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Non-compliance, renegotiation and justice in international adjudication: A WTO perspective

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Abstract: Focusing on the expanding realm of international adjudication, this article approaches justice from the domain of the empirical and shows – through a careful, interview-based case study analysis in the WTO context – that justice in the international context is not only a contested concept, but also a multifaceted one, deeply embedded in notions such as the rule of law, fairness, equality, transformation, and cooperation. Whereas in the past, the primary, if not the sole role of international courts was that of settling disputes, in their modern legalised reincarnation these empowered international institutions have come to be seen primarily as enforcement mechanisms. Mechanisms that have been put in place by states in order to give effect to their originally negotiated commitments, and to hold states (or other entities) accountable for the international rules agreed-upon. Within this common enforcement-centred discourse of international courts, in turn, the natural tendency has so far been to think of 'justice' mainly through its 'legal' or 'rule of law' dimension. This article challenges this enforcement-centred discourse. Focusing on the vibrant WTO dispute settlement system (DSS) and its operation throughout the perennial *EC–Bananas* dispute, the article argues that the current enforcement-oriented debate of international courts, and the WTO DSS in particular, is lacking in several aspects. First, it brushes aside other important roles served by the DSS, and consequently overshadows the manifold social outcomes – beyond rule-compliance – produced by this system. Second, the prevalent rule-enforcement discourse further works in turn as to mask the multiple challenges of justice encapsulated in international disputes reaching the DSS docket, and obstructs the need to explore other conceptions of justice – beyond its legal-procedural meaning – such as global distributive, corrective, or transformative justice, through which the diverse roles and outcomes of the DSS may (and should) be evaluated. Against this backdrop, the article puts forwards a broad multifunctional account of the WTO DSS, which goes beyond the prevalent view of the system as primarily an enforcement mechanism, portraying it instead as a system of multiple, competing, and shifting roles. Among them, providing an orderly mechanism of renegotiation, redistribution, and settlement. Roles that essentially allow WTO Members to readjust their original WTO commitments and reallocate their burdens and benefits of international cooperation, and thereby to arrive at new – at times not fully legally-compliant – but not necessarily 'unjust' cooperative and sustainable social outcomes.

Keywords: compliance; international adjudication; international rule of law; justice; WTO dispute settlement system

I. Introduction

During the last two decades, the world has experienced an intense growth in the number and usage of international courts. These quantitative changes in the global judicial scenery have been intertwined with equally notable qualitative changes in the nature and powers of international adjudicative bodies.[1] An ever-widening range of issue areas now falls under the jurisdiction of international courts. Furthermore, in many cases this jurisdiction is no longer contingent upon the specific consent of states, but is rather compulsory in nature – meaning that the jurisdiction of many international courts may now be invoked unilaterally against those subject to their authority, in a manner quite similar to that prevailing in domestic legal systems.[2]

Whereas in the past, the primary, if not the sole role of international courts was that of settling disputes,[3] in their modern legalised reincarnation, these empowered international institutions – as the case of the WTO dispute settlement system (DSS) discussed here illustrates – have come to be seen primarily as enforcement mechanisms.[4] Mechanisms that have been put in place by states in order to secure compliance with their originally negotiated commitments, preserve their rights and obligations as allocated in numerous international instruments, and hold states (or other entities) accountable

[1] Y Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 *European Journal of International Law* 73.

[2] Y Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, Oxford, 2004); C Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent' (2007) 39 *NYU Journal of International Law and Politics* 791, 792–6.

[3] A von Bogdandy and I Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 *Leiden Journal of International Law* 49.

[4] See e.g. J Bellinger, 'International Courts and Tribunals and the Rule of Law' in C Romano (ed), *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge University Press, New York, NY, 2009) 1, 2; G Born, 'A New Generation of International Adjudication' (2012) 61 *Duke Law Journal* 775; B Zangl, 'Is there an Emerging International Rule of Law?' (2005) 13 *European Review* S73; B Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, New York, NY, 2004) 1–3; A Huneeus, 'Compliance with Judgments and Decisions' in C Romano *et al.* (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press, Oxford, 2014) 437. The emphasis placed on the enforcement role of international courts is further echoed in the extensive research evaluating their performance against their record in eliciting state compliance with international rules and decisions. See e.g. AT Guzman, 'International Tribunals: A Rational Choice Analysis' (2008) 157 *University of Pennsylvania Law Review* 171; C Schulte, Compliance with Decisions of the International Court of Justice (Oxford University Press, Oxford, 2004); EM Hafner-Burton, G Victor and Y Lupu, 'Political Science Research on International Law: The State of the Field' (2012) 106 *American Journal of International Law* 47, 93.

for the international rules agreed upon through the interpretation and application of those rules to the cases coming before them.[5]

Within this prevailing enforcement-centred discourse of international courts, in turn, the natural tendency has so far been to think of 'justice' mainly through its 'legal' or 'rule of law' dimension.[6] Thus, justice is often assumed to be delivered by an international adjudicatory system like the WTO DSS, when – following legal procedures that offer equal access to justice[7] and meet proper standards of procedural fairness[8] – the responding WTO Member discontinues its violative act and brings itself into compliance with WTO rules, so that the original order of rights and duties as enshrined in the WTO agreements is preserved.

In the spirit of this rule of law conception of justice, indeed, a former member of the WTO Appellate Body (AB) noted, 'there is one goal which is a goal of all law, which is to dispense justice; that if you accept rules, then you have to act according to the rules', and the WTO DSS 'helps you to do that'.[9] Under this conception of justice, then, law and judicial mechanisms are perceived as means to deliver justice by controlling non-compliant behaviour that reveals itself in a conflict. Notably, this rule of law vision of justice closely corresponds with one of the justice categorisations identified long ago by Aristotle – that of 'legal justice' or 'justice as law-abidingness', under which the legal or the lawful is the just.[10]

The great emphasis placed on the rule-enforcement role of international courts in current scholarship and the legal justice conception attendant

[5] For recent contributions that go beyond the prevalent enforcement role or the traditional dispute settlement function of international courts see e.g. von Bogdandy and Venzke (n 3); Y Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach* (Oxford University Press, Oxford, 2014).

[6] See e.g. the discussion in E-U Petersmann, 'International Rule of Law and Constitutional Justice in International Investment Law and Arbitration' (2009) 16 *Indiana Journal of Global Legal Studies* 513; Broomhall (n 4) 52–62.

[7] The issue of equal access to justice has been extensively discussed in the WTO DSS context, particularly in writing on developing countries' participation in the system. See e.g. M Footer, 'Developing Country Practice in the Matter of WTO Dispute Settlement' (2001) 35 *Journal of World Trade* 55; ML Busch, E Reinhardt and G Shaffer, 'Does legal capacity matter? A survey of WTO Members' (2009) 8 *World Trade Review* 559.

[8] For literature on procedural justice in the international judicial realm see e.g. AK Schneider, 'Not Quite a World without Trials: Why International Dispute Resolution is Increasingly Judicialized' (2006) *Journal of Dispute Resolution* 119; JP Gaffney, 'Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System' (1999) 14 *American University International Law Review* 1173.

[9] Interview with former AB member (19 April 2012).

[10] D Winthrop, 'Aristotle and Theories of Justice' (1978) 72 *American Political Science Review* 1201, 1203; G Bien, 'Aristotle on Justice (Book V)' in O Höffe (ed), *Aristotle's "Nicomachean Ethics"* (Brill, Leiden, 2010) 109–16.

thereto, coincides, of course, with the common narrative of the judicialisation of international law over the last two decades as signifying a 'shift from a power-based to a rules-based international system',[11] and as representing the creation of a 'new world order based on the rule of international law';[12] that is, a world order 'based on compliance with international law'[13] and 'the application of rule of law principles to relations between States and other subjects of international law'.[14]

In this respect, the legalised WTO DSS, which came to replace in 1995 the diplomatic-oriented dispute settlement procedure of the old GATT, is no exception. As noted by Petersmann, '[t]he WTO's quasi-judicial, mandatory dispute settlement procedures are also an ambitious attempt at strengthening the "international rule of law"'.[15] In fact, Petersmann added, '[i]n contrast to many UN bodies the WTO has gone far beyond a multilateral arena "for power politics in disguise"'[16] with the adoption of the Dispute Settlement Understanding (DSU)[17] – an instrument that provides for an elaborate enforcement mechanism 'by which WTO Members can seek the full implementation of previously negotiated trade concessions'.[18]

[11] R Teitel and R Howse, 'Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order' (2009) 41 *NYU Journal of International Law and Politics* 959, 961.

[12] A Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' (1998) 9 *European Journal of International Law* 2, 8; Y Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106 *American Journal of International Law* 225, 226; Bellinger (n 4) 2; B Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) 31 *NYU Journal of International Law and Politics* 679, 688.

[13] Broomhall (n 4) 53.

[14] S Chesterman, 'An International Rule of Law?' (2008) 56 *American Journal of Comparative Law* 331, 355–6.

[15] E-U Petersmann, 'How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System' (1998) 1 *Journal of International Economic Law* 25, 31. See also D Evans and GC Shaffer, 'Introduction' in GC Shaffer and R Meléndez-Ortiz (eds), *Dispute Settlement at the WTO: The Developing Countries Experience* (Cambridge University Press, Cambridge, 2010) 1, 2 (referring to the WTO DSS as 'a system designed to provide for the rule of law').

