbitral tribunal has authority to issue award of contractual performance against host State), *Enron Corp. v. Argentine Republic (Jurisdiction)*, ICSID Case No. ARB/01/3, 14 January 2004, paras. 78-81 (affirming tribunal's authority to order measures involving performance or injunction of certain acts against States), *Casado v. Republic of Chile (Provisional Measures)*, ICSID Case No. ARB/98/2, 25 September 2001, para. 51 (ordering a State to stay parallel duplicative domestic proceedings does not interfere with State sovereignty). For a discussion of the *TOPCO* arbitration, which (exceptionally) provided for restitution as the remedy in the context of nationalization, see Redfern, at 360, and Endicott, at 524-29.

<sup>76</sup> *See, e.g.,* *Occidental v. Ecuador (Provisional Measures)*, paras. 78, 84; *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, 21 November 1984, para. 202; McLachlan, at 341; Wälde & Sabahi, at 7-9.

available in WTO dispute settlement lack clear analogues in arbitral practice.

For instance, a WTO panel's conformity recommendation eludes ready comparisons with arbitral remedies. On the surface, this recommendation might appear to resemble the traditional remedy of specific performance, as it calls for conduct in conformity with legal obligation. But this recommendation lacks the kind of coercive power – such as contempt proceedings or judicial penalties (*astreintes*) – that stands behind a tribunal or domestic court's order of specific performance. Although the DSU system encourages compliance through the threat of compensation and retaliation, it lacks the coercive authority to compel compliance.<sup>77</sup>

In addition, whereas an arbitral tribunal awarding specific performance generally must specify the mode of performance in its order, a WTO panel can only offer a generic recommendation of conformity. In a nod to sovereignty concerns, the DSU allows the Member in question to decide in the first instance how it will go about achieving conformity. A panel may (but generally does not) “suggest” the means by which conformity may be achieved; any such suggestion is non-binding.

As a result, a conformity recommendation perhaps more closely resembles an order for declaratory relief. Like a declaratory judgment, a conformity recommendation merely affirms that a violation has occurred and the existence of an obligation to comply with a treaty provision. It does not compel specific action in response to that finding.

The WTO remedies of compensation and retaliation also lack clear parallels in arbitral practice. In WTO parlance, “compensation” almost always means prospective trade compensation – liberalization or trade concessions – and not monetary payment to remedy past harm. Compensation and retaliation are temporary measures, intended to induce compliance with a conformity recommendation. They have no direct analogue in traditional private law remedies. Indeed, the closest comparison might be the judicial fines (*astreintes*) used in

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<sup>77</sup> See, e.g., Carmody, at 310-12, 316-17, 328. Exceptionally, WIPO domain name arbitration provides for essentially automatic enforcement of an award. The registrar of a domain name is bound to give effect to a WIPO decision transferring a domain name after 10 days of notification (barring initiation of court proceedings). See Uniform Domain Name Dispute Resolution Policy, adopted 24 August 1999, available at <http://www.icann.org/en/dndr/udrp/policy.htm> (visited 30 September 2008); Nicolas C. Ulmer, “Types of Awards and Issues of Enforcement: Some Reflections on the EUROCONTROL Revised Convention,” *The Permanent Court of Arbitration Peace Palace Papers* 101, 110-11 (2001) (discussing the structure and operation of WIPO domain name arbitration).



certain civil law jurisdictions to induce compliance with a specific performance decree.<sup>78</sup>

### 3.4 A party-driven remedial process

In deference to the sovereignty of WTO Members, the DSU also gives the parties an unusually prominent role in fashioning the remedies to be applied in a given dispute. For instance, the losing party in a WTO case is allowed to decide how it will comply with a ruling in the first instance. As the panel observed in the *US – Section 301* case, the obligation to bring one’s laws into conformity with the WTO Agreement must be enforced “in the least intrusive way possible,” giving the Member concerned “maximum autonomy in ensuring such conformity and, if there is more than one lawful way to achieve this, should have the freedom to choose that way which suits it best.”<sup>79</sup> Although a 21.5 panel may later review whether the Member has, in fact, complied with the ruling, the initial decision is left to the Member’s sovereign discretion. In addition, the losing Member is given a “reasonable period of time” – frequently as long as 15 months – in which to comply.

