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JOINT STANDING COMMITTEE ON TREATIES

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JOINT COMMITTEE ON TREATIES

Monday, 4 December 2000

Members: Mr Andrew Thomson *(Chair)*, Senators Bartlett, Coonan, Cooney, Ludwig, Mason, Schacht and Tchen and Mr Adams, Mr Baird, Mr Bartlett, Mr Byrne, Mrs Elson, Mr Hardgrave, Mrs De-Anne Kelly and Mr Wilkie

Senators and members in attendance: Senators Bartlett and Tchen and Mr Adams, Mrs De-Anne Kelly andMr Andrew Thomson

Terms of reference for the inquiry:

Review of the Cartagena Protocol on Biosafety.

WITNESSES

Committee met at 11.52 a.m.

HOWARD, Mr Lyall James, Deputy Director, National Farmers Federation

MORRIS, Mr Julian Henry (Private capacity)

CHAIR—Welcome, gentlemen. We will now hear evidence on the review of the Cartagena protocol. We will have five minutes from each of you and then we will have some questions.

Mr Howard—Thanks for the opportunity to brief the committee on the biosafety protocol. Agricultural biotechnology is one of the most promising techniques in modern science. It has given us pest resistant crops, plants that can be grown in acidic soils, and rice fortified with vitamin A. In the pipeline are soybeans with healthier oils, bananas that provide doses of vaccine, and cotton that is naturally coloured. Most scientists agree that modern biotechnology is merely the latest form of genetic selection and the risks posed by the release of GMOs, while real, are the same in kind as those posed by the introduction of unmodified organisms.

Environment groups, however, claim that agricultural biotechnology poses new, unprecedented threats to the environment and human health. Greenpeace, one of the world's leading antibiotechnology groups, says, 'Once released into the environment, GMOs may survive, multiply and spread, causing damage to biodiversity which is continuous and irreversible.' Others claim that the release of transgenic organisms is much worse than nuclear weapons or radioactive nuclear waste.

Environment groups are mounting a very serious campaign against agricultural biotechnology. Their members trespass on farms and cut down experimental crops. They invade the premises of legitimate businesses. They offer grim warnings of a future where genetic engineering unleashes cross-species epidemics, transgenic superweeds, and antibiotic resistant genes that will be impossible to control. In waging their war against biotechnology, the activists wield the powerful weapons or anecdote and fear. They make sensational claims based on worst-case analysis, and they exploit a human inclination to believe false predictions about the environment, resources and the food supply. They pressure governments and frighten their citizens into excessive regulatory action in both domestic and international arenas. The cost of such regulations to the marketplace, to science based decision making, to the private sector in general and to the true interests of consumers, is rarely given proper consideration.

Genetic engineering, like any technology, can pose new risks, but if we stopped every time we identified a risk we would make no progress. It is safer now for a man to fly to the moon than it was for the Wright brothers to fly 1,000 yards. In the days of the Wright brothers, many said that flying was unnatural. 'If God wanted us to fly he would have given us wings,' they said. Today, antibiotechnology activists say a similar thing—that it is unnatural for scientists to play God with plant genetics.

On 29 January this year in Montreal, Quebec, over 130 countries agreed on a new regulatory instrument called the Cartagena Protocol on Biosafety, which controls international trade in living modified organisms. Governments and antibiotechnology activists applauded the final agreement, calling it a great victory. 'It puts the environment and trade on a same footing,' declared Canadian environment minister, David Anderson. 'It is a historic step towards

protecting the environment and consumers from the dangers of genetic engineering,' said Greenpeace.

Australia's federal environment minister, Robert Hill, congratulated Australian officials and said, 'It was pleasing that after four years of negotiation the Biosafety Protocol to the Convention on Biological Diversity had been finalised.' However, there was no comment from Australia's minister for trade. This is indeed puzzling because the biosafety protocol is a trade treaty. Its principal operative provisions restrict trade. The question arises: why were Australian officials instructed to join the consensus on the final text in Montreal without expressing a reservation about our trade interests?

