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Confronting Globalization: Lessons from the Banana Wars and the Seattle Protests

Long before the 1999 “battle” in Seattle,¹ when a diverse group of anti-globalization activists protested and disrupted a World Trade Organization (WTO) meeting, a group of Americans met with the prime minister of a Caribbean country, to discuss the country’s economic problems. The major concern was a case brought before the WTO by the United States and some Latin American banana producing countries against the European Union for allegedly giving preferential treatment to Caribbean bananas.² The case was instigated by Chiquita Brands, the United States-based multinational corporation with extensive holdings and operations in Latin America. Many believed that a Chiquita victory at the WTO would essentially destroy the banana industry in several Eastern Caribbean countries.³ The rather diverse

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¹ See Edwina Gibbs, *New Seattle Clashes, Curfew Re-imposed*, Reuters, Dec. 1, 1999; *Messages for the W.T.O.*, N.Y. TIMES, Dec. 2, 1999, at A34; David E. Sanger, *Global Economy Dances to Political Tune*, N.Y. TIMES, Dec. 20, 1999, at C21; Robert L. Borosage, *The Battle in Seattle*, THE NATION, Dec. 6, 1999, at 20.

The Seattle demonstrations were followed by major demonstrations in many other venues hosting meetings of multinational economic institutions, including Washington, D.C., Montreal, Davos, Prague, and Genoa. See ALEXANDER COCKBURN & JEFFREY ST. CLAIR, *FIVE DAYS THAT SHOOK THE WORLD: SEATTLE AND BEYOND* (2000).

² See WTO Panel Report, Report of the Panel on U.S. Complaint Concerning European Communities Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/USA, 97-2070 (May 22, 1997).

³ For a comprehensive discussion of the case, see Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839 (2000). See also Benjamin L. Brimeyer, Note, *Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 MINN. J. GLOBAL TRADE 133 (2001); Jeff Harrington, *Chiquita’s Slippery Trade Dispute*, CINCINNATI ENQUIRER, Dec. 22, 1996, at 101.

American group, composed of academics, labor representatives, environmental and family farm activists, as well as politicians, was in complete agreement with their Caribbean host when the conversation focused on the dismaying behavior of the Clinton administration,⁴ the aggressive tactics of Chiquita, or the unfairness of global trading rules. However, when the prime minister, in appealing for better trade terms with the United States, specifically asked for their support to have his country included in an expanded version of the North American Free Trade Agreement (NAFTA), tension grew.⁵ At that point, disappointment registered on the faces of some group members, especially those representing prominent environmental and labor organizations in the United States. One participant, a vociferous critic of NAFTA, raised her hand as if to object as others held their breath anticipating an international incident. Fortunately the conversation ended before any major disagreement surfaced.

Fast forward to early December 1999 and a labor-led, anti-WTO protest march in Seattle. It was a rather diverse group of demonstrators as young men and women mixed easily with middle-aged and elderly demonstrators; blue-collar workers chanted "This is what democracy looks like" in unison with college students; environmental activists linked hands with farm workers.⁶ However, one could easily count the number of marchers of color present, even as the few that were there made up with enthusiasm what they lacked in terms of numbers.⁷ Indeed, contrasted with the onlookers lining the route as the demonstration wound through the streets

⁴ After assuring petitioners on behalf of the affected Caribbean banana producers that the United States would not bring a WTO complaint, the Clinton administration quickly did so without notice. The administration's change of heart was widely believed to be largely a consequence of substantial political campaign contributions made by Chiquita to the Democratic Party. Chiquita's CEO, Carl Lindner, is also a longtime benefactor of the Republican Party. See Brook Larmer, *Brawl Over Bananas*, NEWSWEEK, April 28, 1997, at 43-44; RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000); LORI WALLACH & MICHELLE SFORZA, *WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY: AN ASSESSMENT OF THE WORLD ON ONE TRADE ORGANIZATION* 140-43 (1999).

⁵ On the Bush administration trade agenda generally, see Duncan Hughes & Tim King, *Bush on Fast Track to Trade Talks*, THE BUSINESS, Aug. 11, 2002, at 8. On the proposed expanded NAFTA or Free Trade Area of the Americas, see <http://www.ftaa-alca.org> (last visited June 16, 2003).

⁶ See *Democracy Bites the WTO*, THE NATION, Dec. 27, 1999, at 3.

⁷ See Elizabeth Martinez, *Where Was the Color in Seattle? Looking for Reasons Why the Great Battle Was So White*, COLORLINES MAGAZINE, Spring 2000, available at <http://www.colorlines.com>.

*of downtown Seattle, the demonstrators stood out in almost alien-like racial homogeneity. Media-fed images of Third World trade officials expressing irritation at the demonstrators and disdain for President Clinton's feeble attempts to co-opt some of the demonstrators' concerns about human rights and environmental degradation served to further heighten unspoken distances and divides.*⁸

INTRODUCTION

The 1999 ruckus in Seattle may be seen as an important stage in the evolution of global opposition to the structure and practice of the Bretton Woods Institutions (BWIs).⁹ It could mark the

⁸ Ann Marie Erb-Leoncavallo, *The Road from Seattle*, 37 UN CHRON. 28 (2000). The reaction of the American anti-globalization activists to the Prime Minister's desire for free trade status and the paucity of third world representation at the Seattle protests illustrate differing perspectives brought to the anti-globalization struggles and suggest that Western anti-globalization activists make too broad a claim when they presume to speak for everyone.

⁹ The debate over globalization has focused considerable negative attention on the Bretton Woods Institutions (BWIs), the triumvirate of global economic institutions—the World Bank, the International Monetary Fund (IMF), and the World Trade Organization (WTO)—conceived at the end of the Second World War to bring economic order and prosperity to the world. Until recently, the brunt of popular discontent fell upon the closely allied World Bank and the IMF, with the passion of critics directed at their prescriptions for the developing world. Lately, the WTO has arguably borne the weight of criticism, becoming the favored target of anti-globalization activists. This shift of focus can be partially explained by the fact that the WTO is a relatively brand new institution; its establishment was delayed for almost half a century after its conception largely because of domestic United States opposition. The nations of the world could not agree on a comprehensive institutional framework for regulating world commerce until 1994. While its core principles, such as nondiscrimination, were honed over centuries of international commerce, the WTO is structurally and in terms of institutional style an infant body, a work in progress, and thus may appear to be more receptive to outside demands. See Paul Demaret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 COLUM. J. TRANSNAT'L L. 123 (1995). See also David Korten, *The Failures of Bretton Woods*, in *THE CASE AGAINST THE GLOBAL ECONOMY* 20 (Jerry Mander & Edward Goldsmith eds., 1996). Moreover, it is becoming increasingly clear that negative effects from the WTO's policy prescriptions are more readily felt in advanced industrial communities than the negative effects from the policies of the World Bank and the IMF. The growing influence of the WTO in the economic life of everyone, those living in the developed world as well as those in developing countries, has expanded the community of the discontented exponentially beyond those concerned with economic conditions in the developing world. This development is consistent with Benjamin Barber's observation that "[t]here is no activity more intrinsically globalizing than trade, no ideology less interested in nations than capitalism, no challenges to frontiers more audacious than the market." BENJAMIN BARBER, *JIHAD VS. MCWORLD* 23 (1996). See also JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002); William Greider, *The Battle Beyond Seattle*, *THE NATION*, Dec. 27, 1999, at 5; Michael Kinsley, *The Mystical*

beginning of a new, more confrontational, stage in the global movement of the discontented to slow down if not halt the march of market fundamentalism.¹⁰ Until recently, there has been far too little appreciation of common interests against this aspect of globalization. These interests transcend traditional divides of national boundaries, race, class, and history. For decades activists in developing countries have complained about market fundamentalism and other destructive practices of the BWIs. Now their cries appear to penetrate beyond a small group of concerned activists and academics in the West. Seattle, in such light, was a welcome development, an opportunity to bring the disenchanted from the center and the periphery together.¹¹

Seattle also gave notice to leaders of these institutions and the Western nations that support them that the disenchanted coalition was expanding, attracting broader support especially among the young in advanced industrial societies, while forging coalitions across many historic divides.¹² With key figures from the global economic establishment, such as Nobel prizewinning economist Joseph Stiglitz, openly raising critical questions about the efficacy of the dominant globalization agenda and the role of the global economic triumvirate in particular, everyone should recognize the important breakthrough that Seattle represented: A movement of the disenchanted that cannot now be dismissed as merely a small ephemeral band of ideologues.¹³

Power of Free Trade, TIME, Dec. 6, 1999; Tina Rosenberg, *The Free Trade Fix*, N.Y. TIMES, Aug. 18, 2002, at 28. See generally, COCKBURN & ST. CLAIR, *supra* note 1; RAVI BATRA, *THE MYTH OF FREE TRADE: THE POORING OF AMERICA* (1993).