Likewise, the ambiguous nature of a panel ruling – which merely recognizes the existence of a violation and recommends compliance with the *WTO Agreement* – also leaves the parties considerable room in which to fashion a compromise settlement. As one commentator has observed, the limited remedies available in WTO proceedings “may prod here and there,” but are “auxiliary” to what is in certain respects a party-driven process of negotiation.<sup>80</sup> This process frequently results in the informal, managed resolution of WTO disputes.<sup>81</sup>

The importance of the parties’ role in fashioning relief is also apparent in the emphasis that the DSU places on negotiation and settlement. For instance, one of the modes of relief specified in the DSU – trade compensation – can only result from the agreement and

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<sup>78</sup> See, e.g., Alexis Mourre, “Judicial Penalties and Specific Performance in International Arbitration” in *Interest, Auxiliary and Alternative Remedies in International Arbitration* (F. de Ly & L. Lévy, eds. 2008); Jean-François Poudret & Sébastien Besson, *Comparative Law of International Arbitration* 467-68 (2d ed. 2007); Laurent Lévy, “Les astreintes et l’arbitrage international en Suisse,” 19 *ASA Bulletin* 21 (2001).

<sup>79</sup> Panel Report, *US – Section 301*, WT/DS152/R, para. 7.102 (adopted 27 January 2000).

<sup>80</sup> Carmody, at 328.

<sup>81</sup> Nevertheless, if the losing party fails to comply with a panel ruling (or takes measures that fall short of full compliance), the prevailing party’s only recourse is to pursue Article 21.5 proceedings and, eventually, retaliation. The parties may, but are not required to, achieve a negotiated resolution of their dispute.

negotiation of the parties.<sup>82</sup> The text of the DSU further affirms the importance of settlement, noting that “[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.”<sup>83</sup> Panels are admonished to “consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.”<sup>84</sup>

Indeed, panels have in some cases suggested ways in which the parties might settle their dispute. For instance, in *India - Quantitative Restrictions*, the WTO panel, having found that the challenged measures violated India’s treaty obligations, suggested that the parties negotiate an implementation/phase-out period for the measures.<sup>85</sup> The panel further outlined factors that it believed should be taken into account when setting the reasonable period of time for implementation.<sup>86</sup>

Settlement is, of course, common in arbitration. But the question of whether and to what extent arbitrators can or should facilitate settlement (as opposed to rendering a binding decision) is unsettled.<sup>87</sup> Moreover, although tribunals sometimes play a role in facilitating negotiated outcomes, it would be particularly exceptional for a tribunal to give the respondent the option of choosing in the first instance how it will comply with a tribunal’s decision. The classic arbitral model is more directive, with the parties normally playing a passive role as recipients of the tribunal’s ruling.

#### 4. LESSONS FOR ARBITRAL PRACTITIONERS

What lessons can arbitral practitioners take from the WTO experience? On the one hand, caution must be exercised when attempting to extrapolate from one dispute resolution system to

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<sup>82</sup> DSU, Article 22(2).

<sup>83</sup> DSU, Article 3(7).

<sup>84</sup> DSU, Article 11.

<sup>85</sup> Panel Report, *India - Quantitative Restrictions*, WT/DS90/R, para. 7.7 (adopted September 22, 1999).

<sup>86</sup> Panel Report, *India - Quantitative Restrictions*, WT/DS90/R, paras. 7.5-7.7.

<sup>87</sup> See, e.g., Gabrielle Kaufmann-Kohler & Victor Bonn, “Arbitrators as Conciliators: A Statistical Study of the Relation Between an Arbitrator’s Role and Legal Background,” 18 *ICC International Court of Arbitration Bulletin* 79 (2007); Christopher Koch & Erik Schäfer, “Can it be sinful for an arbitrator actively to promote settlement?,” *Arbitration and Dispute Resolution Law Journal* 153 (1999). The willingness of arbitrators to facilitate settlement generally reflects their legal background. For instance, German arbitrators and arbitrators from German-speaking Switzerland are generally more inclined to promote settlement, reflecting the practice of courts in these jurisdictions. See Kaufmann-Kohler & Bonn, at 79-81, 84; Koch & Schäfer, at 157-58, 162, 165.

another. The differences between the two remedial systems are great, and reflect distinctive goals, actors, and substantive obligations. It would be inappropriate (and in many cases impossible) for arbitrators to engage in the wholesale adoption of practices that were developed in the context of inter-state trading relationships. What works in one system may not work in the other, and vice versa.

