

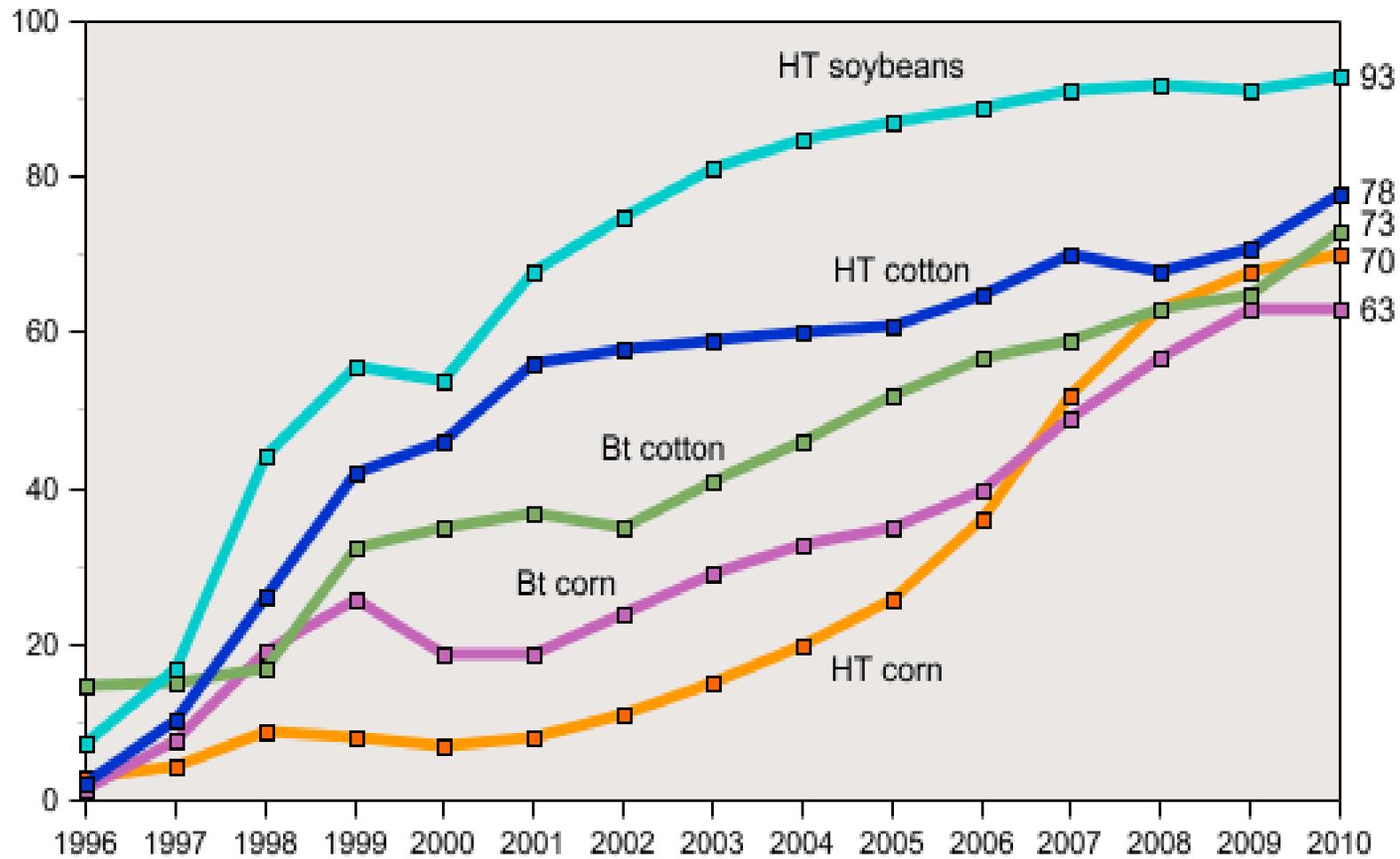
# GMO's and the WTO: Statesmanship and the Precautionary Principle

Paul J. Heald

Professor, University of Illinois College of Law  
Professorial Fellow, Centre for Intellectual  
Property Law and Management, Bournemouth  
University

## Rapid growth in adoption of genetically engineered crops continues in the U.S.

Percent of acres





# The Precautionary Principle

“The **precautionary principle** . . . states that if an action or policy has a suspected risk of causing harm to the public or to the environment, in the absence of scientific consensus that the action or policy is harmful, the burden of proof that it is *not* harmful falls on those taking the action.”