¹⁰ Market fundamentalism may be described as extreme faith in the power of market forces to solve all of a nation's economic problems; an uncritical support for rapid liberalization and deregulation of markets and privatization of industries. This is also referred to as the "Washington Consensus." See STIGLITZ, *supra* note 9, at 20, 67; Rosenberg, *supra* note 9; Paul Blustein, *Globally Disillusioned*, OREGONIAN, Sept. 27, 2002, at D1. See generally, ROBERT KUTTNER, *EVERYTHING FOR SALE—THE VIRTUES AND LIMITS OF MARKETS* (1997).

¹¹ See Balakrishnan Rajagopal, *Taking Seattle Resistance Seriously*, THE HINDU, Dec. 11, 1999, available at <http://www.hinduonnet.com> (online edition of India's national newspaper).

¹² After Seattle, protesters disrupted other meetings of international economic institutions around the world. See Erb-Leoncavallo, *supra* note 8, at 28-31. Even United Nations sponsored events were not spared. At the World Summit on Sustainable Development, held in Johannesburg in September 2002, protesters, mainly from Western nations, jeered Secretary of State Colin Powell during his address in protest over the administration's record on the environment and development assistance. James Dao, *Protesters Interrupt Powell Speech as UN Talks End*, N.Y. TIMES, Sept. 5, 2002, at A10. See also Rajagopal, *supra* note 11.

¹³ Some of the popular press propagandists still go to great lengths to criticize the

Seattle created opportunities for diverse voices of protests to be better heard. There is already evidence of greater willingness now on the part of the international economic establishment to deal with some of the complaints of opponents.¹⁴ This partial success of the opposition could encourage further efforts toward transformation of an economic order that many now concede has made little concrete improvements in the lives of many of the world's poorest.¹⁵ Indeed, economic orthodoxy is now seen as threatening the social and economic security of many who once were comfortably middle class.¹⁶

The fact that Seattle and other similar protests in the developed world have had such attention-gaining impact in such a short period of time should be a matter of deep interest to all who want serious reconsideration of the policies and attitudes that drive the current global economic order.¹⁷ However, there are questions about the resilience of this global effort; questions that the Western-based anti-globalization activists are in the best position to answer: How broad and deep is the support behind these actions? How long can dramatic actions be sustained? What opportunities exist for expanding and deepening the opposition by better incorporating the interests of the disenchanting in the North and the South? How ready is the opposition to respond in a principled, creative, and dynamic manner to the challenges that surely will develop as these subject institutions and their supporters develop more sophisticated responses to criticisms?

The protesters in Seattle and subsequent forums have made

anti-globalization movement. A popular tactic, perfected by *New York Times* columnist Thomas Friedman, is to find cracks in the movement and distinguish between the sincere moderates who want to reform globalization and the crazies or anarchists who just want to destroy everything. See, e.g., Thomas L. Friedman, *Globalization, Alive and Well*, N.Y. TIMES, Sept. 22, 2002, at A13 [hereinafter Friedman, *Globalization, Alive and Well*]; Thomas L. Friedman, *Senseless in Seattle*, N.Y. TIMES, Dec. 1, 1999, at A23 [hereinafter Friedman, *Senseless*].

¹⁴ The United Nations Secretary-General conceded after Seattle, "[People] do not want to be looked after; they want to participate." Erb-Leoncavallo, *supra* note 8; see also Rosenberg, *supra* note 9; Blustein, *supra* note 10; Edmund L. Andrews, *Rich Nations Criticized for Enforcing Trade Barriers*, N.Y. TIMES, Sept. 30, 2002, at A8; *Rich Countries Should Show the Way on Trade: World Bank Urges Action to Further Open Markets to Developing Countries*, World Bank News Release No. 20003/094/S (Sept. 27, 2002) [hereinafter World Bank News Release].

¹⁵ See STIGLITZ, *supra* note 9; KUTTNER, *supra* note 10.

¹⁶ See STIGLITZ, *supra* note 9; Rosenberg, *supra* note 9; Blustein, *supra* note 10.

¹⁷ See Jerry Mander, *Facing the Rising Tide*, in *THE CASE AGAINST THE GLOBAL ECONOMY* (Jerry Mander & Edward Goldsmith eds., 1996).

laudable contributions toward the development of a more effective anti-globalization movement, not the least of which has been to make the shadowy enclaves of bureaucratic elitism marginally more transparent and accountable.¹⁸ Yet in a world grown too comfortable with the fact that poverty and inequality are growing steadily and that nearly fifty percent of humanity barely survives on an average of less than two dollars a day, even greater urgency should be brought to the work that must be done.¹⁹

This Article examines opportunities and challenges facing those working to build a global movement against negative aspects of economic globalization. Even though I focus on the role of the WTO in the banana wars,²⁰ many of the same points could be made by examining the work of the other members of the global economic triumvirate. However, the course of the banana wars with their murky and deplorable origins, peculiar alliances, complex combination of issues, and insights into the dispute resolution process of the WTO, best illustrates many of the points I would like to make.

In Part I, I discuss the banana dispute in its broader context, emphasizing how the WTO dispute resolution process and the substantive biases of the global trade establishment marginalized the interests most affected by the dispute: those of the developing countries where bananas are cultivated. In Part II, I outline two key strategies employed in defense of globalization (that can be extracted from the course of the banana dispute and the Seattle protests): (a) the justification of existing power imbalances through the language and process of law; and, (b) the relentless, cult-like defense of the present order by denying both the histori-

¹⁸ COCKBURN & ST. CLAIR, *supra* note 1; STIGLITZ, *supra* note 9; Rosenberg, *supra* note 9.

¹⁹ See Millennium Report of the Secretary-General of the United Nations, "We the Peoples:" The Role of the United Nations in the 21st Century, at <http://www.un.org/millennium/sg/report> (last visited Jan. 11, 2003). See also United Nations Development Programme, Human Development Report 2002 (2002), available at <http://www.undp.org>; World Bank, World Development Report 2003, Sustainable Development in a Dynamic World (2003), available at <http://www.worldbank.org>. See also Rosenberg, *supra* note 9; Erb-Leoncavallo, *supra* note 8, at 29.

²⁰ See Bhala *supra* note 3. For additional background to this dispute see Jack J. Chen, Note, *Going Bananas: How the WTO Can Heal the Split in the Global Banana Trade Dispute*, 63 FORDHAM L. REV. 1283 (1995). For background on the wider policy implications of the dispute, see Ibrahim J. Gassama, Rapporteur, *Not Just a Trade Issue: Jeopardizing Democracy and U.S. National Interest in the Caribbean*, Report of Eminent Persons Group Mission to Jamaica, Dominica, and St. Lucia, Dec. 2-6, 1996 (on file with author).

cal experiences of the discontented and the possibilities for alternatives to the present system. In Part III, I discuss how a reinvigorated anti-globalization movement can become more effective on a global scale by developing the capacity and flexibility to think, organize, and act dynamically in multiple, intersecting ways, avoiding the tendency to romanticize the local or vilify uncritically the global. I stress the need to be aware of, to respect, and to cultivate diverse historical experiences while recognizing the dynamic nature of perspectives, interests, and alliances in the struggle over globalization.

I

UNDERSTANDING THE BANANA WARS: MORE THAN BANANAS

The banana wars were about much more than bananas, a fruit of dubious nutritional value, but apparently much loved by many Europeans.²¹ The wars actually predated the establishment of the WTO,²² but in their most recent manifestation, they came before the newly-established World Trade Organization in the form of a complaint brought by the United States.²³ The United States acted in response to a Section 301 complaint²⁴ filed in Oc-

²¹ The European Union countries import more than three million tons of the fruit annually, most of it coming from Latin American countries. The Atlantic Caribbean and Pacific (ACP) countries, who are ostensibly the beneficiaries of the European Union preferential regime, export about 727,000 tons of the fruit into the Union. Bhala, *supra* note 3, at 850.

²² Pre-WTO complaints were brought by several Latin American countries against the import regimes of individual European countries, but, under the rules of the General Agreement on Tariffs and Trade (GATT) prevailing then, no report was adopted. The implementation of the Lome Convention consolidated concessions by the European Union in 1993 and the establishment of the new WTO dispute resolution process shortly thereafter provided impetus for the new round of trade complaints. See Bhala, *supra* note 3, at 849.

²³ Ecuador, Guatemala, Honduras, and Mexico also joined the United States on the complaint, but the United States was the dominant national player in the formal process. See Complaint by the United States, WT/DS27/R/USA, May 22, 1997, available at http://docsonline.wto.org/gen_search.asp (all WTO complaints in this note available at this web address); Complaint by Ecuador, WT/DS27/R/ECU, May 22, 1997; Complaint by Guatemala and Honduras, WT/DS27/R/GTM, WT/DS27/R/HND, May 22, 1997; Complaint by Mexico, WT/DS27/R/MEX, May 22, 1997; "Panel to Examine EC Banana Regime," WTO Focus, No. 11, June-July 1996, at 5. See also Michael M. Phillips, *U.S. Plans Punitive Tariffs in Dispute with EU*, WALL ST. J., Dec. 12, 1998, at A3.

