ECONOMIC INTERNATIONALIZATION AND COMPETITION POLICY: INTERNATIONAL AND DOMESTIC SOURCES OF TRANSATLANTIC COOPERATION

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Transatlantic competition relations have transitioned from a largely adversarial reliance on unilateral extraterritoriality to cooperative bilateralism. To explain this surprising transition to international cooperation, the dissertation introduces a cross-level approach that accounts for the influence of economic internationalization and the strategic interaction among various actors operating within causally significant domestic institutional environments. The findings suggest that self-interested competition regulators have driven transatlantic cooperation in competition policy, using their discretionary authority to structure policy coordination through three distinct processes: rule-making, implementation and exploratory institutional cooperation.

PREFACE

The following research project is not simply the result of an individual effort. As with most projects of this magnitude, a number of acknowledgments are more than necessary.

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This dissertation is dedicated to my parents, Linda and David Damro, without whose various unwavering forms of support this project would not have been possible. While I retain full responsibility for any errors, positive comments on the work that appears on the following pages should be directed toward these two wonderful people. Thanks, Mom and Dad.

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CHAPTER 1: Introduction

"I am proud to say that EU/US cooperation in [competition policy] has become something of a model for transatlantic cooperation generally."

Mario Monti, European Commissioner for Competition (2001, 2)

I. Why Care About Transatlantic Relations?

The transatlantic relationship is quite possibly the most important bilateral relationship in the world today.[1] Agreement between the European Union (EU) and the United States (US) often provides a basis for international action in a variety of policy areas that impact global security and economic relations.[2] Similarly, disagreement between the US and the EU often decreases the likelihood of action in a wide range of matters facing the international community.[3] Due to the centrality of this bilateral relationship in the international system, EU-US agreement and cooperation is frequently crucial for facilitating the development and design of new forms of international governance across multiple policy areas. Given the prominence of the transatlantic relationship in shaping international political decisions, scholarly investigations of the causes and consequences of cooperation between the EU and US are particularly useful for understanding the likelihood of cooperation and stability in the international system.

The current study identifies a policy area in which EU-US cooperation excels—competition policy—in order to explain the causes of international cooperation and to determine whether bilateral relations in this policy area can provide general insights for cooperation in other transatlantic and multilateral relations. Examinations of transatlantic cooperation in competition policy can be particularly informative for understanding the

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[1] In general, the current study uses the term "transatlantic relationship" in reference to relations between the United States (US) and the European Union (EU) as well as the individual member states of the EU. The term "EU-US relationship" is employed when discussing relations in which the US and the EU are the primary interlocutors (e.g., those conducted by the EU under Pillar I of the Maastricht Treaty).

[2] The term "European Community" is still legally correct when referring to activities that fall under the rubric of the Single Market (Pillar I), including competition policy. For simplicity, the current study refers to only the "European Union," regardless of whether the activity in question is legally subsumed under the competency of the European Community.

political, economic and legal dynamics of international relations more generally. Indeed, this case displays a useful synthesis of the political, economic and legal dynamics that motivate formal and informal efforts to enhance bilateral and multilateral governance. These dynamics are all the more important because they are occurring in a policy area that fundamentally organizes domestic economies but increasingly addresses cross-border activities.

Since the US issued its first antitrust law in 1890, competition policy has become an increasingly important regulatory tool for constructing and maintaining other domestic free market economies.[4] By prohibiting monopolistic and other anticompetitive business activities, competition policies are intended to create a level playing field among competitors and, ultimately, to determine opportunities and incentives for producers and consumers. Not surprisingly, the two largest free market economies, the US and the EU, rely heavily on domestic competition policies to prevent anticompetitive business activities in their respective markets. However, as foreign direct investment grows and firms and markets internationalize, anticompetitive activity based in multiple jurisdictions challenges the ability of purely domestic competition policies to ensure the "public good" of fair competition in their respective domestic markets.

One way in which states can overcome the challenges of economic internationalization is to pursue anticompetitive activity that originates in foreign jurisdictions by exercising their domestic competition policies extraterritorially. However, the extraterritorial exercise of domestic competition policies threatens the sovereignty of other jurisdictions and frequently results in international political disputes. For example, bilateral competition relations between the US and Europe historically have

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[3] Of course, EU-US agreement is not a prerequisite for international action. For example, in environmental policy, climate change negotiations provide a useful example of international action despite EU-US disagreement (Damro and Luaces-Méndez, forthcoming 2003).

[4] As Brittan notes "More than 80 countries have already enacted a competition law and at least 20 others are in the process of preparing competition legislation. More than 60% of competition laws came into effect in the last 10 years" (1999). See also Fox (2001), Klein (1999), Leary (2001, 1) and Monti (2001a). In relation to free market economies, "In the last several decades, more and more nations have come to recognize the value of competition as a tool for spurring innovation, economic growth, and the economic well-being of countries around the world. National industrial policies and other government interventions that constrain or order competition within markets have not wholly disappeared but are far less evident than they were even a decade ago" (ICPAC 2000, 33).

been largely adversarial affairs, characterized by a reliance on extraterritoriality and unilateral retaliation with countermeasures designed to protect national interests.[5]

Alternatively, states can enter into legally-binding international treaties to manage disputes that may arise from jurisdictional overlaps in competition matters. Such cooperative agreements could prevent the international political disputes that arise from extraterritoriality and unilateral countermeasures. Despite their potential utility, the US and EU have declined to negotiate and sign any treaties governing transatlantic competition relations. Rather, they have responded to the challenges of economic internationalization by enforcing their domestic competition policies in a more active and internationally-oriented fashion. The resulting jurisdictional overlaps threaten the sovereign interests of both the US and the EU and increase significantly the likelihood of transatlantic political disputes that can destabilize the international political economy.

In a surprising development given these circumstances, transatlantic cooperation in merger control—a central component of competition policy designed to prevent corporate mergers from significantly reducing competition—has increased considerably in the 1990s. This unexpected increase in cooperation suggests a transition in transatlantic competition relations from a historically adversarial reliance on extraterritoriality and unilateral countermeasures to cooperative bilateralism. Absent a US-EU competition treaty, this transition to cooperative bilateralism begs the following question: *Given the increasing internationalization of business activity and historical discord in transatlantic competition relations, how and why has EU-US cooperation in competition policy increased since 1990?*

To answer this important research question, the current study employs a case study of the emergence of EU-US cooperation in merger review since the late-1980s. Dominant theoretical approaches from the International Relations/International Political Economy literature provide incomplete explanations for this bilateral transition to cooperation in competition policy because they tend to exclude important actors from the analysis and focus on the role of treaties when explaining international cooperation. To overcome these shortcomings, the current study develops a cross-level approach that

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[5] The adjectives "national" and "domestic" typically describe characteristics of traditional, Westphalian states. While the EU is not a traditional state, for simplicity, the Union's legal jurisdiction is referred to as

identifies a relationship between economic internationalization and EU-US cooperation. This relationship is then explained by investigating domestic politics in the EU and the US, in particular the behavior of regulators with similar preferences operating under, and possibly overcoming, different domestic institutional constraints.

The study finds that EU-US cooperation in competition policy occurs primarily as three "bottom-up" processes—rule-making, implementation and exploratory institutional cooperation—driven by the discretionary authority of utility-maximizing competition regulators reacting to the challenges of economic internationalization and the constraints of domestic political institutions. Instead of pursuing treaties as a basis for increasing cooperation, the EU and US competition regulators have attempted to sign executive agreements under their own discretionary authority. These findings reveal the means by which international cooperation is developing in a traditionally conflictual and largely domestic policy area, a development that, according to EU Competition Commissioner Mario Monti, may serve as a model for transatlantic cooperation more generally (2001, 2). If Monti is correct, the current study will provide insights into the modalities of cooperation in the transatlantic relationship and may suggest useful avenues for enhancing international governance across multiple policies areas.

In order to understand the domestic politics of international cooperation in competition policy, the study relies on insights from the principal-agent framework of delegation. The logic of behavior drawn from this framework is supported by various primary documents, speeches and expert interviews with sixty individuals, including EU and US competition officials, business representatives and private-practice competition lawyers.[6] The current study employs a qualitative analysis to demonstrate the patterns of behavior for politicians (principals) and regulators (agents) that follow from the cross-level approach. More specifically, the analysis focuses on five cases of formal and informal EU-US cooperation in competition policy—the Bilateral Agreement, the Positive Comity Agreement, the Administrative Arrangements on Attendance, the EU-US Mergers Working Group and the International Competition Network—and numerous

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"national" and "domestic" throughout the current study.

[6] The research was conducted from 1999-2002, in Brussels, Belgium; Washington, DC; and Pittsburgh, Pennsylvania.

individual merger cases, in particular, the Boeing/McDonnell Douglas and GE/Honeywell mergers.

This introductory chapter begins by providing a discussion of the linkages between competition policy and internationally-oriented merger activity. It then elaborates the theoretical and practical significance of the current study. Next, the chapter describes and discusses two central analytical concepts—international cooperation and economic internationalization. Finally, the chapter concludes with an outline of the subsequent chapters in the dissertation.

II. Merger Control and the Regulation of a Free Market Economy

This study focuses on merger control—a regulatory instrument designed to manage anticompetitive merger activity—as the area where transatlantic cooperation in competition policy is the "most developed and effective" (James 2001, 4-5).[7] Competition policy broadly incorporates a number of other regulatory activities designed to ensure competitive markets, including antitrust, cartel policy and state aids.[8] In general, the goal of competition policy is to increase economic efficiency.[9] As Nicolaides argues, "Economic theory suggests that efficiency is usually, but not always, improved by rivalry among firms. To encourage rivalry, competition policy prohibits practices and policies that seek to exclude or discriminate against rival firms or that intend to reduce competition among incumbent firms" (1994, 9). One way in which competition can be

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[7] Among others, this claim is supported by Stark (2000, 6). For a discussion of why transatlantic cooperation excels in merger cases, see (Monti 2000b, 4).

[8] Competition policy, or antitrust as it is more commonly known in the US, covers a variety of regulatory activities. Fox argues

> …antitrust (or competition law) is whatever legislators and judges of particular jurisdictions say it is, and it ranges from law to control business practices in order to protect or empower the undergdog, to law to check and disperse business power and ensure a better distribution of opportunity and wealth to the non-established, to law to preserve the competitive process and its governance of markets, to law to advance efficiency through markets anchored (for example) by an aggregate wealth or by a consumer welfare paradigm (2001, 348).

As such, antitrust/competition policy covers cartels, monopolies, merger review and, in the EU, state aids. See also Doern (1996b, 15) for a discussion of the core elements of competition policy. The term "competition policy" will be used in the current study to mean the entire range of both EU and US regulatory activities designed to ensure competitive markets, including merger control. "Merger control" is used when specifically referring to the process of reviewing mergers in both the EU and US.

[9] This goal typically includes allocative, productive and dynamic/technological efficiencies. For a useful discussion of these different types of economic efficiencies, see (Motta 2003).

threatened is when corporate mergers create dominant firms that squeeze out or prevent entry into the market by rival firms.

Merger control, which allows states to review proposed mergers before they are finalized, is an extremely important tool for safeguarding the competitiveness of domestic markets.[10] The merger review process results in regulatory approval, conditional approval or prohibition of a proposed merger.[11] The process requires an analysis of the levels of competition in relevant geographic and product markets in which the merging firms operate. These geographic and product markets may be domestic and/or international (see Chapter 2). Thus, while the merger review process may be initiated to address an initial concern with competition in the domestic market, the relevant geographic and product markets may be international. In such situations, domestically based competition authorities must analyze competition in the international and/or foreign markets.

As foreign direct investment increases and business activity internationalizes (see section IV below), not only do relevant geographic and product markets become increasingly international in nature, but so too does merger activity. Cross-border merger activity is a major source of foreign direct investment (see below). These internationally-oriented mergers affect concurrent domestic jurisdictions by threatening competition in multiple national and/or international markets. Such mergers in concurrent jurisdictions challenge the capacity of national competition authorities to review business activity that is not occurring exclusively within their domestic territory. In response to these challenges, states have traditionally resorted to extraterritorial measures, which, in turn, frequently resulted in destabilizing political disputes and uncertainty over the implications for competition in domestic markets.

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[10] As Graham argues, "Mergers and acquisitions are one of the prime means by which modern economies 'restructure' themselves to adapt to new technologies and to changing circumstances that inevitably occur with the advancement of time. The decision of a competition authority to intervene or not to intervene in a merger and acquisition case can have lasting and important consequences for an economy" (2000, 57).

[11] These potential results apply to both mergers and acquisitions, two terms frequently used interchangeably. Such interchangeable usage of these two terms is inaccurate from the perspective of the economics literature. Campbell and Garbus provide a simple, but useful, distinction between mergers and acquisitions: "generally, a merger involves at least a change in the financial control of one or more businesses, and… in an acquisition, one entity gains control of another. This is often accompanied (and sometimes preceded) by changes in financial structure and often followed by a change in operations" (1991, 3). While noting this distinction, the current study generally employs the term "mergers" to cover both types of activity because the political dynamics of transatlantic cooperation investigated herein do not typically vary between mergers and acquisitions.

III. The Significance of EU-US Cooperation in a Free Market Economy

The insights gained from the current study have theoretical and practical significance. Given the fact that the internationalization of business activity is challenging domestically based merger control, the extent to which EU-US cooperation meets that challenge is of considerable importance to academics and practitioners alike. This section lists some of the more important contributions offered by the current study.

First, the scholarly literature that focuses on the International Political Economy (IPE) is dominated by studies of trade policy. These studies generally investigate the interaction between domestic politics and the international system to explain the causes and consequences of traditional tariff and non-tariff barriers to trade. However, in reality, the international trade agenda is increasingly focusing on the removal technical barriers to trade, such as regulatory differences.[12] This new interest in regulatory differences is coupled with a growing realization of the importance of foreign direct investment (FDI) and increasing levels of cross-border merger activity.[13] While the IPE literature has been slow to address this real-world shift of attention to technical barriers and FDI, the current study offers insights into the international "regulation of foreign direct investment" via the emergence of bilateral cooperation in competition policy.

Second, this study raises a particularly interesting theoretical question given frequent concerns that domestic institutional differences in the EU and US may limit the ability of competition authorities to cooperate.[14] Such institutional obstacles include different evidence-gathering tools, different roles played by courts and different statutory objectives of competition policy. Procedural differences between the EU and US, such as different timetables for merger review, may also reduce the likelihood of cooperation. In

[12] A large body of literature on IPE and comparative political economy has investigated in great detail the relationship between domestic politics and trade policy. However, this literature does not directly compare its findings with the relationship between domestic politics and regulatory policy. For examples of the trade policy literature, see Mansfield, Milner and Rosendorff (2000), Meunier (2000), Destler and Balint (1999), Morrow, Siverson and Tabares (1998), Hanson (1998), Frieden and Rogowski (1996), Alt et al. (1996), Garrett and Lange (1995), Destler (1995), Mansfield and Busch (1995), Goldstein (1993), Hayes (1993), Frieden (1991), Rogowski (1989), Milner (1988) and Destler and Odell (1987).

[13] While FDI has been called "the neglected twin of trade" (Julius 1991), merger activity—as an important component of overall FDI flows—is even less studied and understood by political scientists than FDI.

[14] See Majone (2000b, 279), Cambell and Trebilcock (1997), Doern and Wilks (1996, 328-334), Laudati (1995), and Doern (1995).

addition, substantive differences in EU and US merger review, whether defining markets or calculating market power, raise obstacles to cooperation. Given the preponderance of these organizational differences in domestic competition policies, how can EU-US cooperation in this policy area be explained? The answer to this question should provide insights into the role of domestic institutions in facilitating or obstructing international cooperation.

Third, the current study will also make significant contributions to the literature on European integration. As this literature grapples with explaining the ever-changing nature of the EU, questions are increasingly emerging about the sources and causal implications of the Union's growing role as an international actor.[15] Within competition policy, the Commission enjoys its greatest degree of supranational authority due to its considerable discretionary powers. This supranational authority has been expanded internationally as the Commission pursues institution building through competition policy (Damro 2001). For instance, a landmark European Court of Justice decision in 1994 (Case C-327/91 *France v. Commission*) was prompted by a Commission attempt to enter into a transatlantic competition agreement without prior approval of the Council of Ministers (see Chapter 4). Similar developments make competition policy an excellent test case for understanding the domestic and international sources of the EU's increasingly important role as an international actor.

Fourth, EU-US cooperation in merger control is extremely interesting given the adversarial and discordant history of transatlantic relations in this policy area, especially over issues of extraterritoriality. The initial reasons for creating competition policies were different in the EU and US: the US promulgated the 1890 Sherman Act to protect individual entrepreneurs from large trusts, while the EU developed competition policy as a way to encourage economic integration. During the 1980s, domestic events in the US and Europe compounded the historical tensions in this policy area. Given the historical tensions that peaked in the 1980s, it is particularly surprising that transatlantic competition relations transitioned to cooperative bilateralism in the 1990s. This transition

[15] For general examples across different policy areas, see Ginsberg (2001), Knodt and Princen (2001), Pollack and Shaffer (2001), Henning and Padoan (2000), Meunier (2000), Young (2000), Bretherton and Vogler (1999), Golub (1999), Jupille (1999), Sbragia with Damro (1999), Hanson (1998), Rhodes (1998), Sbragia (1998) and Smith (1998).

had to overcome the different interests of the EU and US and the "discord" that arose from those differences. Therefore, in practical terms, the current study offers useful insights into what appears to be a historically anomalous outcome of cooperative bilateralism. These findings may help to determine whether transatlantic cooperation in competition relations can actually serve as a model for transatlantic cooperation more generally.

Fifth, competition policy traditionally has been a "behind-the-border" domestic issue, and the majority of EU and US competition policy investigations still focus on domestic transactions.[16] Why then would the EU and US allow intervention by foreign authorities in their sovereign domestic affairs?[17] How states manage one policy area that is becoming increasingly international/cross-border can reveal avenues for conflict prevention and cooperation in other, similar policy areas. Thus, a number of regulatory issues that were once considered "behind-the-border" (e.g. environment, government procurement, health and safety) may share similarities with competition policy and, as a result, will benefit from the findings of the current study.

Sixth, while international cooperation is an inherently political issue, scholarly work by political scientists on competition policy is limited.[18] The general topic of competition policy does enjoy attention from economists and legal and business scholars. However, the political implications of and motivations for international cooperation in regulating cross-border mergers are almost entirely unanalyzed by these scholars.[19] These deficiencies across the disciplines are alarming because, as economic internationalization

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[16] See Cini and McGowan (1998, 198), Doern (1996a, 277) and OECD (1987).

[17] Held et al. echo this question in their assertion that "It is now commonplace for American or European competition authorities to intervene, either diplomatically or legally, in what might before have been regarded as purely domestic issues concerning major business mergers or acquisitions which could potentially undermine the competitive position of their own industries or corporations" (1999, 259).

[18] For example, Doern argues "The analysis of comparative competition policy and competition policy institutions has not been a central concern of political scientists or of scholars in public administration and public policy who focus on institutions and policy formation" (1996b, 7).

[19] Two recent studies by economists that argue for the development of a multilateral agreement on competition policy are Lloyd (1998) and Graham and Richardson (1997). Fox (2001), Parisi (1999) and Fidler (1992) offer notable legal analyses of internationally-oriented competition policy. A recent legal study by Esty and Geradin (2001, 40-46) investigates regulatory cooperation as "co-opetition", which focuses on the comparative dynamics of regulation as intergovernmental (across different levels of governance within the US and EU), intragovernmental (across different branches of government within the US and EU) and extragovernmental (between governmental and non-governmental actors, such as the WTO). Notably, this study overlooks the dynamics of regulation between the US and EU. For a useful study of general transatlantic regulatory cooperation, see Bermann et al. (2001).

continues, the importance of competition policy continues to increase. As Devuyst argues,

> In a world economy gradually freed from governmental barriers to trade, competition policy is likely to become an increasingly important structural factor determining the behavior of private firms on the global market. As an instrument to structure the world market, competition policy deserves attention, not only from antitrust lawyers and economists, but also from international relations specialists (1998 479).

Indeed, as the recently failed GE/Honeywell merger and transatlantic disagreements over whether to add competition policy to the WTO agenda show, the political salience of EU-US competition relations remains very high.

Finally, the current study has immediate implications for international economic certainty and stability. Transatlantic cooperation in competition policy is crucial to international certainty and stability because not only does an enormous amount of internationally-oriented merger activity occur among EU and US firms, but the EU and the US also represent the two largest and most interpenetrated, developed markets. Furthermore, the EU and the US possess the two most developed and internationally active competition policies.[20] This increasingly important policy manages the fundamental structure of their respective domestic markets, shaping national economic policy and determining opportunities for both consumers and producers. As such, transatlantic conflicts over competition matters are not easily resolved and hold the potential to escalate into destabilizing trade wars (ICPAC 2000, 41), which can seriously undermine overall certainty and confidence in the international economy.

IV. Analytical Concepts

A. International Cooperation

Before investigating the central research question, the current study requires clarification of two central concepts. The first concept is *EU-US cooperation*. While few

[20] The international significance of the transatlantic relationship in competition policy is also witnessed by the fact that the EU and US are the hubs of the international "hub-and-spoke" system of bilateral competition policy cooperation agreements (Devuyst 2000).

concepts in political science enjoy consensus definitions, the notion of international cooperation does boast strong definitional agreement. International cooperation is frequently defined in political science as occurring "when actors adjust their behavior to the actual or anticipated preferences of others, through a process of policy coordination" (Keohane 1984, 51).[21] Keohane cautions that this definition of international cooperation must be distinguished from "harmony", which refers to a situation in which "actors' policies (pursued in their own self-interest without regard for others) automatically facilitate the attainment of others' goals" (1984, 51).[22] Thus, analyses of international cooperation need to differentiate between cases in which actors with different interests coordinate policies and those cases in which actors merely share common interests. As will be discussed in Chapters 2 and 3, the current study examines a case in which the elected politicians in the EU and US (the "states") have different interests that appear to have been brought into conformity through a process of policy coordination driven by competition authorities with similar preferences.

While Keohane's general definition of international cooperation clearly applies to the type of behavior investigated in the current study, two stipulations are necessary. First, for a variety of reasons mentioned in the preceding sections, the current study focuses on an important geographical subsection of international cooperation—bilateral cooperation between the EU and US. Second, the current study investigates cooperation specifically in merger control, not generally across a wide variety of different and analytically separable policy areas.

While a useful starting point, Keohane's general definition of international cooperation benefits from more precise specification of the possible *types* and *processes* of cooperation that may occur in international relations. Differentiation among these types and processes is crucial to understanding EU-US cooperation in competition policy.

[21] For a discussion of the wide agreement on this definition of cooperation, see Milner (1992) and Milner (1997). Specifically, Milner (1997, 7) notes that Oye (1986), Grieco (1990), Haas (1990), and Putnam and Bayne (1987) have agreed on the utility of Keohane's definition.
[22] Harmony is further distinguished from "Discord": "a situation in which governments regard each others' policies as hindering the attainment of their goals, and hold each other responsible for these constraints" (1984, 52).

1. Types of International Cooperation

EU-US cooperation in competition policy occurs as two potential types: Non-discretionary and discretionary. These two types are classified according to the degree of discretion enjoyed by un-elected regulators. On the one hand, traditional conceptualizations of international cooperation largely focus on non-discretionary types: cooperation occurs between states via formal and binding political agreements. Such non-discretionary cooperation is frequently based in treaties, which require ratification procedures and have the effect of domestic law. Non-discretionary international cooperation is established via political agreements because the "state" (i.e., elected politicians) will typically reserve this important sovereign right to sign international agreements for itself.

On the other hand, international cooperation also can occur between actors operating at sub-state levels, such as regulators. This cooperation is considered discretionary when it occurs between domestic and foreign regulators and is conducted without direct political involvement. The discretionary authority of regulators comes from the power delegated to them by elected politicians and is typically based in policy objectives founded in statutory law. As Viscusi et al. argue, "Given the general and vague policy objectives provided by legislation, a regulatory agency is often left with considerable discretion as to how it regulates the industry" (1996, 321). In order to achieve these objectives, regulatory authorities are allowed to use their own initiative to promulgate rules, guidelines, codes, procedures, etc. In certain cases, regulators can use this discretionary authority to initiate cooperation with foreign regulators. When they do so, this type of behavior is termed discretionary international cooperation.

Provisions for both non-discretionary and discretionary international cooperation are found in EU and US domestic law. To varying degrees, these domestic laws allow competition authorities to cooperate with their foreign counterparts. While cooperation can occur via non-discretionary and/or discretionary means, since 1990, most transatlantic cooperation in competition relations has been conducted under the discretionary authority of regulators. This fact raises difficult questions for the International Relations literature regarding the actors involved in and the nature of transatlantic cooperation (see Chapter 2).

2. Processes of International Cooperation

Keohane argues that international cooperation occurs through “a process of policy coordination” (1984, 51). For analytical purposes, this general process of policy coordination benefits from a realistic disaggregation of three distinct processes of EU-US cooperation: rule-making, implementation and exploratory institutional cooperation. Rule-making cooperation, which may be non-discretionary or discretionary, creates the formal basis for increasing contacts between competition authorities. Implementation cooperation then typically occurs on a case-by-case basis through which competition authorities exchange information and coordinate their investigations in order to reduce the likelihood of divergent decisions. Implementation cooperation may encourage substantive convergence (e.g., consistent decisions) and procedural convergence (e.g., investigation coordination). After successful rule-making and implementation cooperation, informal efforts at exploratory institutional cooperation can emerge as new ways to review and evaluate transatlantic competition relations.

Despite previous transatlantic discord, EU-US cooperation via non-treaty cooperative agreements is readily apparent since 1991. Through *rule-making* cooperation, the EU and US have entered into the 1991 Bilateral Agreement, the 1998 Positive Comity Agreement (PCA) and the 1999 Administrative Arrangements on Attendance (AAA). The Bilateral is the most important agreement guiding EU-US cooperation in merger control. This agreement provided a framework for EU-US competition relations, the most central components of which include

1. Notification when competition enforcement activities may affect the “important interests” (Art. 2, Para. 1) of the other party,
2. Exchange of information,
3. Conduct of enforcement activities, “insofar as possible” (Art. 4, Para. 3), that are consistent with objectives of the other party, and
4. Consultation and confidentiality of information.

The Bilateral also addresses anticompetitive business behavior that occurs outside the jurisdiction of one party, but adversely affects the important interests of that party. First, in an instance of such anticompetitive behavior, the emphasis is on mutual notification by competition authorities during the initial decision-making process.

Second, consideration of the effects of enforcement activities on the other party is stressed. The Bilateral also introduces the notion of positive comity, a principle allowing one competition authority to request formal consideration of their national interests by a foreign counterpart.[23]

While the Bilateral formalized positive comity, the PCA encouraged competition authorities in one jurisdiction to request that their foreign counterparts undertake competition investigations on their behalf in cases where their counterpart was in a better position to investigate the case. Thus, the PCA further clarified the cooperation procedures in the Bilateral Agreement and encouraged reciprocal deferrals of investigative authority between EU and US competition regulators.

While the Bilateral and Positive Comity agreements are binding on the signatories, the Administrative Arrangements on Attendance (AAA) is a non-binding effort at rule-making cooperation.[24] The AAA provides reciprocal arrangements for competition authorities to attend certain stages of each other's merger review processes on a case-by-case basis. As a non-binding agreement, the AAA provides useful comparative insights into the political dynamics that surround binding, rule-making cooperation. Table 1 summarizes the three cases of transatlantic rule-making cooperation, in particular noting their legal standing.

[23] For a more detailed discussion of the principle of comity, see Chapter 4.

[24] The Bilateral and PCA are "executive" agreements. In the US, executive agreements "are formal and binding international agreements, but they have not been ratified by the United States Senate as treaties and thus do not override any inconsistent provisions of U.S. law" (ICPAC 2000, Annex 1-C, v). In the EU, both the European Commission and the Council of Ministers sign such agreements (see Chapter 4 and Macleod et al. 1996).

Table 1: EU-US Rule-Making Cooperation Agreements

	Year	Legal Standing	Substance
EU-US Bilateral Agreement	1991	Binding	Formal cooperation and positive comity introduced
Positive Comity Agreement	1998	Binding	Clarification of cooperation and positive comity in practice
Administrative Arrangements on Attendance	1999	Non-binding	Reciprocal attendance at investigatory meetings

Rule-making cooperation establishes the general framework by which the EU and US cooperate in implementing their respective competition policies. As they cooperate within this framework, EU and US competition authorities contact each other on a daily basis. Since 1991, this EU-US *implementation* cooperation in specific competition cases has increased dramatically and is readily apparent in the number of notifications exchanged between the two authorities (see Chapter 5). Notifications occur when one competition authority informs the other that it is initiating a competition investigation that may affect the interests of their foreign counterpart. Once a notification has been made, the competition authorities proceed to cooperate on a number of procedural and substantive matters that are central to EU and US enforcement activities. As discussed in Chapter 5, this cooperation occurs in four analytical distinct stages: initial contacts, notification contacts, review process contacts and remedial contacts.

Finally, *exploratory institutional* cooperation is the most recent and experimental process of EU-US cooperation in competition policy. The EU and US have only begun to engage in exploratory institutional cooperation since 1999. This type of cooperation is witnessed in the establishment of the EU-US Mergers Working Group (MWG). The MWG is an ad hoc forum mandated to study different approaches in the EU and US to the formulation of remedies and the scope for convergence of merger analysis and methodology. In addition, the EU and US have been engaging in discussions over the last two years to establish an International Competition Network (ICN). Instead of a formal international organization, the ICN is an informal venue for discussing the multilateralization of cooperation in competition policy. The EU and US competition authorities consciously pursued the establishment of the MWG and the ICN under their discretionary authority, in a manner that did not require review and approval by the respective political principals.

Considering the adversarial nature of transatlantic competition relations before 1990 and the political reluctance to negotiate and sign a relevant treaty, the development of EU-US cooperation is particularly surprising. The three processes of cooperation become even more interesting when one realizes that they are largely discretionary and conducted by regulators. Table 2 summarizes the two types (discretionary and non-discretionary) and three processes (rule-making, implementation and exploratory institutional) of cooperation through which US and EU competition regulators currently engage each other.

Table 2: Current Competition Regulators' Authority to Cooperate

	PROCESS of COOPERATION		
	Rule-Making	**Implementation**	**Exploratory Institutional**
EU Competition Authorities	Non-discretionary	Discretionary	Discretionary
US Competition Authorities	Discretionary	Discretionary	Discretionary

This dissertation shows how competition authorities have overcome the domestic differences in EU and US rule-making authority (non-discretionary versus discretionary) to pursue greater cooperation via discretionary implementation and exploratory institutional processes.

B. Economic Internationalization

The second central concept in the current study is *economic internationalization* (EI). As the term suggests, EI is a change in the international economy, which resembles the common notion of economic globalization. However, the current study uses the term "internationalization" with the intent of distancing itself from frequent claims in the globalization literature that the phenomenon in the current study is 1.) making "the state" obsolete,[25] and 2.) occurring globally.[26]

EI is conceptualized as a systemic "stimulus" that simultaneously effects and prompts policy responses in both the EU and the US.[27] More specifically, EI is defined as an expansion of markets from the domestic level to the international level, caused by economic liberalization, deregulation and technological development. EI dramatically increases rivalry among firms, both within national borders and across national borders, which significantly changes business strategies (UNCTAD 2000, 12). A common business response to this new pressure is to increase FDI through the pursuit of internationally-oriented mergers. While trade remains an important element of international economic activity, FDI is becoming an increasingly significant component of overall international economic transactions. This trend is witnessed in the fact that overall FDI inflows have increased dramatically since the 1980s, especially in the developed economies (see Table 3).

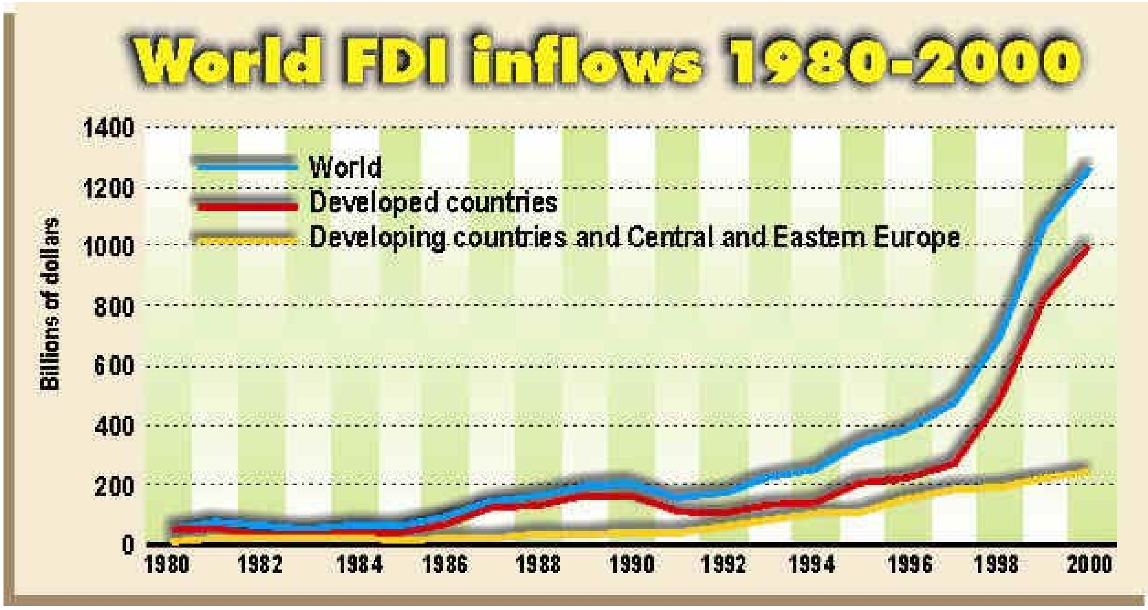
[25] For a useful argument that globalization does not necessitate the end of the nation-state, see Gilpin (2001). In short, Gilpin argues

> …the extent and significance of economic globalization have been greatly exaggerated and misunderstood in both public and professional discussions; globalization in fact is not nearly as extensive nor as sweeping in its consequences (negative or positive) as many contemporary observers believe. This is still a world where national policies and domestic economies are the principal determinants of economic affairs (2001, 3).

[26] For a similar usage of the term "internationalization", see Keohane and Milner (1996), Frieden and Rogowski (1996) and Garrett and Lange (1995).

[27] The use of the term "stimulus" is inspired by Gourevitch's (1986) investigation of different countries' responses to the external stimulus of international economic crises.

Table 3: World FDI Inflows, 1980-2000[28]



This increase in FDI reflects the increasing numbers of internationally-oriented mergers and acquisitions (M&As), an substantial source of overall FDI flows. For example, as UNCTAD reports, "The ratio of the value of cross-border M&As to world FDI flows reached over 80 percent in 1999. M&As are particularly significant as a mode of entry for FDI in developed countries" (2000, 13).

Firms are increasingly pursuing these internationally-oriented mergers as a means to attain internationally competitive economies of scale and enhance overseas market access (with new distribution networks and locally-familiar reputations).[29] Internationally-oriented mergers, in turn, must be reviewed concurrently by competition authorities in different national jurisdictions. This change in the international economy raises the possibility that competition authorities in different jurisdictions may reach different decisions on whether to approve or prohibit the same merger. This challenge to implementing domestic competition policy is at the core of the current study.

[28] Source: UNCTAD, http://www.unctad.org/en/subsites/dite/fdistats_files/fdistats.htm.
[29] For more on the impact of EI on business strategies, see Chapter 2.

V. Chapter Outline

The current study is organized into six chapters. The second chapter begins with a discussion of the interaction between economic internationalization and EU-US cooperation in competition policy, specifically merger control. After establishing the relationship, the chapter discusses briefly the shortcomings of the competing arguments generated by the relevant international relations (IR) literature on international cooperation. The next section focuses on the linkages between the international and domestic levels in order to assess the potential sources of international cooperation. An argument is developed in this section for employing a cross-level approach that acknowledges the stimulus of economic internationalization at the systemic level and incorporates power-sharing arrangements at the domestic level in order to explain more convincingly the discretionary nature and three processes of EU-US cooperation. The next section introduces the principal-agent framework (PAF) of delegation as a simplifying mechanism for understanding the domestic politics of international cooperation in competition policy. The next section posits patterns of behavior that follow from incorporating PAF into a cross-level approach to international cooperation. These patterns of behavior address the international and domestic sources of rule-making, implementation and exploratory institutional cooperation in EU-US competition relations. Finally, the chapter discusses the methodological approach used in subsequent chapters to demonstrate the patterns of behavior.

The third chapter begins with an overview of the historical foundations of competition policy, in particular the US's 1890 Sherman Antitrust Act and the similar, but much later, laws establishing the competition regime in the EU. These institutional developments provide the foundation for US and EU competition regulators' discretionary authority and the respective domestic constraints within which they operate. The next section outlines the domestic control instruments and foreign intervention instruments available to EU and US political principals. This section also discusses the establishment of extraterritorial jurisdiction in antitrust law—initially and primarily by the US—which was largely responsible for the adversarial nature of transatlantic competition relations prior to the 1990s. After discussing these legal foundations, the chapter clarifies the central actors (US and EU principals and agents) in competition policy and addresses their potential relative influence. Next, the chapter discusses the different interests of the EU and US that have led to historical adversity and discord in transatlantic competition relations. Much of this part of the chapter focuses on transatlantic competition conflicts from the 1950s through the 1980s. This section includes a brief discussion of the limitations of early efforts at international cooperation in competition policy. The chapter concludes with a summary of the findings.

The fourth chapter demonstrates patterns of behavior in EU-US rule-making cooperation. The content of three EU-US competition agreements are analyzed in light of the revised cross-level approach developed in Chapter 2. The domestic politics surrounding the signing of the Bilateral Agreement, the Positive Comity Agreement and the AAA are a central part of the analysis of rule-making cooperation. These initial rule-making steps established the framework for transatlantic cooperation and provide the basis for subsequent implementation and exploratory institutional cooperation. The efforts at rule-making cooperation resemble a conscious attempt to design a system of dispute prevention by regulatory agents over dispute resolution by political principals. In particular, the chapter considers how these processes of cooperation in an EI environment are determined by the interaction of domestic preferences and institutions in the EU and US. According to the patterns of behavior (P1, P2 and P3) presented in Chapter 2, the process of rule-making cooperation is characterized by agent attempts to reduce information asymmetries through shirking (pursue their own preferences via discretionary authority), and principal attempts to intervene in that shirking when the costs of not intervening exceed the costs of intervening.

The fifth chapter analyzes the EU-US implementation and exploratory institutional cooperation that has followed from the process of rule-making cooperation. The chapter begins by discussing the reasons why competition agents pursue implementation cooperation. Next, the chapter outlines four different stages of implementation cooperation in merger review: initial contacts, notification contacts, review process contacts and remedial contacts. The implications of EU-US cooperation in each of these stages is demonstrated through the analysis of selected merger cases. While the cases suggest that discretionary cooperation generally functions without direct principal intervention, two instances are also analyzed in which EU-US cooperation failed to prevent intervention: the Boeing-McDonnell Douglas merger and the GE/Honeywell merger. Both of these cases require more in depth analysis to understand where and why flaws occurred in the different stages of implementation cooperation. The chapter then details two efforts at exploratory institutional cooperation: the EU-US Mergers Working Group and the International Competition Network. These two cases reveal concerted attempts by EU and US competition agents to increase bilateral and multilateral cooperation in competition policy through discretionary means.

The final chapter begins with a brief recapitulation of the central puzzle and discusses the theoretical implications of the current study. Next, it summarizes the findings of the study in terms of the patterns of behavior for agents and principals. The chapter then comments on the role of societal (in particular business) influences in EU-US cooperation in merger review. This section also investigates potential ways in which to determine the role of firms in the intervention cost calculations of principals. The chapter concludes with a discussion of the generalizability of the findings to international regulatory cooperation in other policy areas. In particular, insights from the current study are compared to the international politics of trade policy and the emerging political dynamics of cooperation in areas characterized by increasing international regulation. These comparisons raise additional interesting questions that form a clear and promising agenda for future research on the politics of international regulatory cooperation.

CHAPTER 2: Theory and Methods—The International and Domestic Sources of Transatlantic Cooperation in Competition Policy

I. Introduction

This chapter begins with a discussion of the interaction between economic internationalization and EU-US cooperation in competition policy, specifically merger control. After establishing the relationship, the chapter discusses briefly the shortcomings of the competing arguments generated by the relevant international relations (IR) literature on international cooperation. The next section focuses on the linkages between the international and domestic levels in order to assess the potential sources of international cooperation. An argument is developed in this section for employing a cross-level approach that acknowledges the stimulus of economic internationalization at the systemic level and incorporates power-sharing arrangements at the domestic level in order to explain more convincingly the discretionary nature and three processes of EU-US cooperation. The next section introduces the principal-agent framework (PAF) of delegation as a simplifying mechanism for understanding the domestic politics of international cooperation in competition policy. The next section posits patterns of behavior that follow from incorporating PAF into a cross-level approach to international cooperation. These patterns of behavior address the international and domestic sources of rule-making, implementation and exploratory institutional cooperation in EU-US competition relations. Finally, the chapter discusses the methodological approach used in subsequent chapters to demonstrate the patterns of behavior.

II. The Interaction of EI and Merger Control

This section argues that EI functions as an international factor that alters the context in which domestic competition authorities review concurrent jurisdiction mergers. Data presented below suggest that EI is a stimulus for increasing international merger activity. The relationship between this international stimulus and business activity reveals the causal linkages between changes in the international economy and increasing EU-US cooperation in merger review.

As discussed in Chapter 1, EI is defined as an expansion of markets from the domestic level to the international level, caused by economic liberalization, deregulation and technological development.[30] Such a definition of EI, at least tacitly, also includes the expansion of domestic corporate strategies, activities and organizational structures to the international level.[31] EI has dramatically increased rivalry among firms, both within national borders and across national borders, which significantly changes business strategies.[32] A common business response, especially in the developed economies, to this new pressure is to increase foreign direct investment (FDI) by pursuing internationally-oriented mergers (UNCTAD 2000, 13).[33] Indeed, since 1990, mergers and acquisitions "have accounted typically for a third to over a half of all FDI flows" (Held et al. 1999, 243).[34] Such mergers are intended as a means to attain internationally competitive economies of scale and enhance overseas market access (with new distribution networks and locally-familiar reputations). More specifically, according to UNCTAD, firms pursue internationally-oriented mergers in order to access strategic proprietary assets, gain

[30] Much of this EI follows from the successive GATT liberalizations of business activity (Commission 1995, 3; European Commission 1994, Annex I, 2).

[31] For example, Evenett et al. argue

> Falling trade barriers, a revolution in communications technology, declining restriction on foreign investment, ongoing deregulation, and the embrace of market-friendly policies by many governments have wrought significant changes in business strategies on both sides of the Atlantic. The following corporate developments have taken center stage in this new environment: a cross-border merger wave of unprecedented scale; a reevaluation of the benefits of vertical integration, resulting in increased outsourcing and the fragmentation of stages of production across national borders; and the spread of network-based industries (2000, 3).

[32] ICPAC supports this contention: "…as national markets evolve into a global marketplace, more and more companies are deciding that they must become bigger to compete effectively" (2000, 44). See also Group of Experts (1995).

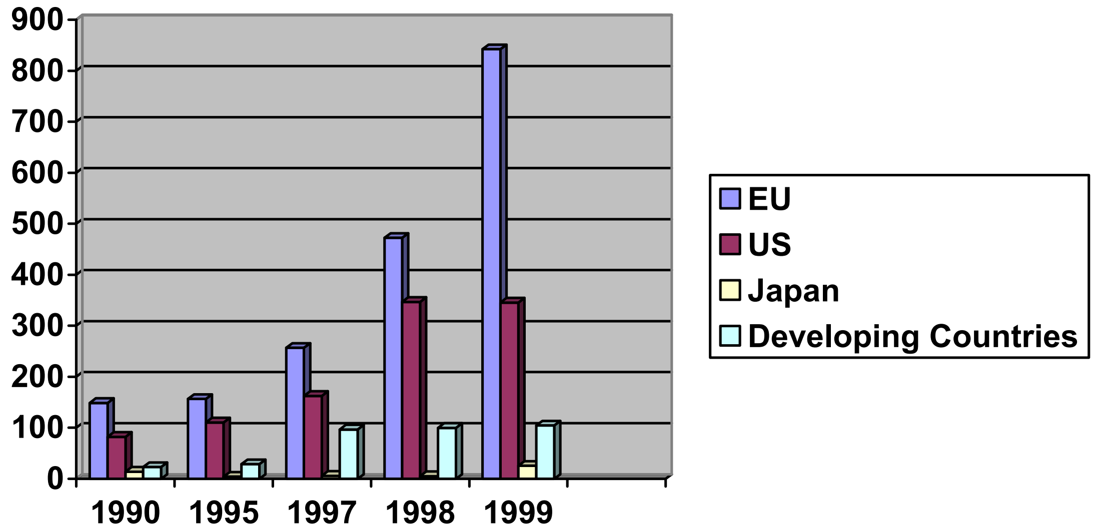
[33] It should be noted that while internationally-oriented M&A activity continues to rise, domestic M&A activity still accounts for the majority of overall M&A activity. For example, in comparison to domestic M&A activity since 1987, internationally-oriented M&As have remained below fifty percent of overall M&A activity (UNCTAD 2000, 11).

[34] As noted in Chapter 1, UNCTAD reports "The ratio of the value of cross-border M&As to world FDI flows reached over 80 percent in 1999. M&As are particularly significant as a mode of entry for FDI in developed countries" (2000, 13). With a similar assessment, Waverman et al. argue "mergers and acquisitions are the main instrument of FDI today" (1997, 8). In addition, *The Economist* noted FDI "grew by 25% to $827 billion in 1999, driven primarily by cross-border mergers and acquisitions" (2000a). *The Economist* recently noted "Figures from the United Nations Conference on Trade and Development showed that cross-border merger and acquisition activity was up by more than a third in 1999 to $720 billion" (2000b). Finally, "In 1999 global merger and acquisition activity was at an all-time high, with over $3.4 trillion in mergers announced worldwide. This volume renders small by comparison the previous year, itself a record year with approximately $2.5 trillion in merger activity" (Cohen 2000, cited in ICPAC 2000, 44).

market power and market dominance, achieve synergy gains, become larger, diversify and spread risks, exploit financial opportunities, and reap personal benefits (2000, 154).[35] These internationally-oriented mergers, in turn, must be reviewed concurrently by competition authorities in different national jurisdictions.

As a major source of FDI, internationally-oriented merger activity has increased dramatically in the last decade.[36] Figure 1 shows the increase in merger activity through the 1990s among US, European and Japanese firms and firms from the entire developing world.

Figure 1: Cross-border M&A Activity, 1990-1999 (Sales and Purchases, Billion $US)[37]



While Figure 1 demonstrates the global nature of cross-border M&A activity, increasing EI via internationally-oriented merger activity is particularly evident in the

[35] For more on the impact of EI on business strategies, see Evenett et al. (2000, 4-5), Garten (2000), and Gaugan (1999).
[36] For a discussion that compares the magnitude of historical mergers waves in the US and Europe with the current wave of the 1990s, see Graham (2000, 57-60).
[37] Note: EU measures of cross-border M&A activity do not include intra-EU activity. However, they are consistently higher than US levels, possibly because of dramatically higher levels of M&A activity with Central and East European firms.
Source: UNCTAD (2000), *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development*, table IV.3, p. 108.

transatlantic marketplace.[38] For example, in 1997, eighty percent of global internationally-oriented merger activity occurred between firms located in the US and EU (UNCTAD 1998, 20). This trend showed no signs of abating during the 1990s as the waves of merger activity continued to reflect ongoing economic liberalization, deregulation and technological development in the transatlantic marketplace.

The ability of states to control merger activity with domestic competition policies is being threatened by the increasing internationalization of markets. This threat is particularly evident in concurrent jurisdiction cases where a merger and its effects are not fully located within one national territory. As Devuyst argues, these changes are related to increasing economic internationalization:

> While antitrust enforcement functions essentially on the basis of national (or in the EU's case regional) competition legislation, technologic developments and trade liberalization agreements have been inviting business to become global. Given this internationalisation of economic activity, there are an increasing number of competition problems that transcend national boundaries (2000, 320-321).[39]

This change in the international system represents a significant challenge to states as previously domestic—or "behind-the-border"—issues become more cross-border and international in nature.[40]

The fact that EU and US merger control laws remain domestic while markets are becoming increasingly transatlantic, even international, creates a crucial disconnect

[38] Domestic mergers in the EU and US have also increased during the same period: "In the United States, approximately $1.7 trillion worth of U.S. deals were announced in 1999, a slight increase from the $1.6 trillion announced the year before. As the total value of transactions grew in the United States, however, the number of deals actually declined to 10,892 compared with 12,279 in 1998. By contrast, the value of European transactions announced in 1999 more than doubled that of the prior year to $1.2 trillion spread over 12,062 transactions. This merger wave has encompassed virtually every industry from financial services, to telecommunications, to defense" (ICPAC 2000, 44-45).

[39] Fox agrees: "…the World Trade Organization (WTO) has become more aggressive in requiring lower tariffs and open markets, thus facilitating global competition and a more nearly integrated world. Globalization, in turn, has brought with it needs and incentives for cooperation among antitrust agencies" (2001, 350). Similarly, Gual argues "…the existence of multinational firms operating outside the jurisdiction of individual countries may weaken the effectiveness of competition policy" (1995, 15), due to the jurisdictional disconnect brought on by EI. For similar arguments elaborating the challenges EI presents to national competition policies, see also Gerber (2001, 435) and Waverman et al. (1997).

