

The Dangers of Secret Treaty-Making

The Biosafety Protocol as a Case Study

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Of all the public processes involving government, treaty-making and the treaty process are perhaps the most open to abuse because they are usually hidden from public view. This problem is of utmost importance, because the implications of international treaties are profound and far-reaching.

The story of the Cartagena Protocol—better known as the Biosafety Protocol to the Convention on Biodiversity—illustrates how a political movement, advancing a weak and flawed proposition, seeks to achieve its ends by trying to establish a rival set of rules designed to subvert an existing key international institution—in this case, the WTO—and to compromise Australia's sovereignty along the way.

This process can be seen working in the common agenda of what I will call the 'Camembert Alliance', made up of protectionist governments (chiefly European), a group of environmentalists, neo-pagans, wealthy social engineers and NGOs hostile to Australia's national interests. The Camembert Alliance is out to set up the 'New Rules'. They do this in two ways:

1. by legitimizing the use of trade sanctions against non-consenting third parties in order to impose domestic policies extra-territorially;
2. by expanding the scope of the Precautionary Principle to impose impossible burdens upon exporters and impose the Alliance's domestic political agenda.

The Camembert Alliance uses three grounds on which to advance the New Rules:

- environmental protection
- labour standards
- human rights

Biotechnology (in the form of genetically modified living organisms or LMOs) is the subject of the Cartagena Protocol, which aims at

... ensuring an adequate level of protection in the field of the safe transfer, handling and use of LMOs resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity ... [Article 1 of the Protocol]

This language is typical of modern treaty-making: it is vague enough to allow all sorts of villainy to be done and it is a charter for malicious manipulation. Without any evidence of harm to human health from LMOs, a group of unelected and anonymous officials, acting in concert with NGOs hostile to Australia's interests, have negotiated a form of words that presupposes grave danger to human health. This then creates its own logic for expanding the Precautionary Principle to legitimize their attack on exporting nations.

Imagine how the same people would have dealt with the advent of the motor car late last century. There would have been an outcry over emissions, noise, speed, and the possible effects of electrical devices within the car body. It would have been denounced, restricted and its

development stymied. This tactic was in fact tried with the early version of the Sony Walkman. Sony's competitors conscripted what the Japanese call *hyoronka*, or learned commentators (usually retired bureaucrats or company executives), who attempted to block the Walkman by denouncing it as unsafe, alleging that, by listening to music through its headphones, thousands of young Japanese would die as they crossed the roads oblivious to oncoming traffic. Happily, the Japanese Government respected the rights of its own citizens.

Negotiations on the Biosafety Protocol, begun in 1995, have not been so happy. Australia was part of the Miami Group—an informal caucus of agricultural exporting nations including Argentina, Canada, Chile, Uruguay and the US. This group was opposed by the so-called Like-Minded Group of developing nations and the EU, which sought to advance its own trade and environmental agenda.

Throughout 1999, Australia held the line against the EU and its protectionist and NGO allies. Strangely though—and this remains unexplained to an angry Government backbench—in January this year, Australia capitulated to the EU. There is some suggestion that the US backed down first—probably due to Al Gore's election campaign strategy. But why the Australian delegation did not hold out and maintain its opposition to the final text is a mystery. ▶

There are four serious dangers lurking within the Cartagena Protocol.

I. ITS RELATIONSHIP TO THE WTO RULES

The Camembert Alliance is seeking to establish the New Rules by creating clear contradictions in the Preamble to the Protocol:

- the penultimate recital in the document says:
... this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements ...
- Yet, the final recital says:
... the above recital is not intended to subordinate this Protocol to other international agreements.

Clearly, this is a surreptitious attempt to set up a parallel set of rules to the WTO. The Camembert Alliance will argue that the WTO deals with trade, and the Protocol deals with biodiversity: hence, different rules are permissible. But there is a dangerous phrase used in this context: that trade and environmental treaties should be 'mutually supportive'. This means simply that the Alliance can ignore the rules-based regime of the WTO while it uses trade sanctions to enforce domestic policy on non-consenting third parties.

If taken to its logical end, one could argue that cars, chemicals or oil 'may have an adverse effect on ... biodiversity' (whatever that means) and so should be the next target of regulation. A Greenpeace press release of 23 March 2000 exposes this attempt to merge the two areas and make the New Rules dominant:

... trade-related measures to protect the environment could be useful for ... catalysing international action ...

So, in Australia we should boycott all WA products until they fix their salinity problems? Or boycott Hunter Valley wines until they stop coal mining?

We must be blunt about all of

this. Voluntary boycotts are an exercise in personal freedom; legal sanctions against innocent third parties (such as Australian farmers) are an abuse of power. Dare I say it, an abuse of human rights, possibly in direct contravention of Article 6 of the International Covenant on Economic, Social, and Cultural Rights.

2. EXPANSION OF THE PRECAUTIONARY PRINCIPLE

The Precautionary Principle is best expressed in a passage from the Greenpeace Website:

'[It] ... allows for preventative measures to be taken where there is a threat of harm to biological diversity, including human health, even where there is no scientific certainty, consensus, or proof of the cause of the harm ...'

Clearly, this so-called principle gives scope for sanctions to be employed against an innocent party without any proof. It is an extraordinary notion. If applied in civil, let alone criminal law, there would be

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an outcry. It should be pointed out that the actions of the Chinese Government in arresting dissidents and sending them to the Xinjiang gulag represent an application of the same principle—that is, no due process.