²⁴ See Trade Act of 1974, Pub. L. 93-618, §§ 301-06, 88 Stat. 1978 (1975). The Act was amended in 1979, 1984, and 1988. The 1988 amendments divided the law into two sections, one dealing with unfair practices that require "mandatory" action, and

tober 1994 by Chiquita Brands International, the successor to the notorious United Fruit Company.²⁵ Chiquita, one of two major banana-trading companies with headquarters in the United States, employs the vast majority of its approximately 45,000 person work force in several Latin American countries.²⁶ It was virtually alone in the multinational corporate community in its unrelenting opposition to a preferential banana-trading arrangement between the European communities and several very poor developing countries. Dole, the other leading United States banana company, for example, suggested a compromise, believing that a “precipitous change in current trading arrangements would cause a disproportionate amount of harm to ACP and European banana producing regions; and the need for transparent and stable regulation in the banana sector.”²⁷ Another major banana trading company, Del Monte, also endorsed the European program, suggesting only “minor modifications.”²⁸

A brief history of the European banana arrangement or program is in order. The European banana program originated in

the other dealing with cases that allow for “discretionary” action. See 19 U.S.C. §§ 2411-31 (1988). Section 301 allows for citizens to petition the United States Trade Representative (USTR) to open an investigation. USTR must decide within forty-five days whether or not to “initiate” the investigation. United States trading partners have long criticized the law and the European Community brought a formal complaint against it before the WTO. Showing surprising discretion and flexibility, a dispute panel gave a mixed ruling that allowed the law to remain but subjected its application to global trading rules. See WTO Panel Report, United States-Section 301-310 of the Trade Act of 1974, WT/DS152/R, Dec. 19, 1999. (Panel Report Adopted by the DSB on January 27, 2000.) For an excellent summary of the statute, its context and the impact of the new WTO dispute resolution process on its efficacy, see JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 317-35 (4th ed. 2002). See also Jared R. Silverman, *Multilateral Resolution Over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO*, 17 U. PA. J. INT’L ECON. L. 233 (1996).

²⁵ See Larmer, *supra* note 4, at 44. For more on this company’s sorry record of human rights violations and political interference in Latin American countries, see STEPHEN SCHLESINGER & STEPHEN KINZER, *BITTER FRUIT: THE STORY OF THE AMERICAN COUP IN GUATEMALA* (1999) and DIANE K. STANLEY, *FOR THE RECORD: THE UNITED FRUIT COMPANY’S SIXTY-SIX YEARS IN GUATEMALA* (1994).

²⁶ See Jeff Harrington, *Chiquita Spurs Trade Dispute with Complaints against Europe*, Gannett News Service, Jan. 24, 1995.

²⁷ See Comments of Dole Food Company, Inc., Submitted to the U.S. Trade Representative Pursuant to 61 Fed. Reg. 18450 (Apr. 25, 1996); Regarding WTO Dispute Settlement Proceedings Concerning the EC Banana Regime, May 16, 1996, at 2 (on file with author). Dole supported maintaining the current preferential system with amendments to improve transparency.

²⁸ See Position of Del Monte Fresh Produce Regarding Regulation 404/93 (on file with author).

the Lomé Convention, a series of trade and economic cooperation agreements between the European Union (EU) and sixty-nine Atlantic, Caribbean, and Pacific (ACP) countries.²⁹ European Union Council Regulation 404/93 established the program in 1993 and was set to expire in 2002. The regulation integrated various preferential trade agreements, remnants of European Colonialism, which facilitated banana imports into several European nations.³⁰ One of its stated aims was to assist banana producers operating out of certain former European colonies. Essentially the program reserved a relatively small quota of banana imports for these former colonies.³¹

The United States, after considerable prodding from Chiquita, took issue with the expressed altruism of the Europeans.³² The U.S. complaint charged that the EU banana regime actually operated to deny American banana companies full access to European markets in violation of fundamental free trade principles codified in the General Agreement on Tariffs and Trade (GATT).³³ The United States insisted that the primary beneficiaries of what they termed a protectionist device were the European-controlled banana shipping and marketing companies operating out of producer countries.³⁴ Specifically, the com-

²⁹ The first Lomé Convention was concluded in 1975. The Fourth Lomé Convention was adopted in 1990 with a ten-year life span. The primary purpose of the convention was to promote economic development in former European colonies in Africa, the Caribbean, and the Pacific region (ACP) utilizing aid and trade assistance. Bananas were covered under Protocol No. V of the Convention. The convention expressly required the EU to ensure that bananas continue to have preferential access after the establishment of the EU. Twelve ACP states that have traditionally exported bananas into the EU benefit from the preferences: Cote D'Ivoire, Cameroon, Suriname, Somalia, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Dominica, Belize, Cape Verde, Grenada, and Madagascar. See Bhala, *supra* note 3.

³⁰ See Council Regulation (EEC) No. 404/93 of 13 February 1993 on the Common Organization of the Market in Bananas, Official Journal, No. L 47, Feb. 25, 1993, at 1. See also Bhala, *supra* note 3, at 848.

³¹ The United Kingdom and France were the staunchest defenders among the Europeans of the preferential trading arrangements. See Bhala, *supra* note 3, at 849.

³² With most of its banana operations located in Central America, Chiquita claimed in 1996 that it had lost fifty percent of its European market due to the operation of the preferences. According to Chiquita, the preferences for the ACP countries amounted to a quota that limited imports from Latin America. See Bhala, *supra* note 3, at 873; Brimeyer, *supra* note 3, at 148.

³³ See World Trade Organization, European Communities—Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States.

³⁴ *Id.*

plaints charged that the European regime violated the following provisions of the GATT: Article I (Most-Favoured Nation treatment), Article II (schedules of concessions), Article III (National Treatment Obligation), Article X (publication and administration of trade regulations), Article XI (general elimination of quantitative restrictions), and Article XIII (non-discriminatory administration of quantitative restrictions).³⁵ In addition, it charged that the regime violated provisions of WTO Agreements on Import Licensing Procedures, Agriculture, and the General Agreement on Trade in Services (GATS).³⁶ The WTO Dispute Settlement Body (DSB) established a single panel to review the complaint on May 8, 1996.³⁷

Eastern Caribbean countries whose bananas entered Europe under the European program felt especially vulnerable to the combined superpower-multinational corporate assault on their economic lifeline and pleaded that the program was critical to their survival as independent, viable modernizing societies.³⁸ For some of the affected countries, like Dominica and St. Lucia, banana sales to Europe accounted for as much as fifty percent of their total exports.³⁹ The Jamaican banana industry, ranking second only to sugar in economic importance within the agricultural sector, provided employment for about 40,000 people.⁴⁰

The banana case was one of the first opportunities for the WTO to test its new dispute resolution process.⁴¹ After decades

³⁵ See General Agreement on Tariffs and Trade, Oct. 30, 1947, 1 January 1948); 55 U.N.T.S. 187 (concluded at Geneva; entered into force (provisionally), January 1948); General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 33 I.L.M. 1125, 1154 (concluded at Marrakesh; entered into force, January 1, 1995).

³⁶ *Id.* See also *Panel to Examine EC Banana Regime*, WTO Focus (WTO, Geneva, Switz.), June-July 1996, at 5.

³⁷ *Panel to Examine EC Banana Regime*, *supra* note 36; see also Francis Williams, *World Trade: Banana Trade under Scrutiny*, FINANCIAL TIMES (London), May 9, 1996, at 6.

³⁸ See *Panel to Examine EC Banana Regime*, WTO FOCUS, *supra* note 36; Canute James, *EU Banana Regime Defense Pleases Caribbean Growers*, FINANCIAL TIMES (London), Nov. 17, 1995, at 31; Thomas W. Lippman, *An Appeal for a Banana Peace*, WASH. POST, June 6, 1996, at A27.

³⁹ See Frances Williams, *WTO Ruling 'Could Ruin Poor Banana Economies'*, FINANCIAL TIMES (London), Sept. 10, 1996, at 4.

⁴⁰ Gassama, *supra* note 20, at 12.