[40] For more on the linkage between increasing trade and the likelihood of antitrust conflict, see Evenett et al. (2000, 14-15).

between national sovereignty and national jurisdiction.[41] The challenge to domestic competition policies occurs because as firms engage in internationally-oriented merger activity, they internationalize their production, distribution and management beyond the sovereign territory and national jurisdiction of their respective domestic competition authority.[42] As EI changes opportunities and incentives for firms, so too must governments change their behavior if they wish to control merger activity that increasingly occurs across or outside their national borders but still affects their domestic market (European Commission 1994, Annex I, 2; Parker 1999; OECD 1999b; OECD 1999e).

These new realities of international business activity have the potential to outpace the legal resources and sovereign authority of individual states to review and enforce national competition policy on mergers not fully located within their national legal jurisdiction. Such mergers are known as concurrent jurisdiction mergers. When a merger occurs in multiple jurisdictions, the firms are required to file pre-merger notifications (see Chapter 3) with the competition authorities in each jurisdiction to which they are subject to review and approval. The related costs to firms of filing in multiple jurisdictions can become extremely high as more and more states develop pre-merger notification requirements.[43]

In its simplest formulation, jurisdiction defines the limits of national legal authority. National jurisdictions are typically mutually exclusive, with jurisdictional overlap precipitating contact and, often, confrontation and conflict (ICPAC 2000).[44] As mergers internationalize, national jurisdiction becomes increasingly disconnected from the economic concept of relevant geographic market, an important analytical tool of merger control. Relevant geographic market is an instrument of merger analysis that

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[41] For other arguments that elaborate a disconnect between national sovereignty and national jurisdiction due to changes in the international economic system, see Monti (2001a), Monti (2000b), ICPAC (2000), Falk (1999), Cerny (1994), Korbin (1997), Cox (1996), Matthews (1997), Ohmae (1995a, 1995b, 1993), Petrella (1996), Rosenau (1997, 103-108) and Held et al. (1999).

[42] "Sovereignty" here is understood as the *ability* of states to achieve specific domestic policy outcomes, not the *autonomy* of individual states to act in the international system.

[43] Waller cites the Exxon-Mobil merger as an example of the burden of multiple filings, noting that the merger "may ultimately involve the filing of up to 40 premerger notifications in different jurisdictions" (2000, 574-575).

[44] While the EU is not a traditional state, for simplicity, the Union's legal jurisdiction is referred to as "national" and "domestic".

indicates "the place where supply and demand interact" (European Communities 1999, 43).[45] Merger analysis must identify the exact location where supply and demand interact in order to determine whether the proposed merger is anti-competitive (i.e., will adversely affect competition within that geographic market).

The current study categorizes mergers as three types based on the affected geographic market. Since the onset of EI, common geographic markets frequently identified in merger analysis include nationally exclusive (or domestic), concurrent and international markets. First, in a nationally exclusive geographic market, a proposed merger will affect one national jurisdiction only. In such cases, one sovereign authority reviews the merger. Second, in a concurrent geographic market, a proposed merger will affect two national jurisdictions concurrently. In such cases, both sovereign authorities review the merger. Third, in an international geographic market, a proposed merger will affect two national jurisdictions concurrently as well as a larger segment of the global economy. In such cases, all sovereign authorities affected review the merger.

The current study is concerned with mergers in which the relevant geographic market spans more than one national jurisdiction—those mergers in which supply and demand interact in concurrent and/or international geographic markets. By spanning more than one national jurisdiction, such mergers cause the interests and sovereign authority of individual states to come into direct contact and possibly confrontation and conflict.[46] At its most obvious, the impact of EI on merger control is evinced in the

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[45] When defining the relevant market for merger analysis, the geographic and product markets must be identified. The geographic market is most important for the current study because this is where national sovereignty and national jurisdiction become disconnected. US and EU definitions of relevant *geographic* market are very similar (ICPAC 2000, 50) and increasingly include international markets instead of exclusively national markets. The US calculation for definition of market is provided by the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (April 2, 1992, as amended April 8, 1997, reprinted at 4 Trade Reg. Rep. [CCH] paragraph 13,104). The current EU definition derives from the Commission Notice on the Definition of the Relevant Market for Purposes of Community Competition Law (O.J. C 372, Dec. 9, 1997).

[46] Campbell and Trebilcock provide three scenarios in which interjurisdictional conflict in mergers is likely:

1. A multinational enterprise based in country A acquires another multinational enterprise based in country B. Both firms have subsidiaries producing similar lines of products in various domestic markets throughout the world. Here the impact of the merger would presumably have to be assessed market-by-market in the light of alternative sources of domestic or import competition in each market, with the possibility that competition authorities in some jurisdictions would find the merger objectionable while others would not.
2. A foreign firm based in country A acquires a firm based in country B where the relevant products produced by the two firms are traded freely in a regional market (e.g., Canada and the United States or member countries of the European Union). Given that the relevant geographic market for

changing market definitions used by US and EU competition authorities. As Evenett et al. argue, "As markets integrate across national borders, the logic of purely national antitrust policy breaks down. The most immediate problem… is how to define the relevant 'market'" (2000, 13). Changes in these market definitions directly reflect changes that are occurring due to the internationalization of business activity.

As firms and markets internationalize, states must find ways to correspondingly expand their national jurisdiction or lose their sovereign ability to ensure the "public good" of fair competition in domestic markets.[47] In addition to ensuring fair competition in a free market, governments must also consider the increasing possibility that foreign authorities will intervene in their domestic matters by reviewing competition cases in concurrent and international geographic markets. Governments can respond to this new threat of market failure and the complication of foreign political intervention through the extraterritorial imposition of domestic merger review authority—via various punitive measures based in domestic law—on concurrent and international geographic market mergers. Such a unilateral approach exacerbates the uncertainties and tensions that follow from overlapping national jurisdictions, increasing the likelihood that national interests and competition policies come into conflict.[48] Historically, transatlantic competition relations have been such reciprocal, political exercises of unilateral extraterritoriality, frequently threatening to escalate into multi-sectoral trade wars.[49]

Alternatively, governments can choose to cooperate while reviewing mergers and reduce the likelihood of tensions caused by external political intervention in concurrent and international geographic markets. Beginning in the 1990s, the EU and US chose to

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the product is supranational, domestic antitrust authorities throughout the regional market are each likely to view their jurisdiction as legitimately engaged. The competitive effects should be essentially uniform across a properly defined economic market, but it is possible that the various domestic competition authorities would come to different factual or legal conclusions.

3. A foreign firm in country A acquires a competitor in county B producing a similar product line, but here the geographic market is global rather than national or regional (e.g., the commercial aircraft manufacturing industry). Here, at least in theory, domestic competition authorities in all countries throughout the world where the product is sold may be interested in reviewing the transaction. The probability of divergent decisions obviously increases greatly when a large number of jurisdictions with different laws and enforcement policies have the potential to become involved (1997, 89-90).

[47] See below for more on the assumption of competition policy designed to ensure the "public good".

[48] Graham agrees, arguing that the frequency of conflicts between national interests "rises with the increasing globalization of industry and the growing anxiety of many governments over its impact on their own efficacy" (1996, 45). See also Baker et al. (1997, 443).

meet the challenge of internationalizing business activity by cooperating with their counterparts across the Atlantic. Notably, however, the EU and US did not establish this cooperation through treaty-making. This cooperation appears to have largely overcome the challenges presented by EI and overlapping jurisdictions. Yet, while EU-US cooperation in merger control has increased dramatically over the last decade, it is not clear *how and why this cooperation has occurred*, especially given the historically adversarial nature of transatlantic competition relations.

III. Competing Explanations of International Cooperation

The current study considers competing explanations of international cooperation to explain transatlantic competition relations.[50] While the study focuses on a topic within the realm of International Political Economy (IPE), because the central question is concerned with international cooperation, the analysis first considers traditional explanations from the International Relations (IR) literature.[51]

The IR literature has long tried to develop convincing, generalizable theoretical explanations of both international conflict and cooperation. While much of this literature has focused on international conflict, the last three decades have witnessed an emergent interest in international cooperation. Two major rationalist[52] IR perspectives—realism[53]

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[49] For a historical accounting of this adversarial relationship, see Chapter 3.

[50] The international relations literature on the sources of international cooperation is voluminous. For a useful review, see Milner (1992). Other recent, notable contributions include Boyer (1993), Grieco (1990), Haas (1990), Feldstein (1988), Putnam and Bayne (1987), Axelrod (1984) and Krasner (1983).

[51] The scholarly literature in IPE is still dominated by studies focusing on trade policy. However, the current study investigates an area of IPE that is increasingly important as the international trade agenda turns toward the removal of behind-the-border technical barriers, such as competition policy. The field of International Political Economy (IPE) is increasingly dividing between those who engage in the more general debates about international relations, such as issues of international cooperation, and those who focus the majority of their efforts on the study of political economy (including comparative political economy and IPE, with frequent overlaps in American politics). Both of these approaches to IPE have contributed useful models and methods to the broader study of IPE (Martin et al. 2002). For a useful discussion of recent developments in the field of IR/IPE, see Katzenstein et al. (1999).

[52] The term "rationalist" is used to describe these literatures due to their reliance on rational choice assumptions (Katzenstein et al. 1999). This reliance leads the literatures to employ interest-based explanations of international cooperation and conflict. See Snidal (1986) for an endorsement of rational choice assumptions in IR analyses.

[53] The realist approach to international politics has undergone numerous revisions and clarifications. The origins of the "scientific" realist research agenda are dated to Morgenthau (1946, 1948). The current influential variant is the neorealist, or structural realist, research agenda developed by Waltz (1959, 1970).

and neoliberalism,[54] the latter a challenge to the former—have dominated much of this discourse in the IR literature. While realism and neoliberalism offer very different explanations of international cooperation, they do share similar simplifying assumptions of rationality and anarchy that are analytically attractive for their parsimony and generalizability.[55] A more recent, non-rationalist challenge—constructivism—remains at the formative stages but does offer different explanations for international cooperation.[56]

More recent treatments include Mearsheimer (1995), Buzan et al. (1993), Walt (1992), Mearsheimer (1990), Walt (1987) and Gilpin (1981).

International cooperation is not typically a high-interest item for the research agenda of neorealism (e.g. Mearsheimer 1995). In addition, realists rely on a unitary actor model of the state, typically arguing that the unitary actor assumption is necessary for parsimonious analysis. For example, Waltz argues that relaxing the unitary actor assumption "will lead to the infinite proliferation of variables" (1979, 65), which lessens the power of theory by unnecessarily complicating the analysis. Moreover, realist explanations are state-centric, arguing that non-state actors are less (or not at all) important for understanding international politics. As such, domestic politics, international institutions, multinational corporations and non-governmental actors are typically absent or considered epiphenomenal in realist explanations of international cooperation.

[54] The neoliberal research agenda is frequently traced to Keohane (1984). Neoliberalism shares common assumptions with neorealism that states are unitary actors and are self-interested, goal-seeking actors. Like the realist explanation, domestic politics, multinational corporations and non-governmental actors are typically absent or considered epiphenomenal in neoliberal explanations of international cooperation.

[55] Neorealist and neoliberal theories cannot explain why EU-US cooperation is largely discretionary instead of based in treaties signed by "the states". Therefore, while the rationalist systemic explanations can explain the EU-US transition to cooperation in their own terms, they fall short of convincingly explaining a crucial element of the resulting cooperation. The problem follows from two central assumptions of the rationalist systemic approaches—states are unitary actors and states are the most important units of analysis. Before discussing this problem, two other shortcomings unique to each of these approaches must be addressed.

First, cooperation in transatlantic competition policy does not seem the likely result of calculations by unitary states operating in a neorealist, self-help world. Problematic for the neorealists, most activity in competition policy still occurs in domestic markets. Thus, cooperation with overseas authorities would allow foreign intervention in a primarily domestic policy area. When the result of cooperation is an unbalanced (relative) loss of sovereignty over a respective domestic market, why would a self-interested, unitary state allow foreign intervention in the way it decides to manage the very structure of its domestic market? This reality of domestic competition policies operating in an international system characterized by EI presents a fundamental challenge to the neorealist emphasis on the importance of national sovereignty and relative gains.

Second, a crucial problem also exists for the neoliberal regime theories. Neoliberal explanations of transatlantic cooperation, which claim that overcoming information shortages are a crucial reason for creating regimes, would likely predict a regime in competition policy for the exchange of information and the establishment of a bilateral dispute settlement mechanism. In reality, the transatlantic cooperation regime prohibits the exchange of confidential business information due to protections afforded by domestic law and lacks a dispute settlement mechanism. Rather, the regime focuses on the exchange of non-confidential information and dispute prevention. In the transatlantic competition regime, the only recourse to dispute settlement seems to be (the decreasingly likely) intervention by domestic politicians threatening to exercise unilateral extraterritorial measures.

While the neorealists and neoliberals suffer from the preceding shortcomings, they also share problems that arise from their mutual reliance on a unitary actor assumption and state-centric focus. By assuming a unitary "state" as the unit of analysis, systemic explanations often overlook and/or disregard crucial sub-systemic actors that may contribute significantly to compelling causal explanations of international cooperation.

To understand the domestic politics that may explain the discretionary nature of EU-US cooperation, the analyst must relax the unitary actor assumption. Anticipating criticism for relaxing this assumption, Milner argues

> abandoning the assumption of a unitary state need not condemn one to hopeless complexity nor to a lack of parsimony. Once one leaves the world of states as unitary actors, one can use the concepts and theories from American and comparative politics, some of which provide powerful, parsimonious tools for understanding strategic interaction in different institutional environments (1998, 779).

Related to the unitary actor assumption, the systemic approaches encounter an analytical problem due to their state-centrism. According to the systemic IR theories, states are the most important and analytically necessary units of analysis (Milner 1998, 761). Therefore, these approaches typically overlook the causal impact of other international actors, such as self-interested international organizations, multinational corporations and non-governmental organizations. It should be noted that neoliberalism does consider the role of international organizations, but typically as a forum through which states operate, not as independent and causally significant actors with interests separate from their member states. As a result, the state-centrism of systemic IR theories encounters some difficulty when trying to incorporate a self-interested, non-traditional governmental actor like the EU. This flaw is particularly noticeable in competition policy, where the European Commission wields its greatest supranational authority.

The interaction between EI and national interests suggested by the rationalist systemic IR theories may help to explain why a cooperative regime has been created, but it cannot explain the crucial characteristic of that cooperation—its discretionary nature. In order to explain why EU-US cooperation in competition policy is largely discretionary, the analysis must consider the behavior of actors within the process of policy coordination identified by Keohane (1984) as an essential component of international cooperation. The domestic politics that led competition authorities to try to isolate other domestic actors from the cooperative process are lost or made trivial when the research is limited to unitary, state-centric analyses. In the current case, the domestic EU and US competition regulators play an important role in international cooperation because their preferences are more similar to each other than to other actors in their respective domestic environments.

[56] The broad constructivist research agenda is frequently traced to the work of Wendt (1999, 1994, 1992), but includes other notable contributions such as Thomas (2001), Finnemore and Sikkink (1998), Keck and Sikkink (1998), Haas (1992, 1990). The crucial difference with rationalists is that the non-rationalist approaches conceive of states as role-players rather than utility-maximizers. Constructivists argue that interest-based analyses cannot adequately determine state behavior because they do not fully consider the origins of state interests, nor the impact that national identities and ideas (e.g., democracy, capitalism, anti-apartheid, environmentalism) can have on state behavior within and toward a regime.

While constructivist approaches like Wendt's do consider the domestic politics of identity and, thus, preference formation, their explanation of international political change—based on states accepting changes in an international norm of what is appropriate behavior—is not convincing in the current study. In competition policy, the "state" (i.e., politicians) is not more likely to cooperate with other states due to some norm of appropriate behavior. Indeed, politicians will still intervene in competition policy, and decrease the likelihood of cooperation, whenever they are compelled by perceived threats to national and/or constituent interests. Rather than politicians, it is the regulatory authorities' behavior that has changed due to the impact of EI on their interests—interests that are ever-present because they are formally specified in domestic institutions of power-sharing arrangements.

Thus, constructivism—like neorealism and neoliberal institutionalism as discussed below—focuses on traditional forms of international cooperation that change the nature of "the state" while overlooking the new forms of discretionary cooperation that change only the nature of regulators' behavior, not their incentives for behavior. In short, constructivism identifies actors in networks who gradually change their understanding of what behavior is appropriate for states, which ultimately changes the beliefs and values (i.e., identities) of politicians and the content of policy. This is not what occurred in the case of transatlantic competition relations. Instead of changing the identities of states and the content of foreign policy, EI is causing competition authorities to follow their interests and adjust their behavior to increase discretionary cooperation.

Although these traditional explanations focus on different levels of analysis, they accept, to varying degrees, a causal link between the systemic-level EI and international cooperation. However, these traditional approaches do not offer convincing explanations of 1) why systemic-level EI initiates specific processes of EU-US cooperation in competition policy, and 2) why EU-US cooperation in competition policy is primarily discretionary. A more convincing explanation will explain the three specific processes through which the EU and US cooperate (rule-making, implementation and exploratory institutional) as well as the specific forms of that cooperation (non-discretionary or discretionary). To do so, this chapter turns to cross-level analyses that incorporate domestic politics as important causal factors in explaining international politics.

IV. Cross-Level Approaches to International Cooperation[57]

The identification of an appropriate level of analysis is central to theory-building. As Singer (1961) points out, the nature of a theory relies on the level at which it is posited, with theories of different levels often advancing very different explanations and

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Evidence of the competition authorities following their interests is apparent in two related examples. First, as will be shown below, competition authorities pursued a *binding* agreement as a way to compel their counterparts to cooperate. Thus, the competition authorities' actions were based on a lack of trust and a desire to reduce the likelihood of their counterpart's extraterritorial tendencies, which would, in turn, prompt undesirable political intervention. Without some shared understanding of the appropriate behavior in international competition relations, the competition authorities were left to devise a way in which they could be assured that their foreign counterparts would not defect from cooperation. They chose to bind each other into a cooperative agreement that reduced the likelihood of defection and, as a result, satisfied their respective interests.

Second, this desire to reduce the extraterritorial tendencies of their counterparts is particularly apparent in the push for positive comity to be included in bilateral agreements. For positive comity to function regularly and effectively, competition authorities must trust overseas institutions and competition authorities. Thus, positive comity requires a reciprocal "culture" of confidence in cooperation and actions of overseas counterparts. In this situation, a shared understanding of what behavior is appropriate might be expected to develop out of necessity. However, behavior that conforms to such a shared understanding is lacking; no reciprocal culture of confidence exists. In fact, only one formal positive comity request has been made and it can be argued that the request was actually made in the self-interest of the US. This request occurred in the Sabre/Amadeus case in which the US competition authorities requested the Commission investigate the allegedly anticompetitive behavior of a French firm. (On Sabre/Amadeus, see Devuyst [2001, 140-42], Janow [2000, 39-40] and Griffin [1999, 184-185].) Ultimately, the Commission decided against the French firm, much to the annoyance of the French Government. In effect, the US competition authorities had used the Commission in an instrumental fashion to challenge the French firm. As a result, the US authorities achieved their interests—the anticompetitive behavior of the firm was remedied and they avoided infuriating French politicians who instead directed their anger toward the Commission.

[57] The term "cross-level" is used to distinguish the approach employed in the current study from the specific two-level model posited by Putnam (1988).

conclusions. The level at which the analysis will take place concerns the location of the causal factors. Most scholars agree that causal factors can be identified at the systemic level, the level of the state and/or the level of the individual (Waltz 1959).[58] Identifying a level of analysis directs the research agenda and informs the audience as to the context within which the argument is formulated, patterns of behavior are expected and, ultimately, events and behavior are explained.

When a level of analysis is determined, the researcher risks overlooking important causal factors at other levels. One solution to this problem is to combine theories from different levels. However, combining theories that emphasize different levels of analysis may diminish the parsimony of the resulting theory. Cross-level analysis offers a productive approach to solving the level-of-analysis problem. In cross-level analysis, new theories are posited that draw from the explanatory power of causal factors at different levels. Such new theories need not be entirely unique; they can rely on a synthesis of previous theories that identify causal factors at different levels of analysis. What is unique about such efforts is the way in which variables are linked to improve the overall explanatory power of the resulting cross-level theory.

A cross-level approach requires a relaxation of the unitary actor assumption common in most systemic theories. In short, national interests cannot just be assumed, they must be explained through careful investigations of domestic politics.[59] The IR literature does offer some valuable examples of earlier scholarly work that relaxed the unitary actor assumption, such as transgovernmentalism (Keohane and Nye 1978, 1974),

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[58] In the IR literature, the origins of the level-of-analysis debate are often traced by scholars to Waltz's (1959) seminal work on the different levels from which analysis proceeds: first image (individual), second image (state), and third image (international system). Today, most major debates in IR still draw on concepts organized around these three levels. Waltz argued that the system is the appropriate level of analysis in order to prevent explanatory reductionism—reference to first and second image factors to explain international phenomenon—and questioned the very utility of cross-level analysis. Indeed, in later work, Waltz argued that analysis across systemic and other levels of analysis was impossible because domestic structure is an independent variable, and sometimes an irrelevant one (1975, 8).

[59] Efforts to bring domestic politics into the analysis of IR include Bueno de Mesquita (2002), who claims, "Without bringing leaders and their domestic incentives back to the forefront of our research, I believe that we cannot really hope to understand the motivations and constraints that shape international politics and economics, the very factors we hope to explain" (2002, 4). See also Kapstein (1995) on the domestic sources of international cooperation. Moravcsik argues domestic politics can be viewed as "an intervening variable that introduces residual variance around the predictions of systemic theory" (1993, 9). Such an approach requires consideration of international-level factors in order to understand domestic interests across different countries and deviations from the predictions of traditional systemic IR theories. Moravcsik adds that privileging systemic approaches cannot be justified prime facie (1993, 14).

transnationalism (Risse-Kappen 1995) and bureaucratic politics (Allison 1971, Allison and Halperin 1972, Halperin 1974). This literature did not rely heavily on systemic factors to account for international cooperation but, rather, emphasized the importance of domestic actors for understanding international politics. Nevertheless, these approaches have significant shortcomings when applied to the behavior investigated in the current study.[60]

More directly related to the current study, the work of Putnam (1988) on international bargaining provided the first powerful metaphor for scholarly work on cross-level analysis.[61] Putnam relies on the conceptualization of international bargaining as a two-level game between two different levels of analysis—domestic politics and international politics.[62] The interface of these two levels is the chief negotiator (considered the chief of government, or COG) of an international agreement. In international negotiations, a COG is constrained by the need for ratification of a given agreement by other international negotiators (Level I) as well as respective domestic constituents, both elites and the general public (Level II).[63]

When bargaining internationally, the COG is engaged simultaneously in domestic and foreign games. Focusing the analysis on the chief negotiator incorporates systemic (interaction with other states based on the constraints of the international system) and non-systemic (state behavior based on the constraints of domestic structures and

[60] Two major shortcomings that follow from these explanations are that sub-state actors (e.g., regulators) function in isolation from other governmental actors and that domestic institutional environments are not causally significant in determining political behavior. As discussed below, without an explicit understanding of the strategic interaction that occurs among different domestic actors, these approaches encounter difficulties explaining why transatlantic cooperation in competition policy is primarily discretionary in nature. In addition, these explanations—in particular bureaucratic politics—often discount international phenomena like EI as important causal factors.

[61] Putnam's work also inspired Evans et al. (1993). Additional notable efforts at cross-level analysis include Moravcsik (1998) and Sandholtz and Sweet (1998)—these two works focus on European integration and are less useful for understanding the bargaining in competition policy that occurs across the Atlantic. For other approaches that consider the relationship between the international system and domestic politics and structures, see Bueno de Mesquita and Lalman (1992), Cowhey (1993), Gourevitch (1978, 1986, 1996), Kang (1997), Katzenstein (1978), Rosecrance and Stein (1993) and Snyder (1991).

[62] For examples of studies considering n-level games, see Collinson (1999) and Patterson (1997).

[63] As Putnam summarizes, "At the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments" (1988, 434).

cognitive and perceptual sets of policymakers) elements. Because Level I agreements need to be ratified at Level II, a crucial link is developed for cross-level analysis.[64]

Putnam's approach is a useful contribution to cross-level analysis. However, as Pollack and Shaffer argue, the approach does have limitations: "while Putnam's model is best known for combining the domestic and international arenas into a single bargaining model, it turns out that the strategies and preferences of individual statesmen, or COGs, are central to determining the outcome of any international bargain" (2001, 22). This emphasis on individual COGs focuses the analysis on those domestic actors most directly engaged in the international negotiations and ratification processes—executives and legislatures.[65] In other words, while this approach is a very useful endeavor in cross-level analysis, it does not consider fully the interests of other important domestic actors, in particular regulators.

The cross-level approach proposed by Milner advances Putnam's (1988) earlier two-level framework by developing an explanation based on a rational institutionalist approach to domestic politics.[66] Building on Putnam's two-level framework, Milner's model incorporates a more sophisticated approach to understanding the strategic interaction that occurs among domestic actors. She argues that the outcome of domestic politics depends upon the policy *preferences* of domestic actors and the *institutions* for power sharing among them (1998, 774-775).[67]

For Milner, the interaction between domestic actors is best characterized as the strategic, utility-maximizing behavior of individuals who are constrained by domestic power-sharing arrangements (i.e., political institutions). On the relationship between the

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[64] For more detailed discussions of the limitations of Putnam's two-level analytic, see Evans (1993), Moravcsik (1993) and Pollack and Shaffer (2001, 20-24).

[65] Evans (1993) suggests other shortcomings: Putnam's approach encounters some difficulties regarding the interests of transnational actors, the necessity for ratification, the lack of opportunities for collusion by chief negotiators, and the potential for issue linkage to gain negotiating leverage.

[66] For discussions of this approach, see Bates (1998, 1997), Green and Shapiro (1994), Schweers Cook and Levi (1990), Tsebelis (1990) and Tversky and Kahneman (1986). See also, Milner's overview (1998, 782-785) and Milner (1997).

[67] In Milner's 1997 book, "information" is employed as a separate independent variable, which is as causally important as interests and institutions. In her 1998 article in *International Organization*, Milner emphasizes interests and institutions as the two primary independent variables with information less important, but, presumably, entering the analysis due to her endorsement of the use of rational institutionalist approaches to domestic politics. The current study more closely resembles the latter approach.

interests of these actors and their domestic institutions, Milner argues that multiple domestic

> actors share control over the key elements of policymaking: setting the agenda, devising policy proposals, amending, ratifying, and implementing policies. How their diverse preferences are aggregated into collective outcomes depends on the nature of their political institutions. In [democracies], strategic interaction among the players within certain political institutions is of central importance to policy choices (1999, 135).[68]

Such an approach does not simply assume that diverse domestic preferences are aggregated into a collective, national policy decision like the traditional explanations in IR. Rather, it opens the "black box" of the state to gain analytical leverage and can explain more convincingly and accurately the emergence of EU-US cooperation in competition policy.[69] The approach's emphasis on the strategic interaction of rational actors also highlights the importance of information asymmetries that are created by domestic institutional environments.

While Milner provides useful analytical insights, the current study diverges from her approach in two important ways. First, she remains overly dependent on Putnam's two-level game analytic. Her research primarily investigates cases in which executives bargain at the international level with other executives. In these cases, legislatures are responsible for ratifying or rejecting the international agreement entered into by the executives. The probability for cooperation is then negatively correlated with the degree of divided government found in the domestic systems (Schultz 1998, 667).[70] As a result, the likelihood of international cooperation is low.

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[68] While domestic power-sharing arrangements are different in the EU and US, they share a fundamental similarity in determining how domestic preferences are aggregated into collective policy decisions on each side of the Atlantic, such as the decision to cooperate internationally. These domestic power-sharing arrangements shape the strategic interaction that occurs among the domestic actors and, in turn, is reflected in foreign policy decisions on when, how and why to cooperate internationally.

[69] In addition, unlike traditional explanations from the Comparative and American politics literatures, the approach does not necessarily discount or eliminate consideration of the impact of a systemic phenomenon (EI) on the way in which domestic interests and institutions are aggregated into collective policy decisions. As such, when applied to the current study, Milner's cross-level approach suggests that the influence of increasing EI—when mitigated by domestic interests and institutions—may lead to increasing cooperation in transatlantic competition relations.

[70] For another argument emphasizing the impact of divided government on foreign policy, see Lohmann and O'Halloran (1994). Evidence from competition policy suggests no systematic variation in international cooperation due to the presence or absence of divided government. The lack of correlation is readily

The current study is not a Putnamian two-level game because it does not focus on the ratification process that is contested between domestic executives and legislatures. Instead of focusing on ratification battles, the current study investigates the creation of Level I agreements *by competition regulators*. This approach reflects the desire of regulators to avoid political battles with and between executives and legislatures, which can explain the emergence of specific processes and types of international cooperation in competition policy. The preferences of EU and US competition regulators (which are created by the interaction of EI and domestic institutions) become so similar as to reduce the contentious nature of the external bargaining that characterizes Putnam's Level I negotiations. Thus, the current study moves beyond Milner to focus on the preferences and political bargains that created the domestic power-sharing arrangements between regulators and other domestic actors. This approach encourages greater consideration of the role of domestic regulatory actors in explaining international cooperation and reveals the reasons why such cooperation may be likely.

Second, the current study is distinct from Milner's cross-level approach because it employs a different strategic bargaining approach to domestic politics, specifically the principal-agent framework of delegation. This framework considers the preferences of and incorporates a causal role for domestic regulators. This revised formulation provides an understanding of how policy outcomes are the result of strategic interaction among rational, domestic actors. Thus, the policy outcome of EU-US cooperation is not merely the result of two-level struggles between foreign and domestic executives and legislatures. Nor is it merely the result of transgovernmental interaction between like-minded competition authorities. Rather, EU-US cooperation is the collective result of diverse, utility-maximizing, domestic actors functioning within different institutional environments. By incorporating the principal-agent framework into a cross-level approach, the analysis also can consider seriously the causal impact of a systemic stimulus (EI) on the preferences of the domestic actors. Most importantly, the strategic behavior of regulators operating in different domestic institutional environments becomes

apparent considering pre- and post-1991 transatlantic competition relations have seen varying degrees of divided government in the US and the EU while cooperation became standard practice after 1991. On the impact of divided government from the Comparative and American politics literatures, see also Krehbiel (1996), Weaver and Rockman (1993) Mayhew (1991), Laver and Shepsle (1991) and Pierce (1991).

an international-domestic interface for explaining EU-US cooperation in competition policy.

V. Interests and Institutions in Domestic Politics

The current study introduces a revised cross-level approach for understanding the interaction between a systemic stimulus (EI), domestic preference aggregation and collective decision-making in domestic and international environments. To do so, the logic of the principal-agent framework of delegation (PAF) is incorporated in order to understand better the domestic politics underlying EU-US cooperation in competition policy.[71] PAF provides a useful simplification of domestic politics that focuses on the actors (principals and agents) involved in rule-making, implementation and exploratory institutional cooperation.

PAF relies on three central assumptions: 1) different domestic actors engage in rational, utility-maximizing behavior, 2) elected politicians and non-elected regulators have different interests, and 3) information asymmetries are crucial for understanding the relationship between politicians and regulators. According to PAF, political principals delegate regulatory authority on a contractual basis to un-elected agents. After delegating this authority, the elected politicians face the challenge of creating a system that compels the agents to act in the principals' interest.[72] The challenge for principals to control the behavior of agents is caused by inherent information asymmetries that benefit the agents.

Because of agent expertise and the fact that principals have limited resources with which to observe all the daily activities of agents, principals provide agents the authority

[71] For an overview of the principal-agent framework, see Moe (1984). Some of the earliest work on the principal-agent framework in political science comes from Mitnick (1980). Other notable examples that address the delegation issues inherent in the principal-agent framework include Huber and Shipan (forthcoming), Huber et al. (2001), Huber and Shipan (2000), Epstein and O'Halloran (1999), Banks and Weingast (1992), Kiewiet and McCubbins (1991), Ferejohn and Shipan (1990), Calvert et al. (1989), McCubbins and Page (1987), (McCubbins et al. 1987), Bendor and Moe (1986, 1985), McCubbins (1985), McCubbins and Schwartz (1984), Weingast (1983), (Weingast and Moran 1983).

[72] The principals and agents in the EU and US competition systems are clarified in the next chapter. The current study assumes hierarchical control within the regulatory agencies of EU and US competition policy. See Moe (1984, 764 and 769) for a discussion of the problem of hierarchical control within regulatory agencies.

to engage in certain activities at their own discretion.[73] However, agents can exercise their discretionary authority to produce regulatory outputs that conform to their own preferences.[74] Such behavior is known as "shirking".[75] In order to overcome these problems that arise from information asymmetries and agent discretion, principals must develop institutional mechanisms to ensure their control over agent activities[76] In Milner's terminology, these control instruments are found in the domestic "power-sharing arrangements" established between principals and agents.

The current study relies on the control-independence dynamic suggested by PAF to reveal some of the behavioral patterns of political principals and regulatory agents in EU and US competition policy.[77] The current study assumes that, given budgetary and other resource constraints, both politicians and regulators are interested in maximizing their own certainty and decision-making authority.[78] These differing interests lead to important variations in the behavior of principals and agents: principals will seek to

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[73] Discretionary authority allows regulatory agencies to fill in the gaps of policy implementation that are left when political principals draft broad legislation (Epstein and O'Halloran 1999, 51). While it is conceivable that political principals could draft very detailed legislation that left no room for discretionary authority, it is unlikely to occur in a large, complex regulatory system that imposes multiple demands on political principals.

[74] Majone outlines the dynamic tug-of-war that follows the initial delegation of regulatory authority: "Over time… bureaucrats accumulate several advantages, including institutionalization and job-specific expertise, which alter the original relationships. Now politicians must deal with agents they once selected… [who] have a strong bargaining position because of their technical and institutional expertise. As a result, they are increasingly able to pursue their objective of greater autonomy" (1996a, 72).

[75] For more on the origins of the "information-shirking" problem within information economics, see Moe (1984). Agents may also succumb to "slippage", which results when the structure of the initial delegation provides incentive for the agents to pursue activities contrary to the goals of the principals (Pollack 1998, 220). In addition, agents can engage in deceptive behavior via adverse selection prior to the initial delegation and moral hazard after the initial delegation. For a useful discussion of adverse selection and moral hazard, see Moe (1984, 754-756) and Elgie (2002). These other theoretical concepts are less central to the current study.

[76] Majone and others organize these control instruments into two main categories: administrative procedures (i.e., rules that must be followed in agency decision-making, professional standards) and oversight procedures (i.e., monitoring, hearings, investigations, budgetary reviews, sanctions) (2000b, 293). For further discussions of these control instruments, see McCubbins and Schwartz (1984) and Pollack (1998).

[77] These preferences are also based on evidence collected from research interviews.

[78] Majone notes the origin of the different interests of politicians and regulators:

> First, bureaucratic agents are bound by contract to serve democratically elected principals; their primary duty is faithful implementation of the law. Second, over time the interests of politicians and bureaucrats tend to diverge. This is because political coalitions change from those existing when democratic principals adopted a certain policy, and also because bureaucracies develop separate interests as a result of institutionalization and external pressures (1996b, 36).

maintain control over regulatory agents while agents will seek to increase their regulatory independence from political principals. In practice, principals will exercise control instruments when they perceive threats to their ability (i.e., certainty and decision-making authority) to protect national and/or constituent interests. Likewise, agents will shirk in order to reduce the likelihood of principals intervening in their activities because such political intervention is viewed as reducing their certainty and decision-making authority. As discussed below, when faced with an increasing number of internationally-oriented mergers, regulatory agents will prefer to pursue this interest through a process of policy coordination (i.e., cooperation) with their foreign counterparts.

VI. Patterns of Behavior

This section posits several patterns of behavior for political principals and regulatory agents. These patterns of behavior are then demonstrated in subsequent chapters with qualitative case studies. The case studies trace the process of transatlantic cooperation in accordance with the revised cross-level approach introduced above. The patterns of behavior follow from the central research question: *Given the increasing internationalization of business activity and historical discord in transatlantic competition relations, how and why has EU-US cooperation in competition policy increased since 1990?*

Before introducing the patterns of behavior, it is useful to make two points. First, it is important to recall Keohane's definition of international cooperation: EU-US cooperation occurs "when actors adjust their behavior to the actual or anticipated preferences of others, through a process of policy coordination" (1984, 51). This definition requires that the actors have different interests, otherwise, a situation of "harmony" exists. When harmony exists, the analyst cannot speak of cooperation, but rather, simply "the mere fact of common interests" (Keohane 1984, 12). The current study makes a subtle, but very important, distinction in this regard by contrasting EU and US "national" interests with the interests of their respective competition regulators. Because "the states" of the EU and US have different "national" interests, historical

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Citing Wood and Waterman (1991, 802-803), Majone notes that these two assumptions are derived from agency theory.

transatlantic competition relations resembled a situation of "discord".[79] However, the competition regulators have very similar interests. Thus, while "the states" of the EU and US have different interests that create a discordant relationship, the complementary interests of their respective competition regulators are creating a cooperative relationship. The process of policy coordination (i.e., cooperation) throughout the 1990s occurred because, as regulatory authority has gradually expanded via discretionary means, the preferences of the competition regulators have emerged as the prevailing force driving the adjustment of EU and US behavior in transatlantic competition relations.

Second, the PAF literature typically argues that increases in agent shirking will lead to increases in political intervention via control instruments. Political principals prefer intervening with control instruments to prevent agents from shirking when the costs of that shirking exceed the costs of intervention. However, the patterns of behavior posited below suggest a counter-intuitive argument that as agent shirking increases in international competition relations, political intervention (both domestically and internationally) decreases. While agent shirking increases in order to cope with the new challenges presented by merger activity in an EI environment, political intervention decreases because agent shirking to expand cooperation reduces the likelihood of divergent decisions that might prompt politicians to intervene. Indeed, agent shirking includes the conscious construction (via rule-making, implementation and exploratory institutional cooperation) of a dispute prevention system that would preclude the need for dispute resolution by political principals. In other words, the principals are less likely to encounter situations in which the costs of no intervention exceed the costs of intervention.

To explore these points, the following patterns of behavior incorporate linkages among agent shirking, political intervention and international cooperation. More precisely, the patterns of behavior indicate the 1) reasons why competition agents shirk, 2) reactions of political principals to competition agent shirking, and 3) linkages between the preferences of competition agents and the emergence of international cooperation. In addition, the patterns of behavior address the specific processes through which EU-US

[79] "Discord" exists when "governments regard each others' policies as hindering the attainment of their goals, and hold each other responsible for these constraints" (Keohane 1984, 52). Chapter 3 provides a

cooperation has emerged and the nature (non-discretionary or discretionary) of these three processes.

Pattern 1: Because EI increases the likelihood of concurrent jurisdiction mergers, regulatory agents will pursue ways to reduce information asymmetries that could lead to divergent decisions.

This pattern of behavior reflects the desire of regulatory agents to seek ways to increase information exchanges and, in turn, counteract the increasing likelihood of divergent decisions caused by EI. As discussed above, EI increases the likelihood of concurrent jurisdiction merger cases. Such concurrent jurisdiction mergers require review and approval by competition authorities in both jurisdictions. In these cases, competition authorities will typically have better information on firms located within their respective national jurisdiction. This information asymmetry increases the likelihood that the analyses of different national competition authorities will generate divergent decisions on concurrent jurisdiction mergers—i.e., they disagree on whether to prohibit, approve or conditionally approve a merger.[80] Such divergences can also arise as disagreements over the specific conditions necessary for approval of a merger.

Political principals will perceive such divergent decisions as threats to their national and/or constituent interests. National interests are perceived as being threatened because divergent decisions function as a threat to political sovereignty. Constituent interests are perceived as being threatened because divergent decisions can delay or disrupt a merger that could potentially benefit political constituents. Both of these outcomes contribute to "discord" in transatlantic competition relations. However, by reducing information asymmetries regulators can reduce the likelihood of divergent decisions. This, in turn, increases the certainty and decision-making authority of the agents because it reduces the likelihood that political principals will intervene based on perceived threats to national/constituent interests.

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summary of these different interests and the resulting discordant transatlantic competition relationship.

[80] For an important differentiation between divergent decisions as "conflicting" or "inconsistent", see Chapter 5.

Pattern 2: Given the higher costs associated with changing non-discretionary authority, competition agents will pursue increases in rule-making cooperation (aimed at increasing exchanges of information) with foreign agents via discretionary means (i.e., shirking).

The statutory delegation of regulatory authority from domestic principals formalizes the discretionary and non-discretionary authority of competition agents. By definition, behavior that does not require approval by principals is primarily discretionary, while behavior that requires approval by the principals is primarily non-discretionary. Thus, attempts by regulatory agents to increase international cooperation via discretionary authority do not require approval by political principals. Likewise, attempts by regulatory agents to increase international cooperation via non-discretionary authority require approval by political principals.

This second pattern of behavior occurs because, by pursuing rule-making cooperation through discretionary means, agents expand their independence and face fewer domestic veto points than they would changing non-discretionary rules. Regulatory agents consciously design this rule-making cooperation to increase their ability to prevent disputes in favor of dispute resolution by political principals. Agents will pursue such cooperation via shirking (i.e., discretionary pursuit of own preferences) because it conforms to their preference for expanding their own regulatory independence while circumventing requirements for principal approval. This pattern of behavior is analyzed in the three qualitative case studies of the Bilateral Agreement, Positive Comity Agreement and the Administrative Arrangements on Attendance.

Pattern 3: Political principals will intervene in domestic agent attempts to shirk (increase discretionary rule-making cooperation) if the costs of not intervening exceed the costs of intervening.

This pattern of behavior occurs because political principals will resist domestic agent attempts to increase their discretionary authority to sign international agreements unless the costs of intervention are comparatively higher. The costs of intervention and no intervention are related to domestic institutional arrangements in the US and EU.[81] Principals will exercise domestic control instruments when they perceive domestic agent

[81] For further discussion of the factors influencing political cost intervention calculations, see Chapter 6.

attempts to shirk via rule-making cooperation as threats to national and/or constituent interests. Such behavior is directly related to the principals' interest in maximizing their certainty and decision-making authority, given budgetary and other resource constraints. This pattern of behavior is analyzed in the three qualitative case studies of the Bilateral Agreement, Positive Comity Agreement and the Administrative Arrangements on Attendance.

Pattern 4: Following successful rule-making cooperation, EI prompts competition agents to continue shirking (discretionary pursuit of their own preference to maximize certainty and decision making authority) via attempts at implementation cooperation to maximize their independence from political principals.

This pattern of behavior occurs because regulatory agents seek implementation cooperation as a way to increase information exchanges in individual concurrent jurisdiction merger cases and, in turn, counteract the increasing likelihood of divergent decisions caused by EI. In addition, by pursuing discretionary cooperation, agents expand their independence and reduce the need for principal intervention (via formal approval) that would be required to change the non-discretionary, domestic rules that govern competition policy implementation. This pattern of behavior is reflected in the increasing levels of information exchanges, notifications and coordination of remedies between EU and US competition agents in individual cases of concurrent jurisdiction mergers (see Chapter 5). Increases in such discretionary areas do not require formal approval from the political principals.

Pattern 5: Following successful rule-making cooperation, EI prompts competition agents to continue shirking (discretionary pursuit of their own preference to maximize certainty and decision making authority) via attempts at exploratory institutional cooperation to maximize their independence from political principals.

This pattern of behavior occurs because, by pursuing discretionary exploratory institutional cooperation, agents expand their independence and reduce the need for principal intervention (via formal approval) that would be required to change the non-discretionary, domestic rules that govern the establishment of new and formal international organizations. This pattern of behavior is reflected in the fact that the EU-

US Mergers Working Group and the International Competition Network were established as means to increase discretionary authority over information exchanges (see Chapter 5).

Pattern 6: Following successful rule-making cooperation, political principals will continue to intervene in domestic agent attempts to shirk (increase discretionary implementation and exploratory institutional cooperation) if the costs of not intervening exceed the costs of intervening.

This pattern of behavior occurs because political principals resist domestic agent attempts to shirk when those attempts are perceived as threats to national and/or constituent interests. Again, this behavior is directly related to the principals' interest in maximizing their certainty and decision-making authority, given budgetary and other resource constraints. This intervention occurs on a case-by-case basis and takes the form of domestic control instruments that are embodied in the delegation of regulatory authority. This pattern of behavior is reflected in numerous individual mergers and the two cases of exploratory institutional cooperation (see Chapter 5).

VII. Methodology

The current study posits patterns of behavior based on a revised cross-level approach to explaining international cooperation in competition policy. The patterns of behavior are demonstrated in subsequent chapters with a qualitative case-study approach designed to open new avenues of scholarly inquiry and to illustrate the utility of the revised cross-level approach. Before empirically addressing the patterns of behavior in subsequent chapters, it is necessary to identify the exact parameters of and reasons for using this case study.

The case study begins with a historical background, starting in 1890 with the US Sherman Antitrust Act, the first legislation establishing an antitrust (i.e., competition) policy. Throughout most of the 1970-80s, the contextual factor of EI begins to change transatlantic relations in competition policy. During this period, transatlantic competition relations become increasingly adversarial and discordant in nature. Beginning in the 1990s, transatlantic relations experienced a seminal transition toward cooperation as negotiations commenced in earnest over the 1991 EU-US Bilateral Agreement. Thus, the analytical portion of the case study focuses on the period from 1990-2001.[82]

While the methodology employed in this study is qualitative, it conforms to the logic of inference suggested by King et al. (1994). Overall, the current study functions as a disciplined-configurative case (Eckstein 1975, 99-104) of international cooperation.[83] As discussed above, the current study investigated established theories for the purpose of interpreting the transition in transatlantic competition relations from a reliance on unilateral extraterritoriality to bilateral cooperation. Absent a satisfying explanation, the current study "can impugn established theories if the theories ought to fit it but do not. It may also point up a need for new theory in neglected areas" (Eckstein 1975, 99). The deficiencies of established theories and the need for a new theory are reflected in the revised cross-level approach developed above. It should be noted that due to the nature of case study research, the current study does not claim to posit valid causal generalizations, more frequent among larger-*N* studies (Lieberson 1992). Therefore, instead of generating generalizable and testable hypotheses, the current study deduces patterns of behavior from the revised cross-level approach and demonstrates them in subsequent chapters. As a result, the current study suggests avenues for expanding and combining existing theories to create a satisfying explanation for a case that comes from an area neglected by political science—generally competition policy, and more specifically international cooperation in competition policy.

Similarly, Odell (2001) labels this approach the disciplined-interpretive case study, one in which the analyst applies an existing theory to interpret or explain a particular new event. Such analyses often show that "one or more known theories can be extended to account for a new event" (Odell 2001, 163). The disciplined-interpretive case study is far from atheoretical because it forces the researcher to identify and apply central analytical concepts and can "generate an additional type of contribution: new suggestions for improving the theory" (Odell 2001, 163). The revised cross-level approach employed herein suggests a new way for improving existing theories: relax the unitary actor assumption of traditional IR theories and introduce a cross-level approach that explains

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[82] For more on determining the parameters of a case, see Ragin and Becker (1992).

domestic politics as the strategic interaction among various domestic actors (including, and especially, regulatory authorities) operating within causally significant domestic institutional environments.

In addition, Odell (2001) also identifies the hypothesis-generating case study, which can be complementary to the disciplined-interpretive case study. The current study posits a number of patterns of behavior that are deduced from the cross-level approach. These patterns of behavior are used to explain the different types and processes of cooperation identified in the current study. After demonstrating the patterns of behavior in subsequent chapters, general hypotheses may be posited regarding international regulatory cooperation (see Chapter 6). As Odell argues, "One of the most valuable contributions of any method would be the generation of a new hypothesis that turned out to be valid or generated fresh lines of investigation" (2001, 165). This is an important goal of the current study.

The current study focuses on the patterns of behavior of principals and agents in bilateral competition policy. By focusing on the dynamics of regulatory control and independence, the current study minimizes the role played by private actors demanding regulations (e.g., firms, interests groups). The exclusion of private actors is preferable as a means to simplify the analysis. Thus, the current study generally holds the influence of firms as a given but analytically indeterminate factor; the influence of EI and the domestic politics of regulatory control and independence are more important for understanding EU-US cooperation in competition policy. It is worth noting, however, that the influence of firms does enter the analysis as a function of EI: without firms changing their business strategies in response to the stimulus of EI, it is doubtful that competition regulators would perceive EI as challenging their ability to implement domestic competition policies. In addition, as discussed in Chapter 5, merging firms may play a more important role in determining transatlantic implementation—as opposed to rule-making and exploratory institutional—cooperation in competition policy. In order to address more fully the role of firms (and other societal influences), Chapter 6 provides a discussion of the implications of minimizing their role in the current study and offers

[83] Eckstein (1975) also identifies configurative-idiographic case studies, heuristic case studies, plausibility probes and crucial-case studies. For more on the disciplined-configurative approach, see Verba (1967).

possible solutions for determining the different influences on political principals' calculations of the costs of intervention.[84]

The current study relies on a number of more concise and temporally limited cases to demonstrate the patterns of behavior for principals and agents. In Chapter 4, the patterns of behavior in EU-US rule-making cooperation are demonstrated with specific qualitative analyses of three cases of rule-making cooperation in the 1990s:

1. EU-US Bilateral Agreement (1991)
2. Positive Comity Agreement (1997)
3. Arrangements on Administrative Attendance (1999).