[16] Ibid.

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

[18] Evans and Shaffer (n 15) 1–2. The view of the legalised DSS as primarily an enforcement mechanism whose key goal is inducing compliance with WTO rules is prevalent in current literature. See e.g. P Eeckhout, 'Remedies and Compliance' in D Bethlehem *et al.* (eds), *The Oxford Handbook of International Trade Law*, (Oxford University Press, Oxford, 2009) 437, 443; J Nzelibe, 'The Case Against Reforming the WTO Enforcement Mechanism' (2008) *University of Illinois Law Review* 319; CP Bown, 'The Economics of Trade Disputes, The GATT's Article XXIII, and the WTO's Dispute Settlement Understanding' (2002) 14 *Economics and Politics* 283, 284, 288–9 (addressing the emphasis placed in the literature on the DSS enforcement role, to the neglect of its role as a forum of conciliation and negotiation).

While enforcement is surely a pivotal role of the legalised and empowered international judiciary, the article submits, the current enforcement-centred debate of international courts, and the WTO DSS in particular, is lacking in several aspects. First, it overshadows other important roles expected to be performed and actually played by the WTO DSS (such as its renegotiation, redistribution and conciliation roles), and consequently eclipses the diverse social outcomes – beyond rule-compliance – generated by this adjudicatory system.

Second, the prevalent rule-enforcement discourse further works, in turn, as to mask the multiple and complex challenges of justice encapsulated in international disputes reaching the DSS docket, and obstructs the need to explore other conceptions of justice – beyond its legal-procedural meaning – through which the diverse roles and social outcomes of the DSS may (and should) be evaluated. Such conceptions, the article shows, may include global distributive, corrective or transformative justice, which look not only to rules and procedures, but also ask what would be a just allocation of the international rights and duties in a given case, what might recompense for past wrongs, or what would assist the parties in conflict to move toward an amicable settlement that accommodates their competing interests and fashions long-term cooperative international relations.

Finally, the dominant enforcement-centred discourse, by capturing justice mainly through legal and procedural terms, also falls short of addressing the manner in which the various dimensions of justice that come into play in WTO adjudication complement or rather contradict one another, due to the tensions latent among them. Prominent in this regard is the tension associated with the rule of law dimension of justice, which in its preference for order, stability and equal enforcement of the law, may hinder change and the promotion of justice, construed as reallocation of pertinent international benefits and burdens, or as redress of injuries suffered in the context of past or present bilateral relationships.

Against this backdrop, the present article first seeks to unfold a more complex functional account of the judicialised WTO DSS, which goes beyond the prevalent view of the system as primarily an enforcement instrument, designed to dispense justice in the legalistic sense of upholding the rule of law and preserving previously agreed-upon international commitments and entitlements. Instead, the article views the compulsory WTO DSS – a judicial system nested within a major edifice of global economic governance – as a system of multiple, conflicting and shifting institutional roles.[19] Among them,

[19] On the multiple roles and goals of the WTO DSS and their shifting nature see S Shlomo-Agon, *Is It All about Compliance: Towards a Multidimensional Goal-Based Approach for Analyzing the Effectiveness of the WTO DSS* (unpublished PhD dissertation, December 2013) 97–147.

providing an orderly mechanism of renegotiation, redistribution, and settlement. Roles that essentially allow WTO Members to readjust their original WTO commitments and reallocate their burdens and benefits of international cooperation, and thereby to arrive at new – at times not fully legally compliant – but not necessarily 'unjust' cooperative and sustainable social outcomes. In putting forward this broad and dynamic functional account of the WTO DSS, the present contribution thus strives not least to call attention to several descriptive and normative questions concerning the roles played by this global governance institution, the social goods it generates, as well as its potential contribution to and actual influence on different aspects of justice at the global level – questions that merit further academic reflection and investigation.

The article is a modest inductive exploration of these questions, carried out through a qualitative empirical analysis of the perennial conflict over trade in bananas[20] launched against the European Union (EU) in the 1990s.[21] Rooted in ex-colonial ties, transatlantic rivalry, and splits among competing groups of developing countries, the famous *EC–Bananas* dispute entangled the EU in enduring non-compliance with WTO law. Ultimately, the dispute came to an end in 2012 with a mutually agreed (not yet fully WTO-compliant) settlement, after several rounds of WTO litigation and negotiation. Being the dispute that most aptly illustrates the intertwining between adjudication and negotiation in the WTO,[22] and given the long-lasting non-compliance featuring this case, *EC–Bananas* provides an informative site for probing the manifold institutional roles played and outcomes produced by the WTO DSS; particularly, the DSS role in generating settlement-renegotiations and in shifting the allocation of rights and duties between WTO Members (rather than merely enforcing the originally agreed-upon distribution of entitlements enshrined in the WTO treaty). In light of such roles and outcomes, and against the various political, economic and moral intricacies underlying the dispute, *EC–Bananas* further forms an instructive case for exploring the complex challenges of justice invoked in WTO adjudication, and for illuminating the need to develop a broader grammar of justice for

[20] Appellate Body Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (9 September 1997) (hereinafter *EC–Bananas*).

[21] Until November 30 2009 the European Union was known officially in the WTO as the 'European Communities' (EC). The 'European Union' has become the official name in the WTO upon the entry into force of the Treaty of Lisbon on 1 December 2009.

[22] H Ruiz-Fabri, 'The Relationship between Negotiations and Third-Party Dispute Settlement at the WTO, with an Emphasis on the *EC-Bananas* Dispute' in L Boisson de Chazournes *et al.* (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff, Leiden, 2013) 87, 89.

assessing the institutional roles played and social effects actually generated by the juridified WTO DSS.

Following this introduction, the article thus proceeds in Section II with a brief recollection of the *Bananas* dispute, laying down its basic facts, while delineating the politico-economic intricacies and multifaceted challenges of justice underling the dispute, as unfolded through the lens of WTO practitioners involved in the case. Section III then turns to present the common reading of the *Bananas* dispute as it is often portrayed through the prevalent enforcement-centred perspective of the WTO DSS. This traditional narrative is thereafter contrasted with an alternative, multifunctional reading of *EC–Bananas*, informed by empirical evidence generated through in-depth semi-structured interviews with professionals with first-hand knowledge of the case.[23] As Section III illustrates, the interviews serve not only to illuminate the complexities underlying the perennial *Bananas* dispute; they also provide a revealing insider's perspective on how such intricacies constructed the prominent role the DSS came to play in this conflict as a forum of renegotiation, redistribution and settlement, and shaped the mixed non-compliant outcomes ultimately brought about in the case. Finally, in light of the broader account of the DSS roles and outcomes unfolded through the alternative reading of *EC–Bananas*, Section IV moves to address several (complementary and conflicting) dimensions of justice that have so far been marginalised in the enforcement-oriented debates of the case. On this basis, this section stresses the need to widen the lens of justice – beyond the rule of law – in writing on the WTO DSS so as to more truly assess the actual functions served and social impacts produced by this global judicial system. Section V concludes.

II. *EC–Bananas*: The basic pieces of the complex puzzle

The origins of *EC–Bananas* trace back to the creation of a common EU regime for trade in bananas in 1993, as part of the implementation of the Single European Act. The unified EU banana regime, replacing the patchwork of banana import policies previously employed by EU Members,

[23] These interviews form part of a broad series of semi-structured interviews conducted by the author, mainly in Geneva, in 2012. The present paper draws on 15 of these interviews. The interviews lasted an average of one hour and were conducted with well-placed WTO professionals, among them: AB members, panellists, senior and mid-level staff members of the WTO Secretariat, WTO ambassadors, legal counsel in trade delegations, and lawyers in private law firms and the Advisory Center on WTO Law (ACWL). For reasons of anonymity, the interviewees are cited throughout this work with generic references, such as 'EU official' or 'WTO legal officer'.

was established after four years of hard-fought negotiations. In devising this regime, some EU Members – particularly France and the United Kingdom – sought to maintain the preferential trade arrangements that had long been accorded under the Lomé Conventions to ACP countries (i.e. ex-European colonies in Africa, the Caribbean, and the Pacific). The fear was that absent these preferential trade arrangements, small-scale banana growers in the ACP countries would be completely eliminated from the EU market by highly competitive Latin American banana producers, leading to the destruction of the ACP countries' economies and possibly their political systems.[24]

As a result, in an attempt to preserve the special position of ACP bananas vis-à-vis the EU market, the single EU banana regime introduced in 1993 – against the will of some other EU Members such as Germany, the Netherlands, and Belgium – put in place a complex interventionist system of tariff, quota and license requirements. This system benefited the ACP countries and firms that traditionally traded in EU and ACP bananas, while imposing heavy costs on countries in Latin America, where banana production was largely dominated by US-based multinational companies. Substantial costs were also inflicted by the EU banana regime on consumers in some EU Member states with loose colonial ties (e.g. Germany), which under the new regime were required to replace their previous liberal market of low-cost Latin American bananas with more expensive EU and ACP bananas.