⁴¹ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 33 I.L.M. 1125, 1226 (concluded at Marrakesh; entered into force, January 1, 1995). See also *U.S. Plans Trade Appeal in Europe Banana Case*, N.Y. TIMES, Aug. 19, 1995, at 32. Opponents of European banana preferences had complained about them under the old GATT system before it was replaced by the

of pursuing dispute resolution under the GATT in ways that were unstructured and considered by some as undisciplined, the new world trade body developed a more contoured and legalistic framework for resolving trade disputes in 1994.⁴² The new dispute resolution framework promoted a more adjudicative process and promised greater efficiency. It provided multiple stages, but bound them with shorter timelines culminating in final reports that do not depend on consensus for adoption.⁴³

The new system is also significantly more formalistic in terms of its operation as it employs more clearly defined procedural rules to apply old substantive doctrines.⁴⁴ This formalism supports its efficiency goal which came under pressure due to a substantial growth in the number of disputes that it attracted.⁴⁵ Formalism also protects the institution from “inefficiencies” that could arise from more serious consideration of issues outside the narrow traditional concerns of open market adherents.⁴⁶ The combined effect of these procedural changes in the dispute resolution process has been to reinforce historic inequalities under cover of legal process.

The WTO treatment of the banana dispute reflects procedural

new WTO dispute settlement process in 1995. Even though complainants had received favorable reports from GATT panels, they could not gain satisfaction under the pre-WTO process which was relatively more dependent on compromise and more susceptible to delays. See Frances Williams, *WTO Ruling Could Ruin Poor Banana Economies*, FINANCIAL TIMES (London), Sept. 10, 1996, at 4.

⁴² Former WTO Director-General, Renato Ruggiero, called the new dispute settlement process “in many ways the central pillar of the multilateral trading system and the WTO’s most individual contribution to the stability of the global economy.” See *About The WTO: Settling Disputes*, Apr. 17, 1997 at http://www.wto.org/english/news_e/pres97_e/seoul.htm [hereinafter *About the WTO*]. See also John H. Jackson, *Dispute Settlement and the WTO-Emerging Problems*, 1 J. INTL. ECON. L. 329 (1998); Demaret, *supra* note 9.

⁴³ See Kym Anderson, *The WTO Agenda for the New Millenium*, 1999 ECON. REC. 77. See also Demaret, *supra* note 9; *About The WTO*, *supra* note 42.

⁴⁴ As the course of the banana dispute demonstrated, the “clearly defined” rules are actually quite flexible when they implicate matters of major importance to one of the major WTO powers. In this case, the Europeans successfully dragged out settlement of the dispute for several years as they collaterally attacked the report upholding the complainants’ position, and vigorously resisted implementation proposals from the victorious parties.

⁴⁵ See Jackson, *supra* note 42.

⁴⁶ Panel reports are characterized by excruciatingly lengthy and boring recitation of facts and restatement of basic doctrines. They also are decidedly devoid of any efforts to go outside the narrowest interpretation of principles, supposedly out of concern that failure to hold sovereign nations strictly to their agreements leads to further conflict. One is left without any expectation that these panels could be forums for progressive interpretations of trade principles and doctrines.

and substantive biases that marginalized those most affected by the outcome—complainants, as well as defendants from developing countries. Simply put, these developing country participants lacked the experience as well as the material and technical resources to participate fully in the lengthy, highly specialized and stylized processes that dispute resolution in the WTO era has now become.⁴⁷ Furthermore, their profound equitable concerns fell outside the narrow doctrinal framework that governs the work of the dispute panel. The developing countries who signed on as complainants signed off their sovereign interests to the United States and a domineering multinational corporation while the developing country defendants concealed whatever concerns they may have had about their arrangements with the European countries to fight a more immediate desperate battle for survival. Fundamental questions about multinational corporate behavior, historical inequities, access to markets in developed countries for agricultural producers in general, crushing national debt burdens, and the like, could not be aired in this particular WTO forum.

Eventually, the WTO panel ruled in favor of the complainants finding that “aspects of the European Communities’ import regime for bananas are inconsistent with its obligations” under the GATT and related agreements.⁴⁸ A series of procedural and substantive appeals by both sides resulted in a clear confirmation of the complainants’ position even as tension between the parties increased.⁴⁹ A lengthy wrangling over implementation of the WTO rulings followed, accompanied by threats of sanctions and warnings of a trade war that could destroy the WTO.⁵⁰ The Americans rejected the steps the Europeans initially offered to take in response to the WTO rulings as totally unsatisfactory and threatened wide-ranging sanctions. In turn, the Europeans con-

⁴⁷ Small nations that could not afford large permanent staff of legal specialists have sought to enlist outside private counsel to represent their interests. In the banana case, the United States objected to such representation. Jackson, *supra* note 42. The Appellate Body ruled against the United States position but that ruling has not been widely accepted yet. *Id.*

⁴⁸ See World Trade Organization, *supra* note 33. See also Press Release, Office of the United States Trade Representative, USTR Hails WTO Report (Apr. 29, 1997); JACKSON ET AL., *supra* note 24, at 424-25, 902-07.

⁴⁹ EC-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, Sept. 9, 1997. See also Bhala, *supra* note 3; Brimeyer, *supra* note 3.

⁵⁰ David Sanger, *U.S.-Europe Trade War Looms Over Bananas*, N.Y. TIMES, Dec. 22, 1998, at A1; EC, *U.S. Accept Compromise on Banana Dispute*, WTO Focus (WTO, Geneva, Switz.), Jan-Feb 1999, at 2.

demned the United States response to their offer as itself a violation of the WTO/GATT process and complained to the WTO about the threats. Meanwhile, the small banana producing countries in the Eastern Caribbean, most affected by the outcome, continued their protests in vain.

Eventually, the United States/Chiquita position prevailed as the complainants, consistent with the new WTO standards, received WTO permission to impose sanctions on European imports.⁵¹ When the Europeans failed to reform the banana program to satisfy the demands of the WTO rulings, the United States began to impose sanctions.⁵² After further lengthy negotiations, the Europeans relented and reached an agreement with the United States on April 11, 2001 to implement the WTO conclusions and recommendations.⁵³ In the compromise agreement, the Europeans agreed to abandon their quotas gradually and move toward a tariff-only regime for banana imports by January 1, 2006.⁵⁴ In the interim, the Europeans agreed to implement a tariff-rate quota system that would gradually reduce the preferences given to banana imports from ACP countries without completely eliminating them.⁵⁵ At the November 2001 WTO ministerial meeting in Doha, Qatar, the Europeans sought and

⁵¹ This was the first time that the GATT-WTO system had granted a party authority to impose sanctions against another. However, the amount of sanctions authorized by the WTO was substantially less than what the United States had wanted to impose. Ecuador also sought and received permission to impose sanctions on the European defendants, becoming the first developing country to do so. See Brimeyer, *supra* note 3; Bhala, *supra* note 3.

⁵² Press Release # 00-54, Office of the United States Trade Representative WTO Panel Finds U.S. Acted Prematurely on Bananas, but U.S. Duties Unaffected (July 17, 2000), available at www.ustr.gov.

⁵³ See European Communities-Regime for the Importation, Sale and Distribution of Bananas: Notification of Mutually Agreed Solution, WT/DS27/58, July 2, 2001, available at <http://docs.online.wto.org/gen-search.asp>; Press Release # 01-50, Office of the United States Trade Representative, U.S. Trade Representative Announces the Lifting of Sanctions on European Products as EU Opens Market to U.S. Banana Distributors (July 1, 2001), available at www.ustr.gov.

⁵⁴ Office of the United States Trade Representative, Termination of Action and Monitoring: European Communities' Regime for the Importation, Sale and Distribution of Bananas, 60 Fed. Reg. 35,689 (July 6, 2001); Press Release # 01-50, U.S. Trade Representative Announces the Lifting of Sanctions on European Products as EU Opens Market to U.S. Banana Distributors (July 1, 2001).

⁵⁵ See European Communities-Regime for the Importation, Sale and Distribution of Bananas: Status Report by the European Communities, WT/DS27/51/Add.25, 21 January 2002 (02-0338). See also Council Regulation (EC) NO 2587/2001, 19 December 2001, Amending Regulation (EEC) NO 404/93 on the Common Organization of the Market in Bananas.

received waivers of GATT Article I (Most-Favoured Nation) and GATT Article XIII (non-discrimination in administering quotas) for a new EC-ACP treaty called the “Cotonou Agreement.”⁵⁶ The agreements between the European defendants and the United States-led complainants, together with the WTO waivers received for the new Cotonou Agreement, provide temporary breaks for the ACP banana producers while putting pressure on them to find long-term solutions to their fundamental economic and political disadvantages.

II

DEFENDING GLOBALIZATION: TWO STRATEGIES

The banana dispute illustrates the key role that the WTO plays in defending economic globalization. In this Section, I discuss two key strategies that defenders of globalization employ to limit challenges to the present order: (1) the entrenchment of power disparities through increased legalization or judicialization of trading relationships and (2) waging a relentless war against memory by denying or devaluing consideration of past injustices that have continuing consequences and obligations. Both of these strategies are readily seen in the consideration of the banana dispute.