Arbitral practitioners may, nonetheless, draw inspiration from the WTO model. Notwithstanding the differences between the two systems, the WTO model affirms the value of non-pecuniary remedies. The WTO example suggests that counsel should be more open to seeking – and arbitrators should give greater consideration to granting – non-pecuniary relief. The WTO example also indicates circumstances in which such relief might be appropriate, and underscores the challenges associated with enforcing non-pecuniary awards. Finally, the WTO remedial experience confirms the utility of non-pecuniary relief as part of a more party-driven remedial process.

#### **4.1 Greater openness to non-pecuniary relief**

The damages-centric approach traditionally adopted by arbitral tribunals has its disadvantages. As many commentators have observed, damages are frequently an inadequate means of compensation.<sup>88</sup> In some cases, the claimant may have been deprived of unique or irreplaceable property. Money damages can be a poor substitute for the restitution of such property.

Indeed, the harm caused by wrongful conduct may defy quantification. For instance, if a government violates its treaty obligations by refusing to permit foreign nationals to assume management positions in an investor's company, how can one quantify the loss suffered by the investor? The most effective remedy would be an order that required the State to permit foreign managers to assume positions in the company.

Damages also exclusively address the consequences of past conduct. They may not adequately deter future violations, or provide meaningful guidance to the parties with respect to their future conduct. Relatedly, the effect of a damages award (the transfer of funds at the end of a case) may do nothing to further or repair the relationship between the parties.

Counsel and arbitrators should consider the WTO example, and (where appropriate) strive for creative and flexible remedial approaches that incorporate non-pecuniary alternatives. For instance,

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<sup>88</sup> See, e.g., Endicott, at 519.

non-pecuniary remedies may be useful alternatives to damages awards that are grounded in lost profits (*lucrum cessans*). The often speculative nature of lost profits claims may render tribunals reluctant to grant them, particularly in the investor-state context if the investment is relatively new or untested.<sup>89</sup> An order to return property, or perform contractual obligations, may not only provide a more effective remedy, but may also pose fewer methodological difficulties than a damages award, and thereby avoid a costly and protracted battle of experts.

Alternatively, a tribunal may award non-pecuniary relief in conjunction with damages. For instance, a tribunal may award restitution of property in addition to certain out-of-pocket expenses incurred by the claimant. Here, again, tribunals would avoid the complex methodological difficulties associated with valuing an investment or engaging in often-speculative lost profits calculations. As long as double recovery is avoided,<sup>90</sup> a combination of non-pecuniary and monetary relief may in some cases provide fairer, more effective relief. Indeed, several treaties, including the NAFTA and the more recent US bilateral investment treaties, expressly permit tribunals to award a combination of restitution and damages (although they allow the respondent State to choose damages in lieu of restitution).<sup>91</sup>

#### 4.2 Circumstances conducive to non-pecuniary awards

The WTO dispute settlement experience also suggests circumstances in which the award of non-pecuniary relief may be most appropriate. In this context, the key variable is the likelihood of compliance. We consider both the situation in which voluntary compliance appears to be most likely, and challenges associated with the enforcement of non-pecuniary obligations.

##### 4.2.1. Voluntary compliance

Notwithstanding the difficulties noted in preceding sections of this chapter, the WTO track record for compliance has been quite good. In virtually every case thus far, the losing Member has indicated its

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<sup>89</sup> See, e.g., Jan Paulsson, "The Expectation Model," in *Evaluation of Damages in International Arbitration* 57 (Y. Derains & R.H. Kreindler, 2006).

<sup>90</sup> Double recovery may occur, for instance, where a tribunal awards both *damnum emergens* and *lucrum cessans*, yet fails to reduce future net cash flows to take into account the amortization of sunk costs. See Paulsson, at 62-65.