The single EU banana regime fell afoul of basic GATT/WTO rules. Particularly, the preferences accorded by the EU to one group of banana exporters (ACP producers) but not to other exporters (Latin American producers), constituted a violation of the basic most-favoured nation (MFN) obligation, which requires WTO Members to treat all their trading partners equally.

Legal challenges on the part of the Latin American countries were thus launched against the EU already under the WTO predecessor, the GATT, where two panels ruled in favour of the complainants.[25] Yet under the GATT dispute settlement mechanism, where emphasis was on flexibility

[24] HR Clark, 'The WTO Banana Dispute Settlement and its Implications for Trade Relations between the United States and the European Union' (2002) 35 *Cornell International Law Journal* 291, 301; K Buterbaugh and R Fulton, *The WTO Primer: Tracing Trade's Visible Hand through Case Studies* (Palgrave Macmillan, New York, NY, 2007) 93–4, 102.

[25] The first dispute was filed as a means of pressure on the EU while negotiations on the common banana regime were still underway. This dispute challenged the GATT-consistency of the various national banana policies existing in Europe at that time. See Report of the Panel, *EEC–Members States Import Regime for Bananas*, DS32/R (3 June 1993). The second dispute directly challenged the common EU banana regime. See Report of the Panel, *EEC–Import Regime for Bananas*, DS/38/R (11 February 1994).

and diplomacy and all decisions were made by consensus,[26] the EU and the ACP countries blocked the adoption of the panel reports, leaving them with no binding legal effect.

Upon the transition from GATT to the WTO, in 1995, and the shift to compulsory, two-level adjudication, with quasi-automatic adoption of panel reports,[27] litigation against the EU banana regime was renewed. This time around, the US joined in the proceedings following massive pressures from multinationals invested in the Latin American banana sector, thereby giving rise to a lengthy WTO dispute in which the US teamed up with the Latin American complainants, while the EU lined up with the ACP countries (some of which assumed the role of third-parties in the dispute). *EC–Bananas* was thus a transatlantic struggle infused with charged north-south tensions. At the same time, it was also a south-south quarrel in which 'developing countries with conflicting interests' were found 'beating themselves on different sides of the table'.[28]

The complex *Bananas* dispute rambled on in the legalised WTO DSS for almost two decades, testing almost every corner of the system until the formal resolution of the dispute in 2012. Throughout the years several litigation rounds, including special arbitrations and several DSU Article 21.5 compliance proceedings were held under the DSS auspices. In all of these proceedings WTO adjudicators sided, in one form or another, with the US and the Latin Americans, declaring the EU banana policy to be WTO-inconsistent. Such legal rulings were further accompanied by the authorisation of two of the complainants, Ecuador and the US, to retaliate (i.e. to suspend trade concessions) against the EU – a right ultimately exercised by the US alone.

While this series of adverse legal rulings and authorised sanctions generated some incremental changes to the EU banana regime over the years, discrimination against Latin American banana exports – and therefore non-compliance on the part of the EU with WTO rulings and rules – persisted all along.[29]

[26] On the diplomatic origin of the GATT and its DSS see e.g. J Jackson, 'The Case of the World Trade Organization' (2008) 84 *International Affairs* 437; RE Hudec, 'The New Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8 *Minnesota Journal of Global Trade* 1; RE Hudec *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers, Salem, NH, 1993).

[27] Under the WTO DSS 'reverse consensus' rule a penal/AB report is to be adopted unless there is a consensus of all WTO Members (including the winning party) against its adoption. The 'reverse consensus' thus makes the adoption of panel/AB reports in the WTO quasi-automatic.

[28] Interview with WTO legal officer (10 July 2012).

[29] E Guth, 'The End of the Bananas Saga' (2012) 46 *Journal of World Trade* 1, 6–7.

Explaining the enduring EU non-compliance in the perennial *Bananas* dispute and the 'impossibility to solve' the case for nearly two decades,[30] a former EU official involved in the case stated:

> [The problem in this case was rooted in the] conflicting trade commitments … . The EU's problem was the commitment to the ACP countries, which is founded on historical relations, which is of a very special nature, and which is not such that you can just dump it, basically … . It was not that the European market itself was being protectionist … . It was really about the ACP countries. So it was basically the EU defending the interest of the ACP countries against other developing countries for equally legitimate concerns. And how do you want to solve that? I mean, the WTO in a sense decided each time but it was just impossible to implement it like that.[31]

A lawyer representing one of the Latin American complainants in *EC–Bananas* similarly emphasised that 'it wasn't just about changing EU protectionism' in this case. 'The real clients of protectionism were … the banana exporters from all the former colonies who had these preferential arrangements. And so, that made it … extremely complicated because, of course, the EU was arguing that … it couldn't just abandon … all these programs for the benefit of these poor countries.'[32]

For the EU, then, the will to complete the single European market, while at the same time assuming responsibility for former European colonies in the ACP countries[33] and maintaining the Lomé Conventions commitments towards this group of developing countries, proved highly difficult to reconcile with its WTO obligations.[34] This difficulty was further aggravated by the pressures exerted by the ACP countries to retain their postcolonial trade preferences once legal action was taken against the EU banana regime in the multilateral trade framework.[35] EU recalcitrance, therefore,

[30] For an elaborate discussion of the various complicating factors that rendered *EC–Bananas* a 'perennial' dispute see Shlomo-Agon (n 19) 263–71.

[31] Interview with former EU official (9 July 2012); see also interview with Ecuadorian official (17 July 2012) ('[I]t was very difficult to find a solution because of the linkages between the ACPs as the former colonies with the European Union, and all the preferences that were being granted to them, so it was a very sensitive issue in that regard, and I think that made things even more complicated than what they were already').

[32] Interview with WTO practitioner (11 July 2012).

[33] H Hauser and A Roitinger, 'Renegotiation in Transatlantic Trade Disputes' in E-U Petersmann and MA Pollack (eds), *Transatlantic Economic Disputes: The EU, the US, and the WTO* (Oxford University Press, Oxford, 2003) [hereinafter *Transatlantic Economic Disputes*] 487, 503.

[34] KJ Alter and S Meunier, 'Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute' (2006) 13 *Journal of European Public Policy* 362.

[35] Ibid, 374; Buterbaugh and Fulton (n 24) 102.

as Colares notes, resulted not so much from the EU outright indifference to compliance with its international commitments, but mainly because it valued certain commitments more than others.[36]

That said, while the EU invoked its historical ties and long-standing commitment to the development of the ACP countries as the main justification for its prolonged non-compliance in *EC–Bananas*, amidst the Latin American complainants the preferential treatment accorded to the ACP countries as a means to remedy for past colonial wrongs,[37] gave rise not only to valid legal claims of trade discrimination, but also to vocal claims of 'unfairness', as the following statement of a former Latin American official makes clear:

> [O]ur understanding is that … [the EU] wanted to protect the ACPs' market … because they have historic relation with ACP countries, some of them are ex-colonies and they have this political commitment for the development of these Members, which we found unfair to the Latin American countries because we were also ex-colonies of … some of the Members of the European Union … . [T]his is something that [is] difficult … to understand but you will find that the preference of the EU will be always [be] … ACPs… instead of Latin American countries.[38]

Note, however, that while the EU preference was accorded to the ACP countries, leading to the dependence of some of these economies on the continued sale of bananas at preferential prices in the EU market,[39] trade in bananas also involved the 'livelihood of … many … constituents' in the Latin American countries,[40] for some of which this was 'their only or major export … opportunity'.[41]

And so, despite the apparent legal simplicity of *EC–Bananas*, involving mainly straightforward arguments of trade discrimination, behind the legal veil and claims of WTO violations lay complex tensions of supranational EU politics, postcolonialism, and north and south, as well as splits among developing countries, all heavily dependent on bananas for their economic

[36] JF Colares, 'The Limits of WTO Adjudication: Is Compliance the Problem' (2011) 14 *Journal of International Economic Law* 403, 428.

[37] Interview with WTO practitioner (19 April 2012) (noting that 'the main reason why the European authorities decided to maintain' the discriminatory banana import system was their belief that in this way they were 'paying back' to the former colonies the things that they 'took away from them' as colonisers); interview with WTO official (5 July 2012).

[38] Interview with former official of Guatemala (24 July 2012) (alternations added).

[39] Buterbaugh and Fulton (n 24) 93–4; T Josling and T Taylor, 'Introduction' in TE Josling and TG Taylor (eds), *Banana Wars: The Anatomy of a Trade Dispute* (CABI Publishing, Cambridge MA, 2003) [hereinafter *Banana Wars*] 1, 2.

[40] Interview with ACWL lawyer (27 July 2012).

[41] Interview with WTO legal officer (10 July 2012).

welfare. Beneath the surface of *EC–Bananas*, therefore, multiple questions of justice at the global level emerged, which included but went far beyond those pertaining to the WTO legal breaches involved.