A. *Employing Law to Entrench Power*

The seemingly never-ending banana dispute reflects an ongoing clash between the realities of old-style power politics and the ideals of those who continue to yearn for a legal order divorced from power politics. In this sense, the dispute speaks to the frustrations of those who bemoan blatant irregularities and unfairness in the global economic system. It also speaks to the hopes of those who believe that the cure for what ails the system is more law—more clearly defined rules and processes.

However, it is not too soon to conclude that the turn toward more law, heralded by the new WTO dispute resolution process, means a lessening neither of the power of those who have it nor of their willingness to employ it to defend narrow chauvinistic interests. Advanced industrial countries, for example, are quick to complain about even de minimis violations of trade rules by the poorest countries, yet they spend billions of dollars subsi-

⁵⁶ See Doha Ministerial Declaration, WT/MIN(01)15, Nov. 14, 2001.

dizing their domestic agricultural enterprises and keeping out agricultural products from developing countries; thus, depriving developing countries of their most likely trading advantage.⁵⁷ The welcoming legal face of the new process does not mean a more level playing field.⁵⁸ It certainly does not mean greater transparency in the system or more equitable consideration. In procedural justice terms, developing countries simply lack the economic resources, the experience playing the game, and the technical expertise necessary to engage in the sort of sustained investigation, monitoring and complex legal maneuvering required to pursue claims adequately under the new system.⁵⁹ In substantive terms, the trading rules and doctrines are still the same, essentially prescribing an extremely narrow and inflexible approach to economic development that has ill-served most poor countries.

It should be recognized that regardless of the outcome of the WTO complaint, the people to whom it mattered most—the people of Jamaica, Dominica, Saint Lucia, and other ACP banana producing countries—would have lost. The very structure of the global free trade regime, as well as its operations, ensures that these people would always be losers. Tragically, all the propaganda they get from the international economic development establishment, their leaders, and indeed, from activists who periodically offer to help them win something from the process, tell them otherwise; thus ensuring that they retain some hope in an otherwise hopeless situation, faith in an otherwise faithless process.

The European banana preferential scheme did not significantly

⁵⁷ According to the *New York Times*: “James D. Wolfensohn, president of the World Bank, accused wealthy countries of ‘squandering’ \$1 billion a day on farm subsidies that often have devastating effects on farmers in Latin America and Africa.” Andrews, *supra* note 14, at A8. Stanley Fischer, who was the IMF deputy managing director in the 1990s, said protectionist policies by the United States, Europe and Japan were “scandalous.” *Id.*

⁵⁸ Andrews, *supra* note 14, at A8; World Bank News Release, *supra* note 14.

⁵⁹ The international agencies are promoting training programs and other technical assistance that supposedly will help poor countries develop the expertise necessary to be more effective in trade matters. *See, e.g.*, Mike Moore, Africa and the Multilateral Trading System: Challenges and Opportunities, Address Before the Conference of African Trade Ministers (Sept. 23, 1999), at WTO News, Speeches-Director General Mike Moore, http://www.wto.org/english/news_e/spmm_e/spmm_e.htm. Initiatives like these minimize the harsh reality of the enormous resource gap between rich and poor and the domestic pressures on the powerful countries to extract as much advantage as they can from trade. *See* Rosenberg, *supra* note 9.

obligate the European countries and it was certainly not within the control of their banana producing former colonies. Essentially, the Europeans gave gifts to their former colonies that really came at the expense of other developing countries. Even this characterization would seem overly generous. The fact is that banana farmers in “beneficiary” countries, like European banana consumers who pay very high prices for the product, do not have much bargaining power within the program.⁶⁰ The European based banana marketing corporations who serve as distributors get the lion’s share of the more than \$2 billion a year in revenues generated. As Professor Bhala puts it, these companies “collect monopoly rents at the expense of the ostensible beneficiaries . . . the ACP countries.”⁶¹

The structure of the banana industry in many of these countries helps to explain this outcome. In conversations with Caribbean banana farmers during our 1996 visit, many farmers extolled their status as independent producers—as opposed to the status of workers in the corporate-owned plantations in Latin America—but acknowledged that their status came with substantial risks. In order to improve competitiveness through quality, they have to follow a strict crop inspection regime that places a heavy burden on the independent farmers to produce acceptable crops.⁶² The distributors, according to these farmers accept only crops that meet their quality standards. In a sense then, these banana distributors limit their risks, maintain control, and profit from a regime that is promoted under the banner of altruism. It is difficult to distinguish their conduct and role from the much vilified Chiquita corporation.

The destinies of several small poor countries may have been at stake, but the WTO dispute was fundamentally about the rules multinationals should follow in carving up the spoils of globalization.

The GATT/WTO system, along with allied World Bank and the International Monetary Fund operations, have not fostered global equality to any appreciable degree and indeed, arguably,

⁶⁰ See Bhala, *supra* note 3, at 963. As Bhala puts it “The EC’s preferential trading arrangement is rotten for European consumers and provide far less succor to ACP countries than is commonly realized . . . the point is that Europeans pay far more than they need to for bananas, and banana plantation workers in poor countries get far less.” *Id.*

⁶¹ *Id.*

⁶² Gassama, *supra* note 20.

are central to maintaining global inequality today.⁶³ The newer more legalistic framework of the WTO helps to launder the ideology of free trade, seeking to mask its violence-laden past and its deeply political and corporatist core with stultifying legalisms. Without a sufficiently critical eye, the changes make the WTO's contributions seem neutral, benign, democratic and progressive.⁶⁴ The language of law buffers the historic readiness to dominate, to win in the narrowest sense, and to make those who refuse to conform pay dearly. The genius of the new process is that it does offer the carrot of hope—the possibility that next time it will be better, everyone will be treated fairly—coupled with the stick of even more punitive actions against those who refuse to go along.

The global economic triumvirate works in close coordination to promote market fundamentalism. Failure to adhere to the dictates of any one of them leads inevitably to retaliation by all. The never-ending short-term IMF loans, for example, are tied to privatization and open markets. Longer term World Bank assistance requires “good governance,” which translates into privatization and open markets, and the WTO of course is about open markets first and last.⁶⁵

To quiet discontent among elites in the developing world, the WTO and its siblings offer *training programs* that bring officials from developing countries to Western capitals to tutor them on the “new” rules and processes of globalization and to help them forget old realities. Similar faith was once expressed in another global institution—the International Court of Justice. Then in 1984, the United States, facing certain defeat in a case brought by Nicaragua, decided it did not want to play the legal game anymore.⁶⁶ More recently, United States enthusiasm for interna-

⁶³ See Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347; STIGLITZ, *supra* note 9, at 3-22; Rosenberg, *supra* note 9; WALLACH & SFORZA, *supra* note 4. For a searing critique of the international and bureaucracy in general, see Graham Hancock, *Lords of Poverty* (2nd ed. 1992).

⁶⁴ This is one way to account for the oft-repeated mantra that “international economic integration is not only good for the poor; it is essential.” Rosenberg, *supra* note 9.

⁶⁵ See generally, James T. Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILL. L. REV. 971 (2000); STIGLITZ, *supra* note 9.

⁶⁶ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 1984).

tional crimes tribunals waned in the face of a near global consensus for a permanent International Criminal Court that could try anyone, including Americans.⁶⁷ Perhaps it would take the United States or one of the other major powers withdrawing from the jurisdiction of the new WTO dispute resolution process to expose the sham behind the mask of legality.

B. Waging War against Memory: But the Present is So Much Like the Past

What unites the anti-W.T.O. crowd is their realization that we now live in a world without walls. The cold-war system we just emerged from was built around division and walls; the globalization system that we are now in is built around integration and webs. In this new system, jobs, cultures, environmental problems and labor standards can much more easily flow back and forth.⁶⁸

Propagandists for globalization, such as *New York Times* columnist Thomas Friedman, argue incessantly that we are witnessing a profound and inevitable transformation of human relationships across physical, social and even psychological boundaries.⁶⁹ Some of them glorify this transformation with religious fervor, insisting that it is the only way to salvation for everyone.⁷⁰ Others merely accept its inevitability with a pragmatist's conceit.⁷¹ These advocates for the only true path, also known as the Washington Consensus, are engaged in a relentless war against memory, a struggle against our recollection of the past. Their task is not just to rewrite history when necessary, *but to help us forget* so we may not conceive other possibilities. When we forget our past or accept their restatement of it we are deprived of agency. We lose our transformative potential and give

⁶⁷ See Lawyers Committee for Human Rights, *U.S. Role: Engagement or Opposition?*, at http://www.lchr.org/ijp/icc_usa.htm (last visited Dec. 12, 2003). See also JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER* 154-60 (2002).

⁶⁸ Friedman, *Senseless*, *supra* note 13, at A23.