<sup>91</sup> See, e.g., North American Free Trade Agreement (NAFTA), 17 December 1992, 32 I.L.M. 605 (1993), Article 1134(1); Treaty between the United States of America and the Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, 11 November 2005, 44 I.L.M. 268 (2005), Article 34(1).

intention to bring itself into compliance, and in most cases has in fact done so.<sup>92</sup>

This record appears to be the product of, *inter alia*, the “repeated game” in which WTO Members find themselves. The WTO is essentially a closed system, in which a finite membership of some 153 countries regularly interact. If one Member fails to comply with an adverse panel ruling, the others will take note. The prevailing party may organize resistance to the losing party’s proposals in trade negotiations, or take other diplomatic or economic measures to encourage compliance. Moreover, a losing Member knows that, in the future, it could be a complaining party, and thus has an interest in ensuring that WTO panel decisions are generally complied with. Thus, the circumstances – a finite set of players, regularly interacting with respect to an array of issues – are conducive to compliance with the non-pecuniary decisions rendered by WTO panels.<sup>93</sup>

Likewise, an arbitral tribunal will be more inclined to award non-pecuniary relief where the losing party is likely to comply with the award. If the parties to the arbitration are repeat commercial players that regularly interact, the prospects for voluntary compliance may be greater. Reputational considerations and bargaining power may also play a role – especially in investor-state arbitration, where a host State’s failure to comply with an award could send a negative message to the investment community. On the other hand, where the parties only episodically interact, or where the dispute has poisoned the atmosphere sufficiently, the incentives for compliance may be reduced. The arbitral tribunal will not be ignorant of such considerations when fashioning its remedy – particularly if it awards non-pecuniary relief, where enforcement presents unique challenges.<sup>94</sup>

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<sup>92</sup> See, e.g., Wilson, section II.

<sup>93</sup> See, e.g., Hudec, at 400 (observing that the ultimate “remedy” in the GATT system was community pressure, and that the WTO procedures “have very likely helped to sharpen that community pressure”); Alexandrov & Palmetier, at 663-64; Kyle Bagwell and Robert W. Staiger, “Economic Theory and the Interpretation of GATT/WTO,” August 2003, available at: <http://www.columbia.edu/~kwb8/EconInterpWTO.pdf>.

<sup>94</sup> For instance, in *LETCO v. Liberia*, the claimant (LETCO) refrained from seeking injunctive relief, which it described as “wholly inadequate” under the circumstances. *Liberian East Timber Corp. (LETCO) v. Government of Republic of Liberia*, ICSID Case No. ARB/83/2, Final Award, 31 March 1986, 26 I.L.M. 647, 668. The ICSID tribunal agreed with LETCO’s assessment, noting that LETCO’s activities in Liberia had terminated two years before, and start-up costs would be prohibitive. The tribunal further observed that “[i]t is also questionable, given the circumstances, whether LETCO and the Liberian Government would be able to cooperate to successfully recommence the concession. Furthermore, given Liberia’s failure to participate in this arbitration, one must doubt whether an injunction by this tribunal would be respected by the Government authorities.” *Id.*, at 668-69; see also Carole Malinvaud, “Non-pecuniary Remedies in

#### 4.2.2 *Enforcement*

The WTO remedial system illustrates some of the challenges associated with the enforcement of non-pecuniary relief. The DSU establishes an elaborate compliance mechanism, including remedies to induce compliance (compensation and retaliation), Article 21.5 panel proceedings to verify compliance, and proceedings to determine the reasonable period of time for compliance and the amount of retaliation (if any) to be authorized. As discussed above, this system is far from perfect, and in some cases allows recalcitrant States to obstruct and delay implementation.

Arbitral tribunals lack this elaborate system for monitoring and ensuring compliance. Instead, tribunals generally delegate enforcement to local courts, according to the framework established under the New York Convention.<sup>95</sup> Below, we consider some of the difficulties associated with using this traditional mechanism to enforce non-pecuniary awards. We also consider the less frequently employed alternative of retaining jurisdiction to ensure compliance, and ways to reduce enforcement costs.

#### 4.2.3 *Final award*

The traditional approach to enforcing arbitral awards — *i.e.*, via the New York Convention — poses greater challenges for non-pecuniary awards than for damages awards. Under the New York Convention, enforcing courts generally exercise what has been characterized as a “ministerial” role, and enforce arbitral awards unless they violate a limited set of criteria or exceptions.<sup>96</sup> Enforcement is typically a one-time event, paving the way for execution on the losing party’s assets.<sup>97</sup>

By contrast, an award of specific performance requires the enforcing court to exercise broader supervisory authority, possibly including ongoing monitoring and coercive measures (such as

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Investment Treaty and Commercial Arbitration,” *in 50 Years of the New York Convention* 230 (van den Berg ed. 2009).