In Chapter 5, the study examines a number of individual cases of concurrent jurisdiction mergers in which the EU and US competition agents cooperated during their respective reviews. These cases demonstrate the patterns of behavior during implementation cooperation. The cases of cooperation are then contrasted with two "flawed" cases of EU-US implementation cooperation:

1. Boeing/McDonnell Douglas (1997)
2. GE/Honeywell (2001).

Chapter 5 also provides qualitative analyses of two cases of EU-US exploratory institutional cooperation:

1. Mergers Working Group (2000)
2. Global Competition Forum (2001).

As with the cases of implementation cooperation, these two cases of exploratory institutional cooperation demonstrate the patterns of behavior as suggested by the revised cross-level approach.

The investigation of the broader case study and the concise, individual cases is informed by the qualitative analysis of primary and secondary documents, speeches and expert interviews with sixty individuals, including EU and US competition officials, business representatives and competition lawyers. The research was conducted in Brussels, Belgium; Washington, DC; and Pittsburgh, Pennsylvania, from 1999-2002.

[84] See also, Damro (forthcoming 2003a).

CHAPTER3: Historical Discord in Transatlantic Competition Relations—Institutional Differences and Self-Interested Actors

"It is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack."

Lord Wilberforce, British House of Lords (1978)[85]

I. Introduction

This chapter begins with an overview of the historical foundations of competition policy, in particular the US's 1890 Sherman Antitrust Act and the similar, but much later, laws establishing the competition regime in the EU. These institutional developments provide the foundation for US and EU competition regulators' discretionary authority and the respective domestic constraints within which they operate. The next section outlines the domestic control instruments and foreign intervention instruments available to EU and US political principals. This section also discusses the establishment of extraterritorial jurisdiction in antitrust law—initially and primarily by the US—which was largely responsible for the adversarial nature of transatlantic competition relations prior to the 1990s. After discussing these legal foundations, the chapter clarifies the central actors (US and EU principals and agents) in competition policy and addresses their potential relative influence. Next, the chapter discusses the different interests of the EU and US that have led to historical adversity and discord in transatlantic competition relations. Much of this part of the chapter focuses on transatlantic competition conflicts from the 1950s through the 1980s. This section includes a brief discussion of the limitations of early efforts at international cooperation in competition policy. The chapter concludes with a summary of the findings.

[85] Remark in the House of Lords judgment In re *Westinghouse Electric Corporation Uranium Contract Litigation* [1978] A.C. 547, 617.

II. Domestic Control Instruments in Competition Policy

The cross-level approach in Chapter 2 relies on domestic power-sharing arrangements to understand the preferences of the relevant principals and agents.[86] In the US, these agreements date from the late nineteenth century, while they were established much more recently in the EU. This section briefly introduces the domestic arrangements (i.e., political institutions) that govern power-sharing between principals and agents in the EU and US. Without these arrangements, no delegation of regulatory authority to the agents would have occurred, and the agents would enjoy no discretion in competition policy. In particular, the section emphasizes institutional developments since 1972, when domestic power-sharing arrangements began to address the ability of competition regulators to cooperate internationally.

A. US Institutions of Competition Policy, 1890-1990

The origins of contemporary competition policy are found in nineteenth century US antitrust legislation.[87] This legislation was borne out by the experiences of the US economy with large interlocking trusts during the 1880s.[88] While the US economic system operated on the basis of market forces, it was also built on the notion that markets should be competitive. The US Department of Justice (DoJ) and Federal Trade Commission (FTC) describe the central value placed on competition in the US free market: "For more than a century, the U.S. antitrust laws have stood as the ultimate protector of the competitive process that underlies our free market economy. Through this process, which enhances consumer choice and promotes competitive prices, society as a whole benefits from the best possible allocation of resources" (1995, 1). The

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[86] The term "power-sharing arrangements" is adopted from Milner's (1997) work to indicate relevant domestic political institutions such as legislation and case law.

[87] While the courts have played a large role in the development of US competition policy, this section of the chapter focuses on the legislative foundations of antitrust. Noting the important role of the courts, Evans argues "Although formally based on legislation, U.S. antitrust policy has generally followed the common-law method, built on more than 100 years of precedent generated by federal and private lawsuits. This approach has enabled U.S. courts to permit significant changes in laws in response to economic learning and industry evolution, since cases and their circumstances change constantly" (2002, 16). For more on the role of the courts in the development of US and EU competition policies, see below.

[88] The emergence of these trusts was encouraged because "Severe business depression had brought about pricing practices that were disastrous to firms in certain industries. To avoid this cutthroat competition, trusts were formed in many industries, including petroleum, meat packing, sugar, lead, coal, tobacco, and gunpowder" (Viscusi et al. 1996, 62).

emergence of economic trusts in the nineteenth century challenged the notion that markets were competitive and created a "big-is-bad" mentality among many US citizens and politicians. These groups determined that a policy was needed to ensure that markets remained competitive—a competition policy. The legislation that emerged was the historic Sherman Antitrust Act of 1890, which still serves as the basis of US antitrust legislation today.

Most historians agree that the Sherman Act was passed in response to the US populist movement of the late nineteenth century (Hofstadter 1965, Scherer 1980, 493).[89] In particular, pressure emerged from the agricultural sector over "deflation, the depressed agricultural economy, and the fear of monopolies and trusts" (Sullivan 1991, 7). More specifically, Shughart recounts the traditional view of the circumstances surrounding the Sherman Act:

> Farmers, it is said, saw themselves being squeezed between falling prices for their own produce on the one hand, and rising prices for purchased manufacture articles and ever higher railway rates for shipping agricultural goods to market on the other. These complaints crystallized into the populist Granger and Alliance movements which targeted the great trusts as a major cause of the farmers' economic troubles. The Sherman Act is thus seen as an important agrarian victory over the forces of industrial monopoly (1990, 11-12).

The Sherman Act provides the legal basis for US antitrust powers. While trusts were typically conglomerates with assets and interests in multiple sectors of the economy, the Sherman Act sought to ensure competitive markets by eliminating all monopoly activity, even that occurring within narrow markets. Generally, the Sherman Act "prohibits agreements in restraint of trade and monopolization, attempted monopolization, and conspiracies to monopolize" (Devuyst 2000, 128).

The Sherman Act's use of the term "trade" refers primarily to commerce among the individual states of the US. However, as with subsequent US antitrust law, the act's prohibition against contracts, combinations and conspiracies has a close relationship to law covering trade with foreign states (Brand 2000, 1093). For example, Section 1

[89] For similar arguments, see Fox and Pitofsky (1997), Viscusi et al. (1996, 62) and Fox and Sullivan (1987). For alternative views on the origins of the Sherman Act, see Shughart (1990) and Stigler (1985). For general background on the origins of the Sherman Act, see Boudreaux et al. (1995) and Dewey (1990).

extends the prohibition to anticompetitive behavior "in restraint of trade or commerce among the several States or with foreign nations." Moreover, Section 2 prohibits monopolistic activity affecting "any part of trade or commerce among the several States or with foreign nations." Finally, Section 6(a) provides for US jurisdiction over non-import foreign commerce (USDoJ/FTC 1995, 2).

The act placed final authority for determining anticompetitive activity in the judiciary. However, the executive branch's Department of Justice (DoJ) was given investigatory and enforcement authority. The DoJ was vested with this authority because the Sherman Act, as a criminal statute, requires both policy analysis *and* prosecution. The DoJ prosecutes violations of the Sherman Act as either criminal or civil offenses.[90] For criminal violations, the act provides for fines and imprisonment.[91] In civil proceedings, injunctive relief and treble damages are available to the DoJ "if the U.S. government is the purchaser of affected goods or services" (USDoJ/FTC 1995, 2). If the government is not the affected purchaser, private plaintiffs can also bring civil proceedings under the Sherman Act through lawsuits for injunctions and treble damages.[92] This and subsequent provisions for treble damages are unique to US antitrust law (McNeill 1998, 453, note 240) and have been a source of considerable tensions with foreign governments (Brand 2000, 1103).

Within the DoJ, the Antitrust Division was assigned responsibility for overseeing the enforcement of the Sherman Act. Because the Sherman Act requires policy analysis and prosecution, the Antitrust Division is staffed with economists possessing policy expertise and lawyers with prosecutorial skills.[93] Thus, the DoJ's Antitrust Division is

[90] According to the DoJ and FTC,

> Violations of the Sherman Act may be prosecuted as civil or criminal offenses. Conduct that the Department prosecutes criminally is limited to traditional *per se* offenses of the law, which typically involve price-fixing, customer allocation, bid-rigging or other cartel activities that would also be violations of the law in many countries… In a civil proceeding, the Department may obtain injunctive relief against prohibited practices (1995, 2).

[91] For more on the levels of fines and length of prison terms, see USDoJ/FTC (1995, 2).

[92] This provision for antitrust enforcement through both governmental and private rights of action is not found in most countries (Brand 2000, 1103). For example, the EU only provides for enforcement via "governmental" acts.

[93] In 1972, the US Attorney General initiated organizational changes to the DoJ's Antitrust Division by creating the Economic Policy Office (EPO). This change required that both attorneys and economists be included in *selecting* which antitrust cases will be investigated. As a result, some argue that by creating the EPO, the DoJ is more likely to take on cases that are less easily litigated, including large cases in multiple

mandated and appropriately staffed to investigate possible statutory violations of the Sherman Act. When a possible antitrust violation is uncovered, the Antitrust Division must prepare a case to be tried before the judiciary. Following a final ruling, the Antitrust Division is tasked with enforcing the decision of the court.

The Sherman Act alone did not completely resolve the concerns associated with anticompetitive business behavior. As Viscusi et al. argue, "As a result of dissatisfaction with the Sherman Act during the first few decades, two additional statutes were enacted" (1996, 62). The Federal Trade Commission (FTC) Act of September 26, 1914, was the first of these two major pieces of US antitrust legislation.[94] Regarding anticompetitive behavior, Section 5 of the FTC Act outlawed "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[95] The act also established the Federal Trade Commission but left ultimate antitrust authority in the judiciary. Like the DoJ, the new FTC was granted antitrust investigative and enforcement powers.[96] Unlike the DoJ, the new FTC was established as a regulatory body independent of the legislative and executive branches.[97]

Prior to the FTC Act, the DoJ's Antitrust Division had been the sole antitrust agent. However, this new act required a dual enforcement system in US antitrust. The Sherman Act, which remained intact as a criminal statute, continued to be enforced by the

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markets, without legal concern over multiple jurisdictions (Eisner and Meier 1990, 276-77). The EPO continued to enhance the role of economists in antitrust through the 1980s.

[94] For useful discussions of the FTC's history and enforcement record, see Shughart (1990), Mackay et al. (1987), Moe (1985; 1982), Katzmann (1980) and Henderson (1968).

[95] The sense of "unfair" has changed since the FTC Act was originally promulgated. Today, "unfair" means "unfair to consumers" (Himelfarb 1996, 934).

[96] This mandate also requires a skilled staff trained in economic policy analysis and legal prosecution. While originally staffed primarily with legal experts, today, "Both agencies have sizable staffs of well-trained economists who examine the effects of business practices on consumers by using highly advanced theoretical and empirical tools" (Evans 2002, 16). The FTC derives its powers from two acts of Congress: the FTC Act and the Clayton Act. See below for more on the Clayton Act.

[97] The emergence of independent regulatory bodies represented an important innovation in US regulation (Yataganas 2001, 17-19, 23-24). Independent agencies "are an Anglo-Saxon, or more particularly American invention" (Yataganas 2001, 22). While the EU has a growing array of independent regulatory agencies, none deal directly with competition policy, such as the FTC does in the US. In general, these bodies combine "legislative, judicial and executive functions (rule-making, adjudication and enforcement in the terminology of American administrative law)" (Majone 1996a, 15). According to Yataganas, these bodies "are independent administrative entities, incorporated by law, with a separate legal personality and endowed with decision-making power of a regulatory (rule-making) or individual (adjudication) nature in a specific area of activity" (2001, 22). As Majone adds, "Statutory regulation by independent boards or commissions has a long tradition in the United States—at the federal level it goes back to the 1887

DoJ (Devuyst 2000, 128).[98] The FTC would share enforcement authority with the DoJ under the Clayton Act (see below), particularly in merger review. In order to prevent disputes over enforcement authority, the two agencies developed a case allocation system "in which one agency grants 'clearance' to the other to pursue a particular investigation" (Shughart 1990, 95). The DoJ and FTC signed a liaison agreement in 1948, to determine which agency would have primary responsibility in certain cases. Generally, Wilke and Gruley note that the DoJ "handled criminal matters and most regulated industries, such as telecommunications, while the FTC traditionally handled retail, food and defense matters" (1998, B4). Figure 2 lists the general responsibilities for investigating anticompetitive behavior as provided in the original 1948 allocation system.

Figure 2: DoJ-FTC Case Allocation System of 1948[99]

FTC	*DoJ Antitrust Division*
• Brewing: monopolization, price discrimination • Auto parts: monopolization, acquisitions • Tires, batteries, and accessories: distribution • Cement • Shopping centers: trade restraints • Department stores: acquisitions • Health care • Food and food distribution • Petroleum: monopolization • Copiers and business machines • Franchising • Textile mill products: acquisitions • Dairy industry: acquisitions	• Brewing: acquisitions • Auto industry: monopolization, dealer relations • Tires: manufacturing • Steel • Aviation • Newspapers: acquisitions • Aluminum • Patents and know-how • Communications • Banking and securities • Computers • International agreements

Because new markets would emerge in the future due to new business practices, products and technologies, the liaison procedure could not be a precise and rigid framework. Rather, these new economic developments would require new procedures to

Interstate Commerce Act regulating the railways and setting up the corresponding regulatory body, the Interstate Commerce Commission" (1996a, 10).

98 This is not to say that an activity falling under both the Sherman and Clayton Acts would automatically be enforced by the DoJ. Rather, "the Commission may take administrative action against conduct that violates the Sherman Act and the Clayton Act, as well as anticompetitive practices that do not fall within the scope of the Sherman or Clayton Acts" (Brand 2000, 1096-97).

99 Source: David L. Roll (1975), "Dual Enforcement of the Antitrust Laws by the Department of Justice and the FTC: The Liaison Procedure," *The Business Lawyer* 31 (July): 2080, cited in Shughart (1990, 96).

determine case allocation in the dual enforcement system. In new cases that raise questions of primary responsibility, "consideration is usually given to prior experience with the industry or firm in question, with the exception that criminal charges are handled exclusively by the Justice Department" (Shughart 1990, 95).[100] Reflecting new technologies and changing markets, the original allocation system was reformed in 1963, 1993 and 1995.

Following the 1995 reform, the boundaries that separated individual sectors according to the experience-based methodology of case allocation again began to blur "in the face of rapid technological change, and as deregulation measures have allowed firms to diversify" (USDoJ 2002, 2). As a result, in March 2002, the DoJ and FTC announced a new clearance procedure to overcome delays associated with this experience-based methodology.[101] Figure 3 depicts the new case allocation system.[102] The new system respects the relative expertise of the agencies within specific sectors.[103] Thus, the two agencies continue to liaise in order to determine which one is the more appropriate and capable to investigate the case.[104]

[100] Wilke and Gruley agree: "In the past, whichever [agency] had the most institutional experience in a given area would get the case" (1998, B4).

[101] For more on the delays associated with the previous case allocation system, see USDoJ (2002).

[102] The US Congress reviewed this new allocation system before its formal implementation. For information on the congressional review, see USDoJ (2002). On the controversy surrounding input from an AOL attorney in the drafting of the new system, see Kulish (2002).

[103] The new agreement also provides for a dedicated clearance officer within each agency, a common database to track Hart-Scott-Rodino (see below) filings and clearance matters, and weekly meetings and reports to review the new system and "ongoing matters" (USDoJ 2002, 4).

[104] However, former US Assistant Attorney General for Antitrust Joel Klein does note that there can be competition between the two agencies to get high-profile cases, and FTC Chairman Robert Pitofsky admits to "a friendly rivalry" in case allocation (Wilke and Gruley 1998, B1).

Figure 3: DoJ-FTC Case Allocation System of 2002

FTC	*DoJ Antitrust Division*
• Airframes • Autos and trucks • Building materials • Chemicals • Computer hardware • Energy • Grocery manufacturing • Operation of grocery stores • Healthcare • Industrial gases • Munitions • Pharmaceuticals, biotechnology • Professional services • Operation of retail stores • Satellite manufacturing and launch vehicles • Textiles	• Aeronautics • Agriculture and associated biotechnology • Avionics • Beer • Computer software • Cosmetics and hair care • Defense electronics • Financial services, insurance, and stock, option, bond, and commodity markets • Flat glass • Health insurance • Industrial equipment • Media and entertainment • Metals, mining, and minerals • Missiles, tanks, and armored vehicles • Naval defense products • Photography and film • Pulp, paper, lumber, and timber • Telecommunications services and equipment • Travel and transportation • Waste

Almost a month after passing the FTC Act, the US adopted its next major piece of antitrust legislation. In response to growing concerns over the potentially anticompetitive effects of mergers, the Clayton Act was signed on October 15, 1914. According to Devuyst, the "US Congress adopted the Clayton Act as a means to protect opportunities for small business" (2000, 128).[105] This new statute lacked the penal provisions of the Sherman Act, but introduced sections analogous to those contained in the FTC Act, which authorized the FTC to issue restraining orders to prevent firms from engaging in anticompetitive practices in their incipiency (Henderson 1968, 27).

Section 7 of the Clayton Act prohibits any merger or acquisition if its effect "may be substantially to lessen competition, or to tend to create a monopoly." In addition to prohibiting mergers, acquisitions and joint ventures that may substantially reduce competition, the Clayton Act also notably prohibits price discrimination, tie-in sales and exclusive dealing agreements and interlocking directorates.[106] Thus, the Clayton Act more clearly defined anticompetitive acts by listing a variety of prohibitions and including merger review in US antitrust legislation (Viscusi et al. 1996, 62).

Like the Sherman Act, the Clayton Act's Section 7 applies to foreign commerce by prohibiting anticompetitive activity "in any line of commerce or in any activity affecting commerce in any section of the country." According to the USDoJ/FTC, the Clayton Act's reference to "commerce" includes "trade or commerce among the several States and with foreign nations" (1995, 3, note 8).

The preceding discussion of the Sherman, FTC and Clayton Acts outlines the original delegation of antitrust-specific authority in the US from political principals to regulatory agencies. However, the US principals did not establish *general* guidelines for the discretionary authority of agents until 1946. In that year, the US Administrative Procedures Act (APA) set broad guidelines for regulatory discretion in making domestic rules.[107] Reflecting the assumptions of the principal-agent framework of delegation (see Chapter 2), the APA's provisions "rely wholly on the belief that the complexity of public policy requires Congress to use the agencies as extensions for carrying out its legislative functions. The point was to force administrators to adhere to legislative values when making rules" (Rosenbloom 2001, 774).

Before the APA, general guidelines for domestic rule-making authority by agents were non-existent: "Until 1946, rule-making procedures were not standardized. Some rules were made with little or no public consultation. Many were not publicized and existed only as letters or in mimeographed form as 'mims'" (Rosenbloom 2001, 774).

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[105] This initial reason for signing the Clayton Act differs noticeably from current US implementation of antitrust policy, which focuses on protecting consumers, not small businesses (Evans 2002). For more on this distinction, see below.

[106] Devuyst notes "two major amendments" to the Clayton Act since its adoption: "In 1936, the Robinson-Patman Act elaborated the prohibition on price discrimination, again to protect small businesses. In 1950, the Celler-Kefauver Act strengthened merger control by outlawing mergers or joint ventures whose effect may be substantially to lessen competition or tend to create a monopoly" (Devuyst 2000, 128).

[107] For a useful discussion of the politics surrounding Congress's adoption of the APA, see Rosenbloom (2001). The APA was embedded in a broader process that reflected the historical dominance of the legislature in US policymaking. As Yataganas argues, "the US constitutional system, especially in the beginning, was founded in a relatively weak executive, so that the first hundred and fifty years (until the New Deal period) of the American republic saw policymaking dominated by the legislature" (2001, 17). For similar assessments of the historical separation of powers in the US and congressional delegation to regulatory agencies, see Epstein and O'Halloran (1999) and Kiewiet and McCubbins (1991, 9-12). For a comparative discussion of US federalism and a potentially federal system in Europe, see Sbragia (1992).

The formalized procedure under the APA required that "before promulgating a rule, the agency must provide notice and opportunity for comments; when it promulgates the rule it must supply a concise statement of the rule's 'basis and purpose'; the rule can be set aside by a court only if it is 'arbitrary, capricious, or abuse of discretion'" (Majone 1996a, 290).[108]

While the APA is not antitrust-specific, it does apply generally to the discretionary authority of agents to make domestic rules governing the implementation of the antitrust statutes, such as the DoJ-FTC case allocation systems discussed above. As such, the APA provides an early example of congressional (i.e., political principal) control exercised through regulatory oversight. While the APA focused on general, discretionary authority in *domestic* rule-making, the act did not formally determine guidelines for *international* rule-making.

The US regulatory agents began asserting their own authority over international rule-making beginning in 1972. In that year, the discretionary authority of US competition agents to enter into executive agreements with foreign governments was clarified with the so-called Case-Zablocki Act (CZA).[109] Previously, the precise legal division of powers between the legislative and executive branches was unclear regarding non-treaty agreements signed between the executive and foreign governments. In comparison, the authority for treaty-making was more clearly elaborated in the US Constitution, which stated that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur…" (Art. II, section 2, clause 2).

While the domestic division of powers over non-treaty agreements was unclear, such agreements signed between the executive branch and foreign governments before the CZA were becoming common features of US foreign policy, often supplementing or replacing treaties (Hyman 1983, 805).[110] The increasing use of these executive instruments of foreign policy prompted the US Congress to delineate more clearly the

[108] For a discussion of the relationship between agency rule-making and adjudication versus court adjudication, see Majone (1996a, 290-292). For a further description of the APA, see also Majone (2000b, 290-91, 293-95).
[109] 1 U.S.C. 112b (1997).
[110] According to Hyman, "As of January 1, 1972, of the 5,306 treaties and other international agreements in effect, 4,359 were executive agreements while only 947 were actual treaties" (1983, 805, note 5).

division of international rule-making authority. Prior to World War II, inter-branch relations were largely characterized by congressional accommodation of executive efforts to increase foreign policymaking authority. However, "After World War II, this de facto accommodation, which had suffered episodic stresses, began to disintegrate, with a series of abortive war powers resolutions, increasing congressional efforts to assert control over agreement making, and more direct intervention in diplomatic protection" (Reisman 1989, 781).

While the extent of treaty-making authority differs between the US House and Senate, both agreed on the CZA as a means to "increase congressional control and oversight of sole executive agreements" (Knaupp 1998, 260).[111] The provisions of the CZA require the executive branch to transmit any international agreements it signs to the Congress within sixty days of the agreement's entry into force.[112] The Secretary of State determines whether an executive agreement meets the transmittal requirements in the CZA (Knaupp 1998, 261). The CZA does not authorize the Congress to alter or reject these executive agreements.[113]

Due to executive non-compliance with the CZA, Congress clarified the Act with two subsequent amendments (Hyman 1983, 837). In 1977, an amendment assured that any US departments or agencies signing international agreements were required to transmit that agreement to the Department of State within twenty days of its signing.[114]

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[111] According to Margolis, "There is substantial consensus that an executive agreement is an agreement made by the president, or by a presidentially authorized individual, with the head (or an authorized representative) of a foreign country, which has not been approved by the Senate before it goes into effect" (1986, 25). More specifically, the US President can enter into three types of executive agreements: 1) sole executive agreements for which the President has authority directly from the Constitution, 2) executive agreements authorized by delegation of Congressional authority, and 3) executive agreements pursuant to a treaty. (The author is grateful to Ronald A. Brand for pointing out this useful distinction.) The current study is concerned primarily with the first type of executive agreement because this is the type of agreement that initially concerned Congress enough to pass the CZA and was the type signed by the US as the Bilateral Agreement in 1991 (see Chapter 4).

[112] For more on the CZA, see Knaupp (1998) and Hyman (1983).

[113] In 1976, the US Senate did attempt to pass the War Powers Resolution, "which would have reserved to the Senate power to refuse to implement agreements that were not made in treaty form. With the exception of the War Powers and the Case-Zablocki Act, most efforts in Congress to limit the scope of presidential power in making sole executive agreements have not gained widespread acceptance" (Knaupp 1998, 249-250).

[114] These executive agreements with foreign governments must be approved by US State Department. Parisi states that, regarding executive agreements, "Entry into such agreements by the FTC and DOJ on behalf of the U.S. Government must first be authorized by the State Department under the terms of the Case-Zablocki Act of 1972" (1999, 135).

An additional amendment was made in 1978, introducing "more effective means of inducing executive compliance" (Hyman 1983, 837), particularly more precise and restrictive time limits for transmittal.[115]

In addition to a clarification of their discretionary authority in international rule-making, US competition authorities also gained significant discretionary authority in the 1970s relating to merger review. The Hart-Scott-Rodino (HSR) Act of 1976 was a significant development in the discretionary authority of US competition agents to implement competition policy.[116] In addition, the HSR would provide a basis for international implementation cooperation in merger review.

Prior to 1976, competition investigations brought under Section 7 of the Clayton Act were initiated *after* a merger or acquisition had been completed. If the competition agents decided to pursue a post-merger challenge on the grounds that the transaction threatened competition, the agents were required to bring the firms to court, typically seeking a divestiture or similar remedy. These legal cases and subsequent appeals and challenges often spanned many years, all the while allowing the newly merged firms to reap profits from what might in fact be an illegal transaction.

One particular case that exemplified the potential pitfalls of the pre-HSR system of merger review was the case of *United States v. El Paso Natural Gas Co*.[117] After seven years of legal proceedings, the Supreme Court ordered El Paso Natural Gas Co. to divest its merger with Pacific Northwest Pipeline Corp. According to the ruling, the divestiture was to occur "without delay." Despite this court order,

> Divestiture in the El Paso case took an additional ten years, meaning that it took a total of 17 years before the government could cure an anticompetitive acquisition. The case went to the Supreme Court so many times some folks lost count. It was estimated that El Paso derived profits of $10 million for every year it retained the illegally acquired company (Baer 1996, 2).[118]

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[115] These "more effective measures" may have fallen short. As Knaupp notes, "Despite the fact that the Case Act is still in full force, since its enactment the Executive Branch has struggled to fulfill its requirements and has rarely complied with the time restrictions imposed. Even more alarming, however, is the fact that hundreds of agreements are never reported at all" (1998, 261).

[116] As Carroll argues, "In enacting the HSR, Congress delegated broad legislative and administrative authority to two agencies" (1983, 110), the FTC and the Antitrust Division of the DoJ.

[117] *United States v. El Paso Natural Gas Co*. 376 U.S. 651 (1964).

[118] For more on the historical development of the HSR, see Baer (1996).

In general, the HSR provides additional investigative tools for competition agents, requires pre-merger notifications by merging firms and allows individual states to recover monetary damages on behalf of citizens for violations of antitrust. The HSR's Article II, which deals with pre-merger notification authority, is most important for the current study. According to Article II, firms meeting certain "size-of-party" and "size-of-transaction" thresholds are required to notify their merger to the competition authorities *before* it is implemented.[119] More specifically, the HSR requirements for pre-merger notification apply

> if the firm making the acquisition has total assets worth \$100 million or more, or annual sales of at least \$10 million, and the company to be acquired has at least \$10 million in assets or annual sales. Any transaction meeting these size limits is covered if the acquiring firm will gain control of more than \$15 million worth (or 15 percent) of its merger partner's stock or assets (Shughart 1990, 62).[120]

Due to the size of the firms involved, the internationally-oriented mergers investigated in the current study tend to meet these HSR thresholds for pre-merger notification.

The HSR also established a 30-day deadline for a competition agent "to decide if it will oppose the merger" (Shughart 1990, 62). During this period, the merging firms must wait for a ruling from the regulators before they can implement the transaction. If the competition authorities decide to oppose the merger, they make a Second Request to acquire further information from the merging firms. Upon issuance of the Second Request, the waiting period is extended another 20 days.[121] Within these parameters, the competition authorities have used their discretionary authority to promulgate "rules implementing all phases of the preacquisition notification program (the Rules). The Rules prescribe the information and documents that companies planning to effect transactions covered by HSR must furnish the agencies to satisfy the notification requirement"

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[119] Firms that fail to meet this HSR obligation can be punished with "court-imposed civil penalties of up to \$10,000 for each day a violation continues. The court may also order injunctive relief to remedy a failure substantially to comply with the HSR Act" (Brand 2000, 1098).

[120] See also USDoJ/FTC (1995, 4) and Brand (2000, 1097-98, note 13) for more on the specific thresholds.

[121] For cash tender offers, the initial waiting period is 15 days, while the post-Second Request period is extended for another 10 days.

(Carroll 1983, 110).[122] Firms may also ask the FTC for interpretations of their obligations under the HSR.

While the HSR significantly increased the discretionary and non-discretionary authority of the US competition authorities, political principals and various interested constituents supported the measure as a useful correction to the pre-HSR system of merger review. As ICPAC argues, the HSR made sense for US competition authorities, consumers and political principals alike:[123]

> Advance notice is viewed as useful to competition authorities because it permits them to evaluate and either prohibit or restructure potentially anticompetitive transactions before the transaction is implemented. In this way, competition authorities avoid the widely acknowledged difficulties that accompany attempts to restore competition by 'unscrambling the eggs' after allegedly anticompetitive transactions have been completed. The experience of the U.S. antitrust enforcement agencies before 1976 illustrates that imposing structural relief after a transaction has been consummated is often difficult, if not impossible. Attempting to prevent anticompetitive harm by relying on antitrust conduct cases after an anticompetitive merger has been implemented, according to the U.S. antitrust enforcement agencies, is a poor substitute for preserving competitive structure in the market in the first place. Even if postconsummation remedies were effective, consumers would suffer the harmful effects of the loss of competition during the interim period before remedies were imposed. Indeed, the

[122] For more on these rules, see USDoJ/FTC (1995, 4). According to Carroll, this discretionary authority is authorized at 15 U.S.C. section 18a(d) (1976), while the rules are codified at 16 C.F.R. section 803 (1982). Carroll also notes that some commentators have argued that the competition authorities have "drafted the Rules so as to extend the coverage of HSR over as many transactions as possible" (1983, 110, note 12).

[123] Some commentators have noted possible disincentives for firms to have originally supported the HSR. Shughart argues that pre-merger notification requirements may impose subtle social costs because it "imposes a duty on firms to announce publicly that they have discovered the existence of a previously hidden profit opportunity… In cases where the proposed acquisition is delayed while the government seeks additional information from the merger partners, other firms, which had been unaware of the existence of undervalued assets, are given time to step forward with takeover offers of their own. The HSR process thus allows these other firms to free ride on the information revealed by the premerger announcement" (1990, 62-63). Carroll also argues that the HSR "has given the antitrust agencies a significant degree of control over one of the most important variables affecting the outcome of an attempted acquisition: the speed with which the offeror can pay for tendered shares. Misuse by the agencies of the powers delegated by Congress under HSR can harm a company's legitimate business interests by unnecessarily prolonging the period from the date the offer is made to the date of its closing. Delay increases the costs of and may be instrumental in defeating attempts to acquire ownership of companies through tender offers" (1983, 108-109).

> stated purpose of the U.S. Congress in enacting the premerger notification regime embodied in the [HSR Act] was to give the agencies 'an effective mechanism to enjoin illegal mergers *before* they occur'[124] (ICPAC 2000, 89).

The HSR made it easier for US competition authorities to prohibit anticompetitive mergers instead of having to "unscramble the eggs". In doing so, the HSR has also increased significantly the workload of these competition authorities. For example, Table 4 provides summary statistics on the workload increases associated with HSR implementation during the 1990s.

Table 4: Merger Activity in the US, 1989-99[125]

	1989	**90**	**91**	**92**	**93**	**94**	**95**	**96**	**97**	**98**	**99**
HSR Filing/ Enforcement Statistics	2883	2262	1529	1589	1846	2305	2816	3087	3702	4728	4679
Second Request Investigations	64	89	64	44	71	73	101	99	122	125	113
Merger Challenges	33	60	37	23	32	50	61	58	54	83	76

As EI has increased since the 1970s, firms have increasingly pursued mergers as a means to meet international competitive pressures. Whether the merging firms are domestic or foreign, if they are active in the US market and meet the HSR's notification thresholds, the merger must be reviewed and pre-approved by the US competition authorities. Thus, the increasing workload of US competition authorities under the HSR reflects the increasing merger activity by both domestic and foreign firms. The pre-merger notification authority of the HSR opened a new procedural avenue through which the US competition authorities could potentially engage in international cooperation over the implementation of competition policy. The possibility of increasing such discretionary implementation cooperation was enhanced considerably by the CZA's clarification that competition authorities could engage in international rule-making cooperation at their own discretion.

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[124] S. REP. NO. 94-803, at 72 (1976).
[125] Source: ICPAC (2000, Annex 2-A).

B. EU Institutions of Competition Policy, 1951-1900

The development of competition policy in Europe occurred much later than in the US. It was not until the end of World War II that the major European states launched competition initiatives. Many of these initiatives relied heavily on the legal and institutional lessons learned in the US experience with antitrust. While a multi-sector, Europe-wide competition policy was agreed to be a common policy for the entire EU in 1957, the actual implementation of the policy required piecemeal statutory advances and court decisions. Indeed, as will be discussed below, merger review was not codified at the European level until the Merger Control Regulation was implemented in 1990.

Following WWII, the US actively encouraged the development of antitrust legislation in the major European states. The US position reflected its desire to establish a liberal, international trading regime and encourage economic recovery in Western Europe. This agenda would be threatened by the re-emergence of large European cartels that dominated national economies and distorted world markets. Many such cartels, originally formed after the Great Depression, had undermined liberal thinking in favor of various mechanisms to plan economies and markets. It was during the inter-war years that the "European economies experienced a double shift: a trend toward the formation of cartels, and a trend toward autarchy. Cartels organized domestic production noncompetitively by fixing prices and dividing market share and controlling exports and imports" (Dumez and Jeunemaître 1996, 217). Following WWII, these cartels were also seen by the US as a potential obstacle to peace in Europe. As Davis and Raghavan argue, "Hoping to diminish the power of the industrial barons that had bankrolled the Nazi war machine, the U.S. pushed for West Germany to establish an antitrust policy to make sure that such industrial conglomerates couldn't gain the kind of power they had accumulated in the 1930s" (2001, A8).

These events prompted the US to support antitrust legislation as a means to ensure that cartels did not become an obstacle to the European economic recovery, the creation of a free trading system and the maintenance of European peace. As a result, the United Kingdom promulgated antitrust legislation in 1948, France in 1953, and Germany in

1957.[126] However, these new competition policies were implemented with an understanding by the US that rigorous antitrust enforcement in Europe would be overshadowed by the need to rebuild national economies.[127] It remained unclear exactly how long such a transition period would last. Thus, while US pressure played a large role in the creation of individual European competition policies, immediate convergence toward a pan-European competition policy remained elusive. Such a convergence was viewed simply as a goal: "Convergence became a goal for the future, as European countries took full advantage of the duration and scope of the divergence margin they had been allowed" (Dumez and Jeunemaître 1996, 218-19).

Despite these obstacles, the US remained undaunted and continued to support the creation of a Europe-wide competition policy. The earliest effort at converging toward a pan-European competition policy can be found in the Treaty of Paris establishing the European Coal and Steel Community (ECSC) in 1951.[128] In particular, Articles 65 and 66 provide the competition principles for the ECSC, which would also serve as a basis for the competition policy included in the Treaty of Rome six years later. Article 65 of the ECSC prohibits anticompetitive agreements, including cartels, which "would tend, directly or indirectly, to prevent, restrict or distort the normal operation of competition within the common market" (paragraph 1). Article 66 of the ECSC prohibits "concentrations" (i.e., mergers) and "misuses" of economic power. In particular, the article identified as anticompetitive those firms that "have or acquire… a dominant position which protects them from effective competition in a substantial part of the common market". The ECSC also created a High Authority to oversee the functioning and implementation of the Treaty provisions. This High Authority was granted sole

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[126] For more on the different historical experiences among the European states, see McGowan and Cini (1999), Cini and McGowan (1998), Gerber (1998), Dumez and Jeunemaître (1996) and Bulmer (1994).

[127] This understanding reflected a popular and recurring European approach to rebuilding national economies through government support for cartel-like national champions. More recently, this approach is found in Davis and Raghavan's argument that "European countries promoted their so-called national champions through technology grants and government contracts. Aircraft maker Airbus was the exemplar, though at various times, Siemens of Germany, Renault of France and Philips of the Netherlands received such treatment…" (2001, A8).

[128] The US's influence was also seen in this project. For example, speaking generally, Majone notes "It is well known that the anti-cartel clauses of the ECSC Treaty… were significantly influenced by the American model represented by the Sherman Act, the Clayton Act and the Federal Trade Commission Act" (1996a, 50). While Jean Monnet viewed the ECSC Treaty as the first European-wide antitrust legislation

responsibility for enforcing Articles 65 and 66. However, competition decisions of the High Authority could be appealed to the newly created European Court of Justice (Gerber 1998, 341).

The next step in creating a pan-European competition policy came with the signing of the Treaties of Rome in 1957, and the creation of the European Economic Communities.[129] The provisions on competition policy in this treaty reflected the earlier agreements in the Treaty of Paris. The relevant articles cover restrictive agreements (cartels), monopolies and public sector firms, and state aids.[130] However, the new treaty did not include explicit provisions on merger control.

The Treaty created the initial framework for the free movement within the single market of goods, services, capital and persons (i.e., labor). To create this single market, Article 3(f) [3(g) TEU] strives to ensure that "competition in the Common Market is not distorted".[131] This basic goal is then elaborated in Articles 85 and 86.[132] Article 85 [81 TEU] follows the basic structure of Article 65 of the ECSC Treaty, prohibiting "all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market". Article 86 [82 TEU] addresses monopoly policy by expanding on Article 66 of the ECSC Treaty to prohibit "any abuse by one or more undertakings of a dominant position" in the single market. These articles placed authority for competition policy in the newly-created European Commission. While these two articles of the EEC Treaty were based on the earlier articles of the ECSC Treaty, it is

(Majone 1996a, 50), its implementation was restricted by sectoral limitations to cover only the coal and steel markets.

129 Germany was instrumental in getting antitrust included in the Treaty (Devuyst 2001; Gerber 1998; and Davis and Raghavan 2001).

130 More broadly, Fox argues that competition policy under the Treaty of Rome is carried out by six means, including the basic framework of the six freedoms, Articles 85 and 86, Article 37, Article 90, Articles 92-94, and general provisions requiring Member States to facilitate the achievement of common tasks and objectives. Fox also notes that the later adoption of the Merger Control Regulation "rounds out the competition rules" (1997a, 6-7).

131 The bracketed TEU citations refer to the new numbering system created by the Treaty of European Union.

132 Article 90 also prohibits governmental restraints as a component of competition policy.

notable that they are also analogous to sections 1 and 2 of the US Sherman Act (Brand 2000, 1105).[133]

While competition policy was agreed to be a common policy of the EEC, in practice, the creation of a truly common competition policy required additional efforts by the European Commission. At the time, Member States still had a patchwork of different competition laws, some (e.g., Belgium) with none at all.[134] Asserting its authority under the Treaty, the Commission began pushing for a Community structure to implement competition policy as a common policy. The Council of Ministers allowed the Commission considerable discretion to prepare the institutional framework for implementing Articles 85 and 86. This delegation of authority may not be as surprising a development as it first appears. For example, as Gerber argues,

> Given the lack of experience with competition law in the Member States and the common assumption that competition law would play the same marginal role in the Community that it played in the Member States, it is not surprising that Member State governments had little interest in becoming directly involved in the structuring of that system (1998, 349).

Following negotiations with the Council, the European Parliament and individual national governments, the Commission issued Regulation 17 in 1962.[135] This Regulation created the institutional structure for the EEC's competition policy and established significant discretionary authority for the Commission. As Gerber argues, "Regulation 17 created a competition law system in which the enforcement and policy-making prerogatives were centered in the Commission and the role of national legal systems was marginalized" (1998, 349).

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[133] For core differences in approach to competition, see below and Himelfarb (1996, 934). On US experience, see Cini and McGowan (1998, 6-7). In addition to the US, Cini and McGowan also elaborate differences in the British and German experiences.

[134] This is not to claim that the Member States generally resisted implementing competition policies. Rather, following the signing of the EEC Treaty, the individual national competition authorities implemented the provisions on competition policy, sometimes actively (Gerber 1998, 349).

[135] Regulation 17/62, 1962 OJ 204. For more on this regulation, see Cini and McGowan (1998, 19-21). The Commission's recent White Paper on modernizing Regulation 17 calls for increased discretion, but also a decentralization of authority. For an excellent analysis of the EU's efforts at modernizing Regulation 17, see Doleys (2000) and European Commission (2002). For a useful analysis of the discretionary impact of Regulation 17 and the White Paper on Modernization, see Majone (2000b, 296-97).

For example, Article 4(1) of the Regulation creates a notification system for EU competition policy. Under this system, agreements that might violate Article 85 (i.e., restrictive agreements, not merger agreements) of the EEC Treaty must be notified to the Commission. It was, however, unclear exactly what the Commission would do with such notifications once received (Gerber 1998, 350). An additional centralizing measure of Regulation 17 is found in Article 9(3), which requires national authorities to suspend their competition investigations in cases in which the Commission begins an investigation under the treaty. This provision reduced the incentive for Member States to initiate competition investigations because they faced the possibility of having to discontinue their enforcement activity if the Commission decided to open an investigation (Gerber 1998, 350).

Regulation 17 also placed significant authority in the EU's Competition Directorate.[136] Competition decisions taken by the Directorate must be sent to the Commission for a final decision. In the negotiations leading up to Regulation 17, France pushed for the creation of a committee of representatives from the Member States that would first have to approve of the Directorate's decision by a majority vote. This committee would inject a political dimension into the Directorate's decisions and reduce the number of decisions sent to the Commission for final approval. Instead of adopting the French proposal, Article 10(3) establishes an advisory committee of representatives from the national competition authorities. This committee need only be *consulted* before the Directorate sends its decision to the Commission, which greatly reduces the possibility that the Directorate will formulate decisions based on political influence exercised through the advisory committee (Gerber 1998, 350).

Finally, Regulation 17 increased the investigatory and enforcement authority of the Commission. Specifically, Article 14 allows the Commission to conduct "dawn raids". Through these dawn raids, the Commission can "enter into any premises relevant to an investigation for violation of the competition law provisions, to examine the books and records of the firms involved, to make relevant copies and to interview personnel at

[136] In 1962, the Competition Directorate was still known as Directorate-General IV, or DGIV. To avoid confusion, DGIV will be referred to as the Competition Directorate throughout the current study, regardless of the time period in question.

the site of the investigation" (Gerber 1998, 351). This authority is much more commonly used in non-merger cases, such as cartel investigations, than in merger review.

The Commission's discretionary authority was further increased in 1965, when the Council afforded it the power to grant group exemptions under Article 85(3) [81 TEU] without approval from the Council.[137] Due to the notification procedure implemented under Regulation 17, the Commission had been flooded with more notifications than could be handled by its limited staff. To alleviate the backlog, the Commission was allowed to grant block exemptions.[138] In addition, Gerber notes, "the Council included language in the Regulation indicating that it favored such delegation, and it has since expanded the categories of cases in which the Commission may so legislate" (1998, 351). As a result, in certain cases, the Commission will issue exemptions of competition law to specific industries and markets. Once granted an exemption, the targeted firms are not required to comply fully with the notification requirements under Regulation 17.

The creation of the EU's institutional framework for competition policy greatly enhanced the discretionary authority of the Commission and the Competition Directorate. As Gerber argues, the Competition Directorate

> is the only directorate to have such [discretionary] power, and some consider it unlikely that the Council would initiate such a practice today. Nevertheless, what began as a response to a specific and temporary need (to deal with a flood of notifications) has come to play an important role in the system, because it further shields [the Directorate's] decision-making authority from political interference.
>
> The Community's political institutions thus constructed an institutional framework for competition law that relied heavily on the initiatives and decisions of the Commission. It centralized authority in the Commission and minimized the role of national competition officials and national courts, and on the Community level it helped to protect [the Directorate] from political influences (1998, 351).

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[137] Regulation 19/65, 1965 OJ 533.

[138] The Commission's first block exemption came in the 1967 Exclusive Distribution and Purchasing Regulation.

While the Commission's general "supranational" authority over competition policy had increased significantly, the EU's institutional framework still lacked an explicit mechanism to review and control mergers in the single market. As Eleanor Fox, an antitrust expert at New York University, argues, no central law or regulation emerged to check the spread of mergers in the single market because there was a general belief among European decision makers that such transactions "would be good for integration" (cited in Davis and Raghavan 2001, A8). Therefore, the Competition Directorate had to look to existing instruments as potential ways to control mergers.[139]

The ECJ appeared to support early Commission efforts to apply existing regulatory instruments to potentially anticompetitive merger activity. For example, in its 1973 *Continental Can* judgment, the ECJ asserted "under certain circumstances, a firm holding a dominant position could be regarded as abusing its position when taking over or merging with a competitor" (McGowan and Cini 1999, 179).[140] Thus, the Commission and Court would be able to use the Article 86 [82 TEU] prohibition against abuses of dominance to control merger activity.[141] In addition, in the 1987 *Philip Morris* case, the Article 85 [81 TEU] prohibition of agreements that prevent, restrict, or distort competition was also applied to merger activity.[142]

Trying to capitalize on the ECJ's apparent support for its position, the Commission issued a draft merger control regulation in the same year as the *Continental Can* decision (1973).[143] This was followed by three more proposals for merger legislation

[139] For example, according to McGowan and Cini, "in its 1966 *Memorandum on the Problems of Concentration in the Common Market*, the Commission asserted that Article 86 [82 TEU] (abuse of a dominant position) might be used to regulate concentrations [i.e., mergers]" (1999, 179).
[140] It is notable that this case was transatlantic in nature. As Kerres describes, "In the *Continental Can Company* case, an American company, which already owned a major German producer of metal tines, tried to acquire control of a Dutch company that dominated the Benelux market in cans. The Commission argued that the acquisition was an abuse of an already dominant market position as defined in Article 86 [82 TEU]" (1991 14).
[141] As Kerres argues, "Article 86 [82 TEU] prohibits the abuse, but not the existence, of a dominant market position within the Common Market, or any substantial part of it. Attempts to increase dominance over a particular market may be judged to be an abuse by the Commission or the Court of Justice…" (1991, 7).
[142] According to Kerres, "In the *Philip Morris/Rothman* case, British-American Tobacco and R.J. Reynolds sued to prevent a partial merger between Philip Morris and Rothmans. The Court of Justice found that Article 85 [81 TEU] could be applied to the proposed purchase of shares, as the reduced independence of the two companies could lead to a reduction in competition. The deal was eventually approved after restructuring" (1991, 14). According to Cini and McGowan (1998, 33), this case also contributed to the eventual signing of the Merger Control Regulation.
[143] McGowan and Cini note that the Commission submitted these proposals under its own authority under Article 235 of the EEC Treaty: "if action by the Community should prove necessary to attain… one of the

in 1982 and 1984. All of these proposals failed, largely due to resistance in the Council, especially from France, Germany and the United Kingdom (McGowan and Cini 1999, 179). However, changes were occurring that would eventually facilitate the establishment of the Commission's merger control authority.

The Commission's various proposals for a merger control regulation gained particular impetus during the 1980s from the negotiations over the Single European Act and the approaching completion of the Single European Market (SEM) (Devuyst 2000, 13). During the 1980s, merger and acquisition activity in the EU was increasing significantly. "According to Commission data, there were 115 mergers in 1982-83, 208 in 1984-5, 492 in 1988-89 and 622 in 1989-90" (McGowan and Cini 1999, 179).[144]

These changes in merger activity prompted business interests, in particular, to pressure for a single pan-European merger regime.[145] As McGowan and Cini argue, "It was against this background that industry demands for the creation of a level playing field and one-stop shop for merger control reverberated" (1999, 180). More specifically, Kerres argues,

> As time went on, pressure increased to pass a regulation that dealt with merger control… Articles 85 [81 TEU] and 86 [82 TEU] are poorly suited to the task of merger control. Moreover, national merger control laws vary considerably amongst the members of the Community, from very strict in Germany to practically nonexistent in Italy. Consistent treatment of mergers and acquisitions throughout the Community could only be assured by an EC regulation. Merger and acquisition activity is on the rise in the Community in anticipation of the creation of the single market in 1992. Some analysts encourage this concentration as a way of increasing the competitiveness of Community exports, but further concentration could also have a negative impact on competition within the Community. For all these reasons, the Community finally

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objectives of the Community and this Treaty has not provided the powers, the Council shall acting unanimously on a proposal from the Commission… take the appropriate measures" (1999, 198).

[144] For these measures, McGowan and Cini cite Tsoukalis (1993, 103). For similar measures, see Tsoukalis (1997, 81-83).

[145] Mergers increased so considerably in the SEM because, in response to greater competition, firms began seeking economies of scale in a much larger European market. To deal with this increased competition, the EU needed a pan-European merger control regulation. For an excellent and simple description of the economics behind these changing business strategies and the EU responses to them, see Jacquemin (1990), Fine (1989, 4) and van Mourik (1996, 20). Supporting statistics and discussions can also be found in Sachwald (1994, esp. 19-20).