⁶⁹ *Id.* See also Paul Krugman, *Enemies of the WTO: Bogus Arguments Against the World Trade Organization* (Nov. 24, 1999), at <http://www.slate.com/Dismal/99-11-23/Dismal.asp>.

⁷⁰ Friedman is perhaps the most visible apostle of the "globalization is inevitable" creed. See Friedman, *Globalization, Alive and Well*, *supra* note 13; Thomas Friedman, *Roll Over Hawks and Doves*, N.Y. TIMES, Feb. 2, 1997, § 4, at 15; Friedman, *Senseless*, *supra* note 13.

⁷¹ See Barbara Crossette, *Globalization Tops 3-Day U.N. Agenda for World Leaders*, N.Y. TIMES, Sept. 3, 2000, § 1, at 1. *But* see Barber, *supra* note 9, for a deeper examination of the complex forces that are at play in the world and the opportunities and challenges they present. See also Blustein, *supra* note 10, at D1.

up our capacity, our right, indeed our duty, to fully participate in ongoing efforts to reorder our world in fundamental ways.

The enthusiasm of globalization advocates is nothing new and it is quite understandable once it is recognized that history for them is usually only a few decades old. The promise of globalization is so new and exciting and inevitable to them because they know or care so little about the past. Theirs is just another end of history account.⁷² Their analyses rarely incorporate a time before the end of the Second World War and the start of the so-called Cold War. Slavery and the age of conquests, for example, are locked away in their minds, protected by cultivated mass amnesia. Imperial subjugation and colonial domination of many of the inhabitants of Asia, Africa, and the New World are more often subject to revisionist history-telling than a courageous acknowledgement of their enduring costs.

For many in the world today—call them non-white, Third World, the South—the present largely reflects much of the past. And the past for these people is often a bottomless memory hole of pain and suffering, much of it intimately connected to forces that may have gone under other names, but bespeak globalization. Today, many are awe-struck by the technological revolution fueling globalization. However, we should not forget that galleons and muskets were revolutionary technologies in their time. Accounts of those days were likewise filled with the arrogance of those who smugly saw the “end of history,” the superiority of their ideology, culture and technology, the inevitable future, and the absolute futility of continued resistance.

The experience of the several ACP countries that fought tenaciously only to lose the legal battles to preserve access to western European countries for their banana crop illustrates the difficulty of conceiving the present as appreciably different from the past. It is simply impossible to understand their predicament or to formulate options for them without a comprehension of their past. The construction of a different world for them must begin by recognizing that these people had very little say in the introduction of the banana crop into their communities. Indeed many of them had no choice in how they came to populate their present territories. Today, they cling to the banana crop even though they could not hope to compete economically with the large South and Central America-based banana plantations. The Caribbean

⁷² See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

farms lack the acreage, soil quality, and cheap labor of their competition. The WTO's whole-hearted promotion of efficiency, meaning "lowest cost production," ensures that they could never compete in global trading unless they could get consideration of other values, such as promoting stable families and communities as well as reparations for past wrongs.

Yet, the belief of the globalization faithful in efficient markets and privatization proceeds from a fundamentalist cult-like perspective that is every bit as strong as belief among the religiously faithful in a Supreme Being. Take the following assertions of one such faithful, Paul Krugman:⁷³

(1) The raw fact is that every successful example of economic development this past century—every case of a poor nation that worked its way up to a more or less decent, or at least dramatically better, standard of living—has taken place via globalization; that is, by producing for the world market rather than trying for self-sufficiency. Many of the workers who do that production for the global market are very badly paid by First World standards.

(2) For what it is worth, the most conspicuous examples of environmental pillage in the Third World have nothing to do with the WTO. The forest fires that envelop Southeast Asia in an annual smoke cloud are set by land-hungry locals; the subsidized destruction of Amazonian rain forests began as part of a Brazilian strategy of inward-looking development. On the whole, integration of the world economy, which puts national actions under international scrutiny, is probably on balance a force toward better, not worse, environmental policies.

Ignoring for now the absence of factual support for these assertions stated as fact,⁷⁴ the cavalier dismissal of history is striking. No indication is made of the myriad ways nations come into this world, nor any acknowledgement of transnational or transcontinental impact, or of violent exploitation and its innumerable consequences. Slavery, genocide, colonial conquests, apartheid, global and regional conflicts, wars of national liberation, the

⁷³ See Krugman, *supra* note 69. See also, PAUL KRUGMAN, POP INTERNATIONALISM (1996); Paul Krugman, *Reckonings; Once and Again*, N.Y. TIMES, Jan. 2, 2000, § 4 at 9 [hereinafter Krugman, *Reckonings*]. Admittedly Professor Krugman is a moderate fundamentalist who has, on occasion, raised questions about the responsiveness of the present global order and opposed some of the policy prescriptions of the BWIs. See, e.g., Paul Krugman, *Saving Asia: It's Time to Get Radical*, FORTUNE MAG., Sept. 7, 1998, at 74.

⁷⁴ See David Kennedy, *The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law*, 10 AM. U.J. INT'L L. & POL'Y 671 (1995) (regarding similar defense of liberal trade theory as fact).

Monroe Doctrine, the Marshall Plan, Communism, the Cold War are only some of the missing elements. Closely connected to the dismissal of history is the absence of context and a profound lack of appreciation of agency and contingency.

Propagandists often point to various Asian nations as proof of their assertions. China, Taiwan, South Korea, and Malaysia have been cited as examples of what may be called “model minority” nations that have successfully employed the modernizing force of global free trade.⁷⁵ However, even a cursory examination of the economic policies pursued by these nations would show that little of whatever prosperity they have achieved has been connected to the advice of the guardians of economic globalization.⁷⁶ China, which was admitted into the WTO only recently, has benefited from trade and foreign investment, but surely not from throwing open its markets or removing foreign exchange controls. According to one recent report, “[f]or . . . most of the developing world except China (and to a lesser extent India), globalization as practiced today is failing.”⁷⁷ But the question must be asked: to what extent has China’s limited success been the result of political and strategic factors such as Western efforts to “rope” China into the global capitalist economy? In any case, China still represents a clear case of government-directed modernization, not free trade. No advocate for a more equitable world economic order would object to lesser developed countries receiving the same access to Western markets that China has been able to gain with so little reciprocity on its part. This reality is nowhere endorsed in the operations manual of the market fundamentalists.

India, on the other hand, has been a very reluctant participant in many aspects of free trade, especially as it relates to intellectual property protection. Korea, too, has imposed technology transfer requirements, protected its market, and pursued Japanese-style government-directed or coordinated investment policies to push industrialization. Its strategic relationship with the United States may have also given it considerable room to adapt market fundamentalist prescriptions to its needs. Few others are given such flexibility by the global economic triumvirate.

⁷⁵ Rosenberg, *supra* note 9; Friedman, *Globalization, Alive and Well*, *supra* note 13.

⁷⁶ See STIGLITZ, *supra* note 9, at 89-132.

⁷⁷ Rosenberg, *supra* note 9.

In Malaysia's case, it should be recalled that it did not hesitate to impose exchange controls when its economy was threatened during the Asian financial crisis of 1997 amidst howls of protests from Western investors, the IMF and other believers in economic orthodoxy.⁷⁸ According to Stiglitz, who was the Chief Economist at the World Bank at the time: "Today, Malaysia stands in a far better position than those countries that took IMF advice."⁷⁹ In general, these "model" Asian nations testify to the role of agency and contingency. Some of them saw alternatives to the Washington consensus and grabbed them. Others were the beneficiaries of time and place such as the struggle between the West and the former Soviet Union. Their "success" actually supports the view that the Washington consensus or market fundamentalism does not represent the only true path. Globalization as we know it is thus far from inevitable unless propagandists succeed in their fundamental task of defeating our memory and our capacity to change our lives—our present and our future.

The extensive official record of the banana dispute before the WTO does not begin to capture the enormous tragedy wrapped in legal formalism. To fully understand this, we must begin with history of how these people came to be on these tiny islands with geographies and economies totally unsuited for the cold efficiency-driven value system that characterizes the global trading regime—a regime that inexorably commodifies everything, making people and produce indistinguishable. Then, we should incorporate context, agency, and contingency.

The farmers who labor to produce their bananas for European tables today came to these islands through one of history's greatest crimes perpetrated on Africans. Slavery should be seen for what it was: a violent and brutish European-centered push for a sort of globalization in which Africans and the produce and treasures of the "new world" were prized commodities. The cultivation of bananas that began on these islands only in the twentieth century, is merely the current link in the chain of human misery that began with this earlier effort at globalization. Ironically, banana cultivation was the result of a sincere push to diversify the economies of these islands away from sugar cane. Bananas, being a year-round crop and resilient to the vagaries of the climate, was preferred even though the climate and soil con-

⁷⁸ STIGLITZ, *supra* note 9, at 122-26.

