The Seattle Fiasco – an Opportunity for Environmental Law

by Mark Halle

When observed from the perspective of a few years, the failure of the World Trade Organisation (WTO) Ministerial Conference in Seattle may well turn out to have triggered a significant change in international governance. It may also have had the effect of placing on the table taboos that had been in place for decades in the world of trade policy. The most obvious and immediate consequence was the failure to agree on a new round of multilateral trade negotiations. But the consequences of Seattle go deeper still. This article argues that the failure of Seattle opens up a number of opportunities in the field of trade law, in particular for environmental lawyers.

The reasons for Seattle’s failure have been analysed over and over. While there is disagreement over the proportions, there seems no doubt that a diabolical mixture of ingredients caused the fiasco to take place. These included inadequate preparation, fundamental disagreement between the European Union and North America on essential issues, lack of political will to make concessions to the developing countries, the overloading of WTO structures with the doubling of membership, serious miss-

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was finalised at the very end of the Uruguay Round and was only adopted following intense pressure from the United States, Japan and a few others and when it became clear that the entire Round agreement could be compromised without it. With the benefit of five years’ perspective, it is now clear that the TRIPS agreement raises serious concerns. These concerns are best known in the area of environment and development, but there is a growing feeling that TRIPS is actually a sorry piece of trade law and could have a series of negative effects on the WTO system as a whole.

The Agreement contains provision for regular reviews (Article 71). These reviews, of course, were intended to examine and debate implementation issues. Now, there is a growing call to reconsider the TRIPS agreement as a whole. The question is certainly being asked why articles containing detailed provisions for the protection and enforcement of private property rights are given so much more importance than others (such as Article 7) which articulate the objectives of the agreement, including the need to strike a balance between private rights and the public good. This debate – is in the view of this author inevitable. It should, however, be well-prepared and should be handled with care.

A final issue relating to TRIPS could open up an even broader area of debate. One of the pillars upon which the entire international trading system is founded is the principle of non-discrimination, contained in Article I of GATT. At the border, WTO members may not discriminate between their own products and like products from another WTO member (national treatment), nor among like products from different members (most favoured nation status). While there are a limited number of recognised exceptions to this rule, “non product-related process and production methods” (PPMs) – in other words the way in which the product was produced rather than inherent characteristics of the product itself – may not be used as grounds for discrimination. Under current interpretations of WTO law, a tuna caught at the price of several dolphin lives cannot be treated differently on import compared to a tuna caught in a dolphin-safe manner.

In fact, the meaning of “like” product is defined nowhere in the WTO agreements, and it is likely that it could never be. The concept is a dynamic and changing one. Nor do the supposed exceptions set out in GATT Article XX offer much guidance, although they allow countries to take measures which restrict trade, provided these are “necessary to protect human, animal or plant life or health” (Article XX(b)) or relate “to the conservation of exhaustible natural resources” (Article XX(g)).

The inability to distinguish between environmentally-friendly and environmentally-harmful goods on the basis of the environmental impacts inherent in their method of production is one of the great criticisms that the environmental community levels at the trading system. It can be argued that organic coffee and coffee grown with abundant use of pesticides and fertilizers are not like products but inherently different. The text of the WTO rules gives little guidance.

At the same time, the principle of non-discrimination is essential and must be fiercely defended as the very foundation of an equitable, rules-based trading system. Trade policy experts are justifiably on their guard against measures which, in their view, are protectionist in intent and impact, although cast in terms of laudable social or environmental goals.

Given the fundamental importance of non-discrimination to free trade, it is interesting to note that the TRIPS agreement not only allows discrimination between like products, but even between identical products. Generic aspirin and brand-name aspirin are not only similar, they are in fact exactly the same chemical compound; and yet the TRIPS agreement allows a distinction between them to be made in trade because the latter is protected by patent or trademark and the former is not.

Ironically, the TRIPS debate could blow open the broader and much more fundamental debate on the basis for non-discrimination. This debate – the so-called PPMs debate – is in the view of this author inevitable. It should, however, be well-prepared and should be handled with care.