> overcame its political reservations and passed the new Merger Control Regulation (Kerres 1991, 8).

In 1990, the Commission implemented Regulation (EEC) No. 4064/89, more commonly known as the Merger Control Regulation (MCR).[146] The MCR greatly expanded the authority of the EU by shifting merger review authority from the individual Member States to the Commission.[147] Within the Union's institutional structure, the Commission is by far the dominant player in merger review, exercising comprehensive supranational powers. Indeed, McGowan and Cini argue "in contrast to all other EU policy areas, competition policy is unique, for both the Council of Ministers and the European Parliament find themselves on the sidelines" (1999, 177). Within the Commission itself, merger review is the domain of the Competition Directorate.[148]

The MCR requires mergers with a Community-wide impact to file pre-merger notifications with the Commission. According to the regulation, the intent of this pre-merger authority is to prevent the creation or strengthening of "a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it" (Article 2[2]). This notification authority closely resembles that acquired by US competition authorities in 1976 under the HSR Act.[149] The

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[146] On the politics behind the MCR, see Doleys (2001), Allen (1996, 169-175), Dumez and Jeunemaitre (1996), Bulmer (1994), Pollack (1998), Waverman et al. (1997), Dickens and Hahn (1999), Eyre and Lodge (2000), and Davison and Johnson (1999).

[147] The need for a single authority in merger control was an important reason for the MCR. As Nicolaides argues:

> There are several reasons why common rules need to be administered by a single, supranational authority. First, it can be given discretion to act independently so that it is above political or corporate influence. Second, a supranational authority has the right to fine firms in any country of the EC or request any of the Member-State governments to stop anti-competitive action. Third, all firms in the EC can have access to that authority for information or for lodging complaints against anti-competitive practices that affect other countries. Fourth, a single authority is more likely to be consistent in the interpretation and the enforcement of the rules. Fifth, rules on competition are never absolute. They permit exceptions whenever the benefits, say, from cooperation between firms outweigh the costs from any reduction in competition. Hence, it is necessary to have a mechanism for controlling deviations from the rules, otherwise individual governments could find excuses to support their own firms (1994, 14).

On the reasons for creating a supranational competition authority, see also Gatsios and Seabright (1989).

[148] Highlighting the central role of this Directorate, Wilks and McGowan argue that its "rise to prominence provides a spectacular case study in organizational success. In ten short years [the Competition Directorate] had transformed itself from a sleepy, ineffectual backwater of Community administration into a formidable machine for economic integration" (Wilks and McGowan 1996, 225).

[149] Under the MCR, the Commission publishes notifications in the *Official Journal* upon receipt. This differs from the US, where the HSR Act (15 USC Section 18A[h]) requires US authorities to keep notifications confidential until, following a preliminary investigation, they decide to open an investigation.

MCR also gives the Commission the quasi-judicial authority to impose administrative fines on merging firms that are not compliant with the notification and other review procedures. It is important to note that, unlike national European merger review regimes, the MCR includes no blocking or clawback provisions (see below).

The regulation also established the Merger Task Force (MTF) within the Competition Directorate. This unit takes action based on complaint or the initiative of the Directorate. The MTF, which has "firmly established its reputation for fast and efficient work" (O'Keefe 1994, 21),[150] "is divided into four units, though there is no sectoral or functional specialization between them. Merger officials are thus expected to operate on a fast learning curve, picking up background information as they go along, and drawing on sectoral expertise from outside their directorate" (McGowan and Cini 1999, 183). While the MTF has primary responsibility for conducting merger reviews, the final decision on mergers remains with the Competition Commissioner and/or the full College of the Commission.[151]

The procedures for merging firms pursuing approval by the EU are explicit in the regulation. Similar to the US's HSR Act, the MCR sets clear thresholds at which the Commission examines mergers.[152] If the turnover of the merging firms does not meet these thresholds, national European competition authorities are responsible for reviewing and approving or prohibiting the merger.[153] Proposed mergers exceeding these thresholds are required to notify formally (via Form CO) their transaction to the MTF. The MCR

[150] For a more detailed study of the MTF's effectiveness, see Neven et al. (1993).

[151] This institutional arrangement has led to concerns over the possible politicization of and lack of transparency in the merger control decision-making process. For examples of such politicization, see Cini and McGowan (1998, 126-131), McGowan and Cini (1999).

[152] The EU's thresholds were amended June 30, 1997 (Council Regulation [EC] No. 1310/97) to trigger Union merger review when 1) the combined aggregate world-wide turnover of all the undertakings concerned is more than ECU 2 500 million; 2) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million; 3) in each of at least three Member States included for the purpose of point #2, the aggregate turnover of each of at least two of the undertaking concerned is more than ECU 25 million; 4) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State (ICPAC 2000, 90).

[153] According to Article 9(3) of the MCR, the Commission may refer all or part of a merger case that exceeds the thresholds to a national competition authority upon request of that Member State. This article is the so-called "German clause" because it was added to the MCR on the insistence of Germany's pro-competition and efficiency approach. Alternatively, Article 23(3), known as the "Dutch clause", allows Member States to request the MTF to review a merger that does not meet the MCR thresholds (McGowan and Cini 1999, 182).

requires merging firms to file such notifications within seven days "after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs" (Article 4[1]).[154]

By explicitly indicating time limits, the MCR's strict deadlines reduce the discretion of the MTF.[155] However, this limitation has been partially offset by the ability of the MTF to engage in pre-notification contacts (PNCs) with the merging firms. PNCs occur before any formal steps are taken under the MCR. According to the Commission, the MTF is

> always prepared to discuss with the parties to mergers proposed transactions which may be notifiable informally and in confidence. Such prior contact is, in the Commission's experience, generally regarded as beneficial to all concerned. In particular, it can reduce or remove the risk of delay or other inconvenience arising from submission of an incomplete notification or of notifying a transaction to which the Regulation does not apply (European Commission 1998, 13).

Because they allow a degree of agent control over the timetable, PNCs are quite possibly the most important form of discretionary authority acquired by the EU competition authorities. The importance of these pre-notification contacts is discussed in more detail in Chapter 5 on the GE/Honeywell merger.

While the tight timetables of the MCR are generally followed, the Commission did allow one late filing in 1999. The Commission is also known to reject requests for late filings (European Commission 2000, 59). As Cini and McGowan argue, the tight and transparent timetables reflect the Commission and Council's appreciation "that the benefits of a merger can be lost if a case is not dealt with quickly. Moreover, speedy

[154] In the US, such notification "may be made as early as an agreement in principle is reached or a (non-binding) letter of intent or contract has been signed" (ICPAC 2000, 110). For more on the EU and US differences in these procedures, see Venit and Kolasky (2000, 88-90).
[155] Details on such timetables are outlined in the Implementing Regulation on notifications, time limits and hearings (EC No 447/98). This regulation was developed under the discretionary authority of the Commission and established as a Commission Regulation. Recently, the Commission submitted a Green Paper on the Merger Regulation that envisions extended timetables in merger review. However, as Commissioner Monti notes, "in order not to eliminate one of the great advantages of the current merger procedure, its limited time, the extension proposed would not be automatic but would only operate at the request of the parties" (2002, 8).

responses reduce the negative effects on share prices and minimize the likelihood of rival and hostile take-over bids" (1998, 122).

Following PNCs and a formal notification, the merger review process automatically initiates the first of two primary phases.[156] Phase I includes the initial assessment of the proposed merger, which may last no longer than one month.[157] During this period, the MTF collects information on the merging parties. Information is collected from a variety of sources, including Form CO and confidential meetings attended by the merging parties.[158] This process is primarily conducted by those MTF case handlers and managers assigned to review the merger. During Phase I, national competition authorities remain in close contact with the MTF and, within three weeks of the formal notification, may request a referral of the merger.[159]

At the end of this first phase, the MTF prepares a draft decision, which is sent to the Competition Commissioner for approval. If the Commissioner does not take a formal action on the case, the merger is considered approved. Alternatively, the Commissioner may formally decide that 1) the merger does not fall within the jurisdiction of the MCR; 2) the merger does not raise serious doubts whether it will be compatible with the SEM; or 3) the merger raises serious doubts whether it will be compatible with the SEM.[160]

As Cini and McGowan note, over 95 percent of proposed mergers are approved during Phase I (1998, 123). However, those mergers deemed to raise serious doubts over compatibility with the SEM enter Phase II of the merger review process, which lasts another four months. The decision to move to Phase II proceedings is extremely

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[156] Throughout the remainder of the merger review process, the Commission's Legal Service is consulted by the MTF. The Legal Service must approve all substantive components of merger decisions. The Service takes this function very seriously because it is responsible for arguing merger decisions appealed to the Court of First Instance (CFI). Procedural decisions also must be run by the Service, even though such matters do not require approval from the full College or the Member States.

[157] If a merger is referred to a national competition authority, the duration of Phase 1 is extended to six weeks. Phase 1 may also be extended to six weeks if the merging parties propose remedies designed to address the concerns of the MTF.

[158] The lengthy Form CO requires detailed information on the merging firms as well as the impact of the proposed merger.

[159] Article 9 of the MCR outlines the reasons why a Member State may request referral of a merger review. In short, the article requires Member States to show that the resulting merger would significantly impede effective competition "on a market within that Member State, which presents all the characteristics of a distinct market" and/or "which does not constitute a substantial part of the common market" (2[a][b]).

[160] It is at the Competition Commissioner's discretion to decide whether or not to bring a Phase I case before the full College of the Commission for approval. However, the decision to raise serious doubts requires approval of the Competition Commissioner as well as the President of the Commission.

significant for the merging firms, which will often and actively resist such a development.[161] The severe aversion to Phase II derives from the time sensitivity of mergers; once a merger has moved to Phase II, a final decision is delayed even further. Phase II proceedings include a more detailed investigation of the proposed merger. Following this more detailed investigation, the MTF considers conditions, or remedies (e.g., divestments), that will be required of merging firms if they are to gain approval.[162] These conditions can be harsh enough that merging firms actually will decide to abort a proposed merger rather than implement the necessary remedies.

During this phase, oral hearings are conducted by the MTF with the merging firms and interested, relevant third parties. Oral hearings are subject to the guidelines established in the Implementing Regulation on notifications, time limits and hearings (EC No 447/98).[163] The hearings have been described as "quasi-court-like but closer to an arbitration style of examination" (Doern 1995, 205). The hearings, which typically last two to three days, are attended by representatives of the merging parties (usually top lawyers and senior company officials), Commission rapporteurs, the MTF official in charge of the case, the Commission's Legal Service, translators and representatives of the Member States (typically officials from their competition and industry departments). While the MTF relies heavily on merging firms and third parties for the information needed to conduct its review, it does cross-check submissions—acquired from the Form CO and oral and written testimony—for veracity.[164]

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[161] See Chapter 5 on the role of firms in the merger review process.

[162] The merging parties themselves are responsible for proposing remedies to meet the competition concerns of the MTF. In the EU, typical remedies consist of structural requirements, such as divestitures, termination of exclusive agreements, provision of access to necessary infrastructure or key technology, and provision of network access or access to specific content (see the Commission's Notice on Remedies). The EU tends to prefer structural commitments instead of behavioral commitments because the former "would require monitoring on the part of the [resource-strapped] Commission" (European Commission 2000c, 2). In April 2001, the EU established an Enforcement Unit within the Competition Directorate. This unit, which works with the case-teams in individual mergers cases, is responsible for advising merging firms on the acceptability and implementation of remedies. Following implementation, the Enforcement Unit also "pays attention" to how the remedies work in practice, however, the remedies "should not require additional monitoring once they have been implemented" (Monti 2002, 2).

[163] For more on the dynamics surrounding the oral hearing, see Chapter 5. See Doern (1995, 205-206) and Johannes (1990) for excellent accounts of the oral hearings.

[164] For more on the role of competitors in the EU's merger review process, see Chapter 5.

The oral hearing is managed by a Hearing Officer (HO).[165] The HO is independent from the Commission, "and is not subordinate to one of the directorates. He or she has a special right of access to the commissioner if the hearing officer feels his or her views are not being addressed" (Doern 1995, 205).[166] Following a hearing, the HO writes a report to the Competition Commissioner and Director-General. The HO can suggest that the report be given to the entire College of the Commission. Occasionally there are recommendations attached to these reports, but most simply report on the content of the oral hearing.

During Phase II proceedings, the Commission issues a formal Statement of Objections. Statements of Objections outline the Commission's conditions for approval or reasons for prohibition of the proposed merger. The merging firms, as well as third parties, are then given two weeks to respond to the statement. Responses by the merging firms typically include measures designed to remedy any problems raised by the MTF. The merging firms then have the right to reply in writing to the objections and to request another formal oral hearing.

Prior to issuing a final decision, the Commission consults the Advisory Committee on Concentrations, which is comprised of competition authorities from the Member States (MCR Article 19). The Advisory Committee delivers a non-binding opinion on each merger case in Phase II, prior to the Commission's final decision. Each Member State in the ACC is afforded one vote. The MCR requires the Commission to ask the ACC for its advisory opinion on Phase II merger cases. Typical ACC opinions are unanimous, but some express a majority (or minority) opinion.[167] In the event that the opinion is not unanimous, no identification is made of individual, dissenting Member States. Also, the Commission maintains the right to decide whether or not to publish the ACC opinion, which it usually decides to publish.

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[165] The EU typically employs two Hearing Officers, one responsible for merger review and one for antitrust. HOs are typically respected officials with long careers in the Competition Directorate, many close to retirement. Their interests are the same as the merging firms: get the information out quickly and in an organized fashion.

[166] For more on the HO, see Gilchrist (2000/2001) and Johannes (2000, 1990).

[167] The ACC opinion rarely, if ever, challenges basic MTF rulings, choosing rather to focus on issues such as the scope of market definitions and exact level of fines being considered, not typically theoretical tools of economic analysis like "bundling".

For a final decision, the entire College of the Commission declares the merger 1) compatible with the SEM, 2) incompatible with the SEM or 3) compatible with the SEM based on conditions and obligations imposed on the merging firms. Any final Commission decision on a proposed merger can be appealed to the European Court of Justice. Such appeals are submitted to the Court of First Instance (CFI). When merger cases are appealed, the court will make its decision based on the substance of the facts at the time of the proposed merger. Thus, there is little concern about the market changing during an appeal and the MTF decision losing its relevance. In addition, appeals take a significant amount of time, especially considering the time sensitivity of mergers. This time lag has lead commentators to decry a "lack of appeal" in the EU merger review system. The implications of this time lag are considered in greater detail below in Section IV, B.

As merger review institutions and law have developed in the EU, so too have mergers increased. The escalation in merger activity has dramatically increased the workload of the MTF case teams. For example, Table 5 depicts the increasing mergers and subsequent MTF activity in the SEM from 1994-1999.

Table 5: Merger Activity in the SEM, 1994-99[168]

	1994	**1995**	**1996**	**1997**	**1998**	**1999**
Merger notifications received	95	110	131	172	235	272
Total cases closed by final decision[169]	91	109	125	142	238	270

The preceding discussion focuses on the institutional and legal structure of the EU merger review process. These structures suggest an influential role for the Commission as the dominant supranational EU actor in competition policy. However, Member States and firms are also active in the process. In addition, within the Commission itself, a complex relationship exists among the MTF, Competition Directorate, Commission's Legal

[168] Source: European Commission (2000, 368).

Service, College of the Commission and the Advisory Committee on Concentrations. These different actors provide a system of checks and balances and will be discussed below in Section IV.

III. Foreign Intervention Instruments

The history of transatlantic competition relations is largely one of adversarial extraterritoriality. Extraterritorial behavior occurs when a country attempts to enforce its laws outside its domestic jurisdiction. Such enforcement typically induces strong political reactions in the jurisdiction targeted by extraterritoriality because it challenges the notion of national sovereignty. As a result of the legally and politically contentious nature of extraterritoriality, the outcome of such behavior is often much less predictable than the domestic enforcement of law. This unpredictability frequently leads to the creation of countermeasures designed to block extraterritorial activity. This section discusses the legal institutional basis of US and EU extraterritoriality.[170]

A. US Legal Basis of Extraterritoriality

While the Sherman Act and FTC Act provided for a degree of extraterritoriality, the US Supreme Court did not always support the extraterritorial jurisdiction of US legal enforcement.[171] In the early twentieth century the court was clearly hesitant to assert extraterritorial jurisdiction.[172] The first US Supreme Court case dealing with the extraterritoriality of the Sherman Act was the *American Banana Co.* decision (1909), in which the Court resisted the application of the Act outside the jurisdiction of the United States.[173] In its judgment, the court decided that

> it was the general and almost universal rule that… the character of an act as lawful must be determined wholly by the law of the country where the act is done… For another

[169] Total cases closed by final decision are generally lower than the notifications received because some cases are referred to Member States and/or the merger proposal may be withdrawn by the merging firms.
[170] For useful works that discuss both EU and US extraterritoriality, see Griffin (1999), Parisi (1999), Kiriazis (1998), Torremans (1996), Ham (1993).
[171] Sections 1 and 2 of the Sherman Act address commerce "with foreign nations", while Section 5 of the FTC Act addresses unfair methods of competition "affecting commerce" (Griffin 1999, 160, note 1).
[172] For a history of US extraterritoriality in the context of competition policy, see Peritz (1996), Sullivan (1991).
[173] *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355 (1909).

> jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent (cited in Devuyst 2000, 130).

Despite this initial reluctance, the judiciary soon recognized that the US could claim jurisdiction over foreign firms ("undertakings") when a direct effect on US commerce and some conduct within US borders could be shown (Devuyst 2000, 130).[174] One such case was the landmark 1945 *Alcoa* decision in which the US Court of Appeals for the Second Circuit asserted US extraterritorial jurisdiction.[175] In this decision, the Court developed the "effects test" of subject matter jurisdiction for competition policy. According to Judge Learned Hand, "it is settled law… that any state may impose liabilities, even upon persons not within its allegiance, of conduct outside its borders that has consequences within its borders which the state reprehends" (cited in Devuyst 2000, 130). In other words, if an activity of a foreign actor has consequences (i.e., "effects") in the US, that activity is subject to US legal sanction, regardless of where the actor is located or resides.

Any remnants of legal reticence on extraterritoriality that might have remained from the *American Banana* decision were finally and formally removed in the 1962 *Continental Ore v. Union Carbide* judgment. In this decision, the Supreme Court applied the effects doctrine and ruled "a conspiracy to monopolize or restrain the domestic or foreign commerce of the US is not outside the reach of the Sherman Act just because part of the conduct occurs in foreign countries".[176] Thus, US extraterritorial jurisdiction was clearly and firmly established in competition matters. The unilateral application of this extraterritorial jurisdiction would generate significant retaliation from foreign governments (see below).

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[174] Devuyst cites *US v. American Tobacco*, 1911; *US v. Sisal Sales*, 1927.

[175] *United States v. Aluminum Co. of America*, 148 F.2d 416 [2d Cir. 1945]. The US Court of Appeals for the Second Circuit acted for the Supreme Court because the higher court could not achieve a quorum due to the number of disqualified justices (Griffin 1999, 160, note 2).

[176] *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 US 690, 704 (1962). See also, Devuyst (2000, 130).

The extraterritorial jurisdiction of US antitrust laws was partially obstructed due to events in private antitrust litigation in the 1970s and early 1980s. During the 1970s, a number of US courts tried to temper the extraterritorial enforcement of US antitrust (Griffin 1999, 161). In particular, the courts began to incorporate a notion of comity into their method for determining extraterritorial jurisdiction.[177] The landmark private antitrust case, which has been called a "high-point" for comity (Waller 2000, 564), was the 1976 *Timberlane* decision.[178] In the decision, the US Court of Appeals for the Ninth Circuit determined that the effects test developed under the *Alcoa* decision was "by itself… incomplete because it fails to consider other nations' interests. Nor does it expressly take into account the full nature of the relationship between the actors and this country" (cited in Griffin 1999, 161). Similar notions of comity were subsequently adopted by the Third, Fifth, and Tenth Circuit Courts (Griffin 1999, 161).[179] This decision to incorporate comity considerations was not merely altruistic, but rather reflected a reality of antitrust enforcement in private cases: "The need for comity in this context arose primarily because private litigants otherwise lacked the incentive to consider the broader national interest in deciding whether to bring treble damages or injunctive actions against foreign defendants" (Waller 2000, 568). In other words, private litigants were unlikely to consider the broader international political ramifications when filing suits against foreign defendants.

The *Timberlane* decision had essentially injected comity considerations into the determination of jurisdiction for antitrust enforcement (Ham 1993, 593). Yet the principle of comity alone is unclear in determining the relative weights of multiple interests in the determination of jurisdiction. In this regard, *Timberlane* is frequently cited as an "interest-balancing" approach in which the court introduced a three-stage test for determining jurisdiction: "there had to be some effect on the foreign commerce of the United States and that effect had to be sufficiently large to present a cognizable injury, and a balancing had to be made of the interests of the United States vis-à-vis those of other nations to justify an assertion of extraterritorial authority" (Ham 1993, 593). The

[177] For a more detailed discussion of comity, see Chapter 4.
[178] *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976).
[179] However, the D.C. and Seventh Circuit Courts "questioned their validity" (Griffin 1999, 161).

court noted that this balancing of interests should take into account a number of factors that typically will invoke political intervention (see Figure 4).

Figure 4: *Timberlane* Interest-Balancing Considerations[180]

- The degree of conflict with foreign law or policy
- The nationality or allegiance of the parties and the locations or principal places of business of corporations
- The extent to which enforcement by either state can be expected to achieve compliance
- The relative significance of effects on the United States as compared with those elsewhere
- The extent to which there is explicit purpose to harm or affect American commerce
- The foreseeability of such effect
- The relative importance to the violations charged of conduct within the United States as compared with conduct abroad

The court's support for comity considerations would continue until 1993, when the Supreme Court weighed in on the matter. However, before discussing the change to *Timberlane's* interest-balancing approach, it is useful to address related developments regarding comity considerations in the US Congress and the competition agencies.

The establishment of US extraterritoriality has not occurred exclusively through the common-law method. For instance, in 1982, the US Congress weighed into the debate over extraterritoriality, passing a "convoluted statute" (Fox 1997a, 10), the Foreign Trade Anti-trust Improvement Act (FTAIA).[181] The FTAIA expanded the potential for extraterritorial enforcement of antitrust beyond cases in which external business activity has a negative effect (i.e., an effects test) on the US *market* or US *consumers*. Instead, the Act raised the possibility of extraterritorial enforcement to external anticompetitive conduct that harms US *exporters*.

[180] Source: 549 F.2d at 614 (cited in Griffin 1999, 161).

[181] Regarding Congressional motivations, Fox argues that Congress was concerned because "U.S. courts tended to incur the wrath of trading partners by not applying comity principles in antitrust cases" (1997a, 10). In addition, Fox argues, "Congress gave as a major reason for this legislation that the law of our trading partners offers export exemptions and that therefore US antitrust law (which was ambiguous in its external coverage) was handicapping US business" (Fox 2001, 355). As a result, the "main effect" of the FTAIA for US firms was "to make clear that U.S. law does not follow U.S. firms into foreign markets" (Fox 1997a, 10).

Not surprisingly, this provision greatly alarmed the US's trading partners because it suggested that US antitrust laws could be applied extraterritorially to "correct" overseas barriers to trade.[182] According to the FTAIA, activities carried out abroad are subject to the Sherman and FTC Acts when the conduct has a "direct, substantial, and reasonably foreseeable" effect on US export trade or export commerce with foreign nations (Griffin 1999, 162).[183] The FTAIA was not intended to prevent or encourage judicial application of comity in international antitrust enforcement (Griffin 1999, 162). Nor did the FTAIA directly address the court's interest-balancing tests.[184]

Contrary to the effects doctrine (i.e., extraterritorial applicability arises from behavior that affects the US market), the FTAIA made clear that US antitrust laws were "not limited to cases in which external conduct caused a negative effect on the US market" (Devuyst 2001, 131). Rather, the enforcement of US antitrust laws would be expanded to apply extraterritorially to behavior that had a "direct, substantial, and reasonably foreseeable effect" on US *exports and exporters*, regardless of where that behavior took place. This congressional intervention in the debate over comity further exacerbated international tensions over US competition and trade policies.

Clearly, the courts (and Congress to a lesser degree) have played a very important role in determining the parameters of extraterritorial jurisdiction and the incorporation of comity considerations in the implementation of US competition policy. However, the regulatory agents have not sat idly by as these principals intervened. For example, the determination of extraterritoriality appeared prominently in the 1955 *Report of the Attorney General's National Committee to Study the Antitrust Laws*.[185] In this report, the US DoJ began asserting its discretionary authority in competition policy by noting that

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[182] As Fox argues, "the real beneficiaries of the [FTAIA] are not the United States' foreign friends at all, but American businesses doing business abroad" (1987, 581).

[183] See also Ham (1993, 592) and Fox (1987, 579-581).

[184] In 1987, the *Restatement (Third) of the Foreign Relations Law of the United States* did include specific requirements for determining jurisdiction, which resembled a "Timberlane-like balancing test" (Griffin 1999, 162). See specifically sections 401 (a-c), 402, 403, and 415 of the Restatement. This Restatement was drafted and completed by the American Law Institute (Fox 1987). For a more recent attempt by the US competition agents to clarify these requirements, see the USDoJ and FTC's *1995 Antitrust Enforcement Guidelines for International Operations*, section 3.2.

[185] As Waller states, "Extraterritoriality was a significant part of the international section of the [Report]. Extraterritoriality was the first and primary of the three international topics dealt with in the report with the Committee ultimately recommending that the Sherman Act only apply to conduct abroad by foreign nationals that produced substantial anticompetitive effects in the United States" (Waller 2000, 576).

the Sherman Act could be applied to foreign nationals if they produced substantial anticompetitive effects in the US.

Using its discretionary authority to implement US competition policy, the DoJ also has issued a number of non-binding guidelines (some in conjunction with the FTC) for enforcing US antitrust laws on international business activity.[186] These guidelines have consistently addressed the means by which competition agents determine extraterritorial jurisdiction in US antitrust enforcement. For example, reflecting the *Alcoa* and *Continental Ore* decisions, a set of US DoJ Guidelines asserted in 1977 that, "When foreign transactions have a substantial and foreseeable effect on U.S. commerce, they are subject to U.S. law regardless of where they take place" (USDoJ 1977, 6).

Under the Reagan Administration, the DoJ issued another important set of guidelines in 1988. These guidelines challenged the FTAIA's assertion that antitrust laws should be enforced to protect US exporters.[187] Specifically, the guidelines reflected the influence of the Chicago School in the Reagan Administration's antitrust policy, and, therefore, limited enforcement of competition policy to activity that harms US consumers. This policy shift was reflected in the now-famous "Footnote 159" in the guidelines, which states

> Although the FTAIA extends jurisdiction under the Sherman Act to conduct that has a direct, substantial, and reasonably foreseeable effect on the export trade or export commerce of a person engaged in such commerce in the United States, the Department is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices (USDoJ 1988, 21).

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[186] These guidelines are non-binding and discretionary. As Stark discusses,

> The U.S. antitrust agencies from time-to-time issue 'guidelines.' Other examples include the 1992 Horizontal Merger Guidelines that were issued jointly by the Justice Department and the Federal Trade Commission, and the draft Guidelines for the Licensing and Acquisition of Intellectual Property…
>
> Guidelines are statements of enforcement policy. They are issued to advise the business and legal communities and others of the antitrust agencies' policies and methods of analysis. Although the agencies naturally intend these Guidelines to be an accurate reflection of law and policy at the time they are issued, the Guidelines themselves are not binding on the courts, private parties, or the agencies themselves (Stark 1994, 5).

[187] See Ham (1993, 592) for more on how the FTAIA relates to the 1977 and 1988 DoJ Anti-trust Guidelines.

The different guidelines issued by the DoJ raise an interesting question: Why would a regulatory agent assert its discretionary authority over determining extraterritorial jurisdiction in this manner? The answer to this question is particularly important because, by asserting its discretionary authority through the subsequent non-binding guidelines, the agent, in effect, shirks and discounts the judiciary (*Timberlane*) and legislature's (FTAIA) approaches to determining jurisdiction. Noting concern over the judiciary's approach to determining jurisdiction, Griffin argues

> American and foreign judges, as well as commentators, question the competence of judges to evaluate the diplomatic, national security, and international economic issues raised by the factors… many agree with the court of appeals in *Laker* [see below] and believe that even if judges are competent to make such evaluations, the proper method of resolution is intergovernmental consultation and negotiation (1998, 72).

From the perspective of the US competition agents, judges are ill-suited for determining extraterritorial jurisdiction. In addition, the alternative—intergovernmental consultation and negotiation—reflects the competition agents' concern that the legislature is also ill-suited for determining extraterritorial jurisdiction. Rather, the competition agents only feel comfortable with "intergovernmental consultation and negotiation," which explicitly means the executive branch and implicitly means the agencies responsible for implementing competition policy. Thus, while comity-like interest-balancing might be permitted in determining extraterritorial jurisdiction, the guidelines make it clear that *any interest-balancing should be conducted under the discretion of the competition agent, not the courts or legislature*. This position is reflected in the EU-US Bilateral Agreement and Positive Comity Agreements discussed in Chapter 4.

While this chapter is particularly interested in the changes that occurred in transatlantic competition relations before 1990, it is useful to note at this point three additional domestic developments in the US regarding extraterritoriality and comity that occurred during the 1990s. These developments, initiated by the US competition agents and the judiciary, further complicated US competition relations with foreign governments but have been largely overcome in the transatlantic marketplace by the EU-US rule-making, implementation and exploratory institutional cooperation that are investigated in subsequent chapters herein.

First, under President George H. Bush, the DoJ made a significant revision to its guidelines for international enforcement in 1992, when it removed Footnote 159. This action limited the previous discretionary policy that US antitrust would only be applied extraterritorially to anticompetitive behavior that harmed US consumers, not US exporters.[188] Thus, in effect, by repealing this footnote, the Bush Administration "restored the Antitrust Division's mandate under the FTAIA to prosecute foreign anticompetitive practices that injure US exports" (Devuyst 2001, 131).[189] Janow describes this change in policy:

> This famous footnote in U.S. antitrust policy can be summarized as follows. As a matter of prosecutorial discretion, the Justice Department during the Reagan administration chose to enforce actions against those export restraints that harmed only U.S. consumers and not those that harmed only U.S. exports. In 1992, during the Bush administration the Antitrust Division of the Justice Department repealed footnote 159 (which had expressed this policy). In so doing, James F. Rill, assistant attorney general for antitrust, also made clear the Justice Department's intention to undertake enforcement action restraining U.S. export commerce, if the conduct was having a 'direct, substantial and reasonably foreseeable effect' upon U.S. exports. In other words, direct consumer harm was not going to be the only focus of Justice Department enforcement action. A number of foreign officials voiced their concern regarding this shift in policy and expressed opposition to U.S. assertions of extraterritorial jurisdiction (2000, 31-32).

This change in the 1992 Guidelines did not directly address the interest-balancing (comity) approach advocated in the 1976 *Timberlane* decision, but it maintained the position of the US competition agents that if any balancing of interests was to occur, it should be conducted by the competition agents themselves.

Second, shortly after the repeal of Footnote 159 had alarmed foreign governments, the US judiciary re-entered the debate over comity in US antitrust enforcement. Because the 1976 *Timberlane* decision had not come from the Supreme Court, "courts and commentators endlessly debated whether comity was an appropriate,

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[188] Fox argues that the Bush Administration shifted this position in response to a trade disagreement with the Japanese Government (1997a, 11).

[189] For more on the removal of this footnote, see (Shank 1996), Pitofsky (1998) and Tritell (1999).

required, or optional aspect of the assertion of extraterritorial jurisdiction and precisely what factors should be included in the analysis" (Waller 2000, 569). This would change in 1993, when the US Supreme Court set a precedent by issuing its *Hartford Fire* decision.[190] The *Hartford Fire* decision, which dealt comity a "near death blow" (Waller 2000, 564), reinforced the extraterritoriality of the Sherman and FTC Acts by limiting the use of the interest-balancing approach promoted in the *Timberlane* decision. In short, the Supreme Court decided that "a defendant must demonstrate a 'true conflict' before the court would balance any conflict between foreign interests and policies against those of the United States. The majority [of justices] only accepted as a true conflict those rare situations where the foreign government actually required what United States law forbade" (Waller 2000, 569).[191] As a result of *Hartford Fire*, the US courts not only restricted the use of interest-balancing tests to determine jurisdiction but also eliminated comity as a meaningful restraint on unilateral extraterritoriality (Waller 2000, 569).

Following the *Hartford Fire* decision, US courts resisted incorporating comity considerations in a number of other antitrust cases. As Waller argues, "Even if a full comity interest balancing approach was the best approach from a theoretical perspective, the United States courts have proved incapable of applying such a test in a consistent and principled manner" (Waller 2000, 570).[192] For example, in 1997, a federal appellate court supported extraterritorial jurisdiction in the *United States v. Nippon Paper Industries* (1 Cir. 1997) decision. In the *Nippon Paper* decision, the court "upheld the Department of Justice's ability to use the criminal provisions of the Sherman Act to prosecute anticompetitive conduct outside the United States by non-U.S. citizens that directly and substantially affect U.S. commerce" (Devuyst 2000, 322).[193] This case demonstrates the limits of comity, but it is noteworthy that the firm involved was Japanese, not European. Nevertheless, commentators cite *Nippon Paper* and other examples as evidence that "U.S. authorities have continued to be zealous in their assertions of extraterritorial

[190] *Hartford Fire Insurance Co. v. California*, 509 US 764 (1993). Griffin argues "The Supreme Court in *Hartford Fire* did not resolve the existing conflict among the courts of appeals over the proper application of comity in antitrust cases" (1999, 188). For a much more detailed case study of this legal decision, see Griffin (1999, 163-168).
[191] For more on the determination of and debate surrounding "true conflict", see Griffin (1999, 192-195).
[192] For examples of such cases, see Waller (2000, 570-572).
[193] For more on this case, see Sulcove (1988).

jurisdiction under the antitrust laws, and comity considerations appear to have had little impact on outcomes" (Griffin 1999, 168).[194]

The third significant change to US antitrust enforcement occurred in 1995 when the DoJ and FTC jointly released their "US Antitrust Enforcement Guidelines for International Operations".[195] While these guidelines were released in 1995 (four years after the beginning of EU-US cooperation in competition policy), it is useful to provide a brief discussion of them here to highlight the continuing tensions in relations between the US regulatory agents and the judiciary.

Much to the chagrin of the US's trading partners, the 1995 revision reaffirmed that competition authorities would enforce competition policy against anticompetitive business activity that harmed US exports. According to McNeill, "The [1995] Guidelines were met with significant criticism from the international trading community: DOJ enforcement actions might be limited only by how far American exports flowed in the international stream of commerce" (1998, 451), not by jurisdiction established by courts. According to Griffin, "Unlike the situation in the EU, the 1995 International Guidelines made it clear that the U.S. enforcement agencies will utilize the Hartford Fire decision to vigorously enforce the effects theory of jurisdiction" (1999, 187).

These 1995 Guidelines reflect another attempt by the DoJ/FTC to assert their authority and limit judicial intervention. According to Griffin,

> The 1995 International Guidelines take the position that courts should not engage in comity analysis in antitrust actions brought by the U.S. Government.[196] Those Guidelines thus reaffirm a similar statement in the 1988 International Guidelines,[197] which was justified by one official as follows: '[F]ederal judges should [not] assume a role as mini-diplomats every time they consider an antitrust case with an international flavor. The judicial branch is independent of foreign policy coordination; giving the judiciary unlimited discretion under the guise of 'international law' or other equally amorphous notions to consider and resolve trade frictions created by antitrust suits would do more harm than good (Griffin 1999, 189).

[194] Griffin lists a number of other cases supporting this position (1999, 168, note 52).
[195] U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* (April 1995), *reprinted in* 4 Trade Reg. Rpt. (CCH) 13,107.
[196] "1995 International Guidelines, section 3.2" (Griffin 1999, 189, note 136).
[197] "1995 International Guidelines, at 20,612 n. 167" (Griffin 1999, 189, note 137).

Griffin argues against the legality of this "broad assertion of executive power by the U.S. antitrust enforcement agencies" (1999, 190).[198] But, nevertheless, the 1995 Guidelines again show that the regulatory agents wanted to avoid judicial intervention in the extraterritorial enforcement—in particular in the determination of the extent of jurisdiction and the consideration of comity—of US antitrust laws. It should be noted that the guidelines do not prevent an interest-balancing approach in determining extraterritorial jurisdiction. As a former FTC Commissioner argues, the 1995 Guidelines

> respect the authority of foreign enforcement agencies over matters that may also fall within US jurisdiction. The International Guidelines declare that the agencies do, and will, cooperate with foreign authorities in the enforcement of competition policy.[199] While some continue to object to the fact that US antitrust law seeks to stop conduct abroad that harms US commerce,[200] the International Guidelines make it clear that the US agencies consider international comity in deciding whether to pursue a matter and that they will seek the assistance of foreign authorities in dealing with the matter[201] (Varney 1996, 18).

In short, the 1995 Guidelines again asserted that competition agents might use an interest-balancing approach to determine extraterritorial jurisdiction in competition cases. However, such interest-balancing should be conducted by the competition agents, not by the judiciary. Of course, this assertion is limited by the fact that private plaintiffs can still bring antitrust cases before the courts and thus, shift interest-balancing from the competition authorities to the courts.

The future of comity remains unresolved by the US courts, legislature and executive; this ongoing debate reflects the struggles over legal competence that are inherent in the US's system of checks and balances at the federal level.[202] The Supreme

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[198] See Griffin (1999, 190-192) for further discussion of this debate and similar criticism by the American Bar Association of the assertion of executive power. For a discussion of this problem of institutional competence in the US, see Mehra (1999).

[199] *See* International Guidelines, 1, 2.9.

[200] *See, e.g.*, Comments of the Government of the United Kingdom, submitted for the Public Record on the then-proposed International Guidelines, December, 1994.

[201] International Guidelines, Illustrative Examples C (note 59), D, and H; 3.2.

[202] The unsettled nature of the *Hartford Fire* case within the judiciary itself is clear: "The application of comity with respect to application of the antitrust laws to conduct outside the United States remains an unsettled area of law after the most recent Supreme Court ruling in the area, *Hartford Fire Insurance Co. v. California,* and lower federal U.S. courts have recently come to different interpretations of the holdings in this case" (ICPAC 2000, Annex 1-C, ii).

Court has historically supported extraterritoriality. While the 1909 *American Banana* decision and 1976 *Timberlane* decision on interest-balancing were exceptions to this general rule, the 1993 *Hartford Fire* decision led to what some commentators in the US have referred to as the "death of comity" (Waller 2000). In addition, the US legislature and competition agents have also expanded the potential use of extraterritoriality to address overseas behavior that might harm US exporters.

Despite these apparent obstacles to international cooperation in competition policy, it is important to note that these changes continue to reflect the desire of the competition agents to reduce the likelihood of intervention by principals. This desire is simultaneously reflected in the 1992 and 1995 Guidelines and the 1991 EU-US Bilateral Agreement. The 1992 and 1995 Guidelines allow for extraterritoriality. Making such an allowance does not challenge the authority of the courts or the legislature, but it demonstrates that the competition agents prefer being responsible for conducting interest-balancing. Likewise, prognostications about the death of comity seem misplaced as comity remains a central component of the 1991 Bilateral Agreement and does not require approval from the court in this regard. By using the provisions in the Bilateral Agreement, the US competition agents are able to conduct interest-balancing at their own discretion, which satisfies their preference to avoid intervention from principals. This behavior supports the claim in Chapter 2 that the US competition agents do not simply pursue international cooperation for the sake of cooperating. Rather, they prefer avoiding intervention from principals (including the judiciary), which is maximized by the pursuit of international cooperation.

B. EU Legal Basis of Extraterritoriality

For its part, the EU's jurisdictional tests for extraterritoriality were developed much more recently than those in the US.[203] In contrast to the US, the EU's development of extraterritoriality has not reflected an explicit desire to protect European exporters but, rather, has focused on threats to the EU market and consumers.

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[203] For general discussions of the development of EU extraterritoriality, see Cini and McGowan (1998), Devuyst (1998), Goyder (1998).

The EU entered the game of extraterritoriality in 1988.[204] In that year, the European Court of Justice (ECJ) issued its *Wood Pulp* decision, which established extraterritorial jurisdiction for the Union.[205] In the *Wood Pulp* decision, forty-one, non-EU producers of wood pulp and their US and Finnish trade associations were accused of fixing prices for wood pulp in the Single European Market (SEM).[206] The final result of the *Wood Pulp* decision confirmed the Commission's authority to apply Article 85 [81 TEU] of the Treaty of Rome to the alleged price-fixing, regardless of where the defendants were located (Lange and Sandage 1989).

In the *Wood Pulp* case, the non-EU producers argued that the Union lacked jurisdiction over them because they were not located inside the SEM (Griffin 1999, 174). Thus, in order to deliver a decision in the case, the ECJ first had to establish its jurisdiction over the defendants. In doing so, the court found that the "decisive factor" for determining jurisdiction over anticompetitive behavior was "the place where it is implemented" (Lange and Byron Sandage 1989, 146), not the place where its effect occurred. As a result, the *Wood Pulp* case was not actually an "effects" test.[207] Rather, EU jurisdiction would cover "non-EU firms outside the EU if they 'implement' anticompetitive agreements reached outside the EU by selling their products to purchasers inside the EU" (Devuyst 2000, 323). Thus, the ECJ avoided having to decide whether there was an effects doctrine in EU law. Rather, because the price-fixing agreement in *Wood Pulp* had been "implemented" within the EU, "jurisdiction could be asserted on the basis of the territoriality principle without having to have recourse to the

[204] It should be noted that individual Member States had extraterritorial laws before the EU established its extraterritorial jurisdiction. For example, "Laws such as the British Restrictive Trade Practices Act of 1956 and the German Law of 1957 against Restraints on Competition created antitrust laws that in many ways were every bit as extraterritorial in their language as that of the United States" (Brand 2000, 894-895).
[205] *A. Ahlström Osakeyhtiö v. Commission*, Cases 89/85, 104/85, 114/85, 116-17/85, and 125-29/85, [1988] ECR, 4 *Common Market Report* (CCH), paragraph 14,491 (September 27, 1988).
[206] On the Wood Pulp decision, see Whish (1996, XII/25-26), Lange and Byron Sandage (1989) and Van Gerven (1990).
[207] EU Competition Commissioner Sir Leon Brittan went to great lengths to show that the EU did not use the effects doctrine in the Wood Pulp decision, even stating that use of the effects doctrine would have created greater controversy (1990, 9). On the debate over the effects doctrine between Brittan and the US Assistant Attorney General for Antitrust Charles F. Rule, see Griffin (1999, 186-187). For a useful discussion of the potentially different outcomes that can follow from the effects doctrine and the implementation doctrine, see Griffin (1998, 67-69).

effects doctrine" (Whish 1996, XII/24). In short, extraterritorial jurisdiction had been asserted with an implementation test instead of an effects test.[208]

It was not until the 1999 *Gencor* case that the ECJ's Court of First Instance explicitly allowed for an effects test to establish extraterritorial jurisdiction of EU antitrust law.[209] In this merger case, the CFI found that extraterritorial application of the MCR "is justified under public international law—even in cases between non-EU companies—'when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community'" (Devuyst 2000, 323).[210] As a result of the *Wood Pulp* and *Gencor* decisions, "The European Union applies its own version of extraterritoriality, using slightly different terminology" (Waller 2000, 574). While the terminology may differ slightly, the practical effect is the same as the US's extraterritorial jurisdiction: while legally justified, the extraterritorial exercise of foreign intervention instruments creates very real challenges to political sovereignty, which, in turn, increases tensions in transatlantic competition relations.

IV. US and EU Actors in Merger Review

It is now useful to look more closely at the actors in US and EU competition policy in order to identify the principals and agents. This section summarizes the principals and agents involved in transatlantic competition relations. Unlike most PAF studies that focus on the US Congress as the sole principal, the principals in the current study are drawn from executives, legislatures and judiciaries. The agents include

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[208] For court decisions prior to 1988 that reflected an "effects doctrine", see Griffin (1999, 173-174, note 75), Brittan (1990) and Lange and Sandage (1989). For example, in the 1972 *Imperial Chemical Industries Ltd. v. Commission* (Dyestuffs) case (Case 48/69, [1972] ECLR 610), the Commission, arguing against the British firm ICI, asserted that "jurisdiction of the Community is justified by reason of economic effects that claimant's conduct produced in the Common Market" (Griffin 1999, 174, note 75). Some commentators cite the ICI v. Commission case, which used the "economic entity doctrine" instead of an effects test, for first testing the EU's extraterritorial jurisdiction (Cini and McGowan 1998, 201; Miles 1995, 111). Accordingly, Wood Pulp was merely a reaffirmation of extraterritoriality and, more importantly, a rejection of comity (Cini and McGowan 1998, 201-202). On the legal development of the different tests for EU extraterritoriality, see Whish (1996) and Lange and Sandage (1989).

[209] Judgment of the Court of First Instance (Fifth Chamber, Extended Composition) in Case T-102/96, 25 March 1999, par. 90. On Gencor, see Bavasso (1999).

[210] The Commission had acted on a similar principle prior to the Gencor decision when it ruled on the 1996 Ciba-Geigy/Sandoz merger and the 1997 Boeing/McDonnell Douglas merger (Devuyst 2000, 323).

regulatory authorities in the US and EU. The US and EU principals and agents in merger review are summarized in Table 6.

Table 6: US and EU Principals and Agents

	Political Principals	Regulatory Agents
US	Congress White House Courts	Federal Trade Commission Department of Justice, Antitrust Division
EU	Council of Ministers Politicians in member states European Parliament College of Commission Courts	Competition Commissioner Competition Directorate (including Merger Task Force)

A. US Principals and Agents in Merger Review

Within the US, the political principals are the Congress, the White House and the courts.[211] Legislative control of domestic regulatory agents is discussed in Chapter 2 and will not be recapitulated here. While studies employing PAF typically focus on the ability of Congress to control regulators, more recent studies include the President (and Administration) as a principal.[212] The current study adopts this approach, simplifying the executive principal as the White House. This simplification of the US executive excludes a number of actors in the executive branch as political principals. As such, the White House is conceptualized primarily as the President, the Vice President and the Executive Office of the President.[213] It should be noted, however, that this conceptualization is frequently blurred as other members of the Administration, such as cabinet secretaries, can wield foreign intervention instruments as a form of political pressure (see Chapter 5).

Executive control of domestic regulatory agents can be applied through a variety of domestic institutional control instruments including the power of appointment and removal, administrative reorganization, and managerial pressure through the Office of Management and Budget (Majone 1996a, 38). Legislative and executive principals share

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211 For a discussion of the analytical issues arising from multiple principals, see Majone (1996a, 37-40).

212 According to Thatcher and Stone Sweet (2002), much of the literature on PAF still focuses on Congress-regulator relations in the US. Majone agrees that many such studies are weakened because they focus on congressional control without considering the role of the Presidency (1996a, 38-39). Wood and Waterman (1991) provide a notable exception to this oversight. For useful reviews of the literature, see Huber and Shipan (2001) and Bendor at al. (2001).

similar features in that they both frequently intervene in the activities of regulatory agents and have made a conscious delegation of authority to the agents.

The third US principal, the judiciary, is not frequently considered in the relevant literature because it has not made a delegation of authority to the agent. However, the judiciary is empirically and theoretically important to understanding transatlantic cooperation in competition policy. While the judiciary is not a traditional principal in the sense that it has delegated authority to the agents, it still exercises judicial review over many decisions made by regulatory agents.[214] This judicial review can occur across all three processes of international cooperation considered in the current study.

In rule-making and exploratory institutional cooperation, the courts can intervene based on the complaint of other actors that the agents have overstepped their discretionary authority. Thus, the role of the judiciary as a principal in these two processes of international cooperation is limited by the desire of other actors (both private and public litigants) to seek its active engagement in the process. As discussed in Chapters 4 and 5, the US judiciary does not appear to have played a significant role in the cases of rule-making and exploratory institutional cooperation discussed in the current study.

In implementation cooperation, the role of the courts is so potentially important that US regulatory agents have consistently tried to reduce intervention by the judiciary in internationally-oriented competition cases. Tensions between the US judiciary and regulatory agents are discussed above in more detail. These tensions revolve around the role of the judiciary in determining the extent of extraterritorial jurisdiction and interest-balancing comity considerations in the implementation of US competition policy. In addition, judicial review is a common feature of competition cases in the US. The HSR established an advance-notice system that allows competition authorities to approve conditions for mergers before taking the merging firms to court.[215] However, if the

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[213] See Meier (2000) for a useful discussion of the organization of the executive branch.

[214] Majone argues that much of the relevant literature overlooks the potentially important instrument of judicial review (1996a, 38-39). Bendor (1990) provides a notable exception to this oversight.

[215] The HSR does not explicitly allow judicial review for the discretionary rules developed by the competition authorities for implementing the Act. As Carroll argues,

> Congress did not expressly provide for judicial review of the agencies' administration of the preacquisition notification program. A company seeking review of agency action pursuant to HSR therefore would proceed under the generally applicable chapter seven of

merging firms and regulatory agents cannot come to an agreement, both the DoJ and the FTC must bring their individual cases before the courts. Therefore, the regulatory agents are always aware that they must prepare strong legal cases based on economic analysis or face an unfavorable court decision. The institutionally mandated role for judicial review in the implementation of US competition policy, which differs significantly from that found in the EU, obligates the current study to consider, at least preliminarily, the courts as a political principal.