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ing the Precautionary Principle as a stalking horse for surreptitious, undemocratic social change. And the strange thing is that almost nobody is raising their voice in protest.

In the Cartagena Protocol, the fourth recital reaffirms the precautionary principle as expressed in Article 15 of the Rio Declaration. Yet it goes much further.

The Rio Declaration states:

'...Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.

But, the Cartagena Protocol, in Article 1 and Article 10(6) expands on this:

Article 1 '... modern biotechnology that *may have adverse effects* on the conservation and sustainable use of biological diversity...' Article 10(6): '... Lack of scientific certainty ... regarding the extent of the potential adverse effects of a LMO ...'

What is worse is that the EU, in its Communication of 2 February this year on the precautionary principle, cites this expanded definition (as yet, unsigned!) as authoritative. Indeed, page 4 of the Communication states clearly that exercising discretion according to the precautionary principle is 'an eminently *political* responsibility'.

But things actually get worse in the Protocol. Article 26 allows 'socio-economic considerations' (whatever they are) to be a factor in decision-making, qualified by the phrase '... consistent with their international obligations ...'

However, the preamble to the Protocol is not subordinate to any other agreement. So wherefore the WTO Rules? This expansion of protectionist legitimacy must accordingly be paramount to the WTO, more so because the new 'socio-economic' ground is specifically spelt out and the qualification expressed in general terms. In law, *generalia*

specificat non derogant (the specific has primacy over the general).

Bluntly described, this 'socio-economic' ground is code for what the Japanese Government has called the 'multi-functionality' of agriculture, *takinou-sei*. The argument has it that agriculture (no matter how inefficient) serves some purpose in buttressing society against undefined threats. In other words, it protects inefficient farmers.

3. SEPARATE APPEAL MECHANISM

In Article 34, the Protocol establishes no dispute-resolution mechanism. This might sound bizarre, but it's true. Suspiciously, it leaves it to a conference of the Parties to consider and approve measures to promote compliance. If this doesn't happen, presumably the mechanism in the Convention will apply, which involves an appeal to the International Court of Justice if and only if the Parties agree, and only conciliation if they don't.

What should be noted is the complete by-passing of the WTO disputes mechanism. Clearly, this regime is established to replace the WTO rules.

4. APPLICATION TO NON-PARTIES

The basic rule of treaty law is that a treaty cannot bind those who are not a party to it; it cannot create third-party rights or obligations (Article 34, Vienna Convention on Treaties). If a treaty is customary international law, then it can apply to third parties, but this is uncommon. Environmental treaties are *not* customary international law, no matter how fervent the support in either the news media or the cappuccino ghettos. They do not yet represent regularities in the actual behaviour of states.

The Camembert Alliance will soon claim that the Protocol is customary international law because the EU and some other large nations have signed it. This is a blatant denial of the sovereignty of any nation

who refuses to sign it—a sort of 'l'état, c'est moi' attitude. In the last instance they will probably claim that its principles stem from 'funda-

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mental notions of human rights' and hence are non-negotiable.

In the Protocol, Article 24(1) makes the leap into extra-territoriality: '... transboundary movements of LMOs between Parties and non-parties shall be consistent with the objective of this Protocol ...' So much for the Vienna Convention. What this means is simple: the bigger we are, the less heed we may take of the established law. Where is the outcry from the supporters of the oppressed in the world? The strangest things happen these days: people who press for objective standards to be applied to bad governments like that of China, remain silent when it comes to checking the worst impulses of so-called civilized governments.

Clearly, in the currency of the modern Internet-driven NGO world, a Beijing artist or a Tibetan monk is worth 50 Australian farmers these days.

THE THIN END OF THE WEDGE

What Australia should really be worried about is what the Camembert Alliance will do next. Having succeeded in debasing treaty law with a so-called environmental protection regime in the Cartagena Protocol,

the next step is clearly an addition to the body of treaties using amorphous notions of human rights as grounds for trade sanctions.

In his election campaign, Al Gore will promise both this and a labour standards ground as bait for organized labour and Green support. If he is elected, we will have a real battle on our hands.

As a result of a number of Government backbench MPs in Canberra becoming aware of what's been going on with the Cartagena Protocol, a request was made of the Prime Minister that, henceforth, all treaties will be presented to the Government party room *before* they are signed. So far as I know, this is the most transparent treaty-making process in the world.

As for Australia's position, be prepared for the argument that says: 'we have to sign it to be a part of it. It's our only chance to reform it from within'. This is, of course, a defeatist position. It also masks a desire to join the effort to restrict freedom.

What can we do? First, we have to face the fact that arguing against the global green NGO movement is very much a David and Goliath struggle. If you recall, David was laughed at when he suggested he could beat Goliath. But he just walked down to the brook, picked up five smooth stones, and hurled one right into Goliath's forehead. Then he cut his head off. The Philistines fled.

Second, we need to stand firm. The Cartagena Protocol is a terrible treaty. Far from arguing about whether or not to sign it, the Australian Government ought to be busy organizing a campaign to destroy it. We need those five smooth stones. We need only the courage to put forth our arguments.

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This article is an edited version of a speech given at a recent IPA Dialogue.

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