In a letter on the biosafety protocol to the National Farmers Federation from the office of the Minister for Trade, NFF was told:

The Australia Government shares your concern about the potential implications of a restrictive Biosafety Protocol on current and future agricultural trade ... The Australian delegation has been tasked to seek a Protocol outcome ... that does not allow for, or provide a pretext for, the application of additional trade restrictions with respect to living modified organisms ... The preservation in full of our rights and obligations under the WTO will be a crucial part of such an agreement.

The trade minister's office had assured NFF that Australia's WTO rights would be preserved in full. However, this is not what happened. A legal opinion for the NFF by one of Australia's leading WTO lawyers found:

If it was an important part of any country's negotiating mandate to protect WTO rights, the lack of an express savings clause and the inclusion of such a poorly drafted preamble, must remain of significant concern.

The opinion says:

... no government could be confident that signing the Protocol would ensure that their WTO rights are fully and effectively protected ... If a government wishes to give away those rights ... there is very little in the Protocol that helps them understand with any confidence just what they would be replacing those rights with.

A recent DFAT discussion paper, which was prepared in collaboration with the Australian Government Solicitor, on the relationship between the protocol and the WTO concluded, '... there is nothing in the Protocol that would require or allow a country to act inconsistently with its WTO obligations.' DFAT argue that NFF's legal advice is wrong and there is no real problem of overlap between the protocol and the WTO.

This view, however, glosses over a critical point. There is no overlap if two countries are members of both the WTO and the protocol. This is because both parties would have moderated their WTO rights in respect of each other by being parties to the protocol. The key point, which the DFAT paper itself concedes, is that neither party can insist that the other party apply the more stringent WTO rules when they restrict imports. You can only guarantee your WTO rights by not being a party to the protocol.

NFF believes that the DFAT paper is factually incorrect in its interpretation of the meaning of the protocol in several key respects. It argues that generally the provisions of the two agreements are very similar. This simply cannot be sustained. A fundamental problem is that the DFAT paper does not take into account how trading partners could abuse the wide powers of

discretion to restrict imports, which the protocol provides. Why would a big, efficient exporter of agricultural products like Australia willingly moderate its WTO rights, which are the only defence against such abuse? The United States, the world's biggest exporter of agricultural products, and the biggest user of agricultural biotechnology, will not be signing the protocol. Why would Australia want to be bound by a global treaty that puts our agricultural industries at a competitive disadvantage?

CHAIR—Can you pause there for a moment. Dick, do you want to ask some questions at this point?

Mr ADAMS—No.

Mr Howard—I am nearly finished.

CHAIR—We will go to Mr Morris and then we will get back to it.

Mr Morris—I would like to give a brief background to the biosafety protocol. Twenty years ago, environmentalists came up with the concept of the precautionary principle, which at that time they promoted as a mechanism by which new substances should not be admitted until the producer of those substances had proved that they could produce no harm to the environment. It was essentially a requirement that there was a negative standard of proof, which, of course, is impossible. Their objective, I believe, at that time was to try to stem the development of new technologies.

In the mid-1980s, the European Union applied the precautionary principle in its ban on the use of hormones in animals as a growth promoter. The EU already had evidence, from its own commission, that there was no harm to consumers from the use of three natural hormones used as growth promoters. These natural hormones had been tested ad nauseam and had been shown to have no effect. Nevertheless the EU imposed a ban. So it was being used then in spite of scientific evidence. From the late 1980s, environmentalists started to push the use of the precautionary principle at the international level. They employed lawyers such as James Cameron to write papers that claimed that the precautionary principle already existed in international law. The purpose was to attempt to restrict the means by which countries could trade amongst one another using agreed and very clear trading rules.

In the mid-1990s, environmentalists became aggrieved at the way in which the WTO was interpreting rules regarding environmental protection—specifically in two cases, the tuna-dolphin case and the shrimp-turtle case. In the latter case, the WTO ruled that if multilateral environmental agreements had been put in place, trade in shrimp, in this case, could be restricted on the grounds of how they were produced. Yet, ironically, the greens were up in arms at this. They were up in arms, it seems, because the treatment of shrimp imports to the United States, which had been restricted, was discriminatory. So it seems that the environmentalists were basically in favour of discriminatory trade sanctions.