In US competition policy, regulatory agents play an extremely important role. This is particularly evident in the degree of discretion enjoyed by competition agents in comparison to other policy areas. For example, as Shughart argues, "Antitrust is unique among federal government policy programs in terms of the degree to which it is administered by autonomous bureaus" (1990, 94).

For the current study, two actors are identified as the primary agents in the US. First, the US DoJ is an agent within the executive branch. Second, the FTC is an agent that functions as an independent regulatory agency. While located in different parts of the government, the agents still share the same interest in avoiding political intervention. The US regulatory agents are notably different from those found in the EU. While the EU has a growing array of independent regulatory agencies (Yataganas 2001, 24-26), none deal directly with competition policy, such as the FTC does in the US.

While individual states within the US can investigate competition cases, they are largely irrelevant to the current study because the size of internationally-oriented mergers typically meet the HSR thresholds and, thus, require DoJ/FTC review. Likewise, although sectoral regulators (e.g., FCC) can be involved in competition cases, they are not considered relevant agents because the DoJ and FTC are the agents actually engaged in cooperation with their EU counterparts.[216]

> the Administrative Procedure Act (the APA). By its enactment of chapter seven, Congress affirmed its approval of the developing common law presumption of judicial review for one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action' (1983, 113-114).

[216] Devuyst does note that the EU is open to increasing cooperation with sectoral regulators:

> The current cooperation agreements provide for a framework between the European Commission on the one hand and the Department of Justice and the FTC on the other hand. The same framework of cooperation does not exist with the Federal Communications Commission and the Department of Transportation, while both agencies also have important antitrust powers in their specific area of competence. The

B. EU Principals and Agents in Merger Review

In the EU's competition system, the principals are the fifteen Member States. Through the MCR, these sovereign European states have delegated regulatory authority for merger control to the European Commission. The Member States may act individually as national politicians and/or political bodies. They may also act collectively as the Council of Ministers and/or the European Council.

The role of the Member States is pervasive in Commission decision-making. The Commission must constantly consider the impact of its decisions on the Member States and the reaction of the Council of Ministers. This ever-present concern means that Member States are a ubiquitous principal in EU policymaking.

The European Parliament and the College of the Commission also function as principals in the sense that the agents prefer avoiding their intervention. In reality, however, the Parliament has a marginal role to play in EU competition policy. As evidence below suggest, the European Parliament does not present a significant threat of intervention to the agents.[217] As discussed above, the College of the Commission (all twenty Commissioners deliberating together) is required, under certain circumstances, to approve final decisions on competition cases. When a decision of the Competition Directorate is brought before the College, Commissioners can obstruct final approval based on their national sympathies or portfolio demands. While not a common occurrence in competition cases, the possibility of such politicization in the College of the Commission exists and must, therefore, be considered.

It should be noted that the national competition agencies in the EU's fifteen Member States do not function as political principals. This is so for two reasons. First, the current study investigates cases of mergers that typically meet the thresholds established in the MCR. Therefore, the majority of these mergers fall under the jurisdiction of the Commission, not national competition agencies. Second, national competition agencies do have a degree of input into the Commission's merger review, in particular through the Advisory Committee on Concentrations in Phase II (see above). However, this body is

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Commission and the two US agencies have, at the highest levels, been actively exploring ways to better structure their mutual cooperation (2001, 148).

[217] On this point, see also McGowan and Cini (1999, 177).

only authorized to advise the Competition Directorate in individual cases. It does not exercise any binding authority over competition decisions in the EU system. As a result, the competition agencies in the EU's Member States function as a "third-party" regulatory agent with little or no capacity to control the Commission in the current study.

Similar to the institutional system in the US, the EU's judiciary also must be considered when identifying the Union's principals. As such, the Court of First Instance (CFI) and the European Court of Justice (ECJ) are identified as political principals. In contrast to the domestic institutions in the US, however, differences in the role of judiciary do exist.[218] These differences are particularly notable in, and important for, implementation cooperation and will be discussed in more detail in Chapters 5 and 6. In contrast to the US system, the EU's MCR does not require competition agents to prepare and try their cases in court. Rather, courts in the EU are less involved because they only entertain appeals from merging firms *after* the regulators have issued a final decision. The courts can provide an additional, objective judgment on the final decision of the regulatory agents. However, an appeal to the CFI requires a considerable amount of resources and, more importantly, may take as long as two to three years.[219] Thus, due to the time sensitivity of mergers, judicial appeal is often an unrealistic option in the EU. In fact, it is unlikely that firms will appeal conditions set by the MTF unless there is a significant point of principal that may affect their future, long-term business considerations. As competition authorities are aware, firms essentially have to "take what they get" in the EU merger review process.

These institutional limitations on judicial review and the level of discretionary authority exercised by the Competition Directorate have led commentators to declare the EU's regulatory agents as "effectively investigator, prosecutor, jury, judge and executioner in its own cause" (Gilchrist 2000/2001, 3). However, it should be noted "the European Court of Justice has tended to confirm rather than constrain the discretionary capacity of the Commission…" (Cini and McGowan 1998, 215). In addition, this limit on judicial review speaks only to the role of courts in implementation cooperation, not rule-

[218] On general judicial enforcement of competition policy, see OECD (1997).

[219] A new appeal procedure has been instituted in the CFI for time-sensitive cases, such as mergers. But, even this new "fast-track" procedure can take one year. Thus, even if individual cases may be expedited, it is unlikely that firms will appeal because there is a perception that no appeal exists for merging firms.

making cooperation. The important role of the EU's courts in such rule-making cooperation is discussed in Chapter 4.[220]

Similar to the US competition agents, the EU's competition agents enjoy a higher degree of discretion than other EU regulatory agents (McGowan and Cini 1999, 177). In competition policy, the regulatory agent is the European Commission, or more precisely, the Competition Commissioner, Competition Directorate and Competition Directorate's Merger Task Force (MTF). Within the Commission, it is crucial to isolate the Competition Directorate because other Directorates often have different interests and may try to intervene in competition cases.[221] When other Directorates do try to intervene, they play a role similar to political principals, except no actual delegation has occurred and they, of course, possess fewer control instruments than the principals.

The MTF is a separate unit within the Competition Directorate, having primary responsibility as the regulatory agent in charge of merger review across the SEM. The MTF is subject to a number of formal institutional checks on its regulatory authority.[222] The Competition Commissioner enters the process after the MTF has completed its Phase I analysis. This Commissioner is bound to enforce EU merger review in accordance with the same statutory objectives as the MTF.[223] As such, the Competition Directorate and Competition Commissioner are empirically distinct from the MTF, but are assumed to be analytically similar to the MTF as agents resisting the intervention of principals.

Combining the legal foundations of EU and US competition policy with the above discussion of the principals and agents reveals the parameters of the discretionary authority of EU and US competition authorities to cooperate internationally before 1991. Table 7 summarizes the discretionary authority of EU and US agents before 1991 across the three processes of international cooperation currently under investigation.

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[220] Similar to the case in the US, the EU's courts do not appear to have not played a direct role in exploratory institutional cooperation, as discussed in Chapter 5.

[221] As Majone notes, "…the directorates for industrial and for social policy frequently take positions at odds with those of the competition regulators (Laudati, 1996)" (cited in 2000b, 285).

[222] However, MTF case handlers are relatively insulated from political intervention. This insulation arises from the organizational structure of the MTF. Unlike the rest of the Competition Directorate, MTF case handlers are not organized hierarchically or sectorally, even though they do begin to specialize in certain sectors after a period of time. This organizational structure may allow MTF case handlers greater autonomy than that found in other parts of Commission.

[223] The Commission's Legal Service enters the merger review process much earlier and also shares the same statutory objectives as the MTF.

Table 7: Pre-1991 Competition Agents' Authority to Cooperate Internationally

	PROCESS of COOPERATION		
	Rule-Making	**Implementation**	**Exploratory Institutional**
EU Competition Authorities	Non-discretionary, but untested	Discretionary, but limited	Non-existent (Untested)
US Competition Authorities	Discretionary under CZA	Discretionary, but limited	Non-existent (Untested)

Unlike Table 2 in the first chapter, the current chapter reveals a different (pre-1991) historical framework for discretionary authority to engage in international cooperation. A simple comparison with Table 2 reveals three important insights.

First, before 1991, the EU's authority in rule-making cooperation was non-discretionary, but untested. However, as will be discussed in Chapter 4, this authority was ambiguous enough to lead to the discretionary signing of and political challenge to the Bilateral Agreement. Second, in implementation cooperation, the regulatory agents had only limited discretionary authority before 1991. Their discretionary authority to cooperate while implementing competition policy on concurrent jurisdiction mergers was largely based on a series of non-binding OECD Recommendations (see below). The limits of this discretionary authority did little to limit unilateral extraterritoriality and were a contributing factor to the discord that historically characterized transatlantic competition relations (see below). Third, Table 7 shows that before 1991, the regulatory agents had no real discretionary authority to cooperate in exploratory institutional situations simply because this process of cooperation had not yet been attempted. In other words, the discretionary authority of regulatory agents in exploratory institutional cooperation was non-existent and, as a result, untested—it was not certain how the political principals would react to this new process of international cooperation.

While not the primary purpose of the current study, the findings herein may shed light on the conditions under which some of the multiple principals and agents discussed in this section are more or less influential. In particular, variations in influence may occur systematically across the different conditions present in the three processes of international cooperation: rule-making, implementation and exploratory institutional cooperation. This issue is taken up in Chapter 6.

V. Adversity and Discord in Transatlantic Competition Relations

The preceding discussion of the legal bases of US and EU extraterritoriality is closely linked to the adversity and discord historically characterizing transatlantic competition relations. The domestic institutions of US and EU competition policy reflect different regulatory objectives and views of extraterritoriality that, at times, appear inconsistent and irreconcilable. In particular, the exercise of extraterritoriality by the US and EU have, at least partially, led to the promulgation of national countermeasures to limit jurisdictional claims. This section discusses the EU and US's different approaches to competition policy and the history of US unilateralism and European retaliation with domestic institutional countermeasures. The section concludes with a discussion of the early attempts at international cooperation in competition matters.

A. Different Approaches and Different Interests

This subsection addresses the different objectives of US and EU competition policy.[224] The initial reasons for creating competition policies were different in the EU and US. While the US promulgated the 1890 Sherman Act to protect individual entrepreneurs from large trusts, the EU developed competition policy as a way to encourage economic integration and to create a single market.[225] In practical terms, the US typically looks more closely at the impact of a merger deal on customers (i.e., increased choices, decreased prices) while the EU looks more closely at the impact of a deal on competitors.[226] Today, these different regulatory objectives reflect the different "national" (and constituent) interests of the US and EU—protecting consumers vs. market integration.[227] These simplified objectives suggest divergent US and EU national

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[224] For more on the different objectives of EU and US merger control, see Graham (2000).
[225] On historical differences between US and EU antitrust thought, see Leary (2001).
[226] As discussed above, since 1992, the US also considers the impact of anticompetitive business activity on exporters.
[227] Charles Stark, former DoJ official and lawyer at Wilmer Cutler & Pickering, offers a sports analogy to describe this diffence:

interests in competition policy and, as a result, resemble Keohane's situation of "discord" rather than "harmony".[228]

The US approach to competition policy did not always focus on consumers. Throughout the early part of the twentieth century, US antitrust analysis focused on the size of an economic concentration and how it affected competitors. If firms grew too large, it was feared that they could force smaller competitors out of (or prevent them from entering) the market. The inevitable result of such anticompetitive behavior was a firm engaging in monopolistic activity. This early foundation of antitrust analysis resembles the current EU approach, known as a market dominance test.[229] The "big-is-bad" thinking in the US began to change in the 1970s. Mirroring the ascent of the Chicago School of antitrust, the transition to a new competition objective was completed during the so-called Reagan revolution in antitrust.[230] The Reagan revolution

> reflected a broad new American belief in the power of markets to make better decisions than social engineers or regulators. Influenced heavily by conservative economic and legal thinkers mainly at the University of Chicago, the U.S. began to focus on the effect a merger would have on prices, innovation and product development, rather than the fate of the companies left to compete with the new entity…

> The European Union's antitrust cops prefer a world that resembles the National Football League: many closely matched teams, battling year after year for dominance. U.S. regulators are comfortable with the New York Yankees model: a powerhouse dynasty free to use its might to acquire players and invest in team development—provided the fans are still getting to see good baseball at a reasonable price (Davis and Raghavan 2001, A1-A8).

[228] According to Keohane, international cooperation must be distinguished from "harmony", which refers to "a situation in which actors' policies (pursued in their own self-interest without regard for others) automatically facilitate the attainment of others' goals" (1984, 51). Harmony is then distinguished from "discord": "a situation in which governments regard each others' policies as hindering the attainment of their goals, and hold each other responsible for these constraints" (1984, 52).

[229] "Early U.S. trustbusters weren't concerned so much with mergers but with something that is prominent in today's European worries: interlocking trusts, in which a single company can dominate not just one market niche but several" (Davis and Raghavan 2001, A8).

[230] These changes to antitrust policy were attributed to President Ronald Reagan's Administration, under which "major monopoly cases such a AT&T and IBM were abandoned; multibillion-dollar mergers in oil, transportation, and other industries were permitted; and price-fixing conspiracies became the major concern of the antitrust agencies" (Eisner and Meier 1990, 269). However, while it is known as the Reagan revolution, the shift may have been more a result of changes within the US regulatory agencies, instead of simply a new Presidential Administration. As Eisner and Meier argue, the antitrust "policies of the Reagan administration were nothing more than an extension of earlier policies originating in the antitrust bureaucracy" (1990, 269). For studies to the contrary that argue the Reagan revolution was more a reflection of presidential control, see (Anderson 1986) and Mueller (1986). Similar studies that suggest a predominant role for principals over the FTC include Moe (1982; 1985) and Kovacic (1987). For a brief discussion of these studies, see Majone (1996a, 37).

> The focus became how a merger affected the consumer, not how it affected the competitive balance between business rivals (Davis and Raghavan 2001, A8).

This major change in antitrust objectives shifted the analysis of anticompetitive behavior from competitors to consumers. Such a shift is significant because final competition decisions can differ dramatically depending on whether the analysis is based on protecting competitors or consumers.[231] Unless overseas competition authorities employ a similar objective, the likelihood of divergent (both inconsistent and conflicting) decisions increases significantly in cases of concurrent jurisdiction.

The regulatory objectives are quite different in the EU. The Union's competition objectives reflect the practicalities of Europe's evolving Single European Market (SEM). In contrast to US competition objectives, the EU's Group of Experts argues that the purpose of Union competition law is

> not only to increase the efficiency of firms or to improve the allocation of resources, but also to bring about the integration of the internal market. The latter concern is not so pressing or non-existent in the United States. This results in a different approach, for example, to vertical restraints or the abuse of a dominant position (1995, 9).

In order to understand fully the objectives of EU competition policy, it is useful to provide a brief historical recapitulation of EU competition policy.[232] At the European level, the 1957 Treaty of Rome reflects the EU's initial competition objective of market integration. Article 3(f) provides for "a system ensuring that competition in the common market is not distorted". This principal was translated into a preference for the largest number of competitors across the individual national markets—a maximum-competitors approach. Thus, freed from border constraints, competition from one national market

[231] While the EU promotes a different regulatory objective in its competition policy, it should be clarified that consumer welfare is not completely dropped from economic analyses in Union merger review. As Monti argues, consumer interests are ultimately a goal of EU competition policy: "Competition should lead to lower prices, a wider choice of goods, and technological innovation, all in the interests of the consumer" (Monti 2001b, 2). Also, "we are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition. We are, however, against mergers that, without creating efficiencies, could raise barriers for competitors and lead, eventually, to reduced consumer welfare" (Monti 2001b, 2). For an argument that challenges Monti's position, see Evans (2002).

[232] See Section II, B above for more on the historical development of the EU's competition policy.

would spur competition in another national market, which would increase competition within the entire SEM.[233]

In the 1960s and 70s, European views of competition began to change. During this period, Europeans embraced a "cartel-oriented" approach to managing markets that departed significantly from the maximum-competitors approach. As a result, European countries began promoting national champions. This period of "big-and-publicly-owned-is-good" thinking gradually changed in Europe through the 1980s. Faith in large, cartel-like, national champions began to weaken at the same time that competition was increasing in the international economy and the Reagan revolution in antitrust was occurring in the US. As Davis and Raghavan describe, this transition returned European competition objectives to a maximum-competitors approach:

> By the late 1980s, however, European leaders had come to believe that these industrial giants had failed to produce economic growth and still lagged behind in competition with the U.S. and Japan. The new approach was to use antitrust policy to assure more competition, in the belief that this was the only way for Europe to stay healthy in global economic fights. Antitrust thinking moved back closer to its postwar roots. 'Today, the people in charge of antitrust policy are taking an aggressive position on competition because they believe in the bankruptcy of national champions,' says Harvard Business School Professor David Yoffie. In short, European thinking became: Keep as many competitors on the field as possible, and the economy will benefit (Davis and Raghavan 2001, A8).

Thus, EU competition policy is now an outgrowth of the same anti-cartel policy that had characterized early US competition policy. The crucial difference in today's regulatory objectives is that the US has departed from the initial objectives of its antitrust policy. These differences in regulatory objectives largely reflect simple differences in the

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[233] Similarly, the West German national antitrust system, which

> became the bedrock of European antitrust thinking, had strict legal prohibitions against abuses of dominant position, but the German approach also held that competition was defined by the absence of restrictions on economic freedom. In practical terms, this meant that antitrust policy should be geared toward keeping markets open and allowing as many competitors as possible, even if that reduced efficiency (Davis and Raghavan 2001, A8).

stage of economic/market integration in the EU and US.[234] In practical terms, these differences in regulatory objectives (competitors vs. consumers) can then be translated into different economic analyses in competition cases, which increase the likelihood of divergent decisions between the EU and US. Fox summarizes the differences in implementation that can follow from these different regulatory objectives:

> Principally, U.S. antitrust law proscribes only that which artificially lowers output and raises price (with a few exceptions); even a dominant firm has the right to compete hard and may do so even if it excludes competitors. EC competition law, among other things, protects small and middle-sized business from unfair exclusions and has a broader sweep against abusive practices (1997a, 12).

The different objectives of US and EU competition policy are further complicated by different institutional mechanisms for conducting merger review. Such differences have led to frequent claims that EU and US competition authorities are institutionally limited in their ability to cooperate.[235] Commonly identified institutional obstacles include different evidence-gathering tools, different roles played by courts and different statutory objectives of competition policy, especially the existence of "public interest" concerns like employment, regional development and R&D in the EU (Cini and McGowan 1998, 195). In addition, language in the Merger Control Regulation allows EU competition authorities to consider "technological and economic progress" when determining whether behavior is anticompetitive (Article 2[1] b).[236] Procedural differences—such as different timetables—and substantive differences—whether

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[234] The US addressed the need for market integration early in its history with the Constitution's Commerce Clause, which prohibited state discrimination in interstate commerce and provided a basis for relatively unimpeded commerce in the national US market.

> Perhaps it is worth commenting in this context that our Constitution's Commerce Clause functioned much like a trade law by eliminating governmental barriers between states. Consequently, when Congress passed our antitrust laws a century later, those laws simply had to insure that private barriers did not replace the prohibited state barriers. The EU's national boundaries and barriers have proven far more enduring and thus even competition law is enlisted to remove those barriers (Valentine 1997, 3-4).

[235] See Majone (2000b, 279), Cambell and Trebilcock (1997), Doern and Wilks (1996, 328-334), Laudati (1995), and Doern (1995).

[236] It does not appear that the EU has yet based a competition decision on this specific language. However, if the EU would do so, it could be challenged in the courts, which would require the ECJ to deliver a final interpretation of "technological and economic progress".

defining markets, calculating market power,[237] or applying different economic theories[238]—between EU and US merger review may also create problems for transatlantic cooperation. These institutional differences are outlined in Appendix 1.

How can EU-US cooperation be explained given the preponderance of these institutional differences in domestic competition policy? Chapter 5 provides evidence from multiple merger cases (in particular Boeing/McDonnell Douglas and GE/Honeywell) that suggests ways in which competition agents can overcome these institutional obstacles by pursuing discretionary implementation cooperation.

B. Discord in Transatlantic Competition Relations: A History of Unilateralism and Retaliation

Through domestic legislation and subsequent court rulings, the US asserted its extraterritorial jurisdiction over the objections of numerous foreign governments. Because extraterritorial enforcement is seen as a threat to national sovereignty, other countries frequently responded with their own extraterritoriality and/or countermeasures.[239] Such a tit-for-tat should not be particularly surprising because, as Lord Wilberforce of the British House of Lords argues, “It is axiomatic that in antitrust matters the policy of one state may be to defend what it is the policy of another state to attack.”[240] Lord Wilberforce’s claim suggests a very high probability of different states pursuing different interests and creating discord in international competition relations—“a situation in which governments regard each others’ policies as hindering the attainment of their goals, and hold each other responsible for these constraints” (Keohane 1984, 52). This subsection discusses the adversity and discord that arose in transatlantic

[237] In the EU, “50 percent and sometimes 40 percent of a market means dominance, especially if the next largest company is far behind. The United States, on the other hand, measures market power and its possible increase microeconomically, by considering the various relevant factors in the specific context” (ICPAC 2000, 48).
[238] Different theories of economic analysis—such as “bundling”, which was used by the EU in the GE/Honeywell merger but has been largely rejected by the Chicago School approach in the US (see Chapter 5)—increase the likelihood of divergent decisions on either side of the Atlantic.
[239] As ICPAC argues, “Historically, concerns by nations over issues of sovereignty have led to some combination of legal, practical, and political impediments to such enforcement aims. Some nations introduced a variety of legal obstacles to stymie other nations in their efforts to prosecute international antitrust matters, and of course, affected parties often take their own evasive measures” (2000, Annex 1-C, i).

competition relations as the result of a political tit-for-tat based on unilateral extraterritoriality and retaliatory countermeasures.

1. The 1950s-1980—The Entrenchment of a Discordant Relationship

The US is not alone in asserting extraterritorial jurisdiction in competition cases. However, it was US extraterritorial assertions of jurisdiction from the 1950s through the 1980s that particularly angered foreign governments as threats to sovereignty.[241] Griffin (1999, 160; 1998, 70-71) provides useful examples of what he calls "aggressive" assertions of extraterritorial jurisdiction in US antitrust enforcement during this period:[242]

- *Timken Roller Bearing Co. v. United States*, 341 US 593 (1951)
- *United States v. Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947 (D. Mass. 1950)
- *United States v. Imperial Chemical Industries Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951)
- *Holophane Co. v. United States*, 352 US 903 (1956)
- *United States v. Watchmakers of Switzerland Information Centre, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600 (S.D.N.Y. 1962), order modified, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965)
- *Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980)
- *Ocean Shipping Antitrust Litigation*, 1980-1981 Trade Cas. (CCH) ¶ 63,630 (S.D.N.Y. Oct. 18, 1980)
- *United States v. Atlantic Container Line, Ltd.*, Crim. No. 79-271 (D.D.C. filed June 1, 1979)[243]

The backlash against US unilateral extraterritoriality was witnessed in the codification of various national countermeasures by foreign governments. As discussed

[240] Parisi introduces this comment as "the obligatory footnote in a paper on this subject," citing Lord Wilberforce's remark in the House of Lords judgment In re *Westinghouse Electric Corporation Uranium Contract Litigation* [1978] A.C. 547, 617.

[241] See especially Griffin for a discussion of states reacting "with vehemence towards the extraterritorial enforcement of U.S. antitrust laws" (1998, 64). In addition, ICPAC argues, "For much of the postwar period, extraterritorial application of U.S. antitrust laws had been a significant source of tension between the United States and its trading partners" (2000, Annex 1-C, ii). See also Fox (2001), Devuyst (2000, 323), Griffin (1998), Baker et al. (1997, 443) and Price (1995).

[242] It should be noted that the US expressed similar concerns over the EU's proceedings against IBM in 1981 (Griffin 1998, 71).

[243] US extraterritoriality also has increased tensions in non-competition areas, including securities trading, taxation, narcotics, boycott and corrupt practices (Demaret 1986, 126). These transatlantic tensions were embedded in a broader economic relationship known for numerous disputes, such as the 1963 "Chicken War"; EC compensatory taxes on imports in 1972; French, Belgian and Dutch income tax practices in 1973; EC minimum import prices in 1976; US countervailing duty actions in 1978; US import duties in

in Chapter 2, these national countermeasures now function as foreign intervention instruments and

> They tend to escalate rather than reduce system friction. More important, they throw up roadblocks to effective enforcement action against anti-competitive activity which has an international dimension… Successful enforcement harmonization would entail replacing sovereignty-oriented blocking statutes with strengthened comity commitments and closer collaboration on information gathering and exchanges. This can be expected to be politically difficult… (Baker et al. 1997, 443).

These sovereignty-oriented, national countermeasures were institutionalized as retaliatory statutes, official protests, practical non-assistance and counter actions by foreign courts. Table 8 lists the countermeasures commonly employed as retaliation for US unilateral extraterritoriality in competition relations.

1981; EC export subsidies in 1982; US import restrictions on printed matter in 1983; US bans on steel pipe and tube imports in 1984; etc (see Baldwin et al. 1988, 52-53).

Table 8: Common National Countermeasures to Unilateral Extraterritoriality[244]

Countermeasure	Description
Blocking Statutes	Prevent the US from collecting evidence and testimony on foreign soil[245]
Clawback Statutes	Authorize the filing of local suits to recover multiple damages already paid in connection with a foreign judgment[246]
Official Protests	Diplomatic notes of protest[247]
	Filing of amicus curiae briefs in connection with ongoing US litigation[248]
Practical Non-Assistance	Reservations against providing investigative or judicial assistance under bilateral or multilateral treaties

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[244] Source: ICPAC (2000, Annex 1-C, ii-iii).

[245] Devuyst notes that a number of traditional allies of the US have enacted blocking statutes: the United Kingdom, Germany, Netherlands, France, Canada and Switzerland (2000, 323). Ham adds to the list Belgium, Denmark, Norway, Sweden and Australia (1993, 573). According to Griffin, the first statute blocking discovery "was enacted by the Parliament of Ontario in response to a U.S. investigation of the Canadian newsprint industry in 1947" (1998, 64, note 3). More recently, Griffin notes the British Protection of Trading Interests Act 1980 (1999, 160, note 7), and Baker et al. note the Canadian Foreign Extraterritorial Measures Act (1997, 481). See also Price (1995).

[246] Clawback statutes followed the earlier blocking statutes. As Griffin argues, clawback statutes are "legislation creating a statutory cause of action to recover damages paid in satisfaction of U.S. antitrust judgments" (1998, 64), in particular responding to treble damages provided for in US legislation. Examples of such clawback statutes include a 1980 French law that criminalized requests for certain types of information located in France, and the 1980 British Protection of Trading Interests Act (POTIA) (Griffin 1998, 64). According to Whish, the clawback remedy (Section 6) of the POTIA provides "an absolute right" for qualifying defendants "to recover the non-compensatory portion of any damages paid by him, from the plaintiff, by an action in the UK courts" (1996, XII/47).

[247] For example, ICPAC cites "Note No. 187, of 5 August 1977, from the Government of the United Kingdom to the United States Government (Department of State) concerning the extraterritorial reach of the 977 amendments to the Export Administration Act. Reprinted in Lowe, EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS (Grotius Pub. Ltd., London 1983), 147-149" (2000, Annex 1-C, ii, note 3). In addition, Griffin cites "*Diplomatic Notes, reprinted in* A.V. Lowe, Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials (1983); G.W. Haight, *Extracts from Some Published Material On Official Protests, Directives, Prohibitions, Comments, etc., in* Report of the 51st International Law Association Conference 565-92 (1964); Joel Davidow, *Extraterritorial Antitrust and the Concept of Comity*, 15 J. World Trade L., 500, 508 (1981); Michael L. Weiner, *Remedies in International Transactions: A Case for Flexibility*, 65 Antitrust L.J. 261 (1996)" (1999, 161).

[248] For example, ICPAC cites "Brief of amicus curiae of the Government of Japan, United States v. Nippon Paper Industries Co., No. 96-2001 (1 Cir., filed Nov. 18, 1996) in which the Government of Japan argued among other things that application of the Sherman Act to conduct by Japanese corporations occurring wholly within Japan is not valid under principles of international law and international comity, and that under well-established canons of construction, U.S. antitrust laws do not apply to conduct occurring wholly within another country. *See also, e.g.,* In re Uranium Antitrust Litigation, 473 F.Supp. 382 (N.D. Ill. 1979) (No. 76-C-3830), Brief of *Amicus Curiae* The Government of Australia, Brief of *Amicus Curiae* The Government of Canada, Brief of *Amicus Curiae* The Government of The United Kingdom" (2000, Annex 1-C, ii-iii, note 4).

Counter Actions by Foreign Courts[249]	Unwillingness to recognize and enforce acts of US courts or extradition requests upon conclusion of antitrust litigation
	Limits recognition and enforcement of foreign court orders, particularly those for multiple damages

Summing up the volume and impact of these national countermeasures, Griffin cites a US antitrust enforcement official who, in 1981, claimed that "there have been five diplomatic protests of U.S. antitrust cases for every instance of express diplomatic support, and three blocking statutes for every co-operation agreement" (1998, 64). These national countermeasures were intentionally crafted to "impede U.S. investigatory efforts to compel production or gain access to information or witnesses located abroad" (2000, Annex 1-C, ii). According to ICPAC, "Sovereignty and consequent jurisdictional issues are among those that historically have elicited the most objections from other governments to U.S. antitrust enforcement efforts and, accordingly, led to the implementation of protective measures that bar efforts by U.S. litigants to obtain information for use in their domestic actions" (2000, Annex 1-C, i). Thus, such measures reduce the availability of information that is vital to the enforcement of US competition policy (see Chapter 2).[250]

2. The 1980s—The Relationship Becomes More Discordant

While the period before the 1980s was notable for the proliferation of countermeasures, limited transatlantic dialogue did occur between US and European competition authorities. However, when conflicts occurred, comity considerations were typically jettisoned in favor of the political expediencies of protecting national and constituent interests. For instance, as Fox argues, "In this period, before the end of the 1980s, the preferred way to resolve conflicts, if they were to be resolved, was respect and

[249] Griffin notes the "British Nylon Spinners, Ltd. V. Imperial Chem. Indust., Ltd., (1953) 1 Ch. 19 (Eng. C.A. 1952). See also O. Kahn-Freund, *English Contracts and American Antitrust Law: The Nylon Patent Case*, 18 Mod. L. Rev. 65 (1955)" (1999, 161).

[250] Regarding the importance of information, ICPAC also argues that "When engaging in this extraterritorial enforcement, U.S. antitrust authorities need to overcome sovereignty concerns that arise when they seek to obtain information and testimony from non-U.S. citizens located overseas; successfully meet jurisdictional requirements, including establishing personal jurisdiction and subject matter jurisdiction; and render valid service of process" (2000, Annex 1-C, i).

retreat in the interests of comity (negative comity). After balancing interests, however, the United States virtually never respected or retreated" (2001a, 244).[251] This perception and the likelihood of similar conflicts increased significantly in the 1980s as EI increased the incentives for internationally-oriented merger activity.

A commonly cited example of transatlantic tensions in competition relations during the 1980s is the *Laker Airways* case.[252] As EU Competition Commissioner Sir Leon Brittan claims, "No doubt the high point of this debate [over extraterritoriality], which at times reached the proportions of a dispute, was marked, and epitomized, by the Laker Airways saga of measure and counter-measure across the Atlantic" (1992a, 49).

This complex case began with insolvency proceedings for Laker Airways Limited, a failed, low-cost British airline. In a bid to protect assets, Laker's liquidators filed a suit in US district court against four US defendants and eight foreign airlines, including two other British Airlines. Due to the very nationality of the many defendants named in the suit, the case was sure to be contentious in terms of extraterritorial jurisdiction. The liquidators of Laker Airways claimed that the defendants had colluded to monopolize the air routes between New York and the United Kingdom. This alleged violation of US antitrust law had been an attempt to drive Laker out of business. As Fox describes, a British court then

> ordered Laker Airways' liquidator (hereinafter Laker) not to proceed against the British defendants.[253] Laker, in response, brought a motion in the U.S. district court to enjoin defendants Sabena, the Belgian airline, and KLM, the Dutch airline, from coat-tailing on the British court action.[254] The U.S. court, by Judge Malcolm Wilkey, declared that the various interests of the parties and nations could not be balanced. Judge Wilkey granted Laker's motion on grounds that important interests of U.S. consumers were at stake so that the U.S. court clearly had

[251] As Fox argues, "Until the end of the 1980s, diverse attitudes towards competition itself created animosities, especially towards US extraterritorial enforcement when it collided with other nations' decisions about how to organize their economies" (Fox 2001, 350).
[252] For example, Brittan argues, "Probably the most celebrated antitrust case is the Laker saga" (1990, 30).
[253] British Airways Bd. v. Laker Airways Ltd., 1984 Q.B. 142 (C.A. 1983). The injunction was later dissolved by the British House of Lords, which observed that the U.S. court was the only forum in which Laker could seek relief. British Airways Bd. v. Laker Airways Ltd., 1985 A.C. 58 (1984).
[254] 731 F.2d at 945-52.

> prescriptive jurisdiction and ought to exercise it[255] (Fox 1987, 576).

The *Laker* case was particularly significant because it exposed the limits of applying comity (i.e., interest-balancing) and the escalation of political tensions that can occur in transatlantic competition relations. In particular, the case witnessed the contentious nature of extraterritoriality and the threat and actual exercise of unilateral countermeasures.[256]

While the *Laker* case exemplifies the suspicions and obstacles to cooperation in transatlantic competition relations, additional domestic events in the 1980s in the US and Europe compounded the historical discord and tensions in this policy area. These domestic events are also discussed in Chapter 4 (section II, G) in the context of the signing of the 1991 Bilateral Agreement.

For the EU, suspicions were linked to an increasingly activist and unilateral extraterritorial US competition policy due to posturing by George H. Bush's Administration (Brittan 1990) and the US Congress, such as Section 301 and the Exon-Florio Amendment of the Omnibus Trade and Competitiveness Act of 1988 (Garbus 1991, 64; Miles 1995, 120).

Section 301 of the Omnibus Trade and Competitiveness Act of 1988 (which amended Section 301 of the 1974 Trade Act) was a particular concern for the EU. This legislation

> …enables the U.S. trade representative to take unilateral action against 'the toleration by a foreign government of systematic anticompetitive activities by private firms or among private firms in the foreign country that have the effect of restricting… access of Unites States goods to purchasing by such firms.' This provision of the Trade Act pressured the Japanese government to participate in the Structural Impediments Initiatives (SII)—an attempt by the Bush administration to tackle competition-related trade barriers in Japan (Devuyst 2000, 322).

US-Japanese relations served as a prism through which the EU could gain insights into the expected behavior of the US: "From the European perspective, a simplistic view of the U.S.-Japan relationship might be heralded as a positive development, since the U.S. may be successful in opening market opportunities for EU goods and services. The

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[255] *Id*. at 948-55.

Commission does not share this view and most observers register concern over… whether the strategy might also be turned against the EU" (Mathis 1996, 129-130).[257]

In addition to Section 301, another component of the 1988 Omnibus Trade and Competitiveness Act spurred fears in Europe about the possible exercise of control instruments by the US President—the so-called Exon-Florio Amendment in Section 501.[258] Under Exon-Florio, the President

> is authorized to prohibit or suspend acquisitions, mergers, or takeovers by foreign persons or persons engaged in interstate commerce in the United States if the President, after investigation, finds credible evidence that such foreign persons might take action that threatens to impair the national security of the United States and that other provisions of existing law do not provide adequate authority to protect national security (Garbus 1991, 64).

In fact, Exon-Florio was shown to be more than a threat as it was actually used against European firms (Garbus 1991, 70; Kang 1997).[259]

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[256] For a more detailed discussion of this case and legal decision, see Meessen (1984).

[257] The US's use of competition policy as a "market opening" instrument against Japan similarly contributed to EU suspicions. Mathis details these market opening instruments:

> the United States has engaged a number of strategies to 'force open' markets which are alleged to be closed by the use of restrictive business practices. Most of these efforts have concentrated on Japan via a series of bilateral negotiations over ten years, commencing with the MOSS (market oriented sector selective) talks in 1985, followed by the Strategic Impediments Initiative (SI, 1989-1992) and now by the current 'United States-Japan Framework for a New Economic Partnership' (1993)… A series of complementing policy instruments are employed to strengthen the U.S. hand in dealing with Japan, including the threat of unilateral sanctions Section 301 provisions of the Trade Act of 1988. Likewise, the U.S. has officially enhanced its capacity to employ a form of 'true extraterritoriality' in citing as unfair practices other countries' antitrust policies which do not equate to an adequate level of domestic enforcement (1996, 129).

[258] For more on politics surrounding and the functioning of the Exon-Florio amendment, see Kang (1997, 303-305).

[259] Garbus goes on to discuss Exon-Florio in much more detail, including its past use for political purposes. This behavior by the US contributed to European fears that Exon-Florio would be used to as a control instrument against their interests:

> On 16 March 1990, BTR PLC commenced an unsolicited tender offer for Norton Company, a New York Stock Exchange firm which is headquartered in Worcester, Massachusetts [p. 68]… The BTR-Norton battle also reflects the use of Exon-Florio as part of a 'political' attack to fend off the prospect of a foreign takeover of a 'good United States local corporate citizen.' United States Senators Kennedy and Kerry (both from Massachusetts) rushed to the defense of Norton and urged CFIUS and President Bush to push the parameters of Exon-Florio to include consideration of the well-being and livelihood of the 3,000 employees in Massachusetts and the impact of Norton on the local community during the past century, in addition to its top-secret technical contracts and retaining for the United States Norton's 'competitive' position in the abrasives and plastics industries (Garbus 1991, 70).

For the US, similar fears were generated by the European Court of Justice's (ECJ) apparent willingness to expand the EU's jurisdictional reach during the 1980s. In particular, the US believed the ECJ's 1988 *Wood Pulp* decision portended a new activism on the part of the Commission (Miles 1995, 120). This ruling addressed a competition case that affected North American firms, demonstrating that the EU was not likely to shy away from extraterritorial confrontation over competition issues with the US.

In addition to EU extraterritorial jurisdiction, domestic institutional developments also suggested a maturation of the Union and its potential willingness to exercise extraterritorial jurisdiction in competition matters. To be sure, the US was still concerned about the potential use of national blocking and clawback statutes by the EU's member states. However, a more pressing matter was the Union's signing of the 1990 Merger Control Regulation as a component of the broader SEM project. The MCR bound the Commission to enforce Union merger control, even extraterritorially, if the merging firms met specific thresholds. The implementation of the EU's MCR held a very real potential to threaten US interests. As former EU Competition Commissioner Sir Leon Brittan admits:

> The possibility of conflict arising as a result of concurrent enforcement activities between the Commission and the competition authorities of its main partners in international trade and investment was considerably increased as a result of the long-awaited adoption… of [the Merger Control] Regulation calling for the prior notification and vetting of large mergers of 'Community dimension' by the Commission… the Commission has turned its attention to competition in such sectors as international air transport, postal and telecommunications services, all areas in which its jurisdiction is liable to come into contact with that of competition authorities in other countries (1992a, 40-50).

The *Wood Pulp* decision, the emergence of the SEM and the pending implementation of the MCR contributed significantly to EU-US tensions in competition policy. In addition to the changes being wrought by EI's impact on business activity, they

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Garbus also discusses the extraterritorial exercise of US federal securities law during the 1980s. As Garbus argues, "the increased use of Exon-Florio as a defensive weapon against foreign takeovers of United States firms and the extra-territorial reach of the Federal securities laws under Consolidated Goldfields provide warning signs of potential dangers to foreign companies seeking to effect acquisitions in the United States" (Garbus 1991, 80).

magnified the challenge facing EU and US competition agents to limit political intervention. During the 1980s, the trend of historical transatlantic adversity and discord in competition relations showed few signs of abating. Rather, EI was increasing the pressures for firms to engage in cross-border mergers and simultaneously increasing the likelihood of concurrent jurisdictional merger reviews. Based on historical experience and domestic institutional developments in the US and EU during the 1980s, the resulting jurisdictional overlaps would likely increase disagreements and political brinkmanship in transatlantic competition relations. To avoid such an outcome, new methods of cooperation would have to be devised.

C. Limited Efforts at International Cooperation in Competition Policy

In the early twentieth century, states initiated efforts to increase cooperation in the international prohibition of anticompetitive (or restrictive) business practices. As Fox argues, this behavior should not be surprising because

> In modern times, market conduct has nearly always had transnational dimensions. Trading nations have discussed the possibility of world disciplines against restrictive business practices since the mid- to late-1940s, when they contemplated and nearly adopted the Havana Charter. Thereafter, nations formulated voluntary codes and principles in the context of the United Nations Conference on Trade and Development (UNCTAD) and the Organization for Economic Cooperation and Development (OECD) (2001, 350).[260]

The OECD in particular provided an intergovernmental forum for increasing voluntary international cooperation among developed countries in competition matters.

As firms and markets rapidly began to globalize in the 1970-80s, the number of firms merging across national borders and the number of foreign mergers affecting domestic US and EU commerce increased considerably (see Chapter 1 and Chapter 2). As a result, cooperation with overseas competition regulators became more pivotal to ensuring the smooth functioning of national merger review processes. Between the US and Europe, such cooperation began largely under a series of non-binding OECD

[260] For a discussion of international cooperation on restrictive business practices beginning in 1927, see Ham (1993, 572-573).

Recommendations on Restrictive Business Practices Affecting International Trade.[261] These non-binding recommendations were initiated by OECD members who noted that they had increasingly similar competition laws and would face increasingly similar problems as the global economy liberalized (OECD 1998, 7). In general, the recommendations encouraged informal contacts, mostly for the purposes of discretionary consultation and information sharing on specific competition cases.

For example, in 1967, the first OECD Recommendation called for mutual notification between competition regulators and discouraged retaliatory unilateralism. As the history detailed above suggests, this recommendation did little to discourage political retaliation in competition matters. Due to shortcomings, the original recommendation was revised a number of times. A subsequent 1973 Recommendation called for consultation between competition authorities during the review processes. The 1967 and 1973 Recommendations were then combined in a 1979 Recommendation, which allowed countries to request (positive comity) consultation when their significant interests were threatened. Next, the 1986 Recommendation included "Guiding Principles," which called on countries to consider taking remedial action in response to a notification from a foreign competition authority. The most recent version of the OECD Recommendation came in 1995, well after the EU and US launched their system of bilateral cooperation.[262]

The record of the OECD Recommendations does provide empirical evidence of international cooperation in competition policy. For example, under the 1979 OECD Recommendation, Ham notes that from 1980-85, OECD members notified 587 competition cases to each other. In particular, the US notified 361 (almost two-thirds of total) cases to OECD members. During the same period, the European Commission notified 57, Germany notified 40, Canada notified 39, and Sweden notified 25 (Ham 1993, 574).[263]

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[261] On pre-OECD activities and comments on each of the Recommendations, see OECD (1999a, 7-9). See Cini and McGowan (1998, 197-98) and especially (Doern 1996, 277-79) for OECD background.

[262] The 1995 OECD Recommendation was signed to encourage cooperation but made no substantive changes to the 1986 Recommendation itself (OECD 1998). Compared to the first recommendation, the 1995 Recommendation "contains a considerably greater emphasis on encouraging countries to assist each other's enforcement proceedings ('investigative assistance'), and to conduct their own proceedings to halt anti-competitive conduct in their territories that is having adverse effects in other countries ('positive comity')" (OECD 2000a, 3).

[263] Statistics are reported in OECD (1984), "Competition Law Enforcement," p. 72.

However, the voluntary framework developed through the OECD Recommendations is notably different from the more binding EU-US cooperation that emerged with the 1991 Bilateral Agreement. Because the OECD recommendations are non-binding and only call for voluntary discretionary cooperation, they did not require political intervention for effect.[264] Likewise, they did little to allay the growing fears of US and EU competition agents who saw overseas institutional developments as likely indicators of increasing extraterritoriality and political intervention.

In addition to the multilateral OECD Recommendations, the US engaged in limited forms of bilateral cooperation prior to 1990, with individual members of the OECD.[265] As Fox argues, "antitrust clashes of the 1970s, and particularly the perception that the US agencies and courts had exceeded jurisdictional bounds and tread on other nations' sovereignty, led to the negotiation and adoption of three memoranda of understanding (MOUs)" (2001a, 244).[266] The MOUs to which Fox refers were signed between the United States and Germany (1976),[267] the United States and Australia (1982),[268] and the United States and Canada (1984, superseded by an expanded agreement in 1995).[269] Under US law, these MOUs are actually formal and binding executive agreements. However, they were not ratified by the US Senate as treaties and,

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[264] Such a distinction is very important because if the recommendations had been binding on the respective competition authorities, they would have ultimately required approval of the respective principals (i.e., political intervention) in the EU, just as was the case in the Bilateral Agreement.

[265] Stark notes the limited EU-US cooperation in competition policy before 1990:

> Cooperation between the U.S. and the EU did not start with the two jurisdictions' 1991 agreement, but contact before then was sporadic. Interestingly, the only instances up to that point in which the U.S. had asked for consultations with a foreign antitrust authority in connection with a foreign antitrust case against U.S. companies had both involved the EU. These consultations involved the Commission's actions in the early 1980s against IBM and the Pulp, Paper and Paperboard Export Association, a U.S. Webb-Pomerene association (2000, 4).

[266] For a longer discussion of these "MOUs", see Ham (1993, 576).

[267] See Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, 27 U.S.T. 1956, T.I.A.S. No. 8291, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,501.

[268] Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, June 29, 1982, United States-Australia, T.I.A.S. No. 10365, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,502.

[269] Memorandum of Understanding Between the Government of the United States of America and the Government of Canada as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, March 9, 1984, United States-Canada, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,503A; Agreement Between the Government of the United States of America and the Government of

therefore, do not override any inconsistent provisions of US law (ICPAC 2000, Annex 1-C, v).[270] As such, the MOUs represent early and limited discretionary efforts at international cooperation in competition policy.[271] Similarly, as EI was increasing and the EU's maturation was becoming evident through the *Wood Pulp* decision, the SEM and the MCR, it soon became clear that the US would have to pursue a new agreement with the Union.

In addition to the MOUs signed between the US and individual OECD members, the US also pursued other methods to increase bilateral cooperation in competition policy. These efforts are largely outside the scope of the current study because they were enacted after 1991, do not address formal cooperation with the EU, and are generally more applicable to non-merger cases. Such efforts include agreements signed under the International Antitrust Enforcement Assistance Act (IAEAA) of 1994 and a number of Mutual Legal Assistance Treaties (MLATs).

The US Congress passed the IAEAA "To address statutory limitations on the ability of U.S. antitrust authorities' to request assistance in obtaining access to and otherwise exchanging confidential information among other things" (ICPAC 2000,

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Canada Regarding the Application of their Competition and Deceptive Marketing Practices Laws, August 3, 1995, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,503.

[270] As ICPAC argues, the negotiation and signing of these three MOUs reflected the "specific bilateral concerns and history from which the agreement emerged" (2000, Annex 1-C, v):

> For example, the *German* agreement is focused predominantly on law enforcement cooperation, reflecting the strong post-World War II German antitrust enforcement tradition. As the earliest of these agreements, it is the least detailed. By contrast, the 1982 Australian and 1984 Canadian agreements centered more on conflict avoidance, which point of emphasis grew out of differences between the U.S. and these other governments over the *Uranium* antitrust litigation of the late 1970s and early 1980s in U.S. courts. Similarly, in the early 1980s, the United States and Australia were in heated dispute over a U.S. antitrust investigation involving ocean shipping in the U.S.-Australia/New Zealand trade. In negotiating these agreements, typically the United States had been concerned about preserving its ability to apply its antitrust laws to harmful anticompetitive conduct affecting U.S. commerce. The foreign government concern had been typically over ensuring that when its interests were affected, it would have advance notice and an opportunity for consultation and, further, that its interest would be considered in any enforcement action the U.S. might then undertake. While this is no longer a central concern in the negotiation of bilateral agreements today, it does apply in particular to earlier agreements" (2000, Annex 1-C, v).

A more detailed investigation of the role of EI (if any) and the domestic politics at play in Germany, Australia and Canada during the signing of these agreements may provide useful comparative insights for the current study. However, such an endeavor is outside the scope of the current study and, rather, will be pursued as part of a future research agenda.

[271] In 1999, the US also signed similar MOUs with the governments of Israel, Japan and Brazil (ICPAC 2000, Annex 1-C, iv).

Annex 1-C, vii).[272] The IAEAA is antitrust-specific in its application to both civil and criminal investigations. More precisely, the IAEAA

> authorizes the FTC and DOJ to enter into bilateral antitrust mutual assistance agreements with foreign governments that will allow the FTC and DOJ to share otherwise confidential antitrust evidence on their position with foreign antitrust authorities; use their respective investigative powers (sub poena, CIDs[273]) to gather antitrust evidence for use by foreign antitrust authorities; and withhold from public discloser any antitrust evidence obtained from foreign antitrust authorities (Parisi 1999, 135).

In passing the 1994 IAEAA, the US legislature clearly increased the authority of competition regulators over international cooperation in the enforcement of competition policy.[274] However, limitations to the use and utility of IAEAA agreements do exist.

