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 mismanagement of the conference by the host country, and its capture by the US electoral process. The relative weight of these different factors can be argued endlessly; the result is incontrovertible.

From the standpoint of trade and environment law, however, the most interesting consequence of Seattle is that everything is once again up for grabs. A few examples are as follows:

One of the tenets of the WTO has been the unitary nature of the Uruguay Round agreements. These agreements were negotiated as a package – a "single undertaking," and trade-offs in respect of one agreement may have been made to obtain advantages in another. This leads to the conviction that the resulting agreements, while open to interpretation and debate about implementation, are no longer open for any substantial change. A change in the Agreement on Subsidies and Countervailing Measures, for example, would likely require opening debate on the entire Uruguay Round package because tighter restrictions on certain subsidies may have been obtained by one group of countries by yielding ground on market access for textiles demanded by another group.

Perhaps the most disputed agreement in the Uruguay Round is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS agreement

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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, and those (Articles 7, 8, 40 and 66(2)) favouring the enhanced and facilitated transfer of technology to developing countries.

Courtesy: HÖB

It is unlikely that TRIPS could be opened for re-examination simply on the grounds that it has proved to be inequitable in respect of the developing countries. More politically acceptable grounds include the fact that TRIPS upset the balance between private protection and the public interest by greatly expanding the former at the expense of the latter. There is also concern that disputes over intellectual property rights could clog up the already overloaded dispute settlement system and cause considerable bad will among developing countries in particular, but also among those who already feel that the WTO gives the privileged additional weapons to assert their power over the poor. TRIPS also creates some serious image problems for WTO, given its appearance of protecting corporations and rich individuals at the expense of the poor and needy. After Seattle, this is precisely the sort of image that the WTO should be looking to change.

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

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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.