## EC—Approval and Marketing of Biotech Products, DS291-93 (2005)

- “Regarding EC-level measures, the United States asserted that the **moratorium** applied by the **EC** since October 1998 on the **approval** of biotech products has restricted imports of agricultural and food products from the United States.”
- “Regarding member State-level measures, the United States asserted that a number of **EC member States** maintain national marketing and **import bans** on biotech products even though those products have already been approved by the EC for import and marketing in the EC.”
- Interesting clash between EU and Member States.

# France bans GM corn amid mass US protests against Monsanto

17Mar2012

By radyananda



French activists rip open bags of MON 810, a variety of Monsanto's genetically modified corn after entering a Monsanto storehouse. (AFP Photo/Eric Cabanis)

By Rady Ananda

Global Research

Amid mass US protests against Monsanto yesterday, France imposed a temporary moratorium on the planting of Monsanto's genetically modified corn, MON810.

"Due to the proximity of the planting season," said Agriculture Minister Bruno Le Maire along with Francois Fillon, Minister for Ecology and Sustainable Development, in a press release on Friday authorities "decided to take a precautionary measure to temporarily prohibit the cultivation of maize MON810 on the national territory to protect the environment."

All prior plantings of MON810, trade name YieldGard, become illegal on March 20.

# Agreement on Sanitary and Phytosanitary Measures: Arts 2 & 3

- “Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is **based on scientific principles** and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5 [allowing for short term measures in the absence of scientific proof]”
- “Members shall ensure that their sanitary . . . measures do **not** arbitrarily or unjustifiably **discriminate** between Members **where** identical or **similar conditions prevail** . . . [no] disguised restriction[s] on international trade.”

# SPM Agreement, Art 5

- 1. Members shall ensure that their sanitary or phytosanitary measures are based on an **assessment** . . . of the **risks** to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations [e.g. *Codex Alimentarius*].
- 2. In the assessment of risks, Members shall take into account available **scientific evidence** . . .
- 3. In assessing the risk to animal or plant life or health and determining the measure to be applied . . . Members shall take into account . . . the potential damage in terms of loss of production or sales in the event of the entry, establishment or spread of a pest or disease; the costs of control or eradication in the territory of the importing Member; and the relative cost-effectiveness of alternative approaches to limiting risks.
- 4. Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of **minimizing negative trade effects**.

## SPM, Arts 7, 8, & Annex C

- “Members shall notify changes in their sanitary or phytosanitary measures and **shall provide information** on their sanitary or phytosanitary measures in accordance with the provisions of Annex B.”
- “Members shall observe the provisions of Annex C in . . . **approval procedures** . . . for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are **not inconsistent** with the provisions of this Agreement.”
- “Members shall ensure, with respect to any procedure to check and ensure the fulfilment of sanitary or phytosanitary measures, that:(a) such **procedures are undertaken and completed without undue delay** and in no less favourable manner for imported products than for like domestic products”

## Panel Opinion: EU Unwritten Moratorium

“We have found that there was undue delay in the completion of the approval procedure with respect to 24 of the 27 relevant products. We therefore concluded that, in relation to the approval procedures concerning these 24 products, the European Communities has breached its obligations under Article 8 and Annex C of the *SPS Agreement*.”

## Panel Opinion: Safeguard Measures by Some Member States in the EU

- “Although some of the member States did provide scientific studies, in no case did they provide an assessment of the risks to human health and/or the environment meeting the requirements of the *SPS Agreement* . . . each of the safeguard measures taken by the relevant member States fails to meet the obligations of the European Communities under the *SPS Agreement*.”

## Key Non-Findings of the Panel!

- “the Panel did *not* examine:
- whether biotech products in general are safe or not.
- whether the biotech products at issue in this dispute are “like” their conventional counterparts. Although this claim was made by the Complaining Parties (*i.e.*, the United States, Canada and Argentina) in relation to some aspects of their complaints, the Panel did not find it necessary to address those aspects of the complaints.”

## Key Non-Findings of the Panel!

- “the Panel did *not* examine . . .
- whether the European Communities has a right to require the pre-marketing approval of biotech products. This was not raised by the Complaining Parties.
- whether the European Communities' approval procedures as established by Directive 90/220, Directive 2001/18 and Regulation 258/97, which provide for a product-by-product assessment requiring scientific consideration of various potential risks, are consistent with the European Communities' obligations under the WTO agreements.
- the conclusions of the relevant EC scientific committees regarding the safety evaluation of specific biotech products.”