In 1999, the US signed its first IAEAA Agreement with Australia, which raises the question as to why the US has not signed a similar agreement with the EU. ICPAC provides two institutional reasons why the US was more likely to enter into an IAEAA Agreement with Australia than other countries, including the EU:

> From a U.S. perspective, it was feasible to enter into such an agreement with Australia because of two features of the Australian system. First, Australia has a strong regime of confidentiality laws that will protect nonpublic information

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[272] Public Law 103-438, published at 108 Stat. 4597, and codified at 15 U.S.C., section 6201-6212. For more on the IAEAA, see Parisi (1999) and ICPAC (2000, Annex 1-C, v-viii).

[273] CIDs are civil investigative demands. ICPAC addresses the difference between sub poenas and CIDs thusly:

> In civil matters, where information-gathering occurs routinely in both the investigation and pre-trial phases, the government is authorized to exercise its compulsory powers by issuing civil investigative demands (CIDs) to persons located abroad as well as domestically. CIDs are used during the pre-filing stage of civil matters, and can be served internationally pursuant to U.S. law. Section 3 of the Antitrust Civil Process Act, 15 U.S.C. §1312. In criminal matters, grand jury subpoenas, in contrast, may not be served outside the territories of the United States unless directed at U.S. citizens. Nonetheless, valid service is recognized under U.S. law when it is made on a person within the United States, even if it compels production of information located abroad, *e.g.,* service of a grand jury subpoena upon a U.S. subsidiary of a non-U.S. corporation for information in the possession of the foreign parent is recognized as a valid exercise of compulsory power (2000, Annex 1-C, iii).

[274] However, as ICPAC argues, "In a concession to concerns about protections for business confidential and privileged information raised by business and legal groups during hearings on the IAEAA, the law specifies that its provisions for sharing information do not apply to confidential information obtained in a Hart-Scott-Rodino premerger notification process" (2000, Annex 1-C, vii-viii). See Section 5(1) of the IAEAA, 15 U.S.C. §§ 6204(1).

> obtained from U.S. companies. Second, [Australia's] laws authorize entry into agreements under which such information may be exchanged in antitrust matters (ICPAC 2000, Annex 1-C, vii).

Thus, US competition authorities are not likely to pursue an IAEAA Agreement with EU competition authorities because the EU's system for protecting confidential information may be weaker than that of Australia. If the US competition authorities were to pursue an IAEAA with the EU, they would likely face higher costs than they did with Australia because domestic US political principals (including the judiciary) would likely perceive the EU's protection of confidential information as weaker than that of Australia.[275] In addition, "A precondition to entering into an agreement under the IAEAA is that the potential partner antitrust authority be empowered to provide *reciprocal assistance* to U.S. antitrust authorities in response to a similarly qualified request" (ICPAC 2000, Annex 1-C, viii). Domestic law in the EU does not allow the Commission to engage in such reciprocal assistance because it cannot exchange confidential information. As a result, on the EU side, an IAEAA Agreement is unlikely to be a high priority for competition agents because current EU law would have to be changed. Acquiring the necessary political support to enter into such an agreement or trying to change the current legal restrictions on discretionary authority over confidential information is too costly (in terms of political intervention) for the EU competition authorities to consider.

In addition to the IAEAA, US competition authorities have other instruments for engaging in international cooperation over antitrust enforcement. Chief among these are MLATs. As former head of the DoJ's Antitrust Division Joel Klein discusses, MLATs are not antitrust-specific (Klein 1999). Rather, MLATs are broader treaties covering mutual legal assistance in criminal matters. As ICPAC describes them,

> In criminal antitrust matters, U.S. antitrust authorities also may make use of non-antitrust-specific channels for enforcement cooperation through the network of bilateral mutual legal assistance treaties (MLATs) that the United

[275] Should US political principals miss this observation regarding the EU system, business interests are always prepared to remind them: "The business community, insisting on its right to have information given to either competition agency duly protected, seems to remain opposed to the idea of EC-US negotiations for a new agreement, making it possible to share confidential information" (Devuyst 2001, 148). On business opposition to sharing of confidential information, see also Schaub (1998, 5-6).

> States has ratified since the mid-1970s. In contrast to the antitrust-specific cooperation agreements [i.e., IAEAA Agreements], the parties to these MLATs obligate themselves to assist one another in a variety of criminal matters—in many instances, although not always, including antitrust crimes such as price-fixing—by obtaining evidence located in one country for the benefit of the other country's law enforcement investigation (ICPAC 2000, Annex 1-C, ix).

MLATs are a common type of US international agreement.[276] However, similar to the situation over the IAEAA, the US competition authorities have not signed an MLAT with the EU. From the US perspective, pursuing an MLAT with the EU competition authorities is not particularly attractive. Such a move would not produce significant benefits because, unlike other MLAT signatories, antitrust violations are not dealt with as criminal cases in the EU's competition system (ICPAC 2000, Annex 1-C, ix, note 18). As a result, it is not clear that an MLAT with the EU could even be implemented in practice.

For the EU's political principals, authorizing the Union to enter into an MLAT would give the Commission, and particularly the Competition Directorate, a significant (and excessively costly in terms of sovereignty) expansion of competency into a new policy area—international cooperation in judicial affairs. This competency would not be antitrust-specific, but rather, would apply more generally to cooperation in criminal matters. In order to implement such an expansion, the EU's political principals would have to reconsider the division of institutional competencies currently embodied in the EU treaties (i.e., Justice and Home Affairs) and then negotiate and sign a treaty with the US. According to the patterns of behavior discussed in Chapter 2, EU competition regulators are not likely to pursue such a drastic strategy due to their preference to avoid political intervention. Similarly, EU political principals are not likely to support such a strategy because of the excessive costs associated with transferring sovereignty over politically sensitive criminal matters to the supranational Union level.

[276] According to ICPAC, "The United States has also entered into 30 MLATs and has signed at least 21 others that are awaiting ratification by the U.S. Senate or equivalent approval from the relevant foreign legislature before entering into force" (ICPAC 2000, Annex 1-C, ix, note 18).

VI. Conclusions

Based on the preceding discussion, a transition to cooperation in transatlantic competition relations appeared very unlikely through the 1980s. Any such transition had to overcome the historical record of discord. This was not a simple matter. As this Chapter argues, the history of transatlantic discord in competition relations is based in different domestic power-sharing arrangements and political institutions, which are reflective of different national interests and circumstances.

Early rule-making attempts at overcoming these differences proved insufficient for prompting a transition to bilateral cooperation in competition policy. The pre-1991 framework (based largely on OECD Recommendations and three MOUs) was inadequate for encouraging EU-US cooperation in competition policy. This pre-1991 framework also did little to allay the growing fears of US and EU competition agents who saw overseas institutional developments as likely indicators of increasing extraterritoriality and political intervention. In particular, institutional developments in the 1980s—the US's Section 301 and Exon-Florio amendment and the EU's *Wood Pulp* decision, the emergence of the SEM and the pending implementation of the MCR—contributed significantly to increasing EU-US uncertainty and tensions in competition relations. In addition, domestic attempts by US competition agents to limit judicial intervention in interest-balancing (i.e., the 1992 and 1995 Guidelines) did nothing to ease the fears of EU competition agents. Rather, these attempts reaffirmed the position that US agents were intent on applying their antitrust laws to activity that harmed US exports. This position significantly limited confidence-building measures and reflected a nagging imbalance in transatlantic competition relations.

To overcome these varied obstacles to cooperation, the EU and US would have to engage in new efforts at international rule-making in order to develop a framework that provided greater certainty in transatlantic competition relations. However, a framework based on MLATs and IAEAA agreements was inappropriate due to the constraints imposed on cooperation by the differing EU and US domestic institutional environments. The new framework would also have to address obstacles to cooperation in the implementation of competition policy, such as different regulatory objectives (protecting consumers vs. market integration) and a preponderance of institutional differences in domestic competition policy that reflected the different interests of the US and EU.

Complicating matters further, EI was increasing in the 1980s. The resulting changes to business activity magnified the challenges facing the EU and US. During the 1980s, the trend of historical transatlantic adversity and discord in competition relations showed few signs of abating. Rather, the discord and the likelihood of future discord increased due to the impact of EI. EI was increasing the pressures for firms to engage in cross-border mergers and simultaneously increasing the likelihood of concurrent jurisdictional merger reviews. Based on historical experience and domestic institutional developments in the US and EU during the 1980s, the resulting jurisdictional overlaps would likely increase disagreements and political brinkmanship in transatlantic competition relations.

Many of the obstacles to cooperation that existed before 1991 continue to act as potential sources of transatlantic discord in competition relations. Even today the foreign intervention instruments (domestic legislation and court rulings) that provide the bases for US, European and EU extraterritoriality and retaliation remain in place and serve as powerful reminders of the past hostility and ever-present potential for transatlantic discord in competition relations. To avoid a return to such discordant competition relations, new methods of cooperation would have to be devised. These new methods of cooperation—discretionary rule-making, implementation and exploratory institutional cooperation—are discussed in the subsequent chapters and evaluated in terms of the revised cross-level approach introduced in Chapter 2. It is through these three discretionary processes that EU-US competition relations have transitioned to cooperative bilateralism.

CHAPTER 4: Transatlantic Rule-Making Cooperation—Formal Initiatives for Dispute Prevention

I. Introduction

This chapter demonstrates patterns of behavior in EU-US rule-making cooperation. The content of three EU-US competition agreements are analyzed in light of the revised cross-level approach introduced in Chapter 2. The domestic politics surrounding the signing of the Bilateral Agreement, the Positive Comity Agreement and the AAA are a central part of the analysis of rule-making cooperation. These initial rule-making steps established the framework for transatlantic cooperation and provide the basis for subsequent implementation and exploratory institutional cooperation. The efforts at rule-making cooperation resemble a conscious attempt to design a system of dispute prevention by regulatory agents over dispute resolution by political principals. In particular, the chapter considers how these processes of cooperation in an EI environment are determined by the interaction of domestic preferences and institutions in the EU and US. According to the patterns of behavior (P1, P2 and P3) posited in Chapter 2, the process of rule-making cooperation is characterized by agent attempts to reduce information asymmetries through shirking (pursue their own preferences via discretionary authority), and principal attempts to intervene in that shirking when the costs of not intervening exceed the costs of intervening.

II. The 1991 Bilateral Agreement[277]—Dispute Prevention over Dispute Resolution

A. Origins of the Bilateral

The basic cooperative framework between the EU and US was established through the 1991 Bilateral Competition Agreement.[278] This agreement formalizes a process of competition policy coordination between the world's two largest industrialized

[277] The Bilateral Agreement was actually signed between the European Communities (EC) and the US. The exact title is the "Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws".

markets. The European Commissioner for Competition, Sir Leon Brittan,[279] launched the initiative for a formal EU-US agreement on competition policy during his now-famous Hersch Lauterpacht Memorial Lecture at Cambridge University in February 1990 (Devuyst 1998, 465). Known in Europe for his pro-market orientation, the British member of the Commission spoke of changing jurisdictional issues in the EU's competition law and the implications for international competition relations. Taking the "most likely example," Brittan warned that due to changing jurisdictional issues, the US and the EU "may well one day soon take different views of a competition case" (1990, 28).[280]

This perception of pending confrontation was reinforced by the EU's concern that the Bush Administration was showing signs of more active antitrust enforcement on cases with jurisdictional overlap (1990, 28; Devuyst 2001, 135). However, instead of seeking to enhance the Union's capacity for extraterritorial retaliation (e.g., pursuing EU-level blocking statutes and/or clawback statutes), Brittan decided to pursue a new framework for dispute prevention. In order to avoid jurisdictional conflict, Brittan realized that conflicts had to be prevented from occurring in the first place. Thus, the objective was to *design a framework for dispute prevention, not dispute resolution* (European Commission 1994, Annex I, 2). By preventing international disputes from occurring, competition authorities could preempt intervention by political principals and reduce the likelihood of reciprocal, extraterritorial retaliation that traditionally characterized dispute resolution in transatlantic competition relations. Brittan determined that this change was best done by formalizing relations so that "wherever possible, only one party should exercise jurisdiction over the same set of facts" (1990, 32).[281]

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[278] EU-US cooperation had occurred under the OECD Recommendation as discussed in Chapter 3. See below for a discussion of the differences between the OECD regime and the cooperative framework that emerged under the Bilateral Agreement.

[279] At the time, Brittan was also a Vice-President of the Commission of the European Communities.

[280] Brittan speculated that if confrontation did not first occur with the US, then it would be Switzerland, Sweden, Canada, Australia or Japan.

[281] Also, then, mutual assistance and ongoing cooperation in concurrent competition cases would be necessary for achieving convergent decisions: "If the parties do exercise jurisdiction concurrently, they should both take account of each other's concerns and seek to adapt remedies accordingly" (Brittan 1990, 33). Thus, the principles found in the Bilateral arise from these two concerns: Urging of exclusive jurisdiction and management of concurrent jurisdiction as ways to avoid jurisdictional conflict.

Noting the increasing interdependence of the global economy and the EU's coming of age in competition matters, Brittan urged negotiations on dispute prevention with Europe's major trading partners. In particular, Brittan targeted the US:

> I personally favour, to start with, a treaty between the European Community and the U.S.A… a party with jurisdiction should be ready not to exercise it in certain defined circumstances, while the other party, in its exercise of jurisdiction, should agree to take full account of the interests and views of its partner. If the parties do exercise jurisdiction concurrently, they should both take account of the interests and views of its partners… [and] take account of each other's concerns and seek to adapt remedies accordingly (1990, 32-33).

Brittan's comments are particularly notable when compared to the substance of the actual agreement that emerged. Also noteworthy is Brittan's desire to begin with a *treaty* on transatlantic competition relations. At the time of the speech, bilateral agreements, and particularly treaties, covering competition policy were rare (see Chapter 3). Brittan was careful to state explicitly that none of these existing agreements "should be taken as a model" for an EU-US agreement (1990, 31).[282] Rather, the transatlantic relationship required something new.

B. Negotiating the "Soft" Bilateral Agreement

By the end of 1990, the US had taken up Brittan's suggestion and launched negotiations with the Commission on a possible bilateral competition agreement.[283] However, Brittan's initial desire for a transatlantic treaty on competition relations soon encountered political reality. During the subsequent negotiations, competition officials from both sides of the Atlantic determined that pursuing a treaty would impose the

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[282] While neither a treaty nor an explicit model, the Commission did acknowledge that the 1986 OECD Recommendation served as "a frame of reference for the definition of some of the issues relating to the extra-territorial application of the rules of competition which frequently arose between the United States and the EEC" (ECJ 1993, 3644). In fact, all subsequent EU-US bilateral agreements have followed "the pattern of the OECD-Recommendations i.e. they provide for notification, exchange of information, coordination of action and consultation" (Ham 1993, 575-76). Instances of exactly corresponding language can be found in the OECD Recommendation and the Bilateral Agreement (Ham 1993, 584). Also, according to the Bilateral Agreement's preamble, the initiative was predicated on previous experience under the 1986 OECD Recommendation and the 1990 Transatlantic Declaration.

[283] The effort gained particular momentum after Brittan raised the proposal in a meeting with former US Assistant Attorney General for Antitrust Jim Rill (James 2001, 4).

excessive costs associated with lengthy and complex domestic approval processes.[284] More specifically, the DoJ negotiators resisted pursuing a treaty because the requirement of congressional ratification would be "too burdensome".[285] On the EU side, the Commission revised the initial proposal for a treaty after the Commission's Legal Service advised the Brittan Cabinet that drafting and signing a treaty would take approximately two years.[286] This timetable was untenable, especially considering the increasing pressures of EI and Brittan's own belief that transatlantic confrontation over competition matters was pending in the near future.[287] Thus, the competition agents opted to pursue discretionary rule-making cooperation fully cognizant that an attempt to increase non-discretionary rule-making cooperation via a treaty would have required the undesirable intervention of political principals delaying the process.

Not surprisingly, the EU and US negotiators of the agreement—who were the competition agents themselves—decided to pursue a different strategy that would not require changes to their respective non-discretionary, statutory law. The negotiators decided that "cooperation should occur on the basis of current statutes".[288] As such, the negotiators began crafting a "soft" agreement that would expand only discretionary cooperation as a means to pursue their statutorily mandated responsibilities.[289] Based on the Case-Zablocki Act, the US competition agents had clear statutory authority to enter into an executive agreement at their own discretion.[290] Such an agreement would not require congressional approval. It was less clear whether the EU competition officials could exercise similar rule-making authority at their own discretion. Nevertheless, the Commission decided to pursue a binding transatlantic competition agreement via discretionary rule-making cooperation. The decision to proceed was based on a belief that

[284] Indeed, Brittan himself foreshadowed this conclusion when he found "it hard to believe that the US or the EC would be willing to give up the opportunity of having the last word about fundamental aspects of market behaviour and structure in their respective territories" (1990, 33).
[285] Interview with official in EU's Competition Directorate, February 2001.
[286] Interview with former member of Brittan Cabinet, March 2001.
[287] In addition, Brittan may have been motivated to finalize an agreement because his tenure as Competition Commissioner was due to expire in approximately two years.
[288] Interview with official in EU's Competition Directorate, February 2001.
[289] Some commentators label such agreements "soft"—"All of these agreements are 'soft' agreements—'soft' in the sense that they are executive agreements that are subordinate to and don't change or override the existing laws of either party—including, in particular, confidentiality laws that restrict the sharing of information" (Stark 2000, 10).

even if the Commission's competence were challenged, it could still present a position that was legally arguable.[291]

With surprising speed, the US DoJ, FTC and European Commission negotiated and finalized a draft text of the bilateral in July 1991. The Commission forwarded this draft to the national competition officials in each Member State along with an Explanatory Note that highlighted the need for a "legally binding document rather than a non-binding recommendation."[292] This Explanatory Note was designed to alleviate any potential fears political principals by suggesting that the draft agreement was an "administrative" arrangement intended to cover cooperation in discretionary matters. While this administrative arrangement would be binding on the EU and US, it would not change or override national and European legislation already in place in the Member States. Such an administrative agreement would enter into force upon signature of the competition agents because it would not require a domestic ratification procedure.

Prior to the negotiations over the Bilateral Agreement, limited international cooperation was occurring among competition agents. These contacts occurred within the informal and non-binding framework of the 1979 OECD Recommendation (as amended in 1986). Unlike the previous OECD regime, a formal and binding "soft" agreement was preferred over an informal recommendation so that the rules of cooperation would be transparent and unequivocal (Schaub 1996).[293] In comparison, the desire of EU and US competition officials for a binding act was "dictated by the intention of going beyond the recommendations of the OECD, not only by envisaging more far-reaching forms of cooperation and coordination but also, and above all, by providing for fixed and obligatory forms of conduct in a legally binding act" (ECJ 1993, 3653).

As an executive agreement, the bilateral would be legally binding in US law, but would not override domestic law. However, the bilateral was an asymmetrical agreement. While it would be a legally binding administrative agreement in the Union, the bilateral

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[290] For a useful history and analysis of the different types of executive agreements, see Margolis (1986). See also Knaupp (1998), Brand (1990), Reisman (1989) and Hyman (1983).

[291] See Commission's legal arguments in French Republic v. Commission of the European Communities, Case C-327/91.

[292] The short note is officially known as the "Explanatory Note on the Draft Agreement between the Government of the United States and the Commission of the European Communities Regarding the Application of their Competition Laws."

[293] Cited in Cini and McGowan (1998, 202).

would not bind the EU's courts and political principals. Rather, it would bind the competition agents and be limited to questions falling within their competence (Ham 1993, 571).[294] The distinct legal classification of the bilateral as an executive agreement in the US and an administrative agreement in the EU reflect the different domestic institutional environments in which the respective competition agents were operating. While the distinctions are subtle, they emerge from a mutual belief by EU and US competition officials that a legally binding bilateral of some variety was an improvement over the completely non-binding OECD Recommendation under which they had previously tried to coordinate cooperation.

In the US, the agreement was negotiated under the discretionary authority of the DoJ and FTC without intervention by political principals.[295] Negotiations on the agreement came to a head in the EU in September 1991. On September 5, the Commission organized a meeting with national competition officials from the Member States in order for them to make comments and observations on the draft bilateral agreement. At this meeting, certain Member States—notably France—raised concerns over the legal basis of and Commission's competence to sign such a binding international agreement. The Member States also expressed their desire that a negotiating brief be obtained from the Council of Ministers before the Commission proceeded. Finally, the Member States raised questions regarding the protection of confidential business information submitted to the Commission and the precise procedures for consultation between the EU and US competition officials. Because of these concerns, the Member States requested that another meeting be held with the Commission after a working group of national experts was convened to discuss the bilateral agreement in more detail.

Sensing a possible derailment of the internal negotiations, Commissioner Brittan ruled that no future meeting would address matters of principle related to the agreement. In particular, Brittan was determined to prevent any discussion over "whether it was advisable to conclude a cooperation agreement with the United States in the chosen form" (ECJ 1993, 3644). Given the opportunity, the Member States might decide that

[294] For a very useful discussion of the legal effects and binding nature of international agreements signed by the EU, see Macleod et al. (1996, 122-141).

[295] Per the Case-Zablocki Act, the competition agents also had to acquire legal approval from the US Department of State.

only the Council of Ministers was competent to sign the transatlantic competition agreement, or worse yet, that a treaty was the more appropriate form for such a bilateral agreement with the US. Brittan did finally agree to convene another meeting on September 9. However, he restricted the agenda to less-contentious technical aspects of the agreement, such as procedures for consultation and protection of confidential information.

Following this meeting and seeking to continue on its momentum, the College of the Commission was convened on the next day. At this meeting, minutes indicate that the Commission "approved the draft agreement and authorized its vice-president [Sir Leon Brittan] to draw up the final act and to sign and conclude the Agreement itself on behalf of the institution" (ECJ 1993, 3645). Acting quickly, the final text was prepared by the US and EU competition officials and signed in Washington, DC, on September 23. The DoJ's Assistant Attorney-General for Antitrust and the Chairman of the FTC signed on behalf of the US. Competition Commissioner Sir Leon Brittan signed on behalf of the Commission. As agreed by the competition agents, the Bilateral entered into force upon signature because it did not require ratification in either jurisdiction.

C. Provisions of the Bilateral Agreement

The actual substance of the Bilateral Agreement addresses most of Brittan's proposals in the initial Hersch Lauterpacht Lecture. Generally, the Bilateral Agreement governs formal and informal transatlantic cooperation and has a much more operational and binding character than the previous OECD Recommendations (Devuyst 2000, 324). The central components of the Agreement include

1. Notification when competition enforcement activities may affect the "important interests" (Art. 2, Para. 1) of the other party,[296]
2. Exchange of non-confidential information,
3. Coordination of action,
4. Conduct of enforcement activities, "insofar as possible" (Art. 4, Para. 3), that are consistent with objectives of the other party, and
5. Consultation.[297]

[296] FTC General Counsel Debra A. Valentine clarifies when notifications are made: "the EC notifies us whenever it reviews a merger involving US firms, assets or markets. We notify the EC whenever we begin investigating a merger involving an EU firm, whenever the EU's important interests are involved or whenever we seek documents or testimony from EU persons or entities" (1997, 6).
[297] For a thorough analysis of the content of the Bilateral Agreement, see Ham (1993).

The Bilateral Agreement reduces the potential for EU-US jurisdictional conflict by formalizing the exchange of information at multiple stages of the merger review process. The agreement emphasizes mutual notification by competition authorities during the initial decision-making process in individual competition cases. In merger review, this first step to transatlantic cooperation occurs when one competition authority officially notifies the other that it is reviewing a merger.[298] Acting as an alert system, such notifications are made "far enough in advance… to enable the other Party's views to be taken into account" (Article 2). After the initial notification, further cooperation can take numerous forms and avenues in the investigatory and remedial phases of a competition case (see Chapter 5). Generally, "the two sides try to synchronize their fact-finding actions and coordinate their respective approaches on the definition of relevant markets, on points of foreign law relevant to the interpretation of the case, and on possible remedies to ensure they do not conflict" (Devuyst 2001, 324).

To preempt the concerns of political principals in an EI environment, the Bilateral respects national sovereignty and is flexible enough to allow for the use of extraterritoriality in cases of concurrent jurisdiction. The agreement protects national sovereignty because it does not challenge domestic US and EU legislation already in force nor does it separate jurisdictions (Fidler 1992, 577). If the Agreement did separate jurisdictions, it would challenge not only national sovereignty, but also the constitutional authority of the respective judiciaries. Specifically, the competition agents agreed that "Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective States or Member States" (Article IX). The Bilateral is also flexible enough to allow for the use of extraterritoriality in cases of concurrent jurisdiction. Regarding extraterritoriality, the bilateral stipulates that "Nothing in this Article… precludes the notifying Party from undertaking enforcement activities with respect to extraterritorial anticompetitive activities" (Article V), regardless of action or inaction by the notified party. In other words, EU and US political principals maintain

[298] Merging firms must also officially notify the competition authorities. In the US, such notification "may be made as early as an agreement in principle is reached or a (nonbinding) letter of intent or contract has

the right to intervene in cases in which they perceive national and/or constituent interests as being threatened.

D. Comity

Possibly the most unique and interesting component of the Bilateral Agreement is the introduction of the international principle of comity. Comity relates directly to Keohane's definition of international cooperation because it requires a "state" to consider the important interests of other "states" when enforcing its domestic laws. Thus, comity serves as a foundation for actors to "adjust their behavior to the actual or anticipated preferences of others, through a process of policy coordination" (Keohane 1984, 51).

Comity can be distinguished as two distinct types: traditional and positive. These two types of comity are frequently confused, even by practitioners of international law (OECD 1999a; OECD 1998). A basis for traditional comity in international competition relations can be found in the non-binding OECD Recommendations. However, moving beyond the OECD's non-binding regime, the 1991 Bilateral Agreement embodied both variants of comity for the first time in a binding agreement relating to competition matters (Ham 1993, 594).[299]

Traditional comity[300] (Article VI) requires a party conducting a merger review to *consider* the important interests of the other party to the agreement.[301] This principle has inspired intensive daily cooperation between EU and US competition officials. As former EU Competition Commissioner Karel Van Miert acknowledged,

> We are for instance within the realm of traditional comity when we cooperate in a certain case to bring our respective positions and remedies closer to each other in order to avoid creating a harmful effect to the market of the partner. We may draw the attention of the partner to our concerns in a certain case. This may open a new trail for his

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been signed" (ICPAC 2000, 110). In the EU, such notifications "can be made only *after* the signing of a definitive merger agreement, acquisition of control, or announcement of a public bid" (ICPAC 2000, 111).

[299] The OECD agrees that the EU-US Bilateral was the "first modern bilateral agreement—and the first agreement related exclusively to competition law—to include positive comity" (1999a, 10).

[300] Traditional comity is also sometimes referred to as "negative" comity. See ICPAC (2000, 226-240), Kiriazis (1998) for more on traditional comity. On the history of comity, see Ryan (2000), OECD (1999a).

[301] The reference to "important interests" is ambiguous, but Ham argues "Important interests are taken here to mean those interests which represent competition issues. It would seem that the comments made would not lead to another conclusion where the important interest would be of another nature, e.g. political interests" (Ham 1993, 586, footnote#39).

> investigation and lead to a final result taking our interests into consideration in a more appropriate way (1998, 2).

This daily cooperation is discretionary in nature.

While the term "positive comity" cannot be found in the Bilateral Agreement, the legal principle is clearly articulated in Article V. Positive comity differs from traditional comity in that it allows one party to *request* that the other party open an investigation into a competition case—located outside the first party's jurisdiction—that affects the first party's important interests.[302] In such cases, the requested party would inform the requesting party whether they plan to initiate an investigation. Should the requesting party be satisfied with the decision of the requested party, the requesting party would normally, but not necessarily, "refrain from pursuing its own enforcement activity with respect to the allegedly anticompetitive conduct, at least pending the outcome of the requested investigation" (Ryan 2000, 33). Significantly, the Bilateral does not *require* such a deferral by the requesting party.[303] If an investigation is initiated, the Bilateral does require the requested party to update the requesting party on the investigation and inform them of any relevant decisions taken in the resulting investigation.

The crucial distinction between the two types of comity is that traditional comity requires parties to consider each other's important interests when conducting competition investigations, and positive comity allows one party to request that the other party investigate a competition case that adversely affects the important interests of the first party. By allowing one party to request an investigation of activity that occurs outside its jurisdiction, the positive comity provision of the Bilateral reduces the need for the requesting party to enforce its domestic competition law extraterritorially. In addition, by refraining from conducting a simultaneous investigation, the requesting party reduces the likelihood that a conflicting decision will be reached.

Of course, positive comity requests require at least a minimal degree of credibility in the commitment made by the requested party. As the OECD argues, "One country might in some circumstances request another to investigate a matter despite concerns about the latter's ability to remedy the situation. However, unless the requesting country

[302] A legal distinction may also be made between a request that a foreign jurisdiction open or expand an investigation and a request for assistance in a foreign jurisdiction's investigation, see OECD (1999a, 3). See also OECD (1999a, 5-6) for a treatment of further definitional issues of positive comity.

has continuing confidence in the requested country's legal tools, commitment, and independence, it is unlikely to defer or suspend it own proceeding during any proceeding by the requested country. Absent deferral or suspension, some of the potential benefits of positive comity will not be fully realised." (OECD 1999a, 13).[304] Thus, for positive comity to function properly, requesting parties must have confidence in the competence of the requested party to carry out enforcement activities and regularly provide updates (i.e., information) on the investigation.

EU and US competition agents employ this legal principle to increase the likelihood of resolving disagreements during the merger review process. This cooperation limits the intervention of those domestic actors that are more reliant on unilateral extraterritoriality to resolve disputes. Even in an EI environment, the competition officials can overcome national jurisdictional limitations through international cooperation—sharing information at the early stages of the review process, adjusting remedial and other decisions to accommodate the interests of the other party, and cultivating long-term relationships based on credible and reciprocal commitments between the regulatory agents.[305] Therefore, the comity provisions in the Bilateral may strengthen the cooperative relationship by increasing the credibility of the commitments made between the competition agents who work together daily on technocratic issues in the merger review process.

E. A Political Challenge to the Bilateral Agreement

Without comprehensive and precise legal boundaries for the authority of the EU's separate institutions, the Commission's competence to sign the Bilateral Agreement was not clear. Nevertheless, the Commission skillfully steered the draft Bilateral Agreement through its uncertain domestic institutional landscape. In fact, the Commission was so successful and expeditious that it was able to approve and sign the agreement before significant opposition could be mounted in the Council of Ministers. This success, however, would prove illusory.

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[303] The possibility of deferral is discussed more in the section below on the Positive Comity Agreement.
[304] On the importance of credible commitments in relation to the Bilateral, see ICPAC (2000, 238-39.).
[305] It should be noted that much skepticism surrounds the actual employment of positive comity. For discussions of the limitations, see below and Waller (2000), Janow (2000, 41) and Ham (1993, 595).

Shortly after the Commission's Director-General of Competition sent the final text to the national competition authorities in each Member State on October 7, 1991, national complaints began to emerge.[306] Concerns were expressed that the Commission had overstepped its authority to enter into agreements with foreign governments, a significant power not readily relinquished by the sovereign EU Member States. Certain Member States were determined to bring the case to court in order to clarify the domestic power-sharing arrangements that governed the ability of the Commission to engage at its own discretion in rule-making cooperation.

On the other side of the Atlantic, the DoJ and the FTC decided to begin cooperating in accordance with the procedures agreed in the Bilateral Agreement. The mounting European concerns did not change the US view that the Bilateral was a useful way to facilitate cooperation with the maturing EU. Even if the legality of the Bilateral Agreement was going to be challenged in the EU, the US competition officials still considered the procedures a practical and useful framework for reducing the likelihood of divergent decisions on cases with concurrent jurisdiction.[307]

The first official challenge to the agreement came from the French Government (supported by the Netherlands and Spain), which formally filed a complaint with the ECJ to annul the Bilateral Agreement. The primary accusation was that the Bilateral was unlawful because the Commission had breached its authority to conclude international agreements, as stipulated in Article 228 of the Treaties of Rome (ECJ 1993, 3646).[308] In addition, the complaint noted concerns over the protection of confidential information during exchanges with the US.[309] The legal challenge is also reported to have reflected a French frustration over a perceived lack of consultation with the Council of Ministers before the Commission approved the Bilateral Agreement.[310] Finally, in 1991, the French

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306 Interview with former member of Brittan's Cabinet, March 2001.
307 Interview with official in DoJ's Antitrust Division, December 1999.
308 The French argument rested on Article 33 of the European Coal and Steel Community Treaty and the first paragraph of Article 173 of the European Economic Community Treaty.
309 Specifically, "The French and Spanish Governments have also alleged the infringement of Article 20 of Regulation No 17, which enshrines the principle of secrecy for the protection of the interests of individual with regard to information acquired by the Commission in connection with its proceedings" (ECJ 1993, 3664). In the Advocate General's opinion, Mr. Tesauro supports the French claim, stating that Articles 8 and 9 of the Bilateral Agreement do not resolve the problem of confidentiality. As a result, the Commission concentrated on the protection of confidential information in its Corrigendum to the Council.
310 Interview with official in EU's Competition Directorate, February 2001.

also viewed Commissioner Brittan with suspicion as a pro-market Anglo-Saxon who would push for increasingly close cooperation on competition issues and sharing of confidential information with the US. Such an individual was sure to threaten the priorities of French industrial policy.[311]

The French legal challenge delayed the official implementation of the Bilateral Agreement in the EU. On December 16, 1993, the ECJ's Advocate General Tesauro delivered a preliminary opinion supporting the French challenge to the Bilateral Agreement. About eight months later, on August 9, 1994, the ECJ delivered its final judgment in the case.[312] The decision found in favor of the French argument and ordered the Commission to pay the legal fees associated with the case (ECJ 1994).[313]

The Commission had attempted to sign, via its discretionary authority, what it labeled an "administrative" agreement on competition policy. However, according to the ECJ, the Commission acted *ultra vires* because signing such an international agreement was beyond the scope of its discretionary authority (Cini and McGowan 1998, 202). In effect, the ECJ decision had clarified the EU's principal-agent power-sharing arrangement over rule-making cooperation in all policy areas (see below).

F. Re-Negotiating the Bilateral Agreement

With the Bilateral Agreement declared void by the ECJ, the Commission began an earnest campaign to gain the Council's approval of the agreement. On October 12, 1994, the Commission presented a request to the Council for a decision on the Bilateral Agreement.[314] In this communiqué, the Commission made its case for the Bilateral, which is surprising in its candor regarding the need to limit political intervention. The

[311] Interviews with official in EU's Competition Directorate, February 2001; and former member of Brittan's Cabinet, March 2001.
[312] See Case C-327/91 *France v. Commission* [1994] ECR I-3641.
[313] For a discussion of the ECJ's judgment on the annulment of the Bilateral, see Riley (1995).
[314] The Commission sent a formal communiqué to the Council asking for approval of the Bilateral Agreement (European Commission 1994). In 1995, under the consultation procedure, the European Parliament approved the Commission's proposal to the Council for the Bilateral (OJ C 043, 20/02/1995 p. 0126). However, under a renewed consultation, the Parliament approved the decision contingent upon two amendments: removal of Art. 235 reference in preamble, second citation; and deletion of Recital 1 (OJ C 089, 10/04/1995 p. 0233). That same year, the Parliament reiterated support for keeping competition authority under the purview of the Commission because "it is the sole institution directly under the democratic control of the European Parliament" (EP Res on the XXIIIrd Competition Report from the

Commission argued that current EU rules (including the Wood Pulp doctrine of extraterritoriality) were insufficient to deal with the competition problems arising from the increasingly international nature of business activity (1994, 2). In short, cooperative arrangements were necessary for "an effective solution to be found to the problems encountered, while at the same time *avoiding the conflicts that may arise from a unilateral reaction based on extraterritoriality*. It is for this reason that the Commission considers that cooperation agreements must be concluded between competition authorities" (italics added) (1994, 2). The communiqué is also noteworthy for its insistence that the Bilateral would limit the US extraterritorial intervention in European competition matters because it incorporated "a number of principles established by US case-law in order to restrict excesses in the extraterritorial application of US competition rules (negative comity) and by developing for the first time the concept of positive comity" (1994, 2).

These internal Union negotiations resulted in the exchange of a short Interpretive Notice between the EU and US.[315] It was during this period that the Council of Ministers raised concerns over the protection of confidential information. Much of the Council's concern, as with businesses, was over the US's criminal sanctions in cartel cases and the use of confidential information.[316] Put simply, the Council and European business interests did not want European citizens (i.e., businesspeople) to be subject to incarceration in US prisons.[317] Here the EU's political principals exercised their oversight control instruments over the competition officials. Not wanting to challenge domestic

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Commission, OJ C 089, 10/04/1995, p. 0146). Noteworthy, the Parliament also calls for the Commission to investigate ways to decentralize competition policy in same resolution.

[315] OJ L 131 of 15.6.95, pp. 38-39.

[316] The rapid pace at which the agreement was initially drafted and signed not only limited review by and input from political principals in the Council of Ministers, but also limited influence by interest groups, in particular business. According to interviewees, the protections for confidential information that appeared in the final agreement were inserted due to the need to satisfy current EU and US domestic law, not as a result of pressure from business interests. For more on the role of business interests, see Chapter 6.

[317] In 1994, business interests actively lobbied for guaranteed protection of confidential information. This was due to the fear of such information being exchanged in cartel, anti-trust, etc. cases, which could then put European executives in US prisons. There was also the legal question of whether information obtained under domestic law could be shared internationally—some businesses argued that the procedures and substance of EU and US competition law were too different to guarantee the proper sharing of such information. The EU member states agreed with businesses on this point and presented these concerns to the Commission. The Commission, not wanting to challenge domestic law, provided further guarantees for the protection of confidential information, which appear in the Interpretive Notice and the "Statement on Confidentiality of Information" (see below).

legislation, the competition officials succumbed to the institutional constraints by which they were bound to protect confidential information. In particular, the Commission readily acknowledged that it

> was bound by the obligations laid down in the Treaty and in the regulations adopted by the Council. This constraint is of particular importance here because of the confidentiality requirement imposed on the Commission under Regulation No 17 (First Regulation implementing Articles 85 and 86 of the EC Treaty), a requirement from which it could not derogate (European Commission 1994, 2).

As a result, the Commission presented a "Statement on Confidentiality of Information" to the Council, which guaranteed that only non-confidential information would be exchanged with US competition officials (European Commission 1998a, 4-5). Exchanges of confidential information can be made if the businesses concerned waive their rights to confidentiality (see Chapter 5).

The Commission also issued to the Council a "Statement on Transparency" that further clarified cooperation with the US. This statement asserted that EU Member States would be informed of ongoing cooperation that may affect their national interests, in particular when a notification is made to or received from the US competition officials (European Commission 1996).[318] It was also agreed that the Commission would report annually to the Council and the European Parliament on the implementation of the Bilateral Agreement.[319] The Notice did not change the core provisions of the Bilateral Agreement that strengthened cooperation between EU-US competition agents.

Following the internal negotiations and exchange of interpretive letters with the US competition officials,[320] the Council and the Commission promptly issued a joint decision on April 10, 1995.[321] The Joint Decision officially approved and implemented

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[318] These assurances are embodied in the Commission's "Statement on Transparency" (European Commission 1998a, 6). "The assessment of which Member State should be notified is made on the basis of the Commission's statement to Council of 10 April 1995, which largely reproduces the provisions of Article II.2 of the Agreement. In most instances, the US authorities also notify the Member States directly, under the OECD Recommendation" (European Commission 1996).

[319] The first such report was presented by the Commission on October 8, 1996. The report covered the period since the approval of the Agreement in April 1995, through June 30, 1996. For more on these reports, see Chapter 5.

[320] Two interpretive letters were exchanged between the US and EU on May 31 and July 31, 1995. These interpretive letters clarified the treatment of confidential information. See OJ L 131 of 15.6.95, pp. 38-39.

[321] OJ 1995 L131/38. Or OJ L 95 of 27.4.95, pp. 45-46.

the Bilateral Agreement, noting "The Agreement shall apply with effect from 23 September 1991" (Article 2), the date the Bilateral was originally signed by the Commission. The Commission was included in this Joint Decision because it was legally required to sign the Bilateral as the competent authority of the ECSC. Otherwise, the ECJ's judgment had basically removed the Commission from the final rule-making equation. But, the fact that the Commission first tried to sign the Bilateral under its own discretionary authority shows its preference to avoid political intervention.

While the agreement was not officially recognized in the EU from 1991-95, it was implemented on an informal basis, with EU-US notifications of merger reviews occurring at an increasing rate each year.[322] The smooth and productive functioning of this "unofficial" implementation cooperation from 1991-95 helped to allay earlier French fears about Commissioner Brittan's plans for closer cooperation with the US. After four years of court deliberations and internal negotiations, the unofficial implementation of the Bilateral had been successful enough that the EU's political principals no longer viewed it as a threat to their national and/or constituent interests. The Commission's original strategy to circumvent the political principals and to approve quickly the Bilateral had ultimately succeeded—the Commission had its binding agreement with the US, which would allow the competition agents on both sides of the Atlantic to pursue discretionary implementation cooperation.

The ECJ judgment against the Bilateral clarified the limits of the Commission's authority to engage in discretionary rule-making cooperation. Essentially, the Commission has no discretionary authority to engage independently in rule-making cooperation that results in binding international agreements. However, to a certain degree, the ECJ's judgment did establish discretionary authority for the Commission in rule-making cooperation. Accordingly, as long as the Commission engages in *non-binding* rule-making cooperation, such as the AAA (see below), it can do so at its own discretion.

[322] While notifications were suspended under the Bilateral Agreement pending the outcome of the French legal challenge, notifications were still made in accordance with the 1986 OECD Recommendation (European Commission 1996).

G. Reasons for Signing the Bilateral Agreement

The Bilateral Agreement signaled a shift from traditional transatlantic competition relations that relied on dispute resolution (via international political intervention) to a new framework for dispute prevention. This agreement would move transatlantic competition relations beyond the informal cooperation embodied in the OECD Recommendations. The US and EU competition agents shared similar incentives for signing the Bilateral Agreement. Both competition agents desired a formal, binding agreement that would address the new competition challenges emanating from an international system being changed by EI. These challenges to domestic competition policy were given urgency because increasing EI encouraged private firms to escalate internationally-oriented merger activity—much of which would have to be reviewed concurrently by US and EU competition officials. In addition to the systemic-level EI, the institutions and strategic interaction among actors in domestic politics also contributed to the signing of the Bilateral Agreement.

Clearly both competition agents viewed the agreement as a way to reduce the likelihood of domestic and international political intervention in concurrent jurisdiction merger cases. The structure of information exchanges in the Bilateral is conducive to decreasing the likelihood of divergent decisions in merger reviews, which decreases the likelihood of political intervention. By providing for the exchange of only non-confidential information, the agreement also avoids requiring principal intervention (e.g., changing existing or creating new domestic law) while still allowing the exchange of enough non-confidential information to reduce the likelihood of divergent decisions. This arrangement reduces the likelihood that foreign and domestic political principals will intervene in concurrent jurisdiction mergers.

Interestingly, it also appears that competition agents signed the agreement in order to reduce the likelihood of their foreign counterparts intervening extraterritorially in competition cases. As such, the US and EU competition agents negotiated the Bilateral out of self-interest, not some shared conception of a common interest. In order to understand the motivations of the competition agents, it is useful to consider the domestic developments that shaped their respective incentives. The following discussion expands on the domestic events detailed in Chapter 3.

For the US competition agents, cooperating within the framework of the Bilateral would reduce the likelihood of intervention by European political principals and competition agents in concurrent jurisdiction mergers. US competition officials feared the possibility of increased intervention by the EU because the Union was seen as "maturing". This maturation came in the form of new domestic and international control instruments, which, according to Janow, were becoming evident through three interlinked events: the Wood Pulp doctrine of extraterritoriality, the completion of the single market and the signing of the Merger Control Regulation (2000, 30-31).[323]

First, the 1988 *Wood Pulp* decision was especially important for changing transatlantic relations because it established the extraterritorial jurisdiction of the EU. This decision reinforced the international reach of control instruments exercised by the EU. Second, the completion of the EU's single market added further evidence that the Union was maturing. As Stark argues, the single market program "was in full swing, bringing with it an increase in the powers and visibility of the Commission" (Stark 2000, 4). The completion of the single market suggested that the EU was becoming an emerging and significant international economic actor. From the US perspective, this new actor was likely to possess more resources for non-punitive control instruments and was more likely to use them. Third, specific to competition policy, this new activism was reflected in the implementation of the MCR in 1990. Not only did the MCR designate the Commission as the lead agency for merger review in the Union, it also created a new Merger Task Force with pre-merger notification authority that could be applied to the behavior of US firms. The MCR contained specific thresholds above which the Commission would investigate anticompetitive behavior. Because many US firms engaging in mergers in the EU were large corporations, their activity would almost certainly meet these thresholds. Thus, the MCR was believed to increase the potential extraterritorial threat to US firms and interests in an increasing number of sectors within the single market.

[323] Janow's inventory of the three factors motivating the US signing the Bilateral is confirmed by domestic competition officials. For example, see Charles A. James, current Assistant Attorney General of the DoJ's Antitrust Division (2001, 4); Charles S. Stark, Chief, Foreign Commerce Section in the DoJ's Antitrust Division (2000, 4); and former FTC Commissioner Janet D. Steiger (1995, 4). See also Miles (1995, 120).

In short, these three factors endowed the EU with additional foreign intervention instruments in competition policy. Specifically, the EU's competition agents could now exercise their merger review extraterritorially and impose remedies on US firms even if the US competition authorities disagreed. The US competition agents viewed such behavior as an unacceptable imbalance that was sure to increase the likelihood of US political intervention. The combination of these new foreign intervention instruments (non-punitive measures and extraterritorial remedies) necessitated negotiation of the Bilateral if US competition agents were to decrease the likelihood of divergent decisions that would prompt political intervention.

The EU competition agents also had a significant self-interest in negotiating the Bilateral. The Commission negotiated the Bilateral conscious of the various foreign intervention instruments available to the US competition agents (e.g., extraterritorial remedies) and political principals (e.g., Section 301, Exon-Florio) as well as their willingness to use them. By reducing the likelihood of divergent decisions in competition matters, the Commission could reduce the likelihood of US political principals intervening with foreign intervention instruments. By entering into a binding agreement, the Commission also could create a more balanced transatlantic relationship with US competition agents. While cooperation had occurred under the non-binding framework of the OECD Recommendation, the EU perceived this regime as unbalanced. The imbalance could advantage the US because it was more experienced and historically more willing to use the numerous foreign intervention instruments at its disposal. By binding the US competition agents into a formal agreement, the Commission could balance out the US's experience and availability of and willingness to use foreign intervention instruments.[324]
The EU was also aware of its own rapid maturation in competition policy and conscious that such domestic changes could precipitate conflict in transatlantic competition matters as well as other policy areas (Brittan 1992a, 49). Although the EU was maturing, the fact that it was largely untested in international competition disputes and lacked significant foreign intervention instruments to counter unilateralism (e.g., blocking and clawback statutes) increased the incentive to cooperate administratively with the US competition

agents. Of course, the individual EU Member States could still exercise their respective foreign intervention instruments against the US, but this was an undesirable recourse to dispute resolution through political intervention. Rather, the Commission needed a method to reduce the likelihood of conflicting decisions without increasing the likelihood of political intervention. The discretionary pursuit of rule-making cooperation was the most appealing avenue open to the Commission.

An important but unexpected finding of this case is that competition agents pursue discretionary rule-making cooperation not only to maximize their independence from political principals, but also to reduce the likelihood of unilateral extraterritoriality by foreign competition agents—EU and US competition officials were both motivated to sign the Bilateral by the need for balance with their foreign counterparts. When competition agents act extraterritoriality (e.g., require divergent remedies in a foreign jurisdiction) they increase uncertainty for their foreign counterparts and increase the likelihood of political intervention. Thus, cooperation between competition agents is not a simple dynamic of agents versus principals. Rather, EU and US agents appeared fearful of each other's extraterritorial reach at the start of this cooperation. Through the 1990s, these agents continued to pursue rule-making cooperation to reduce further the likelihood of political intervention and any need of their foreign counterparts to act extraterritorially.

III. The 1998 Positive Comity Agreement—Furthering Dispute Prevention

The Bilateral Agreement launched formal, binding cooperation between the EU and US competition authorities. Most cooperation that followed from the Bilateral developed on the basis of traditional comity and was implemented as daily and discretionary contacts between EU and US case handlers (see Chapter 5). While the Bilateral was hailed on both sides of the Atlantic as a breakthrough, the competition authorities were simultaneously taking steps to clarify precise implementing procedures for making positive comity requests. This need for clarification ultimately materialized in

[324] Previous efforts by the EU's Member States to address this imbalance had resulted in the promulgation of retaliatory measures, such as blocking and clawback statutes, which were unavailable to the Commission.

the form of a new effort at transatlantic rule-making cooperation—the Positive Comity Agreement (PCA) of June 4, 1998.[325]

The success of the Bilateral Agreement had increased significantly the volume of contacts between EU and US competition officials. In addition to the discretionary contacts occurring among case handlers, meetings between the high-level competition officials also became regular occurrences. One such meeting between the EU's Competition Commissioner (Karel Van Miert) and the heads of the DoJ's Antitrust Division (Joseph Klein) and the FTC (Robert Pitofsky) occurred in Washington, DC, on October 16, 1996. Among other issues, the participants discussed the possibility of drafting a new transatlantic competition agreement (European Commission 1997). Both sides agreed that it would be useful to move forward on a new and separate agreement that would elaborate when positive comity ordinarily would be applied and what specific procedures would be employed for such a request.