After several rounds of WTO litigation, embedded in enduring diplomatic attempts to resolve the case in the shadow of the law, the prolonged *Bananas* dispute finally came to an end with a negotiated settlement in late 2012. Under this settlement – which takes the form of two complementing 'Geneva Agreements on Trade in Bananas' (concluded between the EU and the Latin American countries, and the EU and the US) – the complainants agreed to terminate the WTO dispute. The EU, in return, committed to maintain a tariff-only regime for the importation of bananas, and to substantially lower its MFN banana tariffs in the WTO schedules over a fixed period of time.[42] Yet, while under the Geneva Agreement the complainants were granted improved market access rights to the EU, upon the entry into force of the agreement, and in fact until this very day, bananas originating in ACP countries keep on entering the European market on preferential terms. The preferential tariffs still accorded to the ACP countries, however, are currently not covered by any relevant WTO waiver or exception, such as the free trade agreements (FTAs) exception enshrined in GATT Article XXIV.[43]

Hence, while a satisfactory negotiated settlement was achieved to one of the most acrimonious international trade disputes, reallocating the rights and duties of international economic cooperation between the numerous parties and third-parties with interest at stake,[44] the state of non-compliance

[42] The EU-Latin American countries agreement entered into force on 1 May 2012, available at <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=8501&back=8502> accessed 21 January 2016. The EU–US agreement entered into force on 24 January 2013, available at <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=8502&back=8501> accessed 21 January 2016.

[43] Note that in order to bring the preferential trade arrangements for the ACP countries under the auspices of the FTAs exception of GATT Article XXIV, the EU indeed launched in 2003 the Economic Partnership Agreements (EPAs) negotiations with groups of ACP states. Yet, due to the reluctance of the latter to substitute their *unilateral* trade preferences from the EU with *reciprocal* trade commitments under the EPAs, as required by GATT Article XXIV, at the time of writing, most of the EPAs have not yet been completed. See European Commission, 'Overview of EPAs Negotiations' (2016) <http://ec.europa.eu/trade/policy/countries-and-regions/development/economic-partnerships/> accessed 6 April 2016. As noted by Guth, in order to terminate the remaining gap of EU-non-compliance in *EC–Bananas* and bring banana imports from the ACP countries into full conformity with WTO rules, it is necessary that all EPAs will be signed and implemented. Guth (n 29) 8.

[44] Interviews with WTO practitioners indeed reveal general satisfaction among governments and the private sector with the mutually agreed solution achieved in *EC–Bananas*. See interview with Ecuadorian official (17 July 2012); interview with former WTO ambassador (23 July 2012); interview with EU official (9 July 2012); interview with senior WTO official (23 March 2012); interview with ACWL lawyer (19 April 2012).

with WTO obligations as originally anchored in the WTO treaty was not fully alleviated by the *Bananas* settlement, and it essentially continues to persist long after the settlement has been concluded.

III. Beyond enforcement: An empirical account of *EC–Bananas* and the multiple roles and outcomes of WTO adjudication

While equipped with compulsory jurisdiction, elaborate implementation procedures, including the power to authorise trade sanctions against recalcitrant Members in cases of continued non-compliance, the juridified WTO DSS fell short of delivering a fully legally-compliant outcome in the perennial *Bananas* dispute. In other words, it failed to preserve the rights and obligations of WTO Members as originally distributed in the WTO agreements – a function explicitly prescribed for the DSS in DSU Article 3.2; this is due to the maintenance of the EU tariff preferences for the ACP countries in the absence of a WTO waiver or WTO-compatible FTAs that may absolve the continuing infringement of the fundamental MFN rule.

From a static perspective focused on the 'primary' rule-enforcement function of the WTO DSS, the non-compliant outcome ultimately produced in *EC–Bananas* may be portrayed, of course, as the final – disappointing yet unsurprising – chapter of a chronicle of enduring non-compliance, and thereby as a blatant instance of injustice, in which the EU effectively negotiated and bought its way out of compliance with WTO rules. Nourished by the view of the legalised WTO DSS as principally an enforcement mechanism and the prevalent conception of justice attendant thereto – under which in cases of violation justice operates to maintain the distribution of expectations articulated in the WTO agreement through the withdrawal of the non-compliant measure[45] – this is, indeed, the common reading of the *Bananas* case. A case that over the years has been repeatedly depicted by commentators as the poster boy of non-compliance, and as an abject failure of the DSS to hold the EU accountable for the WTO obligations it originally committed to.[46]

[45] C Carmody, 'A Theory of WTO Law' (2008) 11 *Journal on International Economic Law* 527, 532.

[46] See e.g. BL Brimeyer, 'Banana, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations' (2001) 10 *Minnesota Journal of Global Trade* 133; KJ Alter, 'Resolving or Exacerbating Disputes? The WTO's New Dispute Resolution System' (2003) 79 *International Affairs* 783; WJ Davey, 'Compliance Problems in WTO Dispute Settlement' (2009) 42 *Cornell International Law Journal* 119, 120; ML Busch and E Reinhardt, 'Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement' in *Transatlantic Economic Disputes* (n 33) 465, 475–9; PC Mavroidis, 'The Trade Disputes Concerning Health Policy between the EC and the US' in *Transatlantic Economic Disputes* (n 33) 233, 244–5.

Within this legalistic and enforcement-oriented discourse of *EC–Bananas*, another pivotal concern of justice often flagged by commentators when addressing this case has been the problem of unequal access to justice featuring the current WTO DSS. In this respect, the hurdles faced by Ecuador in implementing its retaliatory rights against the EU in *EC–Bananas* have been aptly invoked as an illustration of the inability of many developing countries (given their small markets and dependence on exports) to have effective recourse to the DSS remedies mechanism – a mechanism that relies almost exclusively on the suspension of trade concessions vis-à-vis the respondent as a means to elicit compliance.[47] In terms of procedural justice, it has been argued that the incapacity of small developing countries like Ecuador to put sufficient pressure on larger, more developed WTO Members, runs the risk that they will be marginalised in the WTO judicial process,[48] and makes their access to the existing WTO enforcement mechanism unequal to that of developed states.[49]

While this common reading of *EC–Bananas*, unfolded through the enforcement-oriented perspective of the WTO DSS, illuminates important aspects of the roles played and outcomes produced by the system, and brings to the fore pertinent issues of justice associated therewith, this reading is only partial. As shown below, an in-depth empirical legal analysis of *EC–Bananas* discloses a more complex story of the manifold shifting roles served and outcomes generated by the DSS, and consequently highlights (in Section IV) other critical aspects of justice pertaining to the *Bananas* conflict and the DSS operation more generally.

This analysis of *EC–Bananas* recounts a story of an international judicial system that in certain disputes – and contrary to the conventional wisdom – is not geared primarily toward the mechanical enforcement of WTO rules, but rather plays an enhanced role in the interstice between law and politics. In this framework, as the following discussion demonstrates, the prominent role played by the DSS in the perennial *Bananas* dispute seems to have revolved around two main paths.[50] First, throughout the conflict and until its final resolution, the mandatory DSS played a systemic role in containing the charged dispute within defined legal parameters and providing an outlet for the claimed interstate injustices, thereby allowing the parties to

[47] J Smith, 'Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement' (2004) 11 *Review of International Political Economy* 542, 548.

[48] Footer (n 7) 94.

[49] M Bronckers and F Baetens, 'Reconsidering Financial Remedies in WTO Dispute Settlement' (2013) *Journal of International Economic Law* 281, 303; M Bronckers and N van den Broek, 'Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement' (2005) 8 *Journal of International Economic Law* 101, 106.

[50] For an elaborate discussion of this role see Shlomo-Agon (n 19) 271–91.

keep cooperating on other fronts and deflecting destabilising effects on the WTO regime. Second, through its successive legal rulings and clarifications in the various rounds of the recidivist *Bananas* dispute, the DSS further served a pivotal function in stimulating renegotiations and constructing focal points around which the parties could coordinate toward a settlement;[51] i.e. an agreement that readjusts the original terms of the bargain as stipulated in the WTO treaty, accommodates the interests of the various parties involved, and reallocates the rights and burdens of international economic cooperation between them.

The claimed shift in emphasis from the legalistic rule enforcement function of the WTO DSS towards its roles of dispute-containment, settlement facilitation, and renegotiation in *EC–Bananas*, is first learned from the views and experience of insiders with first-hand knowledge of the dispute.

Evidence from the field

As one Ecuadorian official noted, we tend to see the WTO DSS 'as a purely legalistic system', but 'that's not the case. There's a lot of politics behind … and in the case of … *Bananas*, the politics was present all along.' In such politically complex cases, a former EU official involved in *EC–Bananas* observed, in turn, the WTO DSS does not serve the 'classical straightforward' role of 'finding the truth, declaring the truth and then having everybody complying with the truth'; instead, it serves 'as a leverage', 'as a tool to find the solution elsewhere', outside the formal judicial process.[52]

Elaborating on this point, a staff member of the AB secretariat involved in *EC–Bananas* noted that in this sort of convoluted cases the DSS plays two main roles. On the one hand, 'it provides a non-negotiated solution to the dispute', i.e., legal answers to the disputed issues. On the other hand, the DSS continues to play a role in the post-litigation bargaining between the parties, as the latter renegotiate on the basis of the legal findings and clarifications provided in the DSS rulings. Those were the roles played by

[51] For relevant writing on the function of the WTO DSS and other international courts as a means to facilitate dispute settlement through information-dissemination, construction of focal points, and stimulation of renegotiations see Guzman (n 4) 180–3; M Gilligan, L Johns and P Rosendorff, 'Strengthening International Courts and the Early Settlement of Disputes' (2010) 54 *Journal of Conflict Resolution* 5, 10–11; T Ginsburg and RH McAdams, 'Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution' (2004) 45 *William & Mary Law Review* 1229; J Linarelli, 'The Role of Dispute Settlement in World Trade Law: Some Lessons from the Kodak-Fuji Dispute' (2000) 31 *Law and Policy in International Business* 263, 335. For similar ideas regarding courts more generally see J Scott and SP Sturm, 'Courts as Catalysts: Rethinking the Judicial Role in New Governance' (2007) 13 *Columbia Journal of European Law* 565.