I have talked with many environmentalists about their motives with regard to promoting the biosafety protocol, and it seems very clear that they were motivated by a desire to undermine international trade laws—to replace them with laws over which they could have a stronger influence. Indeed, if you look at the detail of the agreement, there is much in there that suggests

this is what they have done. The preamble, as I am sure you are aware, ends with the words, 'understanding that the above recital is not intended to subordinate this protocol to other international agreements'.

In the preamble there is also reference to a reaffirmation of principle 15 of the Rio declaration, which is the precautionary principle, albeit in a vaguer sense than the environmentalists perhaps initially desired. This is restated in the objective in Article 1. It is also present in Article 11(8), where it says, in effect, that lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of LMOs on the conservation and sustainable use of biodiversity shall not be used effectively as a means of preventing imports.

The problem with all this, as I see it, is that if you sign the biosafety protocol you subordinate yourself to it and you prevent yourself from being able to use clear rules, as adumbrated at the WTO, as a means of deciding what things can and cannot be traded. Already there have been moves to impute the precautionary principle into the Codex Alimentarius. So, even if you do not sign the biosafety protocol, you are at risk of having the precautionary principle imputed into international trade laws by the backdoor.

All this means that the clarity of international trade law is being undermined, which will reduce incentives to invest in new technologies. In this case, if you sign the biosafety protocol, you will reduce the incentive to invest in genetically modified organisms because you do not know whether you are going to be able to trade in them. This more broadly undermines scientific development. So any country that signs the biosafety protocol is accepting that technology should be restricted on the basis of poor science, and this will lead any country that signs it down the road to a less scientifically advanced nation. That is the main lesson that can be learnt.

My fear with regard to environmentalists is that they are really ignoring many benefits from GMOs, and they are doing this for their own ends. They are trying to promote their capacity to control international trade and they are trying to promote themselves. In the mid-1990s, environmental groups around the world suffered setbacks. They had reduced numbers of people signing up to them. People's concerns shifted at that time to other issues, especially consumer issues. We noticed in Europe the lobbying against GMOs from 1996 onwards shifted away from the environmental concerns towards consumer health concerns, in spite of the fact that there was no evidence whatsoever of any adverse consumer impacts from this technology. This was being done by environmental groups.

I stress that this is absolute cynicism on the part of these groups. I would like to end by pointing out that, of course, GMOs offer the potential for dealing with more saline conditions, drier conditions and so on. In that regard, they will enable countries to deal with climate change. Moreover, we already know that they can produce higher yields, which reduces pressure on biodiversity. The greatest pressure on biodiversity is from habitat encroachment. Again, environmental organisations that call for absolute restrictions on GMOs, ignore all the potential and real environmental benefits. I really urge you not to sign an agreement which just puts those organisations into further positions of power over us.

CHAIR—Mr Howard, do you want to finish off and make a statement?

Mr Howard—Yes. Less than two weeks ago the agriculture council of the European Union adopted the EU's negotiating proposal for the WTO agriculture talks. This is what it says:

> ... the need to use specific measures, including the precautionary principle, whenever there are concerns about the food safety of products should be taken into account.

So the official negotiating objective of the EU in the WTO is to bring the precautionary principle into trade agreements. The biosafety protocol is the first multilateral environmental agreement with the precautionary principles in its operative text. If Australia becomes a party to the protocol, we would be handing the European Union an instrument that could potentially be used against us. It is tough enough out there for Australian farmers without our own government giving the protectionist agricultural countries a free kick.

The precautionary principle appeals to the commonsense idea that it is better to be safe than sorry. In practice, it biases against new technology and it asks the impossible question that a technology be demonstrated to be without risk. There is also the potential for rent seeking. When the EU banned the importation of beef produced with growth hormones, it was hailed as an important victory for consumers and the environment, but it also served another important EU objective: to reduce community beef stockpiles and subsidy payments.

A further opportunity for the protocol to become a useful instrument for protectionists is provided in article 26. The article allows parties to take into account socioeconomic considerations when making import decisions. As the Productivity Commission points out, no definition of socioeconomic considerations is given. Again, these provisions could give the Europeans wide discretion to promote their so-called multifunctionality agenda in the WTO. The EU Commissioner for Agriculture, Franz Fischler, has said recently:

> I want to make it crystal clear to our trading partners that the multifunctional aspect of the EU's agriculture policy ... is not open for negotiation.