A. Negotiating the PCA

In the US, work on this new and separate agreement again proceeded in accordance with the domestic power-sharing arrangements established for rule-making cooperation under the Case-Zablocki Act. These discretionary procedures required negotiation and agreement between the DoJ and FTC. As long as the two competition agents were able to agree on the substance of the agreement, their work did not require approval of the political principals. Ultimately, the only other US actor whose involvement would be required was the Department of State (DoS). The DoS's legal approval would be necessary to make sure that the US was not signing a binding international agreement that conflicted with current domestic law. By 1997, the US competition officials moved beyond internal negotiations and began exchanging drafts of the new agreement with their counterparts in the EU.

In the EU, the internal negotiations were more complex. Due to the power-sharing parameters established by the ECJ ruling on the Bilateral, the Commission followed a very different procedure for negotiating the PCA. Within the Commission itself, the

[325] The official name of the PCA is the "Agreement Between the European Communities and the Government of the United States of America Regarding the Application of Positive Comity Principles in the Enforcement of their Competition Laws."

Competition Directorate was primarily responsible for drafting the agreement, with opinions, comments and other support added by the Directorate for External Affairs.[326] Outside the Commission, the Council of Ministers (CoM) was involved very early. The CoM adopted a negotiating brief for the Commission on October 14, 1996, two days prior to the initial meeting in Washington at which the new agreement was to be discussed.[327] The brief allowed the Commission

> to open negotiations with the US authorities with a view to strengthening certain provisions contained in the [Bilateral] Agreement… The new Agreement envisages introducing a procedure for determining, in certain cases falling within both parties' jurisdiction, whether one party should suspend or defer initiating its procedures in order to allow the other party to undertake investigations on its own and to apply, if necessary, appropriate measures (Council of Ministers 1996).

Because the intended agreement would be binding on the signatories, the EU political principals remained involved in this case of rule-making cooperation. On June 18, 1997, the Commission formally adopted and submitted a proposal for the new agreement to the Council. The short proposal notably highlighted that the new agreement represents a commitment on the part of the US and EU "to cooperate with respect to antitrust enforcement rather than to seek to apply their antitrust laws extraterritorially" (European Commission 1997a).[328] The Commission also submitted the proposal to the individual Member States, the European Parliament, industry and other interested parties for opinion (Commission 1997).[329] Shortly thereafter, the Commission received the Council's approval to enter into the agreement. On June 4, 1998, the Council and the Commission signed the final agreement on behalf of the EU. The DoJ's Antitrust Division and the FTC signed on behalf of the US.

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[326] For example, the Directorate for External Affairs helped to set up meetings between EU competition officials and their US counterparts.

[327] According to the Commission (1997), the Council formally authorized the Commission to negotiate this new agreement on October 25, 1996.

[328] The Commission reiterates this belief in its annual 1998 report to the Council and the European Parliament (European Commission 1999,5).

[329] Starek (1997) also notes that the Council had to wait for the European Parliament to review the proposal before it could take final action.

B. Provisions of the PCA

The primary intent of the PCA is to clarify how positive comity will work in practice. As such, the agreement explicitly mentions the principle of positive comity and asserts that "The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party's competition laws" (Article III). These requests will typically be made when one competition authority is better placed to acquire the necessary information to conduct an investigation. In such a case, the PCA creates the presumption that the competition authorities of a Requesting Party "will normally defer or suspend their own enforcement activities in favor of enforcement activities by the competition authorities of the Requested Party" (Article IV).

Specific conditions are provided under which a positive comity deferral will be made. For example, deferrals will normally be made when the anticompetitive activities in question do not have a "direct, substantial and reasonably foreseeable impact on consumers" in the Requesting Party's territory (Article IV). In other words, if one party feels the anticompetitive behavior is seriously detrimental to its domestic consumers, that party has the right to conduct a simultaneous investigation of its own. This decision to conduct a simultaneous investigation is discretionary and is in no way abrogated if the party has made a positive comity request. The provisions for deferral are not applicable to mergers (see below).

The PCA procedures increase implementation cooperation by requiring the Requested Party—"on request or at reasonable intervals"—to inform the Requesting Party of the status of the investigation. Should the Requested Party be unable to deal "actively and expeditiously" with or update the other party on a positive comity request, the Requesting Party is free to initiate its own investigation. Updates of ongoing positive comity investigations must conform to the domestic statutory requirements of the respective parties for protecting confidential information (Article V).

C. Avoiding Political Intervention in the PCA

While negotiating the PCA, EU and US competition agents pursued rule-making cooperation always conscious of the constraints imposed by their respective domestic institutional environments. In accordance with their domestic power-sharing arrangements, the US competition officials were again able to negotiate this executive agreement without political intervention. The EU competition officials, having learned their lesson from the ECJ ruling on the Bilateral Agreement, enjoyed comparatively less discretionary rule-making authority. As a result, the EU competition agents coordinated with their political principals throughout the negotiation process in accordance with their domestic power-sharing arrangements. Despite this constraint, the EU competition agents still pursued the agreement as a means to enhance and clarify their cooperation with US competition agents.

In an effort to avoid political intervention, the US and EU competition agents were careful not to insert language into the draft agreement that would require changes to domestic law. Such changes would have necessitated principal involvement as politicians amended and/or drafted new legislation. This approach was unacceptable because it would have increased considerably the costs of negotiating and reduced the likelihood of finalizing the new agreement. To make the point as clear as possible, the competition officials inserted Article VII: "Nothing in this Agreement shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the United States of America or the European Communities or of their respective states or Member States." This provision assured that domestic legal protection for confidential business information would be respected.

Another example of the competition agents' preference to avoid political intervention relates to mergers. Upon signing the PCA, the competition agents emphasized the supremacy of domestic legislation, explaining that the agreement does not cover merger reviews (Parisi 1999, 136) because the domestic EU and US merger control laws and pre-merger notification rules take precedence over certain PCA provisions. While the PCA "is not applicable to mergers… the broader, more general positive comity provisions of the 1991 Agreement remain in effect and would in theory permit a positive comity request in a merger case" (OECD 1999a, 10). However, in practice, the PCA encounters clear statutory obstacles to positive comity requests in merger review. First, under the EU's MCR and the US's HSR Act, domestic investigations of mergers cannot be suspended or deferred to foreign competition authorities.[330] Any such suspension or deferral would directly contradict domestic law that charges competition agents with responsibility for merger control. Second, positive comity requests in merger reviews would be largely unnecessary. A competition agent could request that their foreign counterpart open an investigation into a specific merger, but due to pre-merger filing requirements, such an investigation would have already been opened once the merging firms had submitted their notification to merge.[331] Thus, positive comity requests would be redundant and unnecessary in merger review. Third, the statutory timetables contained in the MCR and HSR would make it very difficult for the US and EU competition agents to apply positive comity to their respective merger reviews. A positive comity request and subsequent deferral may extend the merger review process beyond the limits that are statutorily allowable. Thus, the provisions in the PCA show that the competition agents again consciously decided that cooperation should occur on the basis of current statutes.

D. EU and US Reasons for Signing the PCA

Similar to the Bilateral, the PCA furthered the creation of a transatlantic framework based on dispute prevention by competition agents instead of dispute resolution by political principals. Again, the PCA would address the new competition challenges raised by the interaction of the systemic-level EI and competition cases in overlapping jurisdictions. While the applicability of the PCA is limited to non-merger cases, it does offer useful insights into the strategic interaction that occurs between EU and US competition agents. In particular, the PCA not only reduces the likelihood of political intervention in non-merger cases, but also preempts extraterritoriality by competition agents.

[330] The competition officials acknowledged that their domestic institutional environments "leave little discretion to exercise the kind of deference that 'positive comity' implies" in merger review (Parisi 1999; 135, note 15).
[331] Merging firms must officially notify the competition authorities. In the US, such notification "may be made as early as an agreement in principle is reached or a (nonbinding) letter of intent or contract has been

The PCA facilitates future implementation cooperation by reducing the likelihood that EU and US competition laws will be applied extraterritorially in transatlantic cases. In such cases, the competition agents will normally suspend or defer their own investigation instead of exercising their laws extraterritorially. As Van Miert asserts, the PCA "represents a commitment on the part of each party to cooperate with respect to antitrust enforcement, rather than to seek to apply its antitrust laws extraterritorially" (1998, 9). This suppression of extraterritoriality reduces the likelihood that political principals will view the actions of foreign competition agents as threats to national and/or constituent interests.

By clarifying the procedures for positive comity requests, the PCA decreases the likelihood of competition agents reaching divergent decisions in concurrent jurisdiction cases. As Devuyst argues, "The application of positive comity not only represents a commitment to cooperate rather than seek to apply antitrust laws extraterritorially; it also reduces the possibility of conflicting decisions being made by different competition authorities" (2001, 136). This reduction occurs because agents will simply request that their foreign counterparts open an investigation into possibly anticompetitive activity instead of opening their own investigation that could result in a divergent decision. By reducing the likelihood of divergent decisions, the PCA contributes significantly to limiting political intervention.

Both the US and EU competition agents viewed the PCA as a way to reduce the likelihood of unilateral extraterritoriality. The desire to reduce the likelihood of extraterritoriality via a binding agreement becomes particularly evident in the EU position.[332] The Commission's position was largely informed by a report from its Group of Experts, which cited positive comity as an untapped resource for increasing cooperation and raised concerns over US extraterritoriality (Devuyst 1998):

> …it appears that the ambitious provisions of the existing [Bilateral] Agreement have not (yet) been fully exploited. In particular it still remains to be seen how far the 'comity' procedures are really likely to influence competition authorities' natural propensity not to be concerned with the

signed" (ICPAC 2000, 110). In the EU, such notifications "can be made only *after* the signing of a definitive merger agreement, acquisition of control, or announcement of a public bid" (ICPAC 2000, 111).

[332] Devuyst argues that the EU essentially wanted the PCA as a means to limit US extraterritoriality (1998, 467). On this point, see European Commission (1997b, 3).

> external effects of their decisions. Despite recent court decisions[333] and views expressed some months ago by the United States competition authorities, it is important to avoid an unduly restrictive interpretation of the concept of comity which would make it applicable only in the (rare) cases of 'pure conflict' of law, i.e., when a firm cannot comply with the requirements imposed by one jurisdiction except by infringing the law of another jurisdiction (Group of Experts 1995, 9).

The US court decision that concerned the Group of Experts was the *Hartford Fire Insurance Co.* decision. This 1993 decision by the US Supreme Court "dealt comity a near death blow… by limiting comity considerations in most situations to those conflicts where one sovereign has compelled the very conduct which the other sovereign forbids" (Waller 2000, 564). For more on this decision, see Chapter 3.

In signing the PCA, the EU was clearly concerned by the potential extent of US extraterritorial jurisdiction. As Competition Commissioner Karel Van Miert claimed, this concern was a major factor motivating the EU's signing of the PCA:

> As the Community has never formally claimed territorial jurisdiction as extensive as that which is claimed by the US, this situation was viewed as an imbalance in our bilateral relations and an obstacle to any further deepening of these relations. For this reason we have decided to negotiate a strengthening of the positive comity instrument. We believe that the new draft agreement which the Commission adopted last July, and which will soon be concluded, will be a significant contribution to rebalancing relations in this respect (Van Miert 1997, 7).

This need for balancing reveals the EU competition agents' concern over the extraterritorial jurisdiction of the US. Because the EU's legal basis and exercise of extraterritorial jurisdiction was more recent and less established than that of the US (see Chapter 3), the EU had not formally claimed extraterritorial jurisdiction as extensive as the US.[334] As a result, the EU saw the PCA as a way to rebalance the transatlantic relationship (Rakovsky 1997). This speaks directly to the fear regulatory agents have of intervention by foreign regulatory agents.

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[333] Cf. for example the 1993 judgment of the United States Supreme Court in Hartford Fire Insurance Co. v. California, 113 S.Ct. 2909.

[334] As noted in Chapter 3, this would change with the 1999 *Gencor* decision that allowed for an effects test to determine jurisdiction.

The future benefits following from the application of positive comity should not be exaggerated.[335] Due to the success of the Bilateral Agreement, recourse to the safety-valve of positive comity has been reduced. As Claude Rakovsky, member of EU's Competition Directorate, argues, the Bilateral "may have been a source of inspiration in daily co-operation," and this co-operation may have been so good that "it is not normally necessary to activate formally the (positive or negative) comity procedures" (cited in OECD 1999a, 11).[336] Evidence of the limitations of positive comity can be found in the fact that, to date, there has been only one formal request for an investigation under the PCA: the Sabre/Amadeus case.[337] As noted in Chapter 2, this case provides evidence of the US competition agents using the PCA in a self-interested strategic manner. In Sabre/Amadeus, the US competition agents requested that the Commission investigate the allegedly anticompetitive behavior of a French firm.[338] Ultimately, the Commission decided against the French firm, a decision that irritated the French Government. In effect, the US competition agent had used the Commission in an instrumental fashion to challenge the French firm. As a result, the US agents achieved their interests—the anticompetitive behavior of the firm was remedied and they avoided infuriating French politicians who instead directed their anger toward the Commission.

The PCA case indicates that the competition agents were so eager to clarify procedures of positive comity—in order to the reduce likelihood of political intervention—that they went ahead with binding rule-making cooperation (including the EU working within its more restrictive and higher-cost institutional framework) even though the resulting agreement promised little in the way of increasing further discretion. For example, the principle of positive comity is not frequently used and the PCA does not even apply to mergers, the area in which most transatlantic competition relations occur. This limitation is a direct result of the competition agents' preference to avoid political

[335] See Waller (2000) and Griffin (184-185).

[336] Waller agrees, arguing "At one level, comity is no longer important because its advocates won. The United States government now acts cautiously, and considers foreign interests before it seeks to investigate or challenge conduct abroad by foreign nationals that allegedly produces anticompetitive effects in the United States" (2000, 565).

[337] While only one formal notification has occurred under PCA, Janow notes three other informal notifications that resemble the principle of positive comity: AC Nielsen, Parma Ham, and Marathon Oil (2000, 38-39).

[338] For more detailed discussions of Sabre/Amadeus, see Devuyst (2001, 140-42), Janow (2000, 39-40) and Griffin (1999, 184-185).

intervention by not pressing for changes in domestic competition laws on merger control. Thus, the signing of the PCA reflects the concern of competition agents to reduce foreign political intervention and avoid domestic political intervention by requiring politicians to change domestic laws.

The PCA also reflects the concern of competition agents to preempt extraterritoriality by their fellow competition agents. In particular, this fear of intervention by foreign regulatory agents is witnessed in the EU's desire to "rebalance" the relationship. For the US competition agents, the Bilateral Agreement had largely addressed their earlier concerns over balancing—concerns that had emerged from the *Wood Pulp* decision, the SEM and the MCR. However, negotiating and signing the PCA was still in the interests of the US competition agents because it offered the potential of reducing the likelihood of political intervention and could be used strategically as in the Sabre/Amadeus case.

IV. The 1999 Administrative Arrangements on Attendance—Non-Binding Dispute Prevention

In addition to the binding Bilateral Agreement and the PCA, the EU and US competition authorities have also engaged in non-binding, rule-making cooperation. On March 31, 1999, the EU and US competition agents signed the Administrative Arrangements on Attendance (AAA).[339] This formal agreement was designed to enhance implementation cooperation in competition matters. As such, it formalizes procedures for competition authorities to attend (on a reciprocal basis) hearings held during each other's merger review processes. Because the AAA is non-binding, both competition agents were able to negotiate and sign the agreement entirely at their own discretion. As such, the AAA represents the only time when the Commission was able to engage in transatlantic rule-making cooperation entirely at its own discretion. This feature of the AAA case provides useful comparative insights into the Commission's ability to engage in rule-making cooperation despite domestic power-sharing arrangements that limit its ability to negotiate and sign binding agreements.

[339] See Bulletin EU 3-1999, Competition (18/43).

A. Origins of the AAA

When conducting their respective merger reviews, EU and US competition agents frequently meet with the merging firms and third parties as a way to increase their information on the likely impact of the merger.[340] These meetings are known as "oral hearings" in the EU and "pitch meetings" in the US. As provided for in the EU's MCR, oral hearings are held by the Merger Task Force and conducted by an independent Hearing Officer. In the US, the DoJ's Antitrust Division and the FTC hold their own respective pitch meetings. The AAA allows representatives of foreign competition agents to attend these discretionary meetings in cases of mutual interest (i.e., concurrent jurisdiction mergers).

In 1997, prior to negotiating the AAA, the US DoJ and FTC issued requests to attend oral hearings being conducted by the EU's Competition Directorate (European Commission 1998a, 12). After reviewing these requests, the Directorate (specifically, the Hearing Officer) invited officials from the US competition agents to take part as observers in the oral hearings. These invitations were specific to reviews being conducted for three separate merger cases: Boeing/McDonnell Douglas, Guinness/Grand Metropolitan and WorldCom/MCI (Devuyst 2001, 136). Because the US officials attended the hearings as observers, they were not authorized to participate or intervene in the proceedings.

The Commission's decision to accept the US's requests for attendance "took into account that the US authorities were examining the same transactions and that attendance in the hearings could improve cooperation and coordination of enforcement activities" (Devuyst 2001, 136). Based on this experience, the EU believed that further attendance at foreign hearings could prove very beneficial to the analysis of concurrent jurisdiction mergers (i.e., reduce the likelihood of divergent decisions). As a result, the Commission "proposed an exchange of letters" with the US competition authorities in order "to establish a clear framework for such requests and to ensure their reciprocal nature" (Devuyst 2001, 136). The call for reciprocity in such a framework again reflects the desire of the EU competition agents for balance in their relations with the US competition agents.

B. Negotiating the AAA

Not surprisingly, the US competition agents were able to negotiate these new administrative arrangements entirely at their own discretion. Careful to highlight its discretionary authority to sign the formal AAA, the Commission noted that “Neither these administrative arrangements, nor the letters exchanged between the Commission and the US competition authorities, outlining and confirming a common understanding of the said arrangements, constitute a binding international agreement” (European Commission 2000a, 5). Because the AAA would not be binding, the Commission was not constrained by the ECJ’s 1995 decision on the Bilateral Agreement. Thus, the EU Competition Directorate was able for the first time to pursue discretionary rule-making cooperation unabated by the domestic power-sharing arrangements that had required intervention by the CoM in the Bilateral Agreement and the PCA.[341]

C. The AAA in Practice

Based on the AAA, reciprocal exchanges of attendees have now become a common feature of the review process for concurrent jurisdiction mergers. Before the AAA, requests for attendance were dealt with on a case-by-case basis. Now, the procedure to gain attendance has been regularized. As the EU’s Competition Commissioner Mario Monti argues “it has now become standard practice for representatives of the antitrust agencies to attend oral hearings in cases involving close EU-US cooperation—a virtually unprecedented step forward in EU-US regulatory cooperation” (2001a, 3). By simplifying the procedure for attendance into a standard practice, cooperation has been enhanced, which, at least marginally, reduces the likelihood that competition agents will reach divergent decisions.

Exactly who will be allowed to attend these hearings is determined exclusively at the discretion of the competition agents.[342] The DoS is not involved on the US side, and neither is the CoM, Directorate for External Affairs or the individual Member States on

[340] The AAA also applies to non-merger cases.
[341] In addition, because the agreement was simply a non-binding administrative arrangement, the Directorate for External Affairs was not closely involved either. Interview with official in EU’s Directorate for External Affairs, May 2001.
[342] In the EU, this decision is made by the Hearing Officer.

the EU side. Before an arrangement for attendance is completed, the host competition agents will typically consult with the merging firms. When requests for attendance are granted, the prevailing laws protecting confidential information in the host jurisdiction apply to the guest agents. Unless the merging firms have agreed to waive their right to confidentiality, guest competition agents are asked to exit the meeting when confidential information is being discussed. As such, the AAA does not threaten domestic laws on confidential information. It is possible that a request for attendance could be denied. The AAA mentions that attendance will be granted for "appropriate" cases. Thus, a competition agent can "decline to invite attendance by the requesting competition authority, if it believes that the other's attendance would adversely affect the proceedings or would otherwise be inconsistent with important interests" (Devuyst 2001, 137).

The AAA further decreases the likelihood that competition agents investigating concurrent jurisdiction mergers will reach divergent decisions because it reduces the information asymmetries between the agents. However, reciprocal attendance does not guarantee convergent decisions. The BOC/Air Liquide merger in December 1999 was one such case. Following a request by the FTC to attend the EU oral hearing, this merger represented the first time the AAA was formally invoked. While the FTC attended the EU's hearing, the competition agents ultimately ended up in "disagreement" over the merger case (Commission 2000a, 5-6).[343] Thus, cooperation under the AAA does not change the underlying domestic laws upon which the two respective competition agents analyze mergers. Indeed, the competition agents are unlikely to request such changes to domestic laws.

While the AAA has its limits, the agreement does contribute to transatlantic cooperation in the implementation of competition policy. First and foremost, the agreement reduces information asymmetries that can increase the likelihood of divergent decisions. By reducing the likelihood of divergent decisions, the AAA (like the Bilateral and PCA) reduces the likelihood of political intervention via domestic control and foreign intervention instruments. The exchange of attendees and information also reduces the likelihood that foreign competition agents will extraterritorially impose divergent remedies.

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[343] For more on the BOC/Air Liquide case, see Chapter 5.

V. Conclusions

The preceding analysis suggests the means by which transatlantic competition relations have unexpectedly transitioned from an adversarial relationship of unilateral extraterritoriality to one of cooperative bilateralism. In short, the three formal agreements investigated herein are examples of rule-making cooperation that were consciously designed to encourage dispute prevention by regulatory agents instead of dispute resolution by political principals. This transition was a response by regulatory agents to the common stimulus of EI and has occurred through largely discretionary processes that reflect their similar preferences, despite the constraints of different domestic institutional environments. The discretionary processes of rule-making cooperation in competition policy suggest that EU and US regulatory agents consciously increase shirking in order to decrease the likelihood of political intervention.

This chapter also implicitly examines a counterfactual. Without competition agents pursuing their preferences to maximize certainty and decision making authority, political principals could have been expected to respond to the new stimulus of EI and the increasing likelihood of divergent decisions by creating new foreign intervention instruments to pressure foreign regulatory agents or by entering into non-discretionary rule-making cooperation via treaties. Neither of these outcomes occurred. Rather, the competition agents pursued rule-making cooperation via discretionary means in order to create a framework for reducing information asymmetries.

The preceding analysis clearly demonstrates the patterns of behavior discussed in Chapter 2 (i.e., P1, P2 and P3). The primary purpose of the three formal agreements was to reduce information asymmetries between the EU and US regulatory agents (P1). Increases in information exchanges between the regulatory agents decrease the likelihood of divergent decisions, which, in turn, reduces the likelihood of political intervention. Under the cooperative framework established by the three formal agreements, EU and US regulatory agents now share information at all stages of the merger review process (see Chapter 5). By decreasing the likelihood of divergent decisions and political intervention, the competition agents pursued their preference for maximizing their own certainty and decision-making authority in subsequent policy implementation. Similarly, the political principals also pursued their preference to intervene with control instruments when the perceived costs of agent shirking in rule-making cooperation exceeded the costs of not intervening (P3).

Despite different domestic institutional environments that imposed different constraints, the agents were able to achieve their strategic goal of rule-making cooperation. Based on their domestic power-sharing arrangements, the US competition agents enjoyed comparatively more discretionary authority to engage in rule-making cooperation (per the CZA). Even though the EU competition agents enjoyed less (or less clear) discretionary authority to engage in rule-making cooperation, they nevertheless decided to negotiate and sign the Bilateral Agreement at their own discretion (P2).

The case of the Bilateral Agreement demonstrates the domestic constraints on the Commission's discretionary authority to engage in rule-making cooperation. The French decided to intervene in this case because the costs of not intervening were excessive (P3). These costs were excessive because failure to intervene would have essentially granted the Commission discretionary authority to negotiate and sign binding agreements. From the perspective of the EU's principals, such a de facto delegation of authority to the Commission would have allowed the agent to sign binding international agreements in other policy areas—an unacceptable transfer of sovereignty within the EU system. After finalizing the Bilateral Agreement in 1995, the Commission remained conscious of its political constraints and conformed to the de facto power-sharing arrangement—rule-making cooperation that results in binding agreements cannot be conducted under the Commission's sole discretionary authority—established by the ECJ's decision.

The PCA and AAA were negotiated to clarify the procedures for discretionary EU-US implementation cooperation. The US competition agents were able to negotiate and sign both agreements under their discretionary rule-making authority. However, because the PCA is a binding agreement, the Commission lacked equivalent discretionary rule-making authority and, rather, conformed to its new, non-discretionary power-sharing arrangements for rule-making cooperation. Because the AAA was non-binding, the Commission was able to negotiate and sign the agreement solely under its discretionary rule-making authority.

Throughout the three cases analyzed, it becomes apparent that the EU and US competition agents carefully avoided cooperating in ways that would require changes to domestic legislation (P2). Because the Bilateral Agreement is not a treaty, it does not change existing domestic law. While the Bilateral explicitly allows for extraterritoriality, more importantly, it reduces the likelihood of such unilateral behavior by increasing discretionary implementation cooperation between agents through notifications, exchanges of information, coordination of remedies and new measures like comity. This cooperation does not eliminate the possibility of differing analyses in individual merger cases, but it does reduce the likelihood that divergent decisions will occur. Similarly, both the PCA and the AAA carefully avoided mandating changes to domestic law: the PCA respects confidentiality of information and does not apply to merger review, and the AAA also protects confidentiality of information. Neither of these agreements prohibits principals and/or agents from acting extraterritoriality. But they both contribute to implementation cooperation by establishing discretionary mechanisms for reducing the likelihood of such unilateral behavior.

Competition agents clearly prefer avoiding both domestic and foreign political intervention. However, an unexpected and important finding of the preceding analysis is that the agents also prefer avoiding extraterritorial intervention by foreign competition agents, such as the imposition of divergent remedies in concurrent jurisdiction cases. In order to reduce the likelihood of such interventions, the agreements were negotiated in an attempt to encourage "balance" in transatlantic competition relations. During the 1980s, EU and US competition agents perceived a number of overseas domestic developments as likely indicators of greater foreign activism and unilateralism. In an attempt to remedy this perceived imbalance, both the EU and US competition agents decided that binding their foreign counterpart into a cooperative framework was the best solution. Even the non-binding AAA is explicit in its call for balance because it asserts the need for reciprocity in allowing attendance.

The need for balance suggests that the EU and US competition agents behave as self-interested, utility-maximizing actors. Despite their desire to cooperate, they remain suspicious of each other's commitment to cooperation and are not acting on some shared conception of a common interest. The reason for this appears simple: if one agent were to act extraterritorially, they would threaten the other agent's preference to maximize their own certainty and decision-making authority. This preference is further threatened because political principals perceive foreign agents acting extraterritoriality as a likely threat to national and/or constituent interests, which increases the likelihood that the principals will intervene. Thus, the three agreements are designed to reduce the likelihood of extraterritorial actions by agents. This, in turn, reduces the likelihood of political intervention. This finding suggests that, when applied to international regulatory cooperation, the principal-agent insights of PAF must be expanded to cover the patterns of behavior that emerge from agent-agent dynamics.

CHAPTER 5: Transatlantic Implementation and Exploratory Institutional Cooperation—The Practical and Exploratory Dynamics of Dispute Prevention in Competition Policy

I. Introduction

This chapter investigates the EU-US implementation and exploratory institutional cooperation that has followed from the process of rule-making cooperation. The chapter begins by discussing the reasons why competition agents pursue implementation cooperation. Next, the chapter outlines four different stages of implementation cooperation in merger review: initial contacts, notification contacts, review process contacts and remedial contacts. The implications of EU-US cooperation in each of these stages is demonstrated through the analysis of selected merger cases. While the cases suggest that discretionary cooperation generally functions without direct principal intervention, two instances are also analyzed in which EU-US cooperation failed to prevent intervention: the Boeing-McDonnell Douglas merger and the GE/Honeywell merger. Both of these cases require more in depth analysis to understand where and why flaws occurred in the different stages of implementation cooperation. The chapter then details two efforts at exploratory institutional cooperation: the EU-US Mergers Working Group and the International Competition Network. These two cases reveal concerted attempts by EU and US competition agents to increase bilateral and multilateral cooperation in competition policy through discretionary means.

II. Implementation Cooperation—Cooperative Merger Review in Practice

In its most basic conceptualization, EU-US implementation cooperation is a device designed to meet the new challenges of an external stimulus (EI) in competition policy. According to the revised cross-level approach, EI increasingly challenges the enforcement of domestic competition policy, especially over anticompetitive business activity originating from abroad. Due to this international stimulus, domestic competition authorities will likely find that internationally-oriented merger activity is increasingly threatening to outpace their legal and administrative resources to enforce competition policy. More importantly, because EI increases the number of internationally-oriented mergers, it also increases the likelihood of divergent decisions between EU and US competition authorities. In cases of divergent decisions, EI also challenges conventional notions of jurisdiction based on sovereign territory. Thus, EI changes the context in which regulators act by increasing their need to enforce domestic competition policy extraterritorially. Without international cooperation, the result is an increase in the likelihood of political intervention.

John Parisi, Counsel for European Union Affairs in the International Antitrust Division of the FTC, succinctly explains the nature of the problem and the intent of the solution:

> Co-operation among antitrust authorities facilitates the effective and efficient enforcement of antitrust laws and thus the maintenance of competition in markets. That is not an expression of economic theory, but rather a fact of life. As business concerns have increasingly pursued foreign trade and investment opportunities, antitrust compliance issues have arisen which transcend national borders and have led antitrust authorities in the affected jurisdiction to communicate, co-operate, and co-ordinate their efforts to achieve compatible enforcement results (1999, 133).

According to Parisi, in today's EI environment, international cooperation is the preferred way to assure that competition is maintained in domestic markets. The challenges of EI and the cooperative response are clear to competition agents who wish to avoid political intervention. This preference is reflected in the desire "to achieve compatible enforcement results" (i.e., convergent decisions).

Parisi's claim benefits from further clarification of the precise reasons why, in an EI environment, EU and US competition authorities will choose to pursue implementation cooperation. As Youri Devuyst, administrator in the International Unit of the EU's Competition Directorate, argues, there are three central reasons that "given the globalization of the economy—cooperation is to be preferred over unilateralism to enhance the effective enforcement of antitrust rules" (2000, 323).[344] At the bilateral level,

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[344] Devuyst notes that these reasons are supported by the European Commission (1996, 4-5), Parisi (1999) and Melamed (1999).

this “enforcement of antitrust rules” speaks directly to EU-US implementation cooperation in competition policy.

First, competition authorities will cooperate internationally when implementing competition policy in order to *increase information acquisition*. As Devuyst argues, “even if a competition agency is ready to use its antitrust rules extraterritorially, information central to the investigation is often located outside the jurisdiction of the competition authority using the extraterritoriality principle and is thus beyond its reach. Without the necessary proof, competition authorities are unable to take remedial action” (2000, 323). The problems created by information asymmetries in internationally-oriented merger cases present real challenges to the “effective enforcement” of domestic competition policy in an EI environment. This reason for cooperation echoes the crucial role for information exchanges in competition policy that is suggested in the patterns of behavior for agents (P1) posited in Chapter 2. Implementation cooperation is fundamentally concerned with increasing information exchanges as a means to reduce the likelihood of divergent decisions.[345]

As discussed below, information exchanges are crucial to regulatory cooperation and central to each stage of implementation cooperation. In addition, the centrality of information provides merging firms with an opening to influence implementation cooperation to a greater extent than rule-making and exploratory institutional cooperation. Domestic EU and US laws create this opening by providing for the protection of confidential business information in the merger review process. If firms do not waive their rights to confidentiality in merger cases, cooperative analyses can be seriously hindered. Citing the obstacles created by domestic confidentiality provisions, ICPAC argues

[345] It is also possible that regulatory agents will reach divergent decisions having nothing to do with information asymmetries: “Sometimes two authorities looking at the same transaction should come to different results because the transaction will in fact have differing impacts on different markets… [such as in the] Ciba-Geigy/Sandoz case” (Valentine 1997, 3). However, information exchanges in such cases can still assure convergent *remedies* and, thus, these cases do not typically trigger political intervention. If the remedies were divergent, political intervention would be much more likely. Thus, due to post-decision information exchanges “even if the transaction needs to be addressed somewhat differently on both sides of the Atlantic because of differing market conditions and competitive realities, we reach solutions involving divestitures and licensing that neither conflict nor force firms to choose between complying with US or EC law” (Valentine 1997, 6). Valentine goes on to demonstrate this argument with an example of the Boeing/McDonnell Douglas merger case.

> These laws have a particularly significant impact on the merger review process, because much of the information used to analyze a proposed transaction comes from extremely sensitive, confidential information relating to the companies' strategies, investment plans, and marketing goals and methods. It is this information that frequently proves most useful in analyzing a proposed transaction (2000, 65).[346]

The 1991 Bilateral Agreement, PCA and AAA explicitly recognize and respect these domestic laws; doing otherwise would have prompted undesirable political intervention.[347] As a result, competition regulators must obtain waivers from the merging firms before sharing confidential information with their foreign counterparts. Indeed, competition agents must often obtain multiple waivers to cover different types of information and different stages of the review process.[348]

Due to these legal provisions, merging firms may generally play a larger role in implementation cooperation than in rule-making or exploratory institutional cooperation. However, even in implementation cooperation, competition agents have devised discretionary means through which to address the obstacles created by confidentiality provisions (see below). In addition, waivers of confidentiality have become routine in EU-US implementation cooperation *in merger review* (European Commission 2000a, 3; ICPAC 2000). This is so because, by waiving rights of confidentiality, firms expedite the review process and increase the likelihood of convergent decisions (Parisi 1999, 140).[349] Merging firms generally prefer avoiding delays in the review process due to the time sensitivity of the transaction (Damro forthcoming 2003a).[350] Similarly, merging firms

[346] See Majone (2000b, 279), Pitofsky (1998), Starek (1997) and Group of Experts (1995, 7) for similar arguments that measures preventing the exchange of confidential information present a major obstacle to close cooperation between EU and US competition agents.

[347] The EU and US deal differently with confidential information: "Although the end result may be much the same, information gathered in the US tends to be automatically treated as confidential. Under the European system, those supplying information must request such confidentiality" (Devuyst 2001, 147). Ham provides a very useful list of the domestic legal constraints in both the EU and US that protect confidential information. These include the EU's Regulation 17, parts of the US Code and the FTC Act (Ham 1993, 588).

[348] On the different types of information potentially exchanged (agency info vs. business info), see Parisi (1999, 137-138). For the benefit of merging firms, Parisi also discusses the pros and cons of waiving confidentiality rights (1999, 138-140).

[349] See Parisi (1999, 139) for a list of four reasons why firms might be reluctant to waive rights to confidentiality. See also Damro (forthcoming 2003a).

[350] Measurements of corporate desire for expediency in the merger reviews are elusive because "no comprehensive data are available that quantify the overall public and private costs imposed by compliance

generally prefer convergent decisions on remedies (if any remedies are necessary) because disagreements over such matters can delay the implementation of the merger. Because merging firms are increasingly waiving their rights to confidentiality, their ability to influence implementation cooperation in the merger review process is limited in practice.[351] As a result, firms are not considered analytically necessary actors (see Chapter 2) for demonstrating the revised cross-level approach and the patterns of behavior.[352] However, as discussed below in reference to the GE/Honeywell case, firms can occasionally play important roles in determining the likelihood of transatlantic cooperation in competition policy. This issue is addressed in greater detail in Chapter 6.

The second reason why competition authorities will cooperate internationally when implementing competition policy is to *reduce the likelihood of divergent decisions*. This reason is linked directly to and follows from the increasing information exchanges. As Devuyst argues,

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with multijurisdictional merger notification and review requirements" (ICPAC 2000, 91). However, corporate desire for efficiency in the merger review process is reflected in a recent ICC policy statement: "Companies have an interest in reducing the administrative burden, costs and delays resulting from multi-jurisdictional merger reviews. They also have an interest in ensuring that the decisions given by different competition authorities are consistent" (1999). The corporate desire for expediency is also supported by research interviews.

In addition to expediting the merger review process, waiving rights of confidentiality may make the merging firms appear more cooperative in the eyes of the competition authorities. Merging firms admit to the need to appear cooperative in the eyes of the competition authorities. This image can be important to the outcome of the immediate merger and any future merger proposals. Firms prefer that competition authorities trust and come to them before approaching their competitors for information. If competition authorities feel merging firms are being uncooperative, they are capable of increasing the pressure on the firms. For example, merger regulators can issue requests for large amounts of information on short deadlines. The regulators know how many people a firm has working on each case, which makes it easy to determine when and what kind of information requests will be a problem for the merging firms. The intent of most merging firms is to avoid such situations by developing good relations with the competition authorities from the outset of the review process. Once a cooperative reputation has been established, legal counsels then can more easily opt to make deals.

[351] This is not the case in monopoly and cartel cases where firms still actively resist waiving their rights to confidentiality, which increases their opportunities to influence cooperation in such cases. Firms are also limited in their influence in merger review because they lose the threat of "exit" commonly employed to increase pressure on political and regulatory decision makers. Exit is not an option for these firms in merger review because, if they are large enough to meet the thresholds for review in the US and EU, they are dependent on those respective markets for such a large amount of business that they cannot realistically exit in order to save a merger that is challenged by the US and/or EU competition agents. For an example of this occurring in the GE/Honeywell merger, see Evans (2002, 15).

[352] Rather, firms are more likely to be important actors in non-merger cases, such as anti-cartel investigations, where they are less likely to waive their rights to confidentiality (Stark 2000, 7). As Devuyst argues, "In merger cases, companies… are generally willing to cooperate by giving waivers. The problem lies with the cases of antitrust infringements such as cartels, where the necessary goodwill to grant waivers

> there is a need to avoid conflicts of law and remedies to international cases. As international business arrangements may face examination by different authorities at the same time, divergences in the laws applicable to the same set of facts may result in conflicting conclusions as to the legality of the behavior under review. Even where a common view exists among competition agencies as to the anticompetitive nature of the conduct, the remedies imposed in each jurisdiction may be incompatible. Cooperation is thus seen as necessary to reduce the likelihood of such conflicts (2000, 323).[353]

Before moving on to Devuyst's final reason why competition authorities will cooperate internationally, it is important to distinguish between two possible types of divergent decisions: inconsistent and conflicting. Inconsistent decisions occur when "authorities who have chosen to take no action or to impose a 'lesser' remedy against a proposed transaction generally do not feel aggrieved by actions taken in other jurisdictions" (ICPAC 2000, 52). Inconsistent decisions do not challenge the ability of an agent in one jurisdiction to implement its statutory mandate and require no further work to reconcile the inconsistencies (ICPAC 2000, 41 and 52). However, as will be discussed below, inconsistent decisions can still prompt political intervention. Regulatory agents, therefore, will strive to avoid inconsistent decisions because they are often perceived by political principals as threats to national sovereignty and/or their domestic constituents' interests.

Divergent decisions can also be conflicting. This occurs when merging firms are unable to comply simultaneously with the decisions reached in two different jurisdictions. In such a case, the remedies imposed by one jurisdiction may "impact the remedies available to another jurisdiction. This is particularly problematic in largely global transactions where the impact of various remedies may differ from jurisdiction to

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is almost by definition nonexistent, unless the companies are willing to cooperate in order to get a more lenient treatment…" (2001, 148).

[353] Notably, Devuyst does not link this need to avoid divergent decisions to a preference to avoid political intervention. This position, however, is not in direct conflict with the argument advanced in the current study. Rather, the current study posits an argument that incorporates and expands on Devuyst's position: regulatory agents will prefer avoiding divergent decisions precisely because they ultimately prefer avoiding the increasing likelihood of political intervention that is correlated with the increasing occurrence of divergent competition decisions. In short, regulatory agents will react to EI by trying—through largely discretionary avenues—to reduce information asymmetries and, in turn, reduce the likelihood of divergent decisions, which, in turn, reduces the likelihood of political intervention.

jurisdiction" (ICPAC 2000, 52-53, note 38). Regulatory agents strive to avoid conflicting decisions because of the perception they create for political principals.[354] As with inconsistent decisions, political principals are likely to perceive conflicting decisions as threats to national sovereignty and/or their domestic constituents' interests. Challenges of this type can lead to very real international conflicts (i.e., "discord"), including trade wars.[355]

Thus, both types of divergent decisions—inconsistent and conflicting—can prompt political intervention (Schaub 2002, 11; Monti 2000b, 2). As Charles S. Stark, Chief of the Foreign Commerce Section in the US Department of Justice's Antitrust Division, argues:

> And in cases in which the U.S. and EU are reviewing the same transaction, both jurisdictions consider themselves as having a stake in reaching, insofar as possible, consistent, or at the very least non-conflicting, outcomes. The reasons for this should be evident. Divergent antitrust approaches to the same transaction undermine confidence in the process; they risk imposing inconsistent requirements on the firms, or frustrating the remedial objectives of one or another of the antitrust authorities; and they may create frictions or suspicions that can extend beyond the antitrust arena—as we witnessed in the Boeing/McDonnell Douglas matter (2000, 5).

According to Devuyst, the third reason why competition authorities will cooperate internationally when implementing competition policy is to *reduce duplication*. As Devuyst argues, "cooperation would help to avoid unnecessary duplication of work and costs, both for the competition authorities involved and for the businesses whose conduct is subject to review" (2000, 323). While an important motivation for international cooperation, this reason is less important in merger cases than in non-merger cases (Devuyst 2001, 140).[356] In merger cases, duplication of work (i.e., various investigative

[354] The EU's Director-General for Competition notes this linkage: "When divergences do occur, we must learn to manage them and avoid that they escalate into high-profile transatlantic political disputes" (Schaub 2002).
[355] As ICPAC argues, "When divergence [in decisions] occurs, it is the agencies that must often explain and at times attempt to reconcile their differences. Clashes also may lead to trade wars" (2000, 41). On the possibility of trade wars, see also Karpel (1998, 1067).
[356] For a useful discussion of two non-merger cases (1996 AC Nielsen/IRI and 1998-2000 Microsoft) in which implementation cooperation between the EU and US competition authorities reduced the duplication of work, see Devuyst (2001, 140).

efforts) in the review process is mandatory due to domestic law requiring each authority to act under certain circumstances (see Chapter 3). The competition agents are not allowed to determine at their own discretion whether or not they will initiate a particular merger review. Rather, they are statutorily required to open investigations when a transaction meets thresholds established by the US's HSR and the EU's MCR. As soon as proceedings have been opened, duplication of work becomes apparent as, for example, the competition agents seek a considerable amount of identical information through their respective HSR filing and Form CO.

In summary, the primary reasons for competition agents to cooperate in the implementation of merger review are to increase information exchanges and to reduce the likelihood of divergent decisions. Devuyst's third reason—to reduce duplication of work—is less important in merger review due to domestic laws requiring EU and US competition agents to review the same merger. These insights reflect the agent patterns of behavior posited in Chapter 2. In addition, they also support the revised cross-level approach's depiction of the causal stimulus of EI and the contention posited in the fourth pattern of behavior (P4) that competition agents pursue their desire to maximize certainty and decision-making authority via discretionary implementation cooperation. The next section demonstrates these insights in different stages of implementation cooperation in practice.

A. The Practical Stages of Implementation Cooperation in Merger Review

Following rule-making cooperation, the process of implementation cooperation can be further disaggregated into additional stages: initial contacts, notification contacts, review process contacts and remedial contacts. Each of these stages is discussed in detail below, with supporting evidence drawn from specific merger cases. Analysis of the different stages of implementation cooperation is used to demonstrate the patterns of behavior for agents (P4) and principals (P6) posited in Chapter 2. In particular, this section illustrates the reasons for increasing implementation cooperation between EU and US competition agents as witnessed by increasing levels of information exchanges, formal notifications and coordination of remedies in individual concurrent jurisdiction merger cases.

Across each of these stages of implementation cooperation, the EU and US competition authorities are engaging in behavior designed to reduce the likelihood of divergent decisions in individual merger cases. This behavior reflects the concern of the agents that such decisions are typically perceived by political principles as likely to affect adversely their national and/or constituent interests. If principals form this perception in individual merger cases, their likelihood of intervening increases. The competition agents prefer avoiding such an outcome.

In general, the record of individual merger cases suggests that EU-US implementation cooperation has met the challenge of EI. Official commentators on both sides of the Atlantic frequently declare the successes of EU-US implementation cooperation. For example, as former FTC Commissioner Robert Pitofsky argues,

> it is hard to imagine how day-to-day cooperation and coordination between enforcement officials in Europe and the United States could be much improved. Within the bounds of confidentiality rules, we share, on a regular and continuing basis, views and information about particular transactions, coordinate the timing of our review process to the extent feasible, and almost always achieve consistent remedies (2000).

Parisi agrees with this general assessment of EU-US implementation cooperation: "These efforts succeed in the vast majority of cases, despite differences in laws, procedures, and, sometimes, the interests of the affected countries" (1999, 133).[357]

Despite these claims of success, it is useful to describe EU-US implementation cooperation in greater detail in order to demonstrate the patterns of behavior suggested by the revised cross-level approach. The following stages reflect a process-oriented approach to analyzing the practical implementation of EU-US cooperation in competition policy. The process-oriented approach follows from and disaggregates further Keohane's definition of international cooperation as a *process* of policy coordination.

1. Initial Contacts

The current study investigates those individual concurrent jurisdiction merger cases that meet specific statutory thresholds found in the US's HSR and the EU's

[357] For similar arguments, see Devuyst (2001), Monti (2001a) and Van Miert (1998).

MCR.[358] When mergers meet these thresholds, the firms must notify both the US and EU competition authorities of their intent to merge.[359] Most EU-US implementation cooperation occurs after the competition authorities have received such formal notifications from the firms. However, EU-US implementation cooperation may begin even before merging firms submit a formal notification to the respective competition authorities.[360] This subsection discusses the causes and effects of competition authorities engaging in such informal initial contacts before receiving the formal notification of a proposed merger.

Initial contacts occur under the discretionary authority of the competition agents. The domestic statutes governing EU and US merger review do not directly address these initial contacts. Like the other stages of implementation cooperation discussed below, these initial contacts emerged under the framework of the Bilateral Agreement. After signing the Bilateral, EU and US competition authorities devised, under their discretionary authority, a variety of ways to formalize their cooperation in practice. Such initial contacts, while not explicitly mentioned in the Bilateral, are one example of the agents increasing their discretionary means to pursue implementation cooperation.

EU and US competition authorities are in contact with each other on a daily basis.[361] As former FTC Chairman Robert Pitofsky noted, "Our staffs are on the phone with each other day in and day out" (Pitofsky and Klein 1998, 1). This is particularly true of lower-level case managers and handlers who focus on the economic and legal analysis

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[358] Because the current study investigates implementation cooperation in merger review, the analysis does not consider cases brought under the Positive Comity Agreement (PCA). Due to domestic laws that require merger reviews under certain circumstances, the PCA does not apply to merger review. This limitation does not diminish the insights possible from the current study. Rather, the majority of EU-US implementation cooperation occurs in merger cases, making this area of competition policy particularly useful for analyzing questions about international cooperation. In addition, only one case has been formally brought under the PCA (i.e., Sabre/Amadeus).

[359] In the US, such notification "may be made as early as an agreement in principle is reached or a (nonbinding) letter of intent or contract has been signed" (ICPAC 2000, 110). In the EU, such notifications "can be made only *after* the signing of a definitive merger agreement, acquisition of control, or announcement of a public bid" (ICPAC 2000, 111).

[360] Prior to submitting their formal notification, firms may also engage in so-called "pre-notification contacts" with the respective competition authorities. For a discussion of the importance of pre-notification contacts between firms and competition authorities, see Chapter 3 and the discussion of the GE/Honeywell merger below. Once the merging firms submit a formal notification, a strict timetable is set in motion in the EU. This timetable has implications for subsequent implementation cooperation that are discussed below.

[361] Research interviews confirm these close and daily contacts.

of the merger review process.[362] During the course of daily contacts, individual case managers and handlers may, and often do, discuss pending mergers that have not yet been formally notified to one or both of the competition authorities—the beginning of the initial contacts stage. The agents can sometimes be alerted to pending mergers simply by reading financial newspapers or through informal discussions with firms. In such cases, the merger may not have been formally notified, but the competition agents can bring it to the attention of their foreign counterparts and discuss its implications in a hypothetical sense. These discussions must remain hypothetical and avoid concrete details because the regulators take great care not to broach confidentiality requirements during such informal initial contacts.

Initial contacts can function as an "early warning" system for possibly divergent analyses between EU and US competition agents. For example, in order to respect confidentiality requirements, EU and US competition authorities frequently engage in hypothetical discussions over market definitions and other analytical concepts of merger review that may apply to individual merger cases soon to be notified. In such cases, competition agents may speak in loose terms about, for example, a pending notification that is expected from "some firms in the telecoms market". Thus, while respecting confidentiality requirements, regulatory agents are able to make informal initial contacts as the first stage of implementation cooperation. By discussing market definitions and analytical concepts, even hypothetically, before receipt of the formal notification, the agents can alert each other to the potential use of different approaches to evaluating a merger that could lead to divergent decisions. Of course, if the firms proposing a merger agree to waive their rights to confidentiality, initial contacts need not be limited to hypothetical discussions.