[52] Interview with former EU official (9 July 2012).

the DSS in the *Bananas* dispute, this official stressed, and those are the roles being played in other perennial WTO disputes, such as the ongoing transatlantic *Aircraft* conflicts.[53]

Finally, another WTO official similarly stated as follows when explaining the functions served by the DSS throughout the charged *Bananas* dispute:

> [B]y making successive findings of inconsistencies … [the DSS] helped [the] parties to negotiate an agreement … . [T]his [dispute] was so political that it had to be done through a negotiation. But [following]… each of the [WTO] cases … the successive negotiations brought [the] parties closer to a better solution, one which guaranteed [the Latin American countries] better conditions of access to the European market, less discrimination, and more development assistance for the [ACP] countries which were affected … .[54]

A close look at the sequence of events in *EC–Bananas* elucidates how the above-mentioned DSS roles of facilitating the settlement of the dispute and the accommodation of the competing interests through renegotiations actually operated on the ground. As for the EU, the series of DSS rulings rendered in favour of the US and the Latin American complainants in the *Bananas* dispute, accompanied by the implementation of trade sanctions by the US, attributed both reputational and economic costs to the violation of WTO law and the continued state of EU non-compliance. Such costs effectively turned the alternatives previously available to the EU of simply refusing to act or to engage in negotiation with the complainants much more expensive,[55] thereby triggering a strong demand on its part for renegotiation.[56]

[53] Interview with member of the AB Secretariat (4 July 2012).

[54] Interview with WTO legal officer (16 March 2012) (alternations added).

[55] Note that absent retrospective remedies in the WTO DSS, respondents can violate WTO rules without fear of sanctions for the duration of the dispute settlement process and until retaliation is at hand. This situation allows recalcitrant Members to use the dispute settlement process to 'buy time' and prolong the application of their WTO-inconsistent policies. See M Wu, 'Rethinking the Temporary Breach Puzzle: A Window on the Future of International Trade Conflicts' (2015) 40 *Yale Journal of International Law* 95, 98, 101–7; Bronckers and Baetens (n 49); R Brewster, 'The Remedy Gap: Institutional Design, Retaliation, and Trade Law Enforcement' (2011) 80 *George Washington Law Review* 102.

[56] Hauser and Roitinger (n 33) 504. Note that precisely in order to assure the EU ability to negotiate a solution – other than withdrawing a measure found by the DSS to violate WTO law – the ECJ has consistently denied 'direct effect' to WTO rulings and rules, including in the context of *EC–Bananas*. That is, the ECJ has denied the possibility of individuals and EU Members to challenge the validity of EU measures through an appeal to WTO law or legal rulings. See Case C-149/96, Portuguese Republic v. Council 1999 E.C.R. I–8395, paras 38–46; M Bronckers, 'From "Direct Effect" to "Muted Dialogue": Recent Developments in the European Courts' Case Law on WTO and Beyond' (2008) 11 *Journal of International Economic Law* 885; S Griller, 'Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96, *Portugal v. Council*' (2000) 3 *Journal of International Economic Law* 441.

Thus, a former EU official involved in the case explained, 'it was quite a pressure on the EU to be continuously losing these cases without being able to comply'. In addition, this official noted, these cases gave the complainants:

> the leverage of saying [to the EU], 'You're not compliant with the dispute settlement system, you have to do something', and that worked. The EU really felt they have to do something in order to get this off the table … . And so, this was really the incentive then to say, 'Okay, let's find a solution for this.' Otherwise it wouldn't have happened.[57]

A similar picture was depicted by a US official, who noted that 'the EU… never would have done anything to provide additional [market] access on bananas … if it wasn't for the dispute settlement system … . [T]hat was the entire mechanism that prompted the change, even though the change wasn't … done' by the respondent revoking its WTO-inconsistent measure, 'which is the standard way for most disputes'. 'But still', the official stressed, 'without the disputes … there would've been no way that they would have … accommodated the concerns of any of the other parties.'[58]

As for the complainants, although the banana controversy had already been decided in their favour, both the US and the Latin American countries accepted the demand expressed by the EU for renegotiation.[59] In fact, the complainants 'did not alter their readiness to negotiate even after it had become obvious that the EC would not comply', while they were using the series of favourable DSS rulings as a bargaining leverage in the negotiations and as a means to push the negotiations forward.[60] In this spirit, a former Latin American ambassador noted, '[t]he dispute settlement [process] was exactly to allow our side … the winners … to push the negotiations' with the EU towards a mutually agreed solution.[61]

From a rule-enforcement perspective of the WTO DSS, as two commentators have rightly observed, it is hard to explain this 'readiness

[57] Interview with former EU official (9 July 2012) (alternations added). A lawyer representing the ACP countries in *EC–Bananas* similarly stressed the 'very tangible pressure' exercised by the DSS on the EU in this case, the inability of the EU to refuse taking actions concerning its banana regime in the face of the adverse DSS rulings, and the major DSS contribution to 'bending' the EU 'negotiating positions' in the talks on the amended EU tariffs for banana imports. Interview with private attorney (19 July 2012).

[58] Interview with US official (17 July 2012) (alternation added).

[59] Hauser and Roitinger (n 33) 504.

[60] Ibid.

[61] Interview with former WTO ambassador (23 July 2012) (alternation added); interview with former official of Guatemala (24 July 2012) (noting that 'even though there was no compliance in terms of the dispute settlement mechanism' in *EC–Bananas*, the DSS 'was an important element conducive to the negotiations that ended in the Geneva Agreement').

of the complainants at various stages [of the *Bananas* dispute] to renegotiate an issue which had already been decided in their favour'.[62] Arguably, a broad and dynamic perspective of the DSS as a multifunction mechanism for renegotiation, for shaping bargaining positions, and for arriving at newly agreed modes of allocation between the disputing parties, may better explain such readiness.

Note at this point, that the importance of these particular functions of the DSS may not be overstated especially in situations like the *Bananas* case, where striking power asymmetry exists between the respondent (the EU) and most of the complainants (the Latin American countries). Thus, for example, an Ecuadorian official commented that 'if we would not have this [dispute settlement] system … in a purely bilateral relationship between the EU and Ecuador … . I don't think we would have settled this case because of the huge asymmetry between the EU and Ecuador.'[63] Elucidating further the vitality of the legal proceedings pursued before the mandatory DSS as a means for setting the stage for negotiations between the EU and the Latin American countries and for gaining better outcomes than possible in bilateral negotiations outside the system, a former Guatemalan official stressed, the *Bananas* dispute had to be brought before the DSS:

> [Because] otherwise we wouldn't have the Bananas Agreement today. Why would the EU negotiate with the Latin American countries in the first place if we don't have this leverage of saying, 'Okay, you are in non-compliance.' I don't see a particular reason, especially if they are protecting the interest of the ACP countries.[64]

Against this backdrop, a WTO legal officer involved in *EC–Bananas* interestingly concluded with the following statement when addressing this case:

> *[EC]–Bananas* … showed that the WTO dispute settlement is a tool to achieve something, a tool to achieve something that might not necessarily be full legal compliance … . *Bananas* had shown that the Latin Americans and all of the constituents involved in this dispute wanted to achieve something. The EU wanted to maintain some privileges for [the] ACPs, it was politically taboo not to maintain something. The Latin Americans

[62] Hauser and Roitinger (n 33) 504 (alternation added).

[63] Interview with Ecuadorian official (17 July 2012). On Ecuador's strategic use of the WTO DSS in *EC–Bananas* see JM Smith, 'Compliance Bargaining in the WTO: Ecuador and the Bananas Dispute' in JS Odell (ed), *Negotiating Trade: Developing Countries in the WTO and NAFTA* (Cambridge University Press, Cambridge, 2006) 257.

[64] Interview with former official of Guatemala (24 July 2012) (alternation added); interview with former WTO ambassador (23 July 2012).

> wanted to improve the standing of their exports, the US too, and they tried various ways … also political [avenues] outside of the WTO dispute settlement [system]. And the WTO dispute settlement [system] was an effective and a very sort of powerful tool, but only part of an arsenal, of other sort of arms that you can use … to achieve something.[65]

In the complex political and economic context of the *Bananas* dispute, the same WTO official added:

> [The DSS] enhanced cooperation between the Membership … . It … made the Members more flexible and more exposed to each other … . [I]t engaged the Members and … gave a certain dynamic to the exchanges between Members. Whether the dynamic was always positive … is, of course, another question. But it … got people around the table and it got people talking.[66]

In *EC–Bananas*, therefore, as the assorted testimonies of practitioners involved in the case suggest, the legalised WTO DSS did not serve merely as a means to elicit compliance with WTO rules and deliver justice by maintaining the original distribution of commitments articulated in the WTO agreements. Rather, more in line with its 'GATT DNA of pragmatism' and flexibility,[67] the mandatory DSS formed the place where *non-compliance* with the original WTO commitments could have been gradually translated into a discursive process of renegotiation and transformation, and eventually into a settlement that relocates the rights and obligations of international cooperation and accommodates the conflicting interests of the parties involved, including those of third-states with interests at stake (i.e. the ACP countries).