<sup>95</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38 (“the New York Convention”).

<sup>96</sup> New York Convention, Article V; Troy Elder, “The Case Against Enforcement of Arbitral Awards of Specific Performance in Transnational Commercial Disputes,” 13 *Arbitration Int’l* 1 (1997).

<sup>97</sup> According to one author, the framers of the New York Convention “constructed a mechanism that presupposes a common law conception of damages as the usual means of relief.” Elder, at 21.

*astreintes* or contempt proceedings) to ensure compliance. Enforcing courts may be reluctant to undertake such a role with respect to arbitral awards. Although most jurisdictions allow arbitral tribunals to award specific performance, they may prohibit certain forms of non-pecuniary relief – for instance, where an award could be construed as calling for performance of a personal obligation, or would call for particularly expensive and protracted monitoring.<sup>98</sup> In some cases, courts might refuse enforcement of non-pecuniary awards under the public policy exception of the New York Convention.<sup>99</sup>

When the respondent is a State, non-pecuniary awards pose even greater enforcement difficulties. For investor-state disputes resolved under the auspices of ICSID and the Washington Convention, signatory states must enforce awards as they would a domestic court judgment. However, as discussed above, this obligation does not extend to any non-pecuniary aspects of an ICSID award, which would presumably have to be enforced through the New York Convention.<sup>100</sup> Moreover, because non-pecuniary awards frequently involve property or persons located in the jurisdiction of the respondent State, enforcement will often require recourse to the courts of that State. Local law may prohibit the enforcement of non-pecuniary awards against the State. And in countries where judicial independence is not respected, the host State's courts may be particularly reluctant to enforce such awards against the government.

#### 4.2.4 *Monitoring by the tribunal*

Alternatively, tribunals may retain jurisdiction to ensure compliance with a non-pecuniary award. For instance, a tribunal might issue a partial award on liability and order the losing party to comply with certain contractual obligations. The tribunal would then retain jurisdiction to evaluate whether compliance has, in fact, occurred.

In practice, however, tribunals rarely opt to retain jurisdiction. Although tribunals arguably have the inherent authority to do so, neither the rules of the major arbitral institutions nor national arbitration statutes expressly confer this power. Some arbitrators may

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<sup>98</sup> See Mourre, at 68; Elder, at 10. The substantive law governing the contract may also bar the award of specific performance in such circumstances.

<sup>99</sup> New York Convention, Article V.2; Redfern, at 358. Certain arbitration rules may require arbitrators to render enforceable awards. See, e.g., ICC Arbitration Rules, Article 35; see also W. Laurence Craig, et al., *International Chamber of Commerce Arbitration* § 17.04 at 340-41 (3d. ed. 2000). For a different approach, see Yves Derains & Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration*, at 384-85 (2d ed. 2005).

<sup>100</sup> Schreuer, at 1126.

also be reluctant to adopt what might be viewed as a “court-like” role. Moreover, once a decision has been rendered, tribunals may for various reasons, including busy schedules, be reluctant to remain on a case over what might be an indefinite period of time. The parties may also be unwilling to shoulder the cost associated with such a protracted monitoring and enforcement process.

As the WTO experience illustrates, retaining jurisdiction to monitor and ensure compliance can be difficult and time-consuming. It is not always clear when compliance has occurred, and if it has not, what should be done to induce compliance. Of course, a tribunal cannot hold a party in contempt. In some cases, applicable law will permit an arbitral tribunal to issue monetary penalties (*astreintes*) to induce a recalcitrant party to comply.<sup>101</sup> But not every legal system allows tribunals to issue *astreintes*, which (depending on their size and number) may unduly enrich the claimant.<sup>102</sup>

#### 4.2.5 *The two-stage approach*

One solution that may avoid some of the preceding difficulties is to adopt a two-stage approach. The tribunal would first issue a partial award for non-pecuniary relief. The tribunal could then retain jurisdiction to determine whether compliance has occurred. However, if the tribunal concludes that compliance has not occurred, it will – instead of inducing compliance by, for example, issuing *astreintes* – enter an award for money damages.<sup>103</sup>