The National Farmers Federation is strongly opposed to Australia signing, let alone ratifying, the biosafety protocol. This protocol will impede trade and create opportunities for protectionist importers to impose further restrictions on trade. The protocol creates challenges to the authority and standing of the WTO. Acceptance of the provisions of the protocol could severely damage Australia's agricultural export industries. NFF recommends that the Joint Standing Committee on Treaties launch an immediate formal inquiry into the biosafety protocol.

Mr ADAMS—An inquiry into what by whom?

Mr Howard—By your committee.

Mr ADAMS—Right. What do you mean by the words 'the actual restrictions if we sign this protocol with the WTO'? Can you broadly outline that a little?

Mr Howard—There are wide discretionary powers that are difficult to define, for example the precautionary principle. The so-called socioeconomic considerations are not defined, and this would give countries an instrument that gives them wide powers to block trade.

Mr ADAMS—I did question one of the other negotiating groups that was before us in relation to that, because the definition of the precautionary principle was not clear. Has it somewhat changed from how we have seen it in other documentation? I could not get a clear answer from them.

Mr Morris—There is no definition of the precautionary principle explicitly given in the Cartagena protocol. But it does refer to the Rio declaration, which is, essentially, that the lack of scientific certainty shall not be an excuse for cost-effective action to be taken to prevent potential environmental threats. It is very vague. It allows for almost any action to be taken in regard to almost anything.

Mr ADAMS—But if you were trying to look for a definition, wouldn't you come back to the Rio definition?

Mr Morris—The Rio definition is what is referred to twice in the protocol.

CHAIR—With respect, I think they have changed it to make it even vaguer, have they not? Article 10.6 seems to say that, first of all, they have left out 'cost-effective' and instead of 'where there is the threat of serious harm', it now refers to 'potential adverse effects' on—

Mr Morris—It does not actually say that that is, in fact, a definition of precautionary principle, but it is a further elaboration of that concept, in a sense, in a more restrictive way because it is not referring to 'cost-effective', as you say. It is more dangerous.

Mrs DE-ANNE KELLY—Thank you gentlemen for your submission. Mr Howard, could you elaborate on the overlap and the legal opinion that you got?

Mr Howard—The legal opinion was that no government could have any confidence that its WTO rights would be protected if we signed the protocol. The point is that holding an importing country to its obligations under the WTO would be difficult if we were a party to the protocol.

Mrs DE-ANNE KELLY—Did you find that DFAT disagreed with this opinion?

Mr Howard—That is right. They have dismissed our arguments.

Mrs DE-ANNE KELLY—Are they supportive of the Cartagena protocol?

Mr Howard—Their official position is that they will be seeking further consultation with industry before they make a decision on signing.

Mrs DE-ANNE KELLY—They have written a paper as well that you have referred to.

Mr Howard—That is the one I was referring to in the discussion paper.

Mrs DE-ANNE KELLY—Yes. As far as the NFF can determine, that paper is incorrect. In fact, it contains errors.

Mr Howard—Yes. We are going to seek further legal advice on it on which we would like to make a submission to the committee in the context of an inquiry.

Mrs DE-ANNE KELLY—Yes. That is a fairly serious case. If the Department of Foreign Affairs and Trade—and, after all, their only job is ensuring that we are able to trade, which means exports because surely they are not there to increase imports; they are there to increase exports—have made such a fundamental error, particularly with regard to agriculture where, of course, we are dependent—and certainly in the industry where I live 82 per cent of what we produce is exported—it is a fairly serious mistake. Is that the view of the NFF?

Mr Howard—It is a great concern to us. We would like to know how this happened.

Mrs DE-ANNE KELLY—Would the NFF have any views on why it may have happened?

Mr Howard—We do not know how the official negotiating team was put together or what advice they sought from Canberra at what point during the negotiations, but those questions should be asked.

Mrs DE-ANNE KELLY—Yes, indeed they should. The reality is that trade is sometimes at odds with the department of environment and the Department of Foreign Affairs. They should not be but, if one is focused directly on trade, obviously Foreign Affairs has a wider territory, if you like, a wider brief and good relations with all of our neighbours, but sometimes trade has to have a harder edge, doesn't it? You really have to be focused on Australia's national interest and trading interest. Do you think that there is potential for conflict between the two at times, or does the NFF see that as perhaps a difficulty?