# WTO Avoidance Strategy

- Hands off the precautionary principle
- Tread lightly on EU federalism disputes, but give the EU some ammunition against truculent members.
- Avoid being the world judge on disputed environmental issues: facilitate, arbitrate, and mediate . . .
- Distribute decision making to a variety of public and private institutions
- Above all, maintain institutional credibility.

## Present Status of Dispute

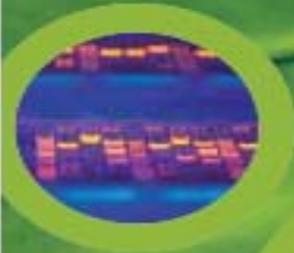
- “In accordance with the parties' joint request, the Arbitrator suspended the arbitration proceedings from 18 February 2008 until the United States requests their resumption under the circumstances agreed between the parties on 14 January 2008.”
- Argentina and Canada essentially settle with the EU by agreeing to a series of bi-lateral talks.

# Tempest in a Teapot?

- Restriction on BHT injected beef is a similar controversy with less troubling economic impact on US farmers.
- Contamination of US grain distribution and transportation systems makes it difficult for large non-GMO growers to get grain cheaply to EU.
- Sellers of processed goods should have less of a problem complying to restrictive regulation.
- Corn a special problem, given pollen drift, which is a non-issue with soybeans.
- Future response of EU?



EUROPEAN COMMISSION / European Research Area / Food, Agriculture & Fisheries & Biotechnology



## A decade of EU-funded GMO research

(2001 - 2010)

## “A Decade of EU-Funded GMO Research”: Environmental Risk

- Ties GMO research to agricultural solutions to global warming and lessen reliance on fossil fuels. Anti-GMO = Pro-Global Warming!
- Reaffirms the pre-cautionary principle.
- Bio-Economy key to economic competitiveness, but also reducing hunger and reliance on pesticides and fertilizer.
- GMO's not “per se” more risky.

## “A Decade of EU-Funded GMO Research” Environmental Risk

- “Now, after 25 years of field trials without evidence of harm, fears continue to trigger the Precautionary Principle. But Europeans need to abandon this knowingly one-sided stance and strike a balance between the advantages and disadvantages of the technology on the basis of scientifically sound risk assessment analysis.”

## “A Decade of EU-Funded GMO Research” Food Security

- More cautious endorsement.
- Still pro-GMO, with admitted inability to say no risks.
- Some ammunition here for targeted application of the precautionary principle.
- Conclusion plays down concerns that EU consumers are alleged to hold.

# Federalism in the EU

- EU v. Member States, directly in opposition . . . How to find a compromise?
- The Panel Opinion creates space . . . withholding judgment on key issues allows for continued negotiation . . .

# Movement . . .

The debate moves to labeling and an organic foods compromise with the US. Thanks, Jim Chen!

The June 2012 organic foods compromise is real politik (not philosophical) approach that maximizes information and facilitates the choices of even irrational consumers. Economics does not care if preferences are irrational.

## Historic Signing Finalizes Organic Equivalence Arrangement Between EU and U.S.



*The world's two largest markets for organic food expand organic market access*

NUREMBERG, Germany and WASHINGTON, D.C., Feb. 15, 2012 /PRNewswire-USNewswire/ -- At a press event today at BioFach Germany, European Commissioner Dacian Ciolos for the European Union's (EU) Agriculture and Rural Development and Deputy Secretary Kathleen Merrigan of the U.S. Department of Agriculture announced the signing of an organic equivalence arrangement between the world's two largest markets for organic food. Under the proposed arrangement, the EU and United States will work together to promote strong organic programs, protect organic standards, enhance cooperation, and facilitate trade in organic products.

(Photo: <http://photos.prnewswire.com/prmh/20120215/DC53925>)



## Nod to Greg Shaffer . . .

“WTO judicial interpretive choices allocate authority for addressing policy concerns to alternative institutional processes, including market, political, administrative, and judicial processes at different levels of social organization, from the local to the global. These choices are particularly important in a pluralist world involving constituencies with different interests, priorities, perceptions, and abilities to be heard.”

- *Gregory Shaffer, A STRUCTURAL THEORY OF WTO DISPUTE SETTLEMENT: WHY INSTITUTIONAL CHOICE LIES AT THE CENTER OF THE GMO CASE, 41 Int'l Law & Politics 1, 4 (2008)*