Evidence from the jurisprudence

The enhanced role played by the DSS throughout the *Bananas* conflict as an orderly mechanism for fostering renegotiation, reallocation, and settlement, is apparent not only from the evidence generated through interviews with WTO professionals; it is also echoed in the choices made and the considerations taken into account by WTO adjudicators themselves along the dispute.

A good illustration in this respect may be traced, for example, in the overt and discrete attempts on the part of the adjudicators in *EC–Bananas*

[65] Interview with WTO legal officer (10 July 2012) (alternation added).
[66] Ibid.
[67] Ibid.

to actively encourage a mutually agreed settlement between the parties.[68] Yet an even more prominent illustration of the conciliation, renegotiation and reallocation roles played by the DSS is reflected in the distinctive willingness of the panelists in *EC–Bananas* to provide the parties with specific suggestions on how to move forward in the negotiations toward the settlement of the dispute – a willingness that stands in contrast to the general practice of WTO adjudicators of avoiding any such suggestions, which they are authorised to make under DSU Article 19.1.[69] Thus, mindful of the fact that panels have rarely 'made suggestions pursuant to Article 19.1', the first compliance panel in *EC–Bananas* found it appropriate on this occasion to make specific suggestions to the EU '*with a view toward promptly bringing the dispute to an end*'.[70] Consequently, at the end of its report the compliance panel outlined three possible ways to be taken by the EU with respect to its banana regime. Among these ways, the move of the EU to a tariff-only regime for the importation of bananas, accompanied by a tariff/tariff-quota preference for the ACP countries that is to be covered by a suitable WTO waiver or an FTA consistent with GATT Article XXIV.[71]

Beyond the notable departure of the compliance panel from the usual practice of WTO adjudicators of avoiding making such suggestions, for the purposes of the present contribution no less important is the particular nature and content of the above-mentioned policy recommendations put forward by the panellists. First, the panel's suggestions to the EU were effectively of the kind that required *all* the parties involved in *EC–Bananas* to cooperate and engage in further negotiations in order to settle the dispute. Thus, the move to a tariff-only regime as suggested by the panel

[68] See Decision by the Arbitrators, *European Communities–Regime for the Importation, Sale and Distribution of Bananas, Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, para 2.13, WT/DS27/ARB (9 April 1999). In this DSU Article 22.6 arbitration between the EU and the US, the arbitrators chose to open their award by encouraging 'the parties to continue in their efforts to reach a mutually acceptable solution to this matter promptly', while noting that 'the suspension of concessions is not in the economic interest of either of them'. The significance of this statement becomes all the more clear once one takes into account the rarity of such pronouncements in WTO judicial practice. Thus, Porges notes, although '[i]n theory, WTO panels may actively encourage settlement … in practice none do'. A Porges, 'Settling WTO Disputes: What Do Litigation Models Tell Us?' (2004) 19 *Ohio State Journal on Dispute Resolution* 141, 167.

[69] J Pelzman and A Shoham, 'WTO DSU-Enforcement Issues' in H Beladi and KE Choi (eds), *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment* (Emerald Group Publishing, Bingley, 2009) 369, 376–7.

[70] Panel Report, *European Communities–Regime for the Importation, Sale and Distribution of Bananas*, *Recourse to Article 21.5 of the DSU by Ecuador*, para 6.154, WT/DS27/RW/ECU (12 April 1999).

[71] Ibid, paras 6.154–6.158.

essentially required all relevant parties to renegotiate the EU tariff rate for the importation of bananas under GATT Article XXVIII. Likewise, a suitable waiver that would allow the EU to maintain its WTO-inconsistent trade preferences for the ACP countries could only be granted in the WTO system through a particular politico-diplomatic process under the WTO Agreement. Finally, the conclusion of FTAs that would exempt the preferential treatment accorded by the EU to the ACP countries similarly required these two groups of states to enter into negotiation with each other.

Second, and more importantly, the panel's suggestions manifested some meaningful sensitivity to the complex circumstances of the case at hand, as well as an attempt to factor into the suggestions 'other-regarding' considerations related to the potential effects of the panel's decision and any future EU banana regime on affected third-states – the ACP countries. Thus, the panel's suggestions did not simply call for the elimination of the discriminatory trade effects of the EU banana regime in the name of trade liberalisation; instead, the panel's suggestions pointed to several ways under which the EU trade preferences for the ACP countries could be maintained, but in a manner that may alleviate some of the WTO-inconsistencies pertaining to the EU banana policy, and that may improve the standing of the Latin American countries vis-à-vis the EU market.

In the spirit of this sensitivity, and after having made the aforementioned suggestions, the WTO panel ultimately found it appropriate to close its ruling in this case with the following 'concluding remark':

> We recall that the fundamental principles of the WTO and WTO rules are designed to foster development, not impede it. As illustrated by our suggestions on implementation above, the WTO system is flexible enough to allow … appropriate policy responses in a wide variety of circumstances across countries, including countries that are heavily dependent on the production and commercialization of bananas.[72]

Arguably, had the panel perceived its function in *EC–Bananas* merely as enforcing WTO law and securing compliance with the original WTO trade commitments, it would have probably avoided making such pronouncements and recommendations. By making, instead, these particular judicial choices and by taking such a reflective stance, the panel essentially revealed the plurality of considerations and broader horizons of justice – beyond compliance and the rule of law – that come into play in WTO adjudication, and manifested the enhanced role played by the DSS in this dispute in stimulating renegotiation, reallocation and settlement between the parties, while providing them with relevant policy suggestions for this purpose.

[72] Ibid, para 6.164.

These suggestions, as later days showed, substantively informed the negotiations held between the parties to *EC–Bananas*.[73] They formed a constitutive element of both the 2001 Understanding on *Bananas* reached between the EU, the US, and Ecuador, and the final Geneva Agreement concluded between the numerous parties to the dispute and which came into force in late 2012.

Under the analysis of WTO judicial practice conducted herein emerges, therefore, an alternative version of the perennial *Bananas* dispute, the institutional roles played by the DSS throughout the case, and the social outcomes to which this adjudicative system gave rise. This version is somewhat different and more complex than the one conveyed so far through the widespread rule-enforcement perspective of the WTO DSS. As a WTO legal officer aptly put it:

> The *Banana* case … is a perfect example that can be used to show either that the [WTO dispute settlement] system is very good, or the system is very bad, depending on which view you take about it … . [Y]ou hear a lot of observers, they tell you, 'Oh, it is used to show that the system is a disaster'… . It took so long and the EU was not complying, etc … . [I]t clearly took a long time, but that's only because the case was a very complex case, and … when you have a case of that dimension … you need to go gradually about it. You cannot just … destroy this policy that the EU had in place to benefit these ACP countries and to order its own market … you need to have gradual changes, which the successive dispute allowed to. And if you see it from … [the point of view of] the complainant[s] … . Every successive case that they brought … improved their conditions to access the EC market … . So even before the last case, they were already increasing their participation … [in the EC] bananas market … . And, at the same time, the ACP countries, which find it very hard to compete, because they have structural problems, have been able to get some development assistance, which hopefully will help them address the kind of structural problems that they need [to tackle].[74]

The juridified WTO DSS, as this excerpt and the alternative version of *EC–Bananas* unfolded herein suggest, is thus not merely an enforcement mechanism designed to elicit state compliance with WTO rules and preserve a formerly agreed-upon allocation of rights and obligations. It is a forum of litigation, struggle, renegotiation, redistribution, and settlement, where many conflicts are fought not only about adherence to formerly

[73] T Josling, 'Bananas and the WTO: Testing the New Dispute Settlement Process' in *Banana Wars* (n 39) 169, 190.

[74] Interview with WTO legal officer (16 March 2012) (alternations added).

agreed rules – though this is certainly an important function of the system – but over broader political, economic, moral, and social interests and values.

In certain realities, however, as the case in point further makes clear, these multiple and competing functions of the DSS do not coincide with one another, imposing, in turn, inevitable trade-offs between the outcomes generated by the system. Thus, in the convoluted *Bananas* case, the DSS role in facilitating renegotiation and settlement, ultimately resulting in an 'agreement at intermediate points' beneficial to the disputing parties, came into collision with the oft-cited enforcement role of the system, which denotes 'a principled-driven adherence' to WTO rules, beneficial to the broader 'security and predictability of the multilateral trading system'.[75]

In terms of *outcomes*, then, in *EC–Bananas*, a negotiated settlement – which reallocates Members' rights and duties, grants remunerative market access rights to the complainants, maintains the ACP countries' trade preferences, and thereby promotes long-term cooperative relations – outweighed compliance with the legal prescriptions originally agreed-upon in the WTO agreements. In terms of '*justice*', in turn, one may ultimately suggest, in *EC–Bananas*, 'distributive', 'corrective', or perhaps 'transformative' justice, came at the expense of justice in its formal legal sense.