ICC Case No. 12875/MS illustrates this approach. In that arbitration, the claimant sought an order compelling the respondent to comply with its obligations under an option agreement, which called for the transfer of shares in a closely-held company in exchange for payment. Although the tribunal observed that respondent had improperly sold these shares to third parties, it nonetheless issued an award for specific performance against the respondent. At claimant’s request, the tribunal retained jurisdiction should the transfer of shares not occur, at which point the tribunal would consider a damages claim presented by claimant.<sup>104</sup>

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<sup>101</sup> In theory, the *astreintes* could be issued as a series of partial awards, and enforced under the New York Convention. I am indebted to Sébastien Besson for this observation.

<sup>102</sup> Swedish arbitration law forbids the use of *astreintes* (SU, Art. 25(3)). See Poudret & Besson, at 468; Lévy, at 21.

<sup>103</sup> This concept is discussed in the investor-state context by McLachlan, at 343, and Wälde & Sabahi, at 9-10.

<sup>104</sup> This award was later vacated on other grounds by the Swiss Tribunal Fédéral.



Alternatively, a tribunal might expressly give the respondent the option of either providing non-pecuniary relief or damages. This approach echoes WTO practice, in which panels defer to the sovereignty of Members by allowing them to choose how they will comply with a panel's ruling. In the arbitral context, a respondent's failure to provide non-pecuniary relief (such as the return of certain property) within a fixed period of time would trigger the award of damages. This variation on the two-stage approach has the added advantage of providing a set period for compliance, reducing the risk of foot-dragging by the respondent. Moreover, should a damages award be required, it would be more readily enforced pursuant to treaties such as the New York Convention and the Washington Convention.

Such an approach may have particular utility in the investor-state context. Providing a State with the option of choosing between non-pecuniary and monetary remedies both respects State sovereignty interests, and holds out the possibility that non-pecuniary relief will be forthcoming. As commentators have observed, States may in some cases prefer compliance with a non-pecuniary award to the alternative of a large damages award.<sup>105</sup> A two-stage approach might also commend itself to investors, particularly if the "first stage" involved a combination of non-pecuniary relief (*e.g.*, the restitution of property or termination of a restrictive regulation) and some degree of monetary compensation for harm already incurred. This mixed "first-stage" remedy would be converted into a pure damages award in the second stage.

The ICSID award in *Goetz v. Burundi* shows the promise of such a two-stage approach in the investor-state context. In that case, the government of Burundi had revoked a license to operate in a Free Trade Zone ("FTZ") established in Burundi. In its decision on liability, the tribunal concluded that the government had expropriated the license, and that the applicable BIT required compensation.<sup>106</sup> However, the tribunal gave Burundi "a reasonable time" (four months) in which to either (a) provide compensation to the investor (it did not specify the quantum), or (b) reinstate the FTZ license.<sup>107</sup> The tribunal noted that "[t]his choice is to be made by the Burundian Government in its sovereignty."<sup>108</sup> If the Burundian government failed to provide either (a) or (b), the tribunal would reconvene the proceedings to

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<sup>105</sup> Wälde & Sabahi, at 8-9.

<sup>106</sup> *Goetz v. Burundi*, ICSID Case No. ARB/95/3, paras. 129-33, 10 February 1999.

<sup>107</sup> *Goetz*, paras. 131, 133, 137.

<sup>108</sup> *Goetz*, para. 136.

determine the appropriate amount of compensation.<sup>109</sup> This decision prompted the parties to enter into a settlement under which the government both reinstated the license and provided a degree of compensation to the investor, in exchange for the investor's commitment to create a certain number of jobs in Burundi.<sup>110</sup>

A two-stage approach will not be appropriate in every case. For instance, if the claimant seeks the restitution of specific property that is difficult to replace or monetize, a damages alternative will be a poor substitute. And, as discussed above, arbitrators may be reluctant to retain jurisdiction to monitor compliance in the first place, absent any express authorization to do so in the applicable arbitral rules or statutes.

