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### **When Cooperation Fails: The International Law and Politics of Genetically Modified Foods**

by Mark A. Pollack and Gregory C. Shaffer  
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The advent of genetic engineering in agriculture and in the food industry some 20 years ago induced one of the most complex and difficult problems in transatlantic relations between the United States and the European Union. While regulation and admission of genetically modified organisms (GMOs) was largely based upon scientific assessment and product liability in the United States, Europeans developed a more skeptical approach, based upon a combination of scientific, economic, and social considerations undertaken within a politically defined process of precautionary risk assessment and strict rules of liability. Resulting restrictions of market access for US foodstuffs to the European market induced major tensions and conflict, which have yet to be resolved. It is a case where efforts at transatlantic cooperation failed, and it is a story the authors of this book tell in great detail. The case study on trade issues in agricultural biotechnology offers a fascinating account of regulatory competition between the globe's leading regulators, and efforts to resolve it by means of negotiations and dispute settlement.

The book, however, is more than an account. It is, at the same time, an effort to address the story both from the point of view of international relations theory and of

international law. It is one of the first efforts to combine the two disciplines in addressing a particular problem, and the authors should be praised for this. Combining the two perspectives allowed the asking of new types of questions and resulted in new modes of analysis, for example when WTO dispute settlement decisions are analyzed in terms of allocation of powers. The theoretical framework is informed, on the one hand, by historical institutionalist theory and path dependence (Pierson, 2000, 2004). Once a particular regulatory avenue is taken, it is difficult to change underlying principles (pp. 77–80). It is informed by the two-level games model (Putnam, 1988), interlocking the domestic and international arenas of negotiations (pp. 80–83). The Habermasian theory of deliberation versus bargaining is tested in the field. On the other hand, the legal analysis of the book is largely informed, without saying so, by the traditions of American legal realism, strongly emphasizing the background and context and the role of legal actors. Fragmentation of international law is a constant theme in the book, and the interaction of what authors call soft and hard law amounts to a major theme. The blending of political science and legal theory results in a strongly analytical and extensive, highly detailed piece of work. Within this theoretical framework, the story is told: background, narrative history of how regimes and treaties came about, the role of international organizations, and analysis of case law, in particular the 2006 *EC – GMO* case. The book does not offer strong ideas on how to move forward. It concludes with five lessons: (i) the transatlantic GMO dispute does not represent a deep civilizational divide, but is real and deeply entrenched; (ii) expectations as to deliberate decision-making need to be tempered; (iii) multilateral regimes can assist States to cooperate, but are hampered by dual challenges of distributive conflicts and regime complexes; (iv) international pressures have some effect, but they are limited by path-dependent domestic regulatory systems; and (v) WTO dispute settlement cannot settle the conflict, but assist in managing it, clarifying rights and obligations. These are not bold and far-sighted propositions, and if the reader expects them in this analytical book, he or she will be slightly disappointed. But these insights are well founded, and need to be taken into account in developing such ideas, and its methodological and analytical insights are of equal interest to other regulatory areas.

The book addresses its topic in seven chapters. Following an introduction and summary in Chapter 1, it sets out the diverging domestic regimes in the EU and the US in Chapter 2. Largely failed efforts to bridge the diverging regulatory regimes by means of international cooperation and networks are described in Chapter 3. Of particular interest here is that these efforts were often seen as being in vain at the outset and only undertaken ‘for politics to smooth things over’ (p. 105). Chapter 4 is at the heart of the book. It exposes the topic to the Habermasian distinction of deliberation and bargaining, and finds that deliberative efforts to find common ground, as opposed to interest-driven bargaining, can only be found at the scientific and technical levels, while efforts to export regulatory paths and risk management are clearly dominated by interests (pp. 136, 174/175). The chapter offers interesting insights into international relations theory and adds further doubts as to whether the distinctions of deliberation versus bargaining (often invoked in challenging the legitimacy of the WTO) stand the test in reality. Likewise, the case study shows strong limits to game theory in the field. The authors find that while both the US and the EU sought to avoid a trade war, the choice of an international regime was fraught with distributive implications, since ‘either side

would face substantial technical, economic and political costs in moving from its preferred regulatory framework toward that of the other side' (p. 125). Given these constraints, the relationship has been rather confrontational. Moreover, it is situated in a world of incoherent international law. The chapter depicts in detail the role and function of different international bodies and organizations and how their interaction may create inconsistencies (pp. 136–176). Among them, the relationship of the WTO SPS Agreement and the Codex Alimentarius is the most interesting one. The authors find that the linkage of international foods standards to the binding SPS Agreement has hardened the soft law of the Codex while softening the hard law of the WTO (pp. 6, 164–174). Chapter 5 turns to WTO dispute settlement and analyses the panel's findings in *EC–Biotech*, adopted in 2006. The book offers a detailed account of the dispute and then turns to possible options for addressing the problems. The authors look at them from the point of view of allocating decision-making powers, either in deference to WTO Members, to markets stressing consumer information and choice, or to the international dispute settlement reviewing domestic procedures. These options are intellectually interesting and show to what extent treaty interpretation may be guided by result-orientation. The authors do not strongly trust WTO dispute settlement, and argue that firm decisions on the merits will challenge the authority in light of weak sociological legitimacy and the lack of recognized constitutional functions (pp. 205–234). Chapter 6 returns to diplomacy and policy making and offers an account of evolutions in the field since the year 2000. The authors mainly deal with the evolution of EU legislation and the difficult situation the Commission finds itself in, between US pressures and the diverse attitudes of Member States. While US regulations largely remained unchanged, they note an increasing awareness by the US public of animal genetics and the problem of cloning. Chapter 7 concludes with the five findings discussed above and turns to the implications of the US–EU tension on developing countries. They are caught between the two competing regimes and need to find their own way as the technology is of great importance to those in need, in particular in the coming era of climate change adaptation.