There is considerable scope for the environmental law community to make sense of the issues before they are captured by an inexpert public. Although it is currently unpopular politically, the best way of ending the environment-trade conflict at WTO would be to negotiate rules
regarding environmental aspects of trade. WTO needs a Trade-Related Environmental Measures (TREMS) agreement. Such an agreement would identify legitimate environmental grounds for distinguishing between products in trade – for example, grounds included in global Multilateral Environmental Agreements – without threatening the principle of non-discrimination. But the environmental community would have to accept that restrictions on trade not covered by these rules would be WTO-illegal and therefore subject to potential trade sanctions.

It is hard not to think that, had they known what a failure in Seattle could trigger, the negotiators might have been more careful to prepare the meeting properly, offer the concessions necessary for trade liberalisation to move forward, and be less dismissive of legitimate environmental concerns.

Forum on Water Security


The Forum set out to address a crisis in the world’s water supply, where it is estimated that one billion people are without an adequate supply of drinking water and two billion without adequate sanitation.

The event, which was chaired by Prince Willem-Alexander of the Netherlands, brought together more than 4,500 experts from all over the world, international organisations, non-governmental organisations and other interest groups.

The meeting ended with a two-day Ministerial Conference, at the close of which Ministers responsible for water management and the environment from 110 countries adopted a Declaration which, while recognising that access to sufficient water and sanitation are basic human needs, does not go so far as to propose a genuine global strategy for addressing the growing shortage of water in many of the world’s poorest countries. Ministers were accused of failing to follow through key demands from delegates. The Chairman noted that the overwhelming majority of the 4,600 participants wanted recognition of water as a basic human right enshrined in the Ministerial Declaration.

The issues of privatisation and charging for water dominated discussions at both the Forum and the Ministerial Conference.

The Dutch co-operation minister, Eveline Herfkens, stated that the world will face significant shortages of water over the coming years and that leaders and the general public must be made aware of the urgent need to resolve the water crisis, just as the oil crisis in 1973 was successfully addressed.

She refuted criticism from environmental groups and their ultra-liberal stance taken at the Forum: these organisations argue that water cannot be reduced to a simple economic commodity but is a fundamental human right. The Minister insisted that charging for water distribution implies that its price should reflect its economic value. She believed that greater involvement of the private sector is an absolute necessity in increasing the efficiency of services and attracting the considerable capital required, which exceeds the resources of governments in this area.

Ministerial Declaration

In the Declaration adopted on 22 March, Ministers pledged to guarantee access for all to safe and sufficient water at a reasonable price to ensure a healthy and productive life, and to protect the most vulnerable against risks linked to water. They acknowledge that pollution, unbridled use of resources, changes in land-use, climate change and many other factors threaten water resources and original ecosystems.

In order to combat the growing shortages – which, as Ministers indicated, most affect the poorest countries – it is essential that the true value of water be recognised.

To this end, they believe it is necessary to manage water in a manner that enhances its economic, social, environmental and cultural value, and to charge for water supply services on the basis of real costs. They emphasise, however, that this approach must reflect a need for fairness, whilst taking account of the poorest and most under-privileged.

The challenges are identified as: meeting basic needs (universal access to adequate supplies of safe water); securing food supply; protecting ecosystems; sharing water resources (peaceful co-operation and the development of synergies between different uses of water at all levels); managing risks (natural catastrophes and epidemiological problems); and valuing water and governing water wisely to ensure that the public and the interests of all stakeholders are included in the management of water resources.

Ministers recognise in this context the need for institutional, technological and financial innovations in order to meet these challenges. They also believe that the private sector has a role to play and advocate that integrated management of water resources should take account of all resources and all players.

However, there are no concrete proposals for a strategy or action plan. Ministers pledge to pursue collaboration and synergies in order to translate principles into action and outline targets and strategies to ensure the challenge of water security is met.

Ministers also agreed to meet periodically to review progress. Their next meeting is planned for 2002, in Bonn, Germany, in the context of the review of the implementation of Agenda 21, ten years after the United Nations Conference on Environment and Development (UNCED).