⁷⁹ STIGLITZ, *supra* note 9, at 125.

dition in many of these places meant back-breaking work for very modest yields. That these farmers are today fighting so hard to hold on to this crop against tremendous multinational forces is testament to the survival imperative. At stake for many is not just individual survival, but the viability of their fragile economic and social structures. Without a way to participate in the global economy, the alternatives are starvation or destructive involvement in another aspect of globalization—the international drug trade.

Yet opportunities for legitimate participation are limited and the process as a whole is rigged to ensure the preservation of the status quo. The proliferation of international legal agreements and the push toward more adjudicative processes have not altered historic relations of dependency.⁸⁰ This is essentially what the banana dispute illustrates. Like their African ancestors, who had very little to do with the colonization of their land or the capture and forcible transfer of their kinfolk to these tiny islands in the Caribbean, the present day inhabitants of ACP banana-producing countries were relegated to outsider or “Third Party” status in the formal consideration of their future. Indeed, the process of determining the economic and social viability of these societies under the WTO rules seems frozen in time and does not require too much imagination to evoke a comparison with the way the Portuguese and Spanish crowns met to divide up the world five centuries ago.

As difficult as the earlier, more political GATT dispute resolution process was, it at least had the virtue of honesty: the weak knew going into it that they had little hope of gaining anything that was not of greater benefit to the strong. The new more legalistic/adjudicative process that came into being in 1995 promised too much and has given very little. The well-publicized crude hijacking of the dispute process by a relatively minor multinational corporation confirmed the enduring centrality of old power relationships. The United States has no banana industry; few American jobs were at stake, yet it fought tenaciously on behalf of a corporation that had the foresight to contribute to the political coffers of the two major American political parties. The violence of old—invasion by marines, gunboat diplomacy, violent overthrow of unfriendly governments—is now often unnecessary. Countries new to political independence, woefully limited in

⁸⁰ WALLACH & SFORZA, *supra* note 4, at 140-43.

human and material resources, and characterized by unstable, incompetent or corrupt leadership, can now be enticed to sign on to a scheme that vigorously champions lessons from a past filled with horrors for the dispossessed. *Pacta sunt servanda*.⁸¹ That old standby remains part of the “new” law of globalization.

The rejection of the European preferential trading scheme was a resolute refusal to acknowledge that the past has a place in the present. However, instead of openly stating that the world trading system cannot accept a plan—grossly inadequate as it is—to acknowledge some European responsibility for their imperial, slave-trading, colonialist past, the WTO hid behind neutral sounding GATT-legal principles and a rigid alienating quasi-judicative dispute resolution process.

The Chiquita Brands-United States victory has laid the groundwork for further injustices as it now provides Europe with a “legitimate” excuse to limit further efforts to provide some form of “reparations” to these former colonies. Indeed it would hardly be a surprise if the WTO rulings lead to retrenchment.

III

AFTER SEATTLE: TOWARD A NEW ANTI-GLOBAL ORDER

*The big economic question for the next century, in other words, is really political: Can the Second Global Economy build a constituency that reaches beyond the sort of people who congregated at Davos? If not, it will eventually go the way of the first.*⁸²

The intensity of passion and the breadth of concern demonstrated by opponents of the new globalization, often described as

⁸¹ Article 26, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.M.T.S. 331, reprinted in 8 I.L.M. 679 (1969). As stated by Article 26, *Pacta Sunt Servanda* means “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”

⁸² Krugman, *Reckonings*, supra note 73. Krugman’s observation was directed to the defenders of globalization. It was an urgent call for reform; to incorporate some of the concerns of the discontented, but by no means a call for fundamental transformation. By “Second Global Economy,” he is distinguishing between the current world economic vision and order constructed “largely under American leadership” since the Bretton Woods conference, and an earlier “First Global Economy: The Era from the Mid-19th Century Onward in which new technologies of transportation and communication made large-scale international trade and investment possible for the first time.” *Id.* Krugman, of course, ignores an even earlier era of global trade connecting Europe to Africa, Asia, and the Americas—a time when many human beings were bought and sold as commodities, and native communities were brutally subjugated.

“corporate globalization” by prominent Western activists like Ralph Nader, caught the global neo-liberal leadership in Seattle by surprise. The WTO Seattle meeting broke down under the weight of inside and outside differences.⁸³ The global economic triumvirate no longer had the freedom to meet anywhere and their record and authority to prescribe came under vigorous and persistent challenge. The leadership scrambled to respond, sometimes ridiculing some of the protesters and at other times rhetorically co-opting many of their issues.⁸⁴

As the Krugman excerpt above suggests, supporters of the present order understand the importance of expanding its constituency. Efforts to accomplish this have already begun in earnest. The World Bank has moved seemingly to embrace all sides preaching “sustainable development in a dynamic economy” and a governance agenda that supposedly promotes the “rule of law” without political interference.⁸⁵ Criticisms of IMF policies are now in vogue, even coming from members of a panel appointed by the United States Congress to review the work of international financial institutions. With a new director-general from Thailand, some see hope for a change in some of the WTO’s policies concerning the developing world. It appears that, at a minimum, the Seattle protests exposed many of the problems within the global trade-centered economic system and encouraged some supporters of globalization to reexamine their faith.⁸⁶ Others, still convinced of the correctness of their vision, prefer to seek new converts.

⁸³ See *Trade Negotiations Begin on Agriculture and Services, Moore Reports on Post-Seattle Consultations*, WTO FOCUS (WTO, Geneva, Switz.), Jan.-Feb. 2000, at 4-11. See also Rajagopal, *supra* note 11.

⁸⁴ Paul Krugman’s lament was tinged with sarcasm: “It is a sad irony that the cause that has finally awakened the long-dormant American Left is that of—yes!—denying opportunity to third-world workers.” Krugman, *Reckonings*, *supra* note 73. See also Mike Moore, Seattle Conference Doomed to Succeed, Opening Address to the WTO’s 3rd Ministerial Conference (Nov. 30, 1999), at http://www.wto.org/english/news_e/spmm_e/spmm16_e.htm; Statement by Mike Moore, Director-General, WTO (Dec. 7, 1999) at http://www.wto.org/english/news_e/spmm_e/spmm19_e.htm.

⁸⁵ See World Bank, *The World Development Report, 2003: Sustainable Development in a Dynamic World Transforming Institution, Growth, and Quality of Life* (Oxford Univ. Press 2003). For a critical look at the World Bank’s governance agenda toward Africa, see Gathii, *supra* note 65, at 971.

⁸⁶ See Joint Statement by the Heads of the IMF, the World Bank, and the World Trade Organization (Nov. 30, 1999), at http://wto.org/english/news_e/pres99_e/pr153_e.htm. See also Dirk Beveridge, *Poor Nations Seek Their Place at World Trade Table*, Feb. 12, 2000; Associated Press, *IMF Ordered to Address Debt Crisis*, N.Y. TIMES, Sept. 29, 2002, § 4, at 3.

A similar task faces the anti-globalization coalition. It must now build upon its successes to expand and deepen its coalition. Perhaps one yardstick by which it could measure progress in this regard would be when it is no longer necessary for Western activists to travel the world chasing the leaders and managers of globalization at every meeting. A broader and deeper movement would have leaders and supporters everywhere ready to challenge the globalization agenda. Three developments must occur to move the anti-globalization movement beyond its present stage to become even more effective on a global scale. The movement should: (1) incorporate more voices from the developing world; (2) recognize the dynamic nature of perspectives, interests and alliances; and (3) develop the capacity and flexibility to organize and act dynamically in multiple, intersecting ways, avoiding the tendency to romanticize the local or uncritically vilify the global.

A. Incorporating More Voices from the Developing World

In spite of its considerable positive contributions, the Seattle confrontations also exposed contradictions and weaknesses among the anti-globalization activists. As anti-WTO demonstrators marched through downtown Seattle, they could be heard chanting “this is what democracy looks like.”⁸⁷ Understandably, they were expressing satisfaction with the diverse grassroots representation within their ranks. Yet even a casual observer could note the dearth of people of color. When the BWIs were being established a half-century ago, only a minority of humanity had any form of self-determination even as they were enrolled into the process. The United States and the United Kingdom did not think it odd to speak on behalf of most of the world. Today, as the anti-globalization campaign matures, one observes the same lack of representation among its leadership, a lack of diversity that may rival that within the ranks of the guardians of globalization. It would appear that the leaders of the anti-globalization movement are as convinced as the globalization leaders are of the obviousness of their claims and their capacity or right to speak for everyone. The notable failure of diversity has consequences in terms of the setting of priorities, choice of tactics, and overall strategy. Globalization activists from the West should work harder to avoid the same messianic impulses of globaliza-

⁸⁷ As heard by the author at the Seattle protests.

tion proponents that led them to propose and enforce uniform approaches to the problems of developing countries.