As the following section thus moves to show, a broader perspective of the multiple, competing, and shifting roles played by the DSS, and a wider view of the diverse social outcomes it brings about, may lead to the conclusion that, at least in some occasions, the renegotiating, reallocating, and dispute settling functions of the DSS, while they may not necessarily lead to full legal compliance, may promote certain dimensions of justice nonetheless.

IV. Widening the lens: Towards a broader 'grammar of justice' in discussions of WTO adjudication

To be clear, the preceding analytical empirical endeavour has not aimed at portraying *EC–Bananas* as an impeccable deed of the WTO DSS. From a rule of law perspective, the non-compliant outcome ultimately produced in this dispute is clearly problematic. It hinders the promotion of a legally predictable multilateral trade system. Furthermore, since many WTO Members are not equally positioned to negotiate and 'buy-out' their way

[75] On this tension between the DSS functions see Pelzman and Shoham (n 69) 377; C Carmody, 'Remedies and Conformity under the WTO Agreement' (2002) *5 Journal of International Economic Law* 307, 322.

of compliance – as essentially did the EU in this case – such an outcome may sustain imbalances of power and inequalities between WTO Members.[76]

Yet by putting forward the alternative account of *EC–Bananas* in the previous section, this contribution has sought to disclose the still incomplete picture of the WTO DSS functions and outcomes unfolded through the lens of the common enforcement-oriented perspective of the system. Particularly, it has strived to illuminate the cardinal roles actually served by the DSS in this dispute as a forum of renegotiation, settlement, and reallocation of concessions, as well as to expose the conflicting outcomes consequently engendered by the system. Among them, a mutually agreed settlement that alongside its non-compliant features appears to bear some substantial cooperative, rectificatory, and redistributive social effects (i.e. effects that go beyond the mere preservation of the original distribution of expectations articulated in the WTO treaty).

By overshadowing such institutional roles and social effects, this final section argues, the prevalent enforcement-centred perspective of the WTO DSS and its conceptualisation of justice mainly through procedural and legalistic terms, has essentially worked further to eclipse other cardinal dimensions of justice, such as global distributive, corrective, or transformative justice, to which the operation of the legalised DSS could perhaps contribute, and on which it seems to be *de facto* influencing.[77]

On distributive, corrective and transformative justice in EC–Bananas

First, the traditional narrative of *EC–Bananas* and the emphasis placed by commentators along this dispute on legal justice and the enduring EU non-compliant behaviour, essentially resulted in the neglect of intricate questions of *distributive justice* that were lurking behind this lengthy

[76] On the injustices associated with such a 'buy-out' possibility in the WTO DSS context see JH Jackson, 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?' (2004) 98 *American Journal of International Law* 109, 117–8, 120–1.

[77] In a somewhat similar spirit, Petersmann has noted: 'In terms of Aristotelian distinction between "general principles of justice" (like liberty, equality, fair procedures, promotion of general consumer welfare) and particular principles of justice requiring adjustments depending on particular circumstances, WTO rule-making and WTO dispute settlement procedures can also contribute to "corrective justice" and "reciprocal justice", just as the special, differential and non-reciprocal treatment of less-developed WTO Members in numerous WTO provisions may contribute to "distributive justice".' E-U Petersmann, 'Multilevel Juridical Governance of International Trade Requires a Common Conception of Rule of Law and Justice' (2007) 10 *Journal of International Economic Law* 529, 534.

dispute and that should have arguably affected its outcomes.[78] Among these questions, which were often marginalised in the vehement compliance-oriented debates of *EC–Bananas*, is the question of the possible effects of strict enforcement of the original distribution of WTO obligations in this case, given the economic dependence developed by affected third-states – the ACP countries – on exports to the EU market; the intricate question concerning the similarity or rather the disparity of the socio-economic conditions prevailing in the two rival groups of developing countries with interest in access to the major market of Europe; and, consequently, the weight, if any, that should have been given to such factors in the resolution of the dispute and the redistribution of trade concessions among the parties involved through the devise of an amended EU banana regime.

While such questions escaped a thorough treatment in writing on *EC–Bananas* and the operation of the DSS in the dispute, this sort of considerations, as seen in Section III, did not go unnoticed by WTO adjudicators. Thus, in its recommendations on possible modifications to the EU banana regime, the first compliance panel in *EC–Bananas* went a long way in order to lay down the contours of possible legal options that may improve the position of the Latin American complainants vis-à-vis the EU market, while at the same time maintain the EU trade preferences for the ACP countries within the legal flexibilities of the WTO rules-based system. As noted above, the options outlined by the panel later on proved to have a significant impact on subsequent negotiations between the parties towards the resolution of the *Bananas* conflict, and became a constitutive element of the final Geneva Agreement settling the case.

Through their ruling and uncommon suggestions, therefore, the WTO panellists seem to have implicitly introduced elements of distributive justice into the negotiations between the parties – laying the ground for an outcome that accounts for the interests of the Latin American complainants as well as affected third-states with interest at stake,[79] while tempering

[78] Distributive justice is concerned with the ways in which benefits and burdens are shared among members of a society/community. C Armstrong, *Global Distributive Justice: An Introduction* (Cambridge University Press, Cambridge, 2012) 15–16. Note that while the concept of distributive justice as such has not been the subject of much academic inquiry in the context of the WTO DSS, the more general question of the relation between international trade and global distributive justice has attracted growing research attention in recent years. See e.g. ibid, 162–87; FJ Garcia, *Global Justice and International Economic Law* (Cambridge University Press, New York, NY, 2013); M Risse, *On Global Justice* (Princeton University Press, Princeton, NJ, 2012) 346–60.

[79] Note that the new EU tariff rates for banana imports negotiated between the EU and the Latin American countries under the Geneva Agreement were incorporated into the EU's WTO tariff schedules. Consequently, the new EU tariffs apply on an MFN basis, so that the redistributive outcome produced in *EC–Bananas* essentially extends to the entire WTO Membership.

possible unfairness that may result from the strict application of the law and the original distribution of entitlements embedded therein.[80]

EC–Bananas, the prominent renegotiation and settlement roles served by the DSS in the dispute, and the negotiated outcome ultimately reached in the shadow of WTO adjudication – securing the complainants better access to the EU market through a revised, less WTO-inconsistent, 'tariff-only' regime, while effectively leaving in place the tariff preferences for the ACP countries – also encapsulate various important facets of *corrective justice*.

First, in the bilateral contractual relationship between the complainants and the respondent, the improved EU tariffs for banana imports agreed upon in the Geneva Agreement may be taken to play an important compensatory role for the impairment caused by the EU discriminatory and WTO-inconsistent behaviour.[81] Yet, as the EU was bound by the lower tariffs only from the day of concluding the Geneva Agreement (15 December 2009), past injury suffered by the Latin American banana suppliers throughout the long *Bananas* conflict was accorded no redress. Circumstances of this sort have led some commentators to call for the introduction of remedial mechanisms such as retroactive financial compensation and reparation for past damage to the WTO DSS[82] – that is, for the introduction of more corrective justice elements into the WTO judicial system.[83]

The contractual relations between the complainants and the EU represent, however, only one instance for reflecting on issues of corrective justice in the context of the protracted *Bananas* dispute. Another such salient instance is the one related to the close relationship between the EU and the ACP countries, and the historical commitment of the first to the latter – a commitment that largely triggered the enduring EU non-compliance in *EC–Bananas*. Herewith several intricate questions arise: what were the exact duties of justice owed by the EU to the ACP countries and which nourished the prolonged EU non-compliance with WTO law and rulings? Were these duties of justice applicable to the EU as a whole, or only to the particular

[80] A somewhat similar discussion may be found in Franck's discussion of the ICJ 1969 North Sea Continental Shelf cases. See TM Franck, *Fairness in International Law and Institutions* (Oxford University Press, New York, NY, 1998) 61–3.

[81] On corrective justice as applicable to private interests in bilateral contractual relationships and the remedy of compensation accompanying this justice conception see C Carmody, 'WTO Obligations as Collective' (2006) 17 *European Journal of International Law* 419, 423; Winthrop (n 10) 1024.

[82] See e.g. Bronckers and van den Broek (n 49); J Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules–Toward a More Collective Approach' (2000) 94 *American Journal of International Law* 335, 346.

[83] Carmody (n 81) 432. See also in this regard Carmody (n 45) 535.

EU Members with postcolonial ties? If, indeed, such ex-coloniser duties applied to the EU in its entirety, what, if any, could have justified the disparate application of such duties in the EU relations vis-à-vis two similar groups of developing states in *EC–Bananas* – the ACP countries and the Latin American complainants – both ex-European colonies and both heavily dependent on banana production for their economic well-being? Also, and more generally, may the will to remedy one group of countries for past (colonial) wrongs justify, in any way, the imposition of harm on others? And lastly, what room, if at all, should postcolonial duties to make reparation for historical injustices have in the present multilateral trade setting of the WTO and in disputes coming before it?

In the extensive debates of the *Bananas* dispute conducted largely through the enforcement-oriented view of the DSS and the rule of law conception of justice accompanying it, this series of corrective justice questions received little academic attention. Future investigation of this type of questions may throw more light on the complex issues of justice latent in WTO disputes and inspire further thinking on the ways they should be tackled.