#### 4.2.6 Other factors

In deciding whether and how to award non-pecuniary relief, arbitral tribunals will have to weigh a variety of additional considerations, many of which are not present in the WTO context. These factors include:

- *The relief requested by the claimant:* Consistent with the doctrine of *ultra petita*, and depending on the scope of the *lex arbitri*, a tribunal can not award a greater type of remedy than that requested by the claimant. For instance, if a party requests only compensation, a tribunal may not award specific performance.<sup>111</sup>
- *Terms of the contract or treaty:* The applicable contract or investment treaty may limit the type of remedy available. For instance, a contract may specify that breach only results in liquidated damages (or a civil law contractual penalty), or may limit the availability of injunctive relief. In the investment context, some bilateral investment treaties restrict a tribunal's ability to award certain forms of non-pecuniary relief.<sup>112</sup>

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<sup>109</sup> Goetz, para. 137.

<sup>110</sup> Goetz, Part II (attaching settlement agreement). For a discussion of this decision, see McLachlan, at 343; Wälde & Sabahi, at 9-10.

<sup>111</sup> See, e.g., *Enron Corp. v. Argentina* (Request for Rectification and/or Supplementary Decision), ICSID Case No. ARB/01/3, para. 42, October 25, 2007; Chittharanjan Amerasinghe, *Jurisdiction of International Tribunals* 422-23 (2003).

<sup>112</sup> See, e.g., NAFTA, Article 1134(1) (limiting awards to either damages or "restitution of property").

- *Applicable law*: The relevant substantive law may not provide for non-pecuniary relief as a remedy for breach of the obligation in question. In the investment context, where principles of international law often govern, some jurisprudence suggests that tribunals may not award specific performance against a State.<sup>113</sup>
- *Nature of breach*: In the investor-state context, a tribunal may decide not to order a respondent State to cease wrongful conduct unless the act in question was of a continuing character (or part of a pattern of wrongful behavior) and the violated obligation continued in effect.<sup>114</sup>
- *Nature of relief sought*: Where the remedy sought is some form of restitution, a tribunal may refrain from ordering restitution where it would be materially impossible or would impose a burden on the respondent that is entirely disproportionate to the benefit deriving from restitution instead of compensation.<sup>115</sup> Relatedly, a tribunal may be more willing to award damages or a negative injunction than an order requiring affirmative performance (for instance, an order requiring that the respondent fulfill its promise to construct a certain piece of infrastructure).
- *Specificity of relief*: A tribunal may be unable to order performance where (for technical or other reasons) it cannot provide specific guidance to the respondent on how to comply. Indeed, an award that does not provide adequate specificity as to the type of performance requested is unlikely to be enforceable.

### 4.3 Facilitative resolution

In some cases, less is more. An arbitral tribunal may find that the best approach is to lay the groundwork for a party-driven solution.

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<sup>113</sup> See, e.g., *Occidental v. Ecuador (Provisional Measures)*, para. 81.

<sup>114</sup> See, e.g., ILC Articles, Article 30 & official commentary; *Rainbow Warrior* arbitration, *supra*.

<sup>115</sup> ILC Articles, Article 35. These limitations do not apply to the compliance recommendations issued by WTO dispute settlement panels, which do not provide the remedy of restitution. Nonetheless, Article 21.5 compliance panels may take into account the feasibility of different proposed modes of compliance. See, e.g., Panel Report, *US – Shrimp (21.5)*, WT/DS58/RW, 15 June 2001, para. 5.114.

Thus, like a WTO panel, a tribunal may in the first instance declare the existence of wrongful conduct and the respective rights and obligations of the parties. The tribunal might also go a step further, and follow the lead of some WTO panels by affirmatively suggesting ways in which the parties might settle their dispute. The tribunal could then give the parties a fixed period in which to negotiate a settlement. If no settlement is forthcoming, the tribunal could then issue affirmative relief (either monetary or non-monetary).

This approach is unusual, but not without precedent. The *Goetz* decision, discussed above, illustrates the way in which tribunals can facilitate party-driven solutions. Although the tribunal did not require the parties to negotiate, its findings on liability and suggestions on potential remedies clarified matters, and ultimately paved the way for a constructive settlement.