Let us examine one of the major criticisms of globalization to illustrate this point further. A central charge of anti-globalization activists is that institutions like the WTO and agreements like GATT work to subvert the democratic process.⁸⁸ For example, Ralph Nader and Lori Wallach wrote: “[U]nder the new system, many decisions that affect billions of people are no longer to be made by local and national governments but instead, if challenged by any WTO Member Nation, would be deferred to a group of un-elected bureaucrats seating behind closed doors in Geneva.”⁸⁹ Economist Herman Daly also has warned against the rush to eliminate the nation-state’s capacity to regulate commerce.⁹⁰ He argues quite correctly that “corporate globalism weakens national boundaries and the power of national and sub-national communities, while strengthening the relative power of transnational corporations.”⁹¹

Yet this new “progressive” defense of national sovereignty and democratic values ought always to be properly put in context. It reflects to a considerable degree the experiences of a small percentage of humanity—those who have memories of a time of communal stability, democratic legitimacy and sovereign control. From the perspectives of the huge number of humanity who have never experienced such, who have never had the choice *not* to be part of globalization, this argument states too much and ignores as much. At a minimum, it fails to appreciate how history has operated to destabilize many communities inside and outside the West. Many of the world’s people have never had this idyllic democracy nor the experience of substantial control of the direction of their communities. Whether it was slavery, colonialism, ethnic cleansing, or Cold War rivalry, they have been, for as long as many can recollect, intimately subject to global trends and conflicts. For them, it is not enough to talk about preserving democracy; one must also address how to build and nurture democracy as well as other measures of self-determination.

⁸⁸ See Ralph Nader & Lori Wallach, *GATT, NAFTA, and the Subversion of the Democratic Process*, in *THE CASE AGAINST THE GLOBAL ECONOMY* 94 (Jerry Mander & Edward Goldsmith eds., 1996); Rajagopal, *supra* note 11.

⁸⁹ Nader & Wallach, *supra* note 88, at 94.

⁹⁰ *Id.*

⁹¹ *Id.* at 95.

B. Recognizing Shifting Perspectives, Interests and Alliances

The banana case demonstrates the danger of oversimplifying the globalization debates and the need to recognize, understand, and appreciate constantly shifting perspectives, interests and alliances. At the most basic level, the dispute pitted the developed and developing worlds as well as multinationals on both sides of the equation. The fact that the narrowest and most myopic of perspectives may have prevailed in this instance speaks more to the artificially constraining impulses of the WTO dispute resolution process rather than to the interests and perspectives of the parties. The banana case, a richly textured dispute with a multitude of interests, was squeezed into a formalistic fantasy of legal process. The results added nothing to either global understanding or wealth.

Take one of the complainants' charges—that the true beneficiaries of the European quotas are not the people of the producing countries, but the European-controlled banana marketing and shipping conglomerates such as Fyffes or Geest.⁹² This charge is actually quite accurate and portends another simmering dispute. The complainants assert with reason, that these “European” corporations have used the cover of aiding weak producer economies to gain important advantage in the European market over their American competitors.⁹³ A World Bank report supported the charge, stating that for every dollar earned by the Caribbean countries on banana export, about twelve dollars are earned by the largely European marketing middlemen.⁹⁴ If the Europeans were truly interested in supporting these desperate economies, there are surely better ways of doing this.

The fundamental aim of the European preferential regime must be recognized. The regime serves to tie former colonies economically as well as politically to their former colonial masters, ensuring an unbroken chain of unequal relationship that stretches over centuries in many cases. This suggests that even in the era of this new globalization, when economic power is increasingly shifting away from nations to global corporations, the

⁹² See Julie Wolf, *Why Europe is Divided by the Banana Split*, THE GUARDIAN, Jan. 10, 1996, at 17; Canute James, *EU Banana Regime Defence Pleases Caribbean Growers*, FINANCIAL TIMES, Nov. 17, 1995, at 31.

⁹³ See Holman W. Jenkins, Jr., *Yes, We Have No Banana Policy (Can We Borrow Yours?)*, WALL ST. J., Feb. 10, 1999, at A23.

⁹⁴ *Id.*

historic collaboration between state and corporation to project national hegemony has not been abandoned. The United States-Chiquita and the European-Fyfees/Geest collaboration are in this sense remnants of historic desires for control.

The banana dispute thus evidences concerns and fault lines about globalization even within sectors in advanced industrial societies. With “American” companies holding sway over vast, highly efficient Central American fruit plantations, some Europeans sought to maintain their own spheres of control in these smaller “European” enclaves even when it meant subsidies for less efficient production and marketing. These ties protect some European domestic communities for political, economic or cultural reasons. They guarantee a “European” source, in this case, for a fruit that many Europeans desire but that is not cultivated in Europe.⁹⁵ They also help to project cultural values and maintain strategic global interests of nations. Apparently, the open market promises of globalization do not completely reduce the attractiveness of local/national control or influence. This desire for the “local” remains an unsuppressed feature of the globalization debate.⁹⁶ All parties retain some aspects of it even though it seems only the most powerful are allowed to get away with its expression.

C. Organize and Act Dynamically—Avoid Romanticizing the Local or Uncritically Vilifying the Global

To meet the renewed efforts post-Seattle, of the globalization supporters to gain converts and co-opt their issues, leaders of the Western-based anti-globalization movements must adopt a more flexible and dynamic strategy to expand and deepen their global coalition. To do this, I suggest two changes in their strategies to combat globalization. First, the opposition must become, in a sense, less ideological. Second, the opposition should become more skeptical of the romanticized notion of the local that is a centerpiece of many of their arguments against globalization.

It is critical that opponents of globalization avoid making the

⁹⁵ Spain imports bananas from islands in the Atlantic under its control. Bhala, *supra* note 3.

⁹⁶ Even Friedman concedes that globalization must be de-Americanized and democratized into something he calls “multi-localism,” “so that people everywhere feel some stake in how it impacts their lives.” Thomas L. Friedman, *Big Mac II*, N.Y. TIMES, Dec. 11, 1996, at A27. See also Craig R. Whitney, *Anxious French Mutter as U.S. Envoy Tries to Sell Globalism*, N.Y. TIMES, Dec. 2, 1999, at A12.

same mistakes that globalizers have made in promoting a one-size-fits-all solution to every problem and projecting an ideological inflexibility toward global solutions of all kinds. A dynamic, flexible approach recognizes that the problem is not a simple global versus national (or local) dichotomy. It is actually more about the appropriate level of decision-making for specific types of problems. Global approaches have been very successful in dealing with many problems, especially in the areas of war prevention and human rights standard-setting. Many questions regarding environmental degradation and economic advancement could also benefit from global as well as local or mixed approaches. Flexibility allows for more choices and encourages diversity of perspective. A great danger lurks in a rigid ideological approach that rejects certain measures out-of-hand. It is quite clear, given the multiplicity of interests in the developing world and the different historical standpoints, that a rigid ideological approach emanating from the West is not likely to be successful. People in developing countries have become attuned to recognizing imperial claims regardless of whether they emanate from the right or from the left.

It is also important that the Western-based movement develop or articulate a more textured understanding of the local or national in their criticism of globalization. Too often, the rejection of globalization posits a return to a local basis of decision-making that is unattractive or even alien to many people in developing countries today. This is not just because of the centuries of outside intervention. For a significant number of people in the developing world, the local is often the locus of oppression, both in terms of traditional practices and in terms of veneration of the sovereign. Many of the oppressed in these societies welcome the introduction of the global to limit the influence of traditional powers and to provide more options for them. Women and youths, for example, have sometimes welcomed the introduction of Western assembly work as an opportunity to escape both the daily grind of village life, and the influence of overbearing communal elders. Certainly, global human rights standards have been embraced in many societies because of their alternative visions of power relationships across gender, class, and ethnicity. Again, it must be recognized that there are matters that should be local and those that could be better dealt with at other levels all the way up to the global. Flexibility and a profound readiness

to learn from those most at risk should dictate the response of the anti-globalization movement to these issues.

CONCLUSION

This Article has employed insights from the Seattle protests and the lengthy banana dispute before the WTO to discuss challenges facing opponents of economic globalization. While the Seattle protests opened up possibilities for advancing an anti-globalization agenda, they also alerted guardians of globalization to their weaknesses. The Article has argued that opponents of globalization face the urgent task of expanding and deepening the movement to incorporate more voices from the developing world. Globalization has succeeded to a considerable degree because it has employed law and legal processes to mask historic unequal power relationships and waged an unrelenting war against the memory and relevance of past injustices. It remains a potent force. To successfully meet its challenges, opponents must welcome diverse voices, recognize shifting interests and perspectives, and adopt more flexible and dynamic approaches to their work.