Finally, the perennial *Bananas* conflict, the roles played by the DSS throughout the case, and the outcome negotiated between the numerous parties involved, may also be explored through the lens of the more modern notion of transformative justice; a notion of justice that does not seek to distribute rights and obligations or to correct harm exclusively, 'but rather to resolve conflicts between national interests in a manner that develops and strengthens relationships among those involved'.[84]

Transformative justice, as noted by Carmody, aims to fashion accommodative relationships between groups with competing interests.[85] Accordingly, as elaborated on this concept in another study:

> Transformative justice must be driven by the needs of participants. Decisions on how to resolve the conflict ought to be based on a consensus … . The goal will be to find common ground on which a mutually acceptable resolution can be established. This is the power of transformative justice: the possibility of using the substance of a conflict as a means of exploring options and establishing responses that are not only acceptable to all parties but develop and strengthen relationships among those involved.[86]

[84] Carmody (n 45) 532.

[85] Carmody (n 81) 433.

[86] Law Commission of Canada, 'From Restorative Justice to Transformative Justice: Discussion Paper' (1999) 42, available at <http://dalspace.library.dal.ca/bitstream/handle/10222/10289/Participatory%20Justice%20Discussion%20Paper%20EN.pdf?sequence=1> accessed 6 April 2016. The Discussion Paper begins with the notion of 'restorative justice' as it has been developed in the criminal justice system, and seeks to extend it, through the notion of 'transformative justice', to other fields of law.

Within this transformative justice framework, in turn, the adjudicative process – rather than being a means for the mere application of the law, the advancement of legal predictability, and the vindication of rights in a victory versus defeat pattern – serves as a mechanism to facilitate the active participation of the relevant parties in finding a mutually agreed solution to the dispute.[87] In other words, unlike the conventional perception of the judicial process as a backward-looking adversarial process that works to produce winners and losers, under a transformative justice approach 'the aim of dispute settlement is to achieve solutions that are acceptable to all of the parties, and that promote interdependence'. Under this latter approach, there is '[n]o absolute requirement to restore the relationship by repairing the harm done. Relief is instead fashioned along flexible and broadly remedial lines.'[88]

While the WTO Agreement contains fundamental aspects of distributive and corrective justice, Carmody has observed, when '[t]hought about carefully, transformative justice seems to best describe the overall operation of the WTO agreement'. It explains 'the insistence on consensuses' in the WTO framework. It explains 'the shape of dispute settlement' and the explicit preference made in DSU Article 3.7 for 'a solution that is mutually acceptable to the parties'. Finally, transformative justice also 'explains the reflexive relationship between dispute settlement and negotiation' in the WTO system.[89]

EC–Bananas, as the empirical account of this charged and complex conflict provided in Section III has shown, illustrates probably more than any other WTO dispute this reflexive relationship. This dispute illuminates how the legalised, multi-stages WTO dispute settlement procedures serve not necessarily as a two-sided adversarial process, but rather as a mechanism for bringing together all the parties with interests at stake, facilitating renegotiation between them, and allowing them to arrive at a balanced accommodation of the competing interests that is acceptable to them all and conducive to their long-term cooperative relations. Put differently, the intertwining between third-party adjudication and negotiation in *EC–Bananas* and the mutually agreed settlement ultimately achieved in the case exemplify how the conflict situation between the manifold parties with interest at stake was transformed, through the adjudicative process, from one in which groups were in competition with one another to one in which groups came to recognise their mutual interests and were better able to arrive at a workable solution.

[87] Cf ibid, 27–8.
[88] Carmody (n 45) 535.
[89] Carmody (n 81) 434.

On the complementary and conflicting nature of the various conceptions of justice

As one may infer at this point, the latter notion of transformative justice, like the concepts of distributive and corrective justice, or the legal justice concept prevalent in discussions of *EC–Bananas* and the WTO DSS, each resonates with different moral concerns and socio-economic interests that manifest themselves in the real life of WTO adjudication. Each provides a unique perspective on how to assess the diverse functions played and social outcomes generated by the WTO DSS. Each conception is thus partial, and often complementary to the others. Yet, at times, tensions may also arise between the different conceptions.

One such notable tension is the one flagged by Franck in his treatise *Fairness in International Law and Institutions*, between the more substantive, distributive aspect of justice, and its rather legal and procedural dimension.[90] Whereas the former favours change, Franck has noted, the latter dimension of justice expresses the preference for order and provides the kind of stability that the rule of law generally supports.[91] '[I]t accommodates a deeply felt popular belief that for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted, and applied', and it must equally enforce the rules against everyone.[92] In some cases, therefore, Franck has concluded, these two dimensions of justice may come into collision,[93] since 'the rule of law', in its preference for order and stability, may be unconducive to change and 'may impede the advancement of justice, understood as a matter of moral distributive allotments or as rectification for wrongs of the past'.[94]

Such a tension indeed manifested itself in the *Bananas* dispute. Thus, whereas the pursuit of justice in its international rule of law dimension pulled in the direction of equal enforcement of WTO law on the EU, rectification for past colonial wrongs and the advancement of a new distributive allotment between the disputing parties and affected third-states pulled in another, less WTO-compliant direction. In the contestation between these various dimensions of justice, as insinuated earlier, the latter dimensions seem to have prevailed.

Yet *EC–Bananas* exemplifies not only the conflicting relationship between the various dimensions of justice pertinent to the WTO DSS operation,

[90] Franck (n 80) 7–9.

[91] Ibid; L May, *Global Justice and Due Process* (Cambridge University Press, Cambridge, 2010) 58–9.

[92] Franck (n 80) 7–8.

[93] Ibid, 7.

[94] May (n 91) 59.

but also the manner in which the different dimensions may complement one another. As the statements of the Ecuadorian and Guatemalan officials in Section III suggest, it was the shift to the rule of law introduced by the binding WTO DSS that enabled these developing countries to seek justice in its distributive, corrective and transformative sense in the *Bananas* case. The legalised DSS offered the Latin American complainants not only more voice and procedural fairness compared to the GATT;[95] it also provided them with the leverage needed to bring the EU to the negotiating table and seriously address their impairment;[96] it framed the necessary bargaining environment for redistribution of the gains from international trade; and it enabled the numerous parties involved in the case to transform the state of non-compliance to one that better accommodates the competing economic, social, and political interests at stake.

That said, in the discussions of the convoluted *Bananas* dispute over the years, often conducted through the enforcement-oriented lens of the WTO DSS, the complementary and conflicting relationships between the various dimensions of justice underlying the dispute and the DSS operation have been hardly considered. This has also been the case with respect to many of the distributive, corrective and transformative justice questions briefly delineated in this section, and the more general question of what principles should be followed in order to assure that the diverse challenges and dimensions of justice encapsulated in the roles, operation, and outcomes of the WTO DSS are adequately addressed.

EC–Bananas, therefore, as this article suggests, serves not only as an informative case for studying the manifold, competing and shifting roles – beyond enforcement – played by the WTO DSS in today global governance. It also serves as an instructive dispute for exposing some of the profound challenges of justice that pave their way to WTO adjudication, for highlighting the need to embrace a broader grammar of justice for evaluating the social outcomes the WTO DSS generates and the processes through which they are created, and for stressing the need to more generally rethink the delicate and complex relationship between non-compliance, justice, and the roles of international adjudicatory institutions such as the one operating within the WTO framework. Non-compliance, as the case in point has shown, need not be viewed solely through the enforcement role of the WTO DSS and its complementing rule of law conception of justice. It may also be construed through the settlement, renegotiation, and

[95] Schneider (n 8) 128.

[96] C Davis, 'Do WTO Rules Create a Level Playing Field? Lessons from the Experience of Peru and Vietnam' in JS Odell (ed), *Negotiating Trade: Developing Countries in the WTO and NAFTA* (Cambridge University Press, Cambridge, 2006) 219.

reallocation functions served by the DSS and the concepts of distributive, corrective, and transformative justice that such judicial functions bring to the fore.

V. Conclusion

The way we perceive the role/s of international courts like the WTO DSS defines the way we analyse their operation and capture their outcomes. It also brings certain issues of justice to the foreground and pushes other to the background. And so, as seen in this article, the prevalent enforcement-centred perspective of the WTO DSS – largely nourished by the legalisation of the multilateral trade system with the transition from GATT to the WTO, and the judicialisation of international law more generally – has resulted in the marginalisation of other important functions, beyond enforcement, played by this international adjudicative system. This includes the very traditional dispute settlement role of the DSS, as well as its cardinal functions as a forum of renegotiation and reallocation of rights and obligations between WTO Member states. In turn, the enforcement-centred perspective of the WTO DSS, due to its natural focus on such notions as the rule of law, compliance, and procedural justice, has worked further to eclipse other salient issues of justice that manifest themselves in WTO adjudication and on which the DSS seem to be effectively influencing. Against this backdrop, through a close empirical investigation of the perennial *Bananas* dispute and the intricate political, social, economic, and moral questions associated therewith, this contribution has sought to put forward a broader multifunctional account of the WTO DSS, and thereby to shed light on the consequent need to broaden the lens of justice – beyond the rule of law – in writing on the DSS, so as to more critically assess the actual functions served and social outcomes produced by this global judicial system.

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