The decision in *Occidental v. Republic of Ecuador* (LCIA merits award) is also instructive. In addition to awarding damages for past harm, the tribunal offered the parties “guidance” on “how to best conduct their future relations, in the understanding that both parties are willing to work together for the future in a mutually beneficial relationship, as became evident in this arbitration.”<sup>116</sup> The tribunal suggested that the parties explore the possibility of rebalancing the economic benefits of the contract, and consider (in addition to tax refunds) “[p]ayment in kind,” an option the parties had previously considered at one stage in the dispute.<sup>117</sup>

A few caveats are in order. As discussed above, there is considerable disagreement in arbitral circles over whether, and to what extent, arbitrators may facilitate settlement.<sup>118</sup> Absent greater clarity concerning the proper role of arbitrators in the settlement process, practitioners may be reluctant to adopt such a strategy.

Moreover, any attempt to help facilitate a party-driven solution will require the exercise of judgment and due regard for the specific facts of the case. The tribunal will consider the relationship between the parties and counsel, as well as the results of previous settlement

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<sup>116</sup> *Occidental Exploration and Prod. Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, 1 July 2004, para. 213 (merits award).

<sup>117</sup> *Occidental v. Ecuador* (LCIA merits award), para. 214.

<sup>118</sup> For instance, the arbitration rules of the major arbitral institutions (including the ICC, ICSID, LCIA, SCC, and Swiss arbitration rules) do not expressly grant the arbitral tribunal authority to facilitate settlement, or specify limits on that authority. *But see* CIETAC Arbitration Rules, Article 40(2) (“[T]he arbitral tribunal may conciliate the case during the course of the arbitration proceedings.”); WIPO Arbitration Rules, Article 65(a) (“The Tribunal may suggest that the parties explore settlement at such times as the Tribunal may deem appropriate.”).

efforts that the tribunal may have been involved in. If the relationship between the two sides has broken down, then postponing a decision on remedies based on the remote chance of a settlement would be pointless. On the other hand, if the parties interact on a frequent basis in the marketplace, or are repeat players, they may be more amenable to settlement discussions.

## 5. CONCLUSION

This chapter is, first and foremost, a comparative exercise. We have compared the WTO approach to remedies with traditional principles of state responsibility, noting the *sui generis* characteristics of the WTO system. We then noted how these characteristics differ in important respects from the remedial practice of international arbitral tribunals, which focus more on principles of corrective justice and for whom damages are the most common form of relief. In contrast with arbitral tribunals, WTO panels provide exclusively prospective, non-pecuniary relief, which is reinforced by an (imperfect) system of monitoring and enforcement.

We conclude that the WTO remedial experience illustrates both the possibilities and limitations of non-pecuniary relief in international adjudication. For arbitral practitioners, the relatively successful WTO remedial experience should prompt a greater openness to non-pecuniary relief. Counsel should carefully consider whether non-pecuniary options (as opposed to a simple damages award) could provide a more effective remedy for their clients. For their part, arbitrators should remain open to requests for such relief, and to exploring the possibility of incorporating such relief in their awards. The WTO experience also illustrates the circumstances in which non-pecuniary relief may be most propitious – for instance, where the parties are repeat players and where monitoring and enforcement costs appear to be relatively low. Finally, the party-driven nature of the WTO remedial process – where the parties play a more significant role in fashioning the particular form of non-pecuniary relief – may also serve as an example to arbitral practitioners. In the end, the utility of non-pecuniary relief will hinge on the facts and circumstances of a given case.

The WTO example will be more relevant if and when practitioners are able to forge a greater degree of consensus regarding the appropriate role of the arbitral tribunal. For instance, counsel and arbitrators will be more amenable to pursuing non-

pecuniary solutions if arbitration rules and statutes clearly recognize the authority of arbitral tribunals to monitor compliance and facilitate settlement. Until greater clarity on these issues is achieved, practitioners may be reluctant to move beyond their “comfort zone” in this regard.

Finally, we note that this chapter is but one strand of an ongoing dialogue between WTO and arbitral practitioners. For these conversations to bear fruit, they must be rooted in a greater degree of mutual understanding and awareness. As the President of the International Court of Justice, Dame Rosalyn Higgins, counseled the WTO Appellate Body, “the better way forward . . . is for us all to keep ourselves well informed.”<sup>119</sup>

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<sup>119</sup> Quoted in Debra Steger, “The WTO in Public International Law: Jurisdiction, Interpretation and Accommodation,” in *Ten Years of WTO Dispute Settlement* 12 (Dan Horowitz *et al.*, eds. 2007).