Mr Howard—Because of our industry's dependence on trade, we believe that our trade officials should be single focused and single minded in pursuing our trade objectives. There is always the danger with a big mega department that they will seek to come to a consensus position that takes into account wider considerations. If we had, for example, something like the United States trade representative's office that worked fiercely for US trade interests, did not take into account the wider considerations and, in fact, went to war for trade, that would be a good outcome for Australia's agricultural trade.

Mr ADAMS—You do not mean literally go to war?

CHAIR—No, metaphorically speaking.

Mr Howard—Interdepartmental.

Senator TCHEN—I am not sure who I should direct this question to, but the objective of this Cartagena protocol is related fairly specifically to the trade in living modified organisms. Given that in fact very little of our agricultural trade is actually dealing with living organisms, except for live sheep, live cattle and so on, does this protocol actually have that much impact on Australian agricultural export?

Mr Howard—It includes seeds, plants and materials for food, feed and further processing. It divides it into two categories: products that are going to be released into the environment—for

example, live animals—and then products for further processing for food and feed. Both of them come under the protocol, and the precautionary principle applies to both. Right now, you are right, we do not have a large commitment to biotechnology in a commercial sense. However, hundreds of millions of dollars of research is going into new products produced with modern biotechnology for Australian agriculture. Our attitude is that we cannot bury our heads in the sand over this. The productivity improvements that this is going to bring in the future means that, when it is to our best advantage to release them, Australia will be in that position.

Senator TCHEN—But those products could be exported in a non-living state, couldn't they?

Mr Howard—Some of them could be, some may not.

Senator TCHEN—One might argue that, for Australia's balance of trade, it is better to only export value added product—in other words, process them in Australia first before we export them. That is better for Australia, isn't it?

Mr Howard—Not necessarily.

Senator TCHEN—It might encourage us into that type of exporting.

Mr Howard—In some industries we are competitive at further processing, in others we are not. For example, we are highly competitive in raw sugar exports and not in refined sugar. Up and down the Queensland coast we are the most efficient traders, handlers and distributors of raw sugar, so value adding is not to our advantage in that industry.

Senator TCHEN—Perhaps Mr Morris might be best placed to answer this question: have your legal advisers looked into the possible implication that this protocol is more restrictive than in the question I put to you earlier? A living organism is defined in the protocol as something which is capable of transferring and replicating genetic material. Basically that could extend to all sorts of things, because as long as you have viable DNA that could be described under that.

Mr Morris—If, for example, a human being has been subject to gene splicing for some therapeutic reason, they would be subject to the biosafety protocol in principle, and that is obviously taking it to an extreme. But you might want to think of things like wheat, which is capable of transmitting its genes. In the very near future, there is going to be a wonderful GM wheat which is high in thioredoxin and therefore is beneficial to those people who are allergic to glutenin, so people with coeliac disease would be able to eat this wheat. Yet it would be subject to the biosafety protocol, so if countries restricted imports of it that would be harmful to their people as well as to your exporters. But, yes, I think it could be very broadly construed.

Senator TCHEN—In the legal opinion that you received, did you look into the possibility that, even though at this stage the protocol specifies that its objective only relates to living modified organisms, there is a likelihood that the protocol, once in place, might be extended to all organisms, whether living or not? That would be a greater threat to agricultural exports.

Mr Morris—Clearly there was a push by environmental groups to try and have it as broad as possible. It would be feasible in the future to make amendments, but that is obviously subject to negotiation at the international level. I do not want to make any hypothetical comment.

CHAIR—Can you just clarify this: where there has been clear ambiguity in this instrument as to whether or not Australia's rights under the WTO regime have been diminished or preserved, the department of trade, as part of the Department of Foreign Affairs and Trade, came down on the side of diminishing those rights, according to Professor Waincymer's opinion. Yes or no?

Mr Howard—That is right. They joined the consensus on the text in Montreal without expressing a reservation about our trade interests.

CHAIR—Thank you.

Resolved (on motion by Mr Adams):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 12.24 p.m.