The book offers a comprehensive discussion of transatlantic relations in agricultural biotechnology regulation. Not all of the pertinent regulatory issues in agricultural biotechnology are addressed in doing so. The debate on patenting life forms and agricultural products and other related issues of intellectual property, such as the disclosure of origin and the protection of traditional knowledge, all of which closely relate to biotechnology, are not included in the study. The same holds true for rules of civil liability which exert a strong influence on investment in responding to risks. These standards are mainly found in domestic law and have not been the subject of EC law and of international negotiations, except for protracted efforts within the Convention on Biodiversity. These aspects also indicate that a complete analysis cannot do without looking closely into national legislation on GMOs in the European Union and the literature produced. This may well exceed the possibilities of a single book which already amounts to some 440 pages. But in the end, EU regulations cannot be understood and explained without this complex and diverse background of national law and the diverging philosophies implemented. The same holds true for attitudes to GMOs, which are not uniform throughout Europe. The book encourages further research to explain in detail why these differences truly exist in the first place. In relation to the US,

the authors discuss a number of reasons, mainly in the institutional and cultural contexts. They point out that Americans per se are not less risk averse, and that Europeans tend to accept higher risks in other fields, such as carcinogens, tobacco, and nuclear power, among others (p. 282). Indeed, European attitudes to genetic engineering in medicine are welcoming. You do not find the same objections and distrust. Attitudes to medicine do not differ from the US, and it is therefore impossible to make a case against genetic engineering per se on ethical grounds when it comes to consumption of agricultural GMOs. The case is different for cultivation, given the potential environmental spill-over effects in the relatively dense and varied geography of European agriculture and landscape. It will be necessary to ask to what extent that difference can be traced to agricultural protectionism and its path dependence. Distributional issues discussed, in the final analysis, relate less to regulatory schemes than to underlying interest in protecting production and markets. GM in agriculture tends to favor large-scale and competitive production, and thus exporters. To what extent are defensive attitudes linked to, and caused by, the long-term process of tariff reductions and removal of production subsidies in agriculture, and thus a means to revert to technical barriers to trade in order to keep cheaper and competitive products off the market? To what extent is it caused by protection of small farmers and the promotion of niche markets and specialties based upon organic farming? And why is it that biotechnology is not taught at European schools? Is the European public simply held hostage to sectoral interests in disguise?

These questions need to be asked urgently as biotechnology is likely to become more important in the era of climate change adaptation. For 20 years, the debate on agricultural biotechnology has been dominated by the transatlantic dispute. It needs to be freed from this heritage in order to work towards a common framework primarily based upon the needs of developing countries. They will be the prime users and beneficiaries of agricultural biotechnology. They need an appropriate framework to assess risk and benefits. Risk assessment and risk management need to be shaped at the international level in a manner to serve these needs in the first place. While the book remains pessimistic, given past experience, it offers most valuable information to those who seek to overcome the dispute in an emerging multi-polar world and work towards a global regime. The experience on deliberative practices in science encourages promoting a clear separation of risk assessment and risk management. While scientific risk assessment should be undertaken within a network of international institutions, risk management should be left to domestic government. It is here, and not in risk assessment, that non-scientific factors may be considered. In the end, the differences between the science-based US approach and the precautionary approach of Europe, as the authors depict them, may not be a fundamental but rather a methodological difference that can be overcome by appropriately shaping processes in domestic and international law. The book also encourages studying the topic in terms of multi-level governance and as a matter of allocating appropriate powers to appropriate levels. It is not a matter of uniformly addressing biotechnology in international law, but of identifying those elements that need regulation on this level in order to avoid unjustified barriers to access and trade.

In conclusion, the book shows the limits of diplomacy and international law in areas of deeply entrenched differences of perceptions and attitudes in a regulatory field. It

offers many of the elements that need to be taken into account in moving the matter forward in international law in coming years. It is an excellent piece of analytical research and highly recommended to all working in agricultural biotechnology regulation and beyond.

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## Bilateral and Regional Trade Agreements

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The recent proliferation of preferential trade agreements (PTAs) marks an important shift in global trade governance. It also raises a number of challenging questions of economics, international relations, and international law. What explains the sharp rise in these agreements? How do increasing numbers of PTAs affect the multilateral system? Which interests benefit, and which are disadvantaged, by the turn to PTAs?

A burgeoning literature examines these and related issues, and Simon Lester and Bryan Mercurio's *Bilateral and Regional Trade Agreements (BRTA)*, a two volume collection of edited papers, is a welcome addition to this scholarship. In this short review, I outline the structure of and some of the main arguments found in *BRTA*, and then briefly explore what this publication may signal with respect to scholarship on PTAs. My suggestion, in short, is that *BRTA* is useful not only in its own right, but also as an overview of the past, present, and future of thinking about PTAs.

The first volume of *BRTA*, subtitled 'Commentary and Analysis', consists of an introduction and sections that address (i) the economics and politics of PTAs; (ii) the relationships between PTAs and WTO and international law; and (iii) the treatment of specific trade policy issues, such as services and intellectual property, in various PTAs. The volume opens with chapters that address several of the enduring issues raised by PTAs. For example, Pravin Krishna's chapter provides a brief review of Viner's famous analysis of PTAs' ambiguous welfare effects, and then discusses more recent economic debates over PTAs, including whether it is possible to design a PTA that is necessarily welfare-improving.

Olivier Cattaneo's essay on the political economy of PTAs nicely compliments Krishna's economic review. Cattaneo reminds us that, as a historical matter, multilateralism is the exception rather than the rule. In claiming that both approaches reflect a balance between domestic political forces that favor liberalization and those