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[362] High-level contacts among EU and US competition authorities may also be considered "initial contacts", but they occur outside the process currently under investigation. The Commission reports annually on these high-level contacts. For example, the following high-level contacts were reported in 2001:

> There were numerous bilateral contacts between the Commission and the relevant US authorities during the course of 2001. Commissioner Monti paid a visit to Washington in March, and used the occasion to meet, among other persons, key members of the administration. On 24 September, he met in Washington the newly appointed heads of the US antitrust agencies, Assistant Attorney General Charles James of the [DoJ] and Chairman Timothy Muris of the FTC, for the annual bilateral EU/US meeting. The meeting coincided with the 10th anniversary of the EU/US bilateral agreement on competition policy (European Commission 2002, 116-117).

The European Commission provides a useful example of the fruits of cooperation that can follow from informal initial contacts:

> Bilateral cooperation was particularly intensive with regard to the large oil merger cases, most notably with regard to the Exxon/Mobil merger. Informal contacts between the FTC and the Commission started soon after the announcement of the Exxon/Mobil transaction (December 1998), long before the formal notification occurred in May 1999. This allowed the EU and US authorities to discuss the particular competition concerns for future oil and gas output which they feared might stem from the creation of so-called 'super majors' (European Commission 2000, 99).

Thus, in the Exxon/Mobil merger case, informal initial contacts reduced the likelihood of divergent decisions because EU and US competition agents were able to discuss the parameters of relevant product markets (oil and gas), the identification and characteristics of possibly dominant positions (super majors) and the future market impact of the transaction. All of these cooperative exchanges of information occurred under the discretionary authority of the agents and were initiated approximately five months prior to the receipt of formal notification of the merger. As a result, the competition agents were able to discuss in detail important aspects of the merger and coordinate their approaches long before the statutorily mandated timetables were set in motion by the formal notification.

Initial contacts can significantly expand the competition agents' discretion because they allow information exchanges prior to opening the formal procedures for cooperation under the terms of the Bilateral Agreement. Because competition agents can discuss expected mergers and exchange information prior to the firms' formal notification, initial contacts also increase discretionary flexibility regarding the strict statutory procedures (including formal deadlines) embodied in the HSR and MCR.

2. Notification Contacts

The next stage of implementation cooperation is characterized by notification contacts. These notifications contacts are formal, written exchanges between the competition agents. As such, they should not be confused with the formal notifications that merging firms are required to submit separately to the competition agents pursuant to the HSR and MCR.

Notifications occur when one competition authority informs the other that it is initiating a competition investigation that may affect interests in the foreign jurisdiction. These notification contacts are explicitly outlined in the 1991 Bilateral Agreement. According to the framework established under the agreement, this stage of implementation cooperation is triggered when merger review (or other non-merger proceedings) by one jurisdiction may affect the "important interests" of the other jurisdiction. Article II.2 of the Bilateral includes a number of circumstances that ordinarily trigger implementation cooperation, and "thereby give each party the opportunity to determine the extent to which its important interests might be affected" (Parisi 1999, 136).[363]

Due to differences in domestic legislation, the EU and US deal with these notifications differently. The Commission notes differences in notification procedures that arise from EU and US domestic legislation and summarizes the EU-US notification process as follows:

> on receipt of a notification [from the merging firms], the Commission publishes a notice of the fact of the notification [from the merging firms] in the Official Journal. Thus the proposed merger is made public at the outset and all mergers meeting the criteria for notification to the US are notified, even where, on subsequent examination, they do not raise competitive concerns. The corresponding US legislation[364] requires that the fact of a merger filing, as well as its content, remain confidential. Thus the US authorities notify the Commission only when, after a preliminary examination, they decide to open an investigation into the proposed merger (1996, 3.1).

[363] This list of triggering circumstances includes matters that

- are relevant to enforcement activities of the other party;
- involve anti-competitive activities (other than a merger or acquisition) carried out in significant part in the other party's territory;
- involve a merger or acquisition in which one or more of the parties to the transaction, or a company controlling one or more of the parties ot the transaction, is a company incorporated or organized under the laws of the other party or one of its states or member states;
- involve conduct believed to have been required, encouraged or approved by the other party; or
- involve remedies that would, insignificant respects, require or prohibit conduct in the other party's territory (Parisi 1999, 1136).

[364] Hart-Scott-Rodino Act, 1976, 15 U.S.C.§ 18A(h).

The procedures established under the Bilateral for formal EU-US notification of a merger have also influenced the internal discretionary procedures followed by competition agents. For example, the Bilateral led directly to the creation of new, discretionary procedures by the Competition Directorate (i.e., DGIV):

> The first practical step taken by DG IV was the elaboration of a set of guidelines for its case handlers, identifying the criteria which would trigger notification [to the US] and the stages in the procedure when notification [to the US] should be made. These guidelines have now been inserted in DG IV's internal manual of procedures (European Commission 1996, 3.2).

As the revised cross-level approach in Chapter 2 suggests, EI contributes to an increasing volume of internationally-oriented merger activity, which, in turn, increases notification contacts between the EU and US. The European Commission suggests such a linkage between EI and the increasing levels of EU-US notification contacts in 2001:

> During 2001, the Commission continued its close cooperation with the [DoJ and FTC] in an ever greater number of cases. The trend towards the globalisation of markets continued apace during the year, as most vividly illustrated by the record number and scale of transnational mergers: the year 2001 saw a notable increase in the number of transactions notified to both the Commission and the US antitrust agencies (2002, 116).

Table 9 illustrates the increasing number of total EU-US competition notifications and merger notifications since implementation cooperation began in 1991. The increasing levels of notifications since 1991 are positively correlated with the increasing number of concurrent jurisdiction competition cases caused by EI since 1990 and the commitment of the EU and US competition agents to coordinate their competition investigations in such cases.

Table 9: EU and US Notifications, 1991-2000[365]

Year	EU Competition Notifications[366]	US Competition Notifications			Merger Notifications	
		FTC	DoJ	Total	EU	US
1992[367]	26	20	20	40	11	31
1993	44	22	18	40	20	20
1994	29	16	19	35	18	20
1995	42	14	21	35	31	18
1996	48	20	18	38	35	27
1997	42	12	24	36[368]	30	20
1998	52	22	24	46	43	39
1999	70	26	23	49	59	39
2000	104	26	32	58	85	49

Table 9 also suggests no systematic variation in EU-US implementation cooperation between cases investigated by the FTC or DoJ. Majone argues that the effective control of regulatory agents may vary depending on whether they are located within the executive branch or independent regulatory commissions (1996a, 38). For

[365] Source: European Commission (2001a), Report to the Council and European Parliament, p. 8. The figures reported in Table 9 require two stipulations. As the Commission notes, "Under Article II of the Agreement, notifications are made at certain stages of the procedure and so several notifications may be made concerning the same case. For instance, in the *Boeing/McDonnell Douglas* case the Commission sent seven notifications to the US authorities and received six notifications from the FTC on the same case" (European Commission 1998a, 5.1). However, the figures given in the table represent the number of cases in which one or more notifications took place and not the total number of individual notifications. In addition,

> The cases listed below are those which fall directly under the EC/US Agreement and are dealt with in the US by either the US DoJ or the FTC. Some competition cases are dealt in the US by other agencies, for instance the US Department of Transportation (DoT), the Federal Maritime Commission (FMC) or the US Department of Commerce (DoC). These agencies do not formally cooperate with the Commission directly, but do so indirectly, mostly through the DoJ. There are therefore informal contacts between the Commission and these agencies. These cases are not discussed in this report [and are therefore not included in Table 9] (European Commission 1999, 4).

[366] The numbers reported for EU and US "Competition Notifications" include both merger and non-merger notifications. Table 9 separates out merger notifications in the last two columns to demonstrate that they account for the bulk of all competition notifications.

[367] Notifications since 23 September 1991.

[368] The Commission explains the slight decrease in the number of total notifications from 1994-1997 by the circumstances created by the ECJ's decision in August 1994 on the Bilateral Agreement. As the Commission argues,

> the limited scope of cooperation during the period prior to 10 April 1995 has meant that the information available for that period does not provide a good basis for comparison. In particular, during the period following the judgment of the Court of Justice, notifications under the Agreement were suspended pending approval of the Agreement by the Council. Notifications were made nonetheless, in accordance with the 1986 OECD Recommendation (1996, 1).

example, the FTC is dependent on Congress for its budget. Due to this dependence on Congress, the DoJ may be more independent than the FTC even though the former is part of the executive branch. Despite this possible variance in regulatory independence, as Table 9 and research interviews indicate, the number of notifications to the EU does not vary significantly or systematically between the FTC and DoJ. This supports the claim in Chapter 3 that, while located in different parts of the government, the DoJ and FTC still share the same preferences and are not subject to different degrees of control in their respective pursuit of implementation cooperation with the EU.

3. Review Process Contacts

Following the receipt of a formal EU-US notification, the competition agents engage in a variety of cooperative contacts during their respective review processes. These review process contacts "can focus on any or all of the main issues likely to arise in the context of a merger investigation" (Monti 2001a, 2). During the merger review process, such contacts can occur via telephone calls, faxes, emails and even face-to-face interactions during oral hearings and pitch meetings (as provided for under the AAA).

Review process contacts include a variety of exchanges of information designed to reduce the likelihood of divergent decisions. More specifically, review process contacts frequently target substantive issues such as the definition of relevant product and geographic markets[369] and the assessment of the likely competitive effects of the proposed merger on the relevant markets (European Commission 2000a, 3). However, even the use of similar market definitions does not always guarantee convergent decisions because of differing market conditions and competitive realities in the EU and US (Janow 2000, 44).

Review process contacts occur under the discretionary authority of the regulatory agents. However, information exchanged during these contacts must respect the rights of confidentiality afforded to firms by domestic law. In fact, competition agents are very careful to conform to this constraint on their discretionary authority for fear of violating relevant domestic statutes, which, in turn, are likely to prompt principal intervention. This feature of the institutional landscape of EU and US competition policies opens a potential avenue for firms to exert influence in concurrent jurisdiction merger reviews. However, as discussed above, most firms waive their rights to confidentiality in merger cases in order to facilitate EU-US implementation cooperation and expedite the review process. In fact, competition agents explicitly encourage merging firms to waive their rights to confidentiality as a way to increase the effectiveness of cooperation and the likelihood of consistent decisions.[370] As discussed below, divergent decisions are not necessarily inevitable when firms refuse to waive their rights to confidentiality.

EU and US competition agents do not typically make public comments regarding their respective review processes or transatlantic review process contacts. Rather, they prefer (and in some cases are legally required by domestic law) that their respective review processes and transatlantic review process contacts remain confidential until they are prepared to announce publicly whether or not to oppose a proposed transaction. Similarly, the competition agents prefer that other actors not publicize ongoing cases.[371] Such publicity can lead to a politicization of the merger review process. Demonstrating this aversion to publicity during the review process, Parisi argues an important point for the current chapter that

> trying the case in public is of little utility. The U.S. agencies normally keep silent during the course of an investigation—even where the press reports on it.[372] And

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[369] Markets are defined in the US by specific guidelines in the "DOJ and FTC Horizontal Merger Guidelines. The EC has adopted a notice on market definition that in many ways is very similar to the market definition section of the U.S. merger guidelines" (ICPAC 2000, 50).

[370] As the Commission notes, "The Commission has begun to take the initiative in suggesting to notifying parties a 'standard form' waiver, which they are invited to sign, and hence to minimise the time spent on negotiating the terms" (1999, 4.2). The Commission describes the benefits of these waivers during review process contacts:

> It is becoming more common for case handlers to ask for waivers on a routine basis in order to enable the agencies to exchange confidential information between one another. Frequently the main benefit of this is not so much the information which might be exchanged, but the removal of constraints which prevented the agencies from having a free and unfettered dialogue. For example, such exchanges prevent misunderstandings which might otherwise arise owing to an imperfect understanding of the position or intentions of case handlers in the other jurisdiction. And where co-operation is carried into the investigation stage, a co-ordinated approach can reduce the burden on the notifying parties and third parties (European Commission 1999, 4.2).

[371] For an example of firms attempting to publicize a merger review and reactions by competition agents, see the GE/Honeywell case discussed below.

[372] FTC policy does permit public confirmation of the existence of a merger or non-merger investigation under certain circumstances, particularly where the subjects of the investigation themselves have disclosed

> FTC Commissioners are constrained by judicial decisions limiting their utterances while an action is pending, lest their decision be tainted with prejudice.[373] Suffice it to say that trying to use the press as a separate front for advocacy of your case is a diversion from the necessary task of dealing effectively with the enforcement agency on the merits of the case. The same can be said for 'politicizing' the matter by appeals to parliamentarians or officials of other government agencies (1999, 141).

Review process contacts occur in most internationally-oriented merger cases that are simultaneously investigated by EU and US competition agents. Unfortunately, systematic and consistently reliable reporting of these intensive and sometimes mundane and technical contacts is not available. Therefore, the current study cannot provide a qualitative analysis of each of the nearly six hundred mergers notified between the EU and US between 1991-2000.[374] However, selected evidence of close and "effective" (i.e., contributing to convergent decisions) implementation cooperation is documented and made regularly available in a variety of forms. For instance, such references are ubiquitous in speeches made by EU and US competition officials.[375]

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the existence of the investigation to the public. See FTC Policy Concerning Disclosures of Non-merger Competition and Consumer Protection Investigations, 63 Fed. Reg. 219 (Nov. 13, 1998).

[373] See *Texaco, Inc. v. FTC*, 336 F.2d 754 (1964); *Cinderella Career and Finishing Schools, Inc., et al. v. FTC*, 425 F.2d 583 (1970).

[374] In this regard, the opportunity for quantitative analysis is also limited. Early research efforts in the current study attempted to construct a database of EU-US implementation cooperation that could be used to evaluate statistically the patterns of behavior and to engage in subsequent hypothesis testing. However, much of the information in individual merger cases that would be necessary to assess cooperation and answer the research question presented in the current study was either inconsistently reported by multiple sources (e.g., EU, US, firms, international organizations, media outlets) or unavailable due to confidentiality restrictions. Examples of such information that would be useful for operationalizing potentially important explanatory variables include the number and nature of:

- waivers granted by firms
- EU-US notifications
- jobs jeopardized by merger
- market shares effected
- expected impact of merger on markets
- degree of public ownership and/or contracts of merging firms
- comity considerations of "important interests" by competition agents.

Despite the obstacles to acquiring this information, future research plans include continued efforts to compile such relevant information.

[375] For example, Monti uses examples of EU-US cooperation in specific merger cases (2001a). On the US side, see Parker (1999) and Starek (1997).

More formally, the European Commission reports annually to the European Parliament and CoM on bilateral cooperation with the US competition authorities.[376] These reports showcase and provide brief descriptions of competition cases in which EU-US review process contacts are particularly effective or ineffective.[377] This series of reports is used in the current study to identify a specific population of individual concurrent jurisdiction mergers.[378] The selected mergers are not intended to be a representative sample. Rather, they are used to illustrate how review process contacts generally contribute each year to EU-US implementation cooperation. The cases also provide empirical insights that are useful for evaluating the patterns of behavior posited in Chapter 2.

Table 10 lists all of the merger cases that have been highlighted in the Commission's annual reports and the significance (according to the Commission) of each. Further details of those mergers that provide useful insights for the current study are discussed below on a case-by-case basis. The table is limited to merger activity since 1995, because the Commission's first report was mandated only after the ECJ's ruling on the 1991 Bilateral Agreement. Some of the merger cases are also notable for the implementation cooperation that occurred in the remedial contacts stage, which will be discussed in the next subsection.

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[376] These reports are available at http://europa.eu.int/comm/competition/international/bilateral/. The reports on bilateral activity are typically included in the general reports the Commission submits on competition policy across the entire Single European Market. The reports on bilateral activity with the US originated in 1995 following the ECJ's decision on the 1991 Bilateral Agreement. The Commission and CoM jointly agreed that the Commission should submit annual reports evaluating the implementation of cooperation to the CoM and European Parliament. The US DoJ and FTC do not offer a similar compilation of transatlantic competition cases. Beginning in 2000, the Commission's annual report on cooperation with the US also included, but keep separate, bilateral cooperation with Canada. Cooperation with Canada was included because the EU signed a bilateral competition agreement with Canada on June 17, 1999.

[377] Two merger cases that are examples of ineffective cooperation—Boeing/McDonnell Douglas and GE/Honeywell—are discussed in detail below.

[378] This method of case selection is imperfect. For example, due to confidentiality restrictions, the reports contain discussions of some mergers without naming the firms involved. Such discussions are used simply to illustrate points made in the reports. The reports do include lists (as annexes) of all merger and non-merger (including joint ventures) notifications made. However, these lists typically do not include cases that were ongoing at the time of publication. Rather, such cases appear in the annual report that follows closure of the case.

Table 10: Selected EU-US Merger Cases, 1995-2000

Year	Merging Firms	Significance
1995-1996 (April 10, 1995-June 30, 1996)	Kimberley-Clark/Scott Paper	Inconsistent, but not conflicting remedies
	Glaxo/Wellcome	Prompted EU and US to exchange general views on product market analysis in pharmaceutical sector
	Hoechst/Marion Merrill Dow	
	Upjohn/Pharmacia	
	Shell/Montecatini	Global geographic market, but EU and US concentrated on effects in their respective domestic markets
	Lockheed Martin/Loral	EU identified global market; US identified national market
	BT/MCI (I)	Cooperation limited by lack of waiver of confidentiality
1996 (July 1-December 31, 1996)	Sandoz/Ciba-Geigy	Cooperation defining product and geographic markets and terms for approval; overcame different timetables as firms waived confidentiality
	Baxter/Immuno	Overcame different timetables
1997[379] (January 1-December 31, 1997)	Boeing/McDonnell Douglas	Agreed on product and geographic markets but not final decision; displayed elements of comity
	BT/MCI (II)	Cooperation in refining new product market definitions
	Guinness/Grand Metropolitan	Cooperation defining product markets led to compatible remedies
	Dupont/ICI	Cooperation defining product markets
1998 (January 1-December 31, 1998)	WorldCom/MCI	Example of "best-practices" for cooperation; US agents attended EU oral hearings; extensive remedy discussions; cooperated on implementation of undertakings offered
	Price Waterhouse/Coopers & Lybrand	"Headline case"[380]; substantial cooperation during review process; required clearance by competition agencies other than EU and US
	Travelers Group/Citicorp	"Headline case"; limited EU-US cooperation

[379] The Commission notes that this report does not cover a number of aviation merger cases (1998a, 5).
[380] The Commission refers to these mergers as "headline cases" due, in large part, to the high announced value of the merger (European Commission 1999, 4.2).

	BP/Amoco	"Headline case"; limited EU-US cooperation
	Exxon/Mobil (I)	"Headline case"
	SBC/Ameritech	"Headline case"
	Daimler Benz/Chrysler	"Headline case"; limited EU-US cooperation
	AHP/Monsanto	"Headline case"; conditions of competition different in Europe and US
	KPMG/Ernst & Young	"Headline case"
	Hoffman-La Roche/Boehringer Mannheim	Conditions of competition different in Europe and US; cooperation on remedies
	Halliburton/Dresser	Cooperation on remedies and their implementation
	Wolters Kluwer/Reed Elsevier	Substantial cooperation in review process
	Exxon/Shell	Substantial cooperation in review process and remedies
	Marsh & McLennan/Sedgwick	Substantial cooperation in review process
1999 (January 1-December 31, 1999)	Exxon/Mobil (II)[381]	Multi-stage cooperation with EU agents visiting FTC
	BP Amoco/ARCO	Substantial cooperation between EU and FTC
	Allied Signal/Honeywell	Multi-stage cooperation between EU and DoJ; overcame different timetables
	BOC/Air Liquide	US's first use of AAA
2000 (January 1-December 31, 2000)	Time Warner/EMI	US agents attended EU's oral hearings; cooperation in "new economy" market analysis; merger terminated and notification withdrawn
	MCI WorldCom/Sprint	EU's first use of AAA; US agents attended EU's oral hearings; cooperation in "new economy" market analysis; first merger involving US company to be prohibited by Commission
	AOL/Time Warner	US agents attended EU's oral hearings; cooperation in "new economy" market analysis
	Boeing/Hughes	Substantial EU-FTC cooperation

[381] This merger appears in two separate reports because it was announced December 1998, but notified May 1999.

	Astra Zeneca/Novartis	Substantial EU-FTC cooperation; firms offered EU and US same remedies to solve competition concerns in different regional markets
	Alcoa/Reynolds	Substantial EU-DoJ cooperation; EU cooperation with Canadian and Australian competition authorities

Table 10 suggests a variety of reasons for, modalities of, and obstacles to EU-US implementation cooperation. A number of insights from Table 10 are particularly useful for demonstrating certain patterns of behavior posited in Chapter 2 (i.e., P4 and P6). The following discussion of review process contacts reveals the lessons from selected merger cases included in Table 10 and relies heavily on the descriptions provided in the Commission's bilateral reports. Table 10's insights into the remedial contacts stage are discussed in the next subsection.

Under the report covering 1995-1996, one merger in particular exemplifies the role of information exchanges in implementation cooperation. The Lockheed Martin/Loral merger is an example of how EU-US information exchanges can provide competition agents with previously unknown information from a foreign jurisdiction that is necessary for reviewing a concurrent jurisdiction merger. The Commission notes the importance of such information exchanges: "Early in the investigation, the FTC was able to draw the Commission's attention to information filed with the Securities and Exchange Commission and thus on public record in the US. This proved helpful in evaluating the effects of the merger on the satellites market" (European Commission 1996, 4.3).

In 1997, the Boeing-McDonnell Douglas merger prompted a considerable degree of transatlantic attention. The cooperative problems encountered during this merger review are discussed in greater detail below. However, it is useful to note at this point that the merger did display some elements of comity. In particular, after transatlantic exchanges of information, the US requested comity considerations by the EU. As a result, the EU decided not to rule on the defense-related portion of the merger because it was considered an "important interest" of the US.

The BT/MCI (II) merger reveals the importance of cooperation during the review process for mergers that effect changing and/or new product markets. These contacts were also notable because they occurred during face-to-face meetings held in both the EU and the US, meetings held prior to the AAA. As the Commission reports,

> There were frequent contacts between EC officials and the Department of Justice in the course of the investigation of the then proposed *BT/MCI* merger. Meetings between the two sides were held in both Washington and Brussels. Because the case required assessment of product markets related to the offering of transatlantic telephony services, and in particular consideration of the impact of the merger against the background of international accounting rate arrangements, the discussions between the two sides were helpful not only in terms of refining market definitions, but also in pooling knowledge about the regulatory background on each side of the Atlantic (European Commission 1998a, 5.2.b.i).

The Guinness/GrandMetropolitan merger case displayed clear evidence of the benefits of cooperation during the remedial contacts stage, as discussed in the next subsection. Regarding review process contacts, this merger also provides a pre-AAA example of a competition agent attending another's proceedings: "Following requests put forward by the Federal Trade Commission, officials from the US authority were authorised by the Hearing Officer to take part as observers in the public hearings held pursuant to the EC Merger Regulation in the framework of the examination of the *Guinness/Grand Metropolitan* merger" (European Commission 1998a, 5.2.b.vii.).

A number of mergers in 1998 show the increasing levels and benefits of implementation cooperation between the EU and US competition agents. In particular, the WorldCom/MCI merger is frequently cited as an example of "best practices" in implementation cooperation because of the extensive contacts during the merger review process. As the Commission argues,

> An example of best cooperation practices is set by the *WorldCom/MCI* case, where the two case-teams worked smoothly together. Indeed, joint negotiations were undertaken between the parties and the US DoJ and the European Commission, as a result of which the parties agreed to find a buyer and to divest MCI's Internet activities prior to completing the merger" (European Commission 1999, 2.1).

The success of the cooperation in the WorldCom/MCI merger review has been attributed to the lessons learned in the Boeing-McDonnell Douglas merger, as discussed below.

A series of mergers listed in Table 10 suggests that the size of a merger is not directly correlated with the extent and intensity of EU-US implementation cooperation. One reason for this is that large mergers that meet EU and US notification thresholds may not have a significant and equivalent competitive impact in both jurisdictions. The Commission provides three examples of such mergers in 1998:

> It might be thought that large mergers would normally require more extensive cooperation simply because of their scale, but this is not necessarily true. While some relatively large cases fell technically within the EC jurisdiction, they had little or no competitive impact in Europe. This might be because the main focus of activity is outside Europe, such as in the *Travelers Citicorp* case, or because the merging parties were coming together from home positions in their respective territories and the competitive impact of the overlap was minimal. In the *Daimler Benz/Chrysler* and *BP/Amoco* cases each party was active principally in its respective home continent, but absent or not substantially present in the territory of the other, hence overlaps were marginal or non-existent. In such cases co-operation will be limited, and typically involve case handlers in the EC and US respectively making contact with one another, keeping each other informed about their respective timetables, and perhaps discussing product and geographic market definitions (1999, 4.2).

Similar to the informal initial contacts discussed above, review process contacts encourage competition agents to reach similar product and geographic market definitions. This cooperation is useful for reaching convergent decisions, especially when the merger in question is global or transatlantic in nature. The Commission notes such cases:

> More substantial co-operation in the assessment phase may arise where the geographic extent of the product or service markets is either world-wide, or covers both the United States and Europe. In these cases both agencies have an interest in ensuring consistency of product and service market definition, and in knowing whether the other believes there is a substantial competition issue. In *Price Waterhouse/Coopers & Lybrand*, *WorldCom/MCI*, *Wolters Kluwer/Reed Elsevier*, *Exxon/Shell* and *Marsh & McLennan/Sedgwick,* discussions took place about product market definition and geographic extent, with a view to confirming each agency's analytical approach (1999, 4.2).

When competition agents do use different market definitions, they typically analyze different market conditions, which can increase the likelihood of divergent decisions. However, the EU and US competition agents may use different market definitions and still benefit from implementation cooperation. For example, EU and US competition agents may adopt different definitions of relevant markets,

> but find co-operation helpful in establishing why those differences exist, and to satisfy themselves that they are comfortable with their own reasoning. *American Home Products/Monsanto*, and *Hoffmann-La Roche/Boehringer Mannheim*, were cases where the conditions of competition were different in Europe from those in the US. Even if the product or geographic markets and hence the competition analysis differ, there may still be cases where a certain co-ordination of treatment of remedies is desirable (1999, 4.2).

Thus, implementation cooperation encourages the review and self-evaluation of market definitions employed by competition agents. As the discussion suggests, competition agents are able to overcome the possible pitfalls (i.e., divergent decisions) associated with analyzing different product and/or geographic markets. While their definitions of relevant markets may diverge, they can still reach convergent decisions on remedies, which ultimately reduces the likelihood of political intervention during the later stages of implementation cooperation.

Prior to 1999, the EU and US competition agents attended certain stages of each other's review process on a case-by-case basis. However, general procedures for such attendance on a reciprocal basis were formalized in the AAA (see Chapter 4). These attendance exchanges are designed to increase the exchange of information in individual merger reviews. However, such exchanges of information do not guarantee the competition agents will reach convergent decisions during or at the conclusion of their review process contacts. The first case of attendance under the AAA suggests such limitations. The EU and US competition agents cooperated closely on the 1999 BOC/Air Liquide merger, with the FTC attending the EU's oral hearing. Despite the close cooperation and information exchanges provided during their review process contacts, the EU and US competition agents pursued divergent remedies (Monti 2001a, 4).[382]

[382] However, it should be noted that the remedies were inconsistent, not conflicting.

The Commission's report on bilateral cooperation with the US in the year 2000 reflects the increasing number of internationally-oriented mergers and the complications of mergers in "new" sectors (i.e., those requiring new market definitions for analysis).[383] A series of large mergers in the multimedia sector demonstrate such complications. The Commission describes these mergers and notes the benefits of implementation cooperation in reviewing them:

> Transatlantic co-operation during 2000 was particularly intensive with regard to the big 'new economy' and multimedia merger cases, notably in the *AOL/Time Warner, Time Warner/EMI* and *MCI WorldCom/Sprint* merger cases… Representatives from the DoJ (*MCI WorldCom/Sprint*) and the FTC (*AOL/Time Warner, Time Warner/EMI*) attended the oral hearings of the parties intending to merge, and there were regular telephone calls, e-mails, exchanges of documents, and other contacts between the case teams.
>
> In the *AOL/Time Warner* and *Time Warner/EMI* cases, discussion between staff on both sides focused most closely on the assessment of the effects that the proposed transactions would be likely to have on competition in the music markets (e.g. recorded music, music publishing and on-line distribution through Internet). Ultimately, in the light of the objections advanced by the Commission to the proposed transaction, the *Time Warner/EMI* deal was terminated and the parties withdrew their notification…
>
> In *MCI WorldCom/Sprint*, the Commission quickly reached the conclusion that this proposed merger between two US telecommunications companies would have worldwide effects. The Internet is global in nature; Internet access and service providers, Internet content providers, end-customers, all demand universal connectivity to the worldwide web. The Commission had found already in 1998, when it investigated the merger between WorldCom and MCI, that there is a global market for top-level (universal) Internet connectivity and that the impact of this merger between these two US companies affected not only US consumers but also *inter alia* European Union consumers… *MCI WorldCom/Sprint* was the first merger

[383] For a useful recent discussion of the challenges facing competition agents trying to regulate "new" industries, see Walker (2002).

> involving a US company to be prohibited by the Commission[384] (European Commission 2002a, 1.2.1).

As the preceding excerpt suggests, final decisions can vary considerably between mergers in the same sector. Yet, the EU and US competition agents cooperated closely via discretionary review process contacts and were able to avoid divergent—in particular, conflicting—decisions.

4. Remedial Contacts

Remedial contacts occur when EU and/or US competition authorities determine that certain conditions will have to be met before final approval is granted to a proposed merger.[385] The consideration of remedies, which are submitted by the firms, is part of the overall merger review process. However, this is considered a separate stage of implementation cooperation for the current study because, while competition agents may agree throughout the review process contacts, they may disagree on the precise nature of the remedies necessary for approval. Like the other stages of implementation cooperation, remedial contacts occur under the discretionary authority of the EU and US competition agents.

As the Commission argues, EU-US cooperation via remedial contacts is specifically in the interest of the firms involved: "co-operation in the devising of remedies can help the notifying parties avoid 'double-jeopardy' whereby they are required to negotiate remedies sequentially, and thus have to make further concessions to the second agency to secure the clearance of a deal which has already received the blessing of the first" (European Commission 1999, 4.2).[386] While remedial contacts are important for merging firms, their importance for competition agents is fundamentally based in the fact that disagreements over remedies can lead to divergent decisions, which, in turn may prompt principal intervention. As discussed below, remedial contacts have evolved to include discretionary cooperation in market testing and implementation of

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[384] This merger appears to be only the third case in which the EU investigated two US firms. According to EURECOM: "this is the first instance where the Commission has blocked a merger by two firms not based in the EU" (2000, 1) even though the DoJ had issued an earlier decision that it would block the merger, which prompted the firms to announce the withdrawal of the merger notice.

[385] For more on the types of remedies typically employed in merger reviews, see Chapter 3.

[386] See also Parisi (1999, 141) for a similar argument.

remedies, two practical areas of merger review not explicitly identified in the Bilateral Agreement.

Again, the current study does not provide a qualitative analysis of the remedies reached in each of the nearly six hundred mergers notified between the EU and US competition agents. Rather, qualitative evidence is drawn from the Commission's reports on bilateral cooperation with the US as well as commentaries by EU competition officials. Specific merger cases selected from Table 10 are used to reveal the general benefits and implications of remedial contacts.

The Commission's description of the Guinness/Grand Metropolitan merger indicates the benefits that may follow from firms waiving their rights to confidentiality during the remedial contacts stage. As the Commission argues,

> In the *Guinness/Grand Metropolitan* case the parties were prepared, once negotiations had reached a certain point, to allow discussions to take place between the antitrust authorities on the proposed remedies. This was valuable in ensuring an element of coordination which might not otherwise have been possible. In particular it ensured that the remedies finally agreed upon in each of the jurisdictions were consistent with one another (1998a, 5.2.b.v.).[387]

The Boeing/McDonnell Douglas merger reveals the role of comity during the consideration of remedies for a merger on which the EU and US disagreed:

> Although the FTC was not concerned about remedies in the *Boeing/MDD* case, as they would eventually clear the merger, the Commission, which was looking very closely at some form of divestiture of DAC,[388] informed the FTC of such a possibility. However, as the FTC expressed reservations on the feasibility of such a remedy, and given that the Commission's enquiry showed that there was no potential buyer for DAC, the Commission informed the

[387] Devuyst agrees, arguing

> The merger of 1997 between the UK-based groups Guinness and GrandMetropolitan, both active in the production and distribution of whisky and other spirits, is an example of a large merger involving separate national markets. The economic analysis of both the European and US spirits markets revealed variations in consumption patterns from one country to another. Although EC and US regulators used different product and geographic market definitions for their respective assessments, they nevertheless needed cooperation to understand each other's thinking… The remedies adopted by the Commission, which involved the divestment of particular brands, were closely coordinated with the remedies adopted by the FTC to ensure consistency as regards both content and timing (2001, 139).

[388] Douglas Aircraft Corporation.

> FTC that it would take into account its concerns and would therefore abandon the idea of DAC's divestiture (European Commission 1998a, 5.2.b.v.).

The "best practices" merger of 1998, WorldCom/MCI, also presents examples of close cooperation during the remedial contacts stage. The Commission's report reveals the extent to which remedial contacts can occur, including cooperation in market-testing and assuring the implementation of remedies. Through market-testing, competition agents determine whether the remedies offered by merging firms will satisfactorily address their competition concerns. One means by which competition agents engage in market-testing is to ask for comments from third parties (e.g., relevant market players, including consumers, producers, competitors) on the likely impact of the proposed remedies. Once competition agents accept a package of remedies, they then must ensure that the newly merged firm implements the measures, whether they are behavioral or structural. Due to fewer personnel resources, the EU may be at a disadvantage compared to the US ensuring that firms implement the agreed remedies. The practical impact of this limitation is discussed below in relation to the GEH merger.

The Commission's report is also useful for comparing remedial contacts in the best practice WorldCom/MCI merger with experiences in Exxon/Shell and Halliburton/Dresser:

> In *WorldCom/MCI* and *Exxon/Shell* cases the cooperation which had begun during the assessment [review process contacts] stage was continued when discussions of remedies began. In *WorldCom/MCI* trilateral remedy negotiations were conducted between the notifying parties and the two agencies. In addition, the [DoJ] and the Commission jointly conducted the market testing of a first set of remedies. This included the presence of one person from DG IV case team in the DoJ premises to take part to the DoJ market testing. In *Exxon/Shell*, the remedy was extensively discussed between the US and EC agencies before either agency came to a final view.
>
> There are as yet few cases on record where co-operation has taken place regarding the implementation of undertakings [i.e., remedies] offered, but this may be an area of growth in the future. In *WorldCom/MCI* there was an exchange of letters between the EC and the US DoJ where the Commission requested the DoJ's co-operation regarding the undertakings which were mutually offered by

> the parties to both the Commission and the DoJ. The DoJ confirmed that it would take whatever steps are necessary and appropriate to evaluate, and if it found them to be sufficient, to seek the effective implementation of these undertakings.[389] In a good example of such co-operation, the *Halliburton/Dresser* case was cleared within the first Phase in the EC, but in the US it took somewhat longer because of several serious problems identified there. One of the problem areas found related to the market for drilling fluids. Although this was of concern to the European Commission as well as to the DoJ, the US Antitrust Division as considered to be better placed to deal with it, as it involved divestitures of assets located in the US. Therefore, the Commission kept in close contact with its US counterparts, and relied on their pursuing the required divestiture as an element in deciding to clear the case at Phase 1. Subsequently, the US Antitrust Division kept the Commission fully informed throughout the divestiture process (European Commission 1999, 4.2).[390]

This description of cooperation through remedial contacts shows that implementation cooperation has evolved to include market-testing and the implementation of remedies. These two developments increase further the likelihood of the competition agents reaching convergent decisions on remedies. And, notably, coordination of market-testing and implementation of remedies represents a discretionary increase in cooperation not originally envisioned in the Bilateral Agreement.

The next important example of EU-US remedial contacts comes from the Astra Zeneca/Novartis merger in 2000. This merger case is a unique example of competition agents agreeing to the same remedies despite focusing on different regional markets and operating under different timetables for their respective reviews:

> The Commission co-operated closely with the FTC in the treatment of the *AstraZeneca/Novartis* merger case, in particular so to a find a common solution to the problems identified in the markets for cereal fungicides and maize herbicides. Co-operation proved particularly useful for both authorities because they had been offered the same commitment [i.e., remedy] in order to solve competition

[389] As Devuyst argues, "The two authorities continued to cooperate until the undertakings were fully implemented and exchanged formal letters to this effect" (2001, 139).

[390] ICPAC provides similar evidence: "rather than negotiating separate undertakings with the merging parties, the EC relied on the provisions of a U.S. consent decree to satisfy its concerns regarding a perceived global problem in drilling fluids" (ICPAC 2000, 76).

> concerns on different regional markets. In this particular case of world-wide divestitures of both Novartis' strobilurin business and AstraZenaca's acetochlor products, co-operation between the authorities was needed to ensure that the final commitments accepted were not contradictory and that the buyer would be acceptable to both authorities. In fact, in view of the FTC's request to have a 'buyer upfront' for these businesses before approving the deal, the parties had already started to implement the commitment of looking for a buyer before the commitment could be finally accepted by the Commission (European Commission 2002a, 1.2.1).

As this description suggests, the competition agents engage in remedial contacts in order to reduce the likelihood of "contradictory" (i.e., conflicting) decisions. This evidence is consistent with claims made throughout the current study that agents cooperate in order to avoid divergent decisions.

Table 10 is limited to merger activity from 1995-2000. However, in a speech at France's the Centre d'économie Industrielle, Ecole Nationale Supérieure de Mines, EU Competition Commissioner Mario Monti discussed two examples of merger cases in 2001, in which EU-US discretionary remedial contacts contributed to overall implementation cooperation:

> In the Metso/Svedala case, close co-operation between the Commission and the FTC took place not just during the Commission's investigative period, but also during the implementation phase of the remedies, after the Commission's decision had been issued. Indeed, due to different time constraints in the two jurisdictions, the FTC investigation continued after the Commission's investigation had been concluded.
>
> Thanks to this very close co-operation, the Commission and the FTC were able to request very similar undertakings, in the form of divestiture of various rock-crushing businesses, and to approve at the same time the buyer for the business to be divested. The difference of timing allowed the approval to take place at the same time, even when the FTC had adopted an up-front solution.
>
> The Nestlé/Ralston Purina case is another example of enhanced co-operation, in this case a tripartite one, between the European Commission, the FTC and the Canadian Competition Authority.

> In this case, the affected markets were of a national dimension, and, therefore, the competition problems examined and the remedies adopted by each authority had to be different. However, the authorities discussed their respective cases in detail, in particular market definition, as well as the principles they intended to apply to find appropriate solutions.
>
> Finally, the Commission approved the acquisition, subject to divestitures of plants and brands in Spain, Italy and Greece. The remedial action chosen by the FTC with regard to the US market is also very similar. The only element of distinction [i.e., inconsistency] between the two remedies packages is that, while the brand divestiture was permanent in the US, the Commission accepted a licensing of the divested brand for a limited period of time combined with a re-branding by the proposed buyer in order to avoid a situation where the ownership of some pet food brands would be permanently split in different parts of the Community (Monti 2002, 6-7).

Monti's description reveals a potentially important insight into EU-US cooperation. The fact that the EU and US reached inconsistent, but not conflicting, decisions in the cases suggests that inconsistent decisions may not be as likely to prompt political intervention as conflicting decisions. This finding remains inconclusive, however, as the BMD and GEH merger cases discussed below provide contrary insights. This issue is addressed in greater detail in Chapter 6.

Remedial contacts represent the last practical stage of EU and US competition agents engaging in implementation cooperation. Based on the data provided in the Commission's annual reports and the commentaries of EU officials, remedial contacts provide another means by which EU and US competition agents reduce the likelihood of divergent (especially conflicting) decisions. In addition, the preceding discussion of remedial contacts reveals areas in which the EU and US competition agents are increasing their implementation cooperation through their discretionary authority—market-testing and implementation of remedies.

B. Flawed Cases of EU-US Implementation Cooperation

The preceding analysis suggests that EU-US implementation cooperation functions smoothly and tends to reduce the likelihood of divergent decisions. If competition agents have reduced the likelihood of divergent decisions, then political intervention should be unlikely in individual concurrent jurisdiction merger cases. In fact, this is what appears to have happened. However, political intervention, while infrequent, does still occur. While implementation cooperation has contributed to depoliticizing transatlantic competition relations by reducing the likelihood of divergent decisions, competition policy—especially international cooperation in competition policy—remains susceptible to politicization.

Signs of politicization are particularly witnessed in two concurrent jurisdiction merger cases: the 1997 Boeing-McDonnell Douglas (BMD) merger and the 2001 GE/Honeywell (GEH) merger. EU and US competition agents regard implementation cooperation to have been particularly "flawed" in these two cases. The current study uses the term "flawed" to indicate an outcome that deviates from the preferences of the competition agents. Such deviations display significant levels of political intervention in and/or public challenges by private actors to the merger review process despite implementation cooperation. Based on their preferences and the cooperative framework created by the regulatory agents, such political intervention and public challenges are undesirable outcomes. From the perspective of the competition agents, the occurrence of such undesirable outcomes suggests a flaw in the framework or in the way in which it was implemented in these two cases. Therefore, both of these cases require more in depth analysis to understand where and why flaws occurred in the different stages of implementation cooperation.

1. The Boeing-McDonnell Douglas Merger of 1997

The Boeing/McDonnell Douglas (BMD) merger was the first significant flawed case of EU-US implementation cooperation since the Bilateral Agreement first established a cooperative framework for transatlantic competition relations. The case provoked considerable public and private attention because it involved a merger between two large US firms that was challenged in the EU but approved in the US. The EU's divergent decision and the subsequent US reaction surprised many observers in Brussels and Washington and contributed to the high-profile of the case. Due to the intransigent positions of the EU and US, the case "took the United States and European Union to the brink of a trade war" (Evenett et al. 2000, vii).[391] However, according to the patterns of behavior posited in Chapter 2, the flawed nature of this case appears to be rather easily explained. The escalation of the case should not surprise observers because such a divergent decision by competition agents is likely to be perceived as a threat to national and/or constituent interests and, therefore, *should* prompt political intervention. In the end, the BMD merger was particularly significant not because of the escalation of political intervention, but because it served as a valuable learning experience on a number of fronts for both EU and US competition agents.

The intent of the current discussion is to draw out lessons from the BMD case that demonstrate the revised cross-level approach and reflect specific patterns of behavior (i.e., P4 and P6) posited in Chapter 2. Therefore, the current study provides only a brief overview of the merger case. More detailed reports of the substantive issues of the merger and the divergent analyses taken by the EU and US can be found elsewhere.[392]

This case began when the Boeing Company and the McDonnell Douglas Corporation (MDC), two US aerospace companies, announced plans to merge on December 15, 1996.[393] In accordance with the provisions of the Bilateral Agreement, and following the receipt of formal notification from the merging firms, the EU and US competition agents notified each other that they were both opening their own investigations into the BMD case.

Following a preliminary investigation in Phase I, the Commission announced its intent to open an in-depth Phase II investigation on March 17, 1997. The Commission was concerned that Boeing already enjoyed a dominant position in the global market for aircraft over 100 seats—a position that would be strengthened by adding MDC. More specifically, the deal would have increased Boeing's share of the market in aircraft over 100 seats from 64 to 70 percent and left Airbus as the only other competitor in that product market. In addition, the Commission was concerned that the merger would

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[391] For similar claims, see ICPAC (2000) and Coleman (1997).

[392] For example, see Damro (2001), Boeder (2000), ICPAC (2000), Van Miert (2000), Karpel (1998), Peck (1998) and Snyder (1997).

[393] According to the agreement, Boeing would purchase McDonnell Douglas for $13.3 billion.

increase significantly Boeing's defense and space business.[394] In early May, the EU's Competition Commissioner Karel Van Miert also expressed his concerns about Boeing's twenty-year exclusive supply agreements with American Airlines and Delta Airlines, declaring them "totally unacceptable" (Morrocco 1997, 24).[395]

On May 21, the Commission issued its formal Statement of Objections. The statement outlined the EU's concern that the merger would strengthen Boeing's existing dominant position. According to the MCR, such a transaction would be anticompetitive.[396] At this point, the US's FTC was unable to comment on the merger because its review was still ongoing (White House 1998a).

The EU's Statement of Objections included concerns over the impact of the merger on competition in the defense industry. However, following a communiqué from the US requesting comity considerations, the Commission agreed not to investigate the defense related portions of the merger. In accordance with the Bilateral Agreement, the Commission's decision reflected a determination that this aspect of the merger represented an "important interest" of the US. The fact that the EU dropped its defense related complaints suggests that the Commission calculated that including such a politically sensitive subject as defense would have increased significantly the likelihood of political intervention by the US principals (i.e., White House and Congress).

On July 1, it became apparent that the decisions of the EU and US competition agents were significantly diverging. On that day, the FTC approved the BMD merger. According to the FTC's analysis, the merger would not raise significant competition concerns because MDC was no longer competitive in the commercial transport market (Sparaco 1997, 67). Because the FTC approved the merger, remedial contacts between the US and EU competition authorities were necessarily limited.

In the hopes of gaining similar approval in the EU, BMD submitted a new package of remedies to the Commission. This package was rejected by the Commission

[394] The Commission was concerned that "Whilst Boeing's commercial aircraft operations have usually accounted for 70% to 80% of its total business, around 70% of MDC's total business is related to the defence and space center" (1997c).
[395] These agreements would have locked the airlines into purchasing arrangements requiring them to buy from only the newly merger BMD for twenty years.
[396] Under the MCR, the Commission is mandated to prevent the creation or strengthening of "a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it" (Article 2[2]).

after closed-door negotiations on July 16. According to Boeing, the Commission's rejection was based on lingering concerns over BMD's dominant position and the exclusive supply agreements (Boeing 1997a).

Facing an intransigent Commission and with a final decision in the case scheduled for July 23, US political principals began to intervene in the process with threats of retaliation. These threats of retaliation took the form of numerous foreign intervention instruments. Once it became clear that the EU would not approve the merger without remedies (i.e., a divergent decision), the White House intervened with President William J. Clinton stating that he might consider a complaint to the WTO or retaliatory tariffs if no resolution was reached.[397] The US legislature also intervened in the review process. Both the House of Representatives and the Senate passed resolutions opposing EU "interference" in a US business transaction.[398] On July 16, the US Senate unanimously approved a resolution that condemned the EU for its intentions (Wolf 1997).

Roberto provides a useful summary of the political intervention that occurred in the BMD case as well as the Commission's reaction:

> Congress, led by legislators from Boeing's home state of Washington, quickly responded. In its July 23, 1997 resolution chastising the EC's actions, the U.S. House of Representatives said the EC was 'apparently determined to disapprove the merger to gain an unfair competitive advantage for Airbus Industries, a government-owned aircraft manufacturer; and… this dispute could threaten to disrupt the overall relationship between the EU and the United States which had a two-way trade in goods and services of approximately $366 billion in 1996'.[399] Furthermore, resolutions passed in both the House and Senate vowed that any disapproval by the EC of the Boeing/McDonnell Douglas merger 'would constitute an unwarranted and unprecedented interference in a United States business transaction that would threaten thousands of American aerospace jobs'.[400] In addition, reports circled that the Clinton administration threatened to challenge government subsidies to Airbus Industries before the WTO

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[397] Clinton stated that "we have a system for managing this through the World Trade Organization and we have some options ourselves when actions are taken by Europe in this regard" (White House 1998b).

[398] H.R. Res. 191, 105th Cong. (1997), 143 Cong. Record 5550 (1997); S. Res. 108, 105th Cong. (1997), 143 Cong. Record 7609 (1997).

[399] H.R. Res. 191.

[400] H.R. Res. 191 and S. Res. 108.

> or to impose taxes or penalties on Airbus-manufactured planes sold in the United States.[401] The FTC was in turn accused of trying to protect a 'national champion' by approving the merger[402]… Meanwhile, Van Miert insisted that the EC was not out to protect Airbus[403] (1998, 598-599).

For their part, Boeing and MDC continued to resist the demands of the Commission despite a fast-approaching MCR deadline for a final decision. Finally, facing the reality that the EU was not going to change its decision, the merging firms contacted the Commission with an eleventh-hour solution on July 23. Boeing Chairman and CEO, Philip Condit, argued that BMD's concessions were made due to a fear that the newly merged company would have faced "large fines and potential harm to our customers" without EU approval (Boeing 1997b, 1). The Commission accepted the final package of remedies offered by BMD, which addressed each of the EU's competition concerns.[404] Formal authorization of the merger as compatible with the SEM came on July 30. The newly-merger BMD began operating on August 4 as the largest aerospace company in the world (Damro 2001, 215).

The BMD case provides a clear instance of divergent decisions and political intervention.[405] As such, the case reveals useful insights for the current study. The case supports claims that political principals are likely to perceive divergent decisions as

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[401] …Vice President Al Gore stated that the United States would act quickly if a U.S. company were put at an 'unfair competitive disadvantage because of an improperly motivated regulatory decision of a foreign country.' See Stanley Holmes and Michele Flores, "Boeing Deal Tussle About Trade," *Seattle Times*, May 15, 1997, at D1.

[402] See Boeing v. Airbus: Peace in Our Time, Economist, August 1, 1997, at 59, 61.

[403] See Emma Tucker, Editorial, Van Miert's Finest Hour, Fin. Times, July 24, 1997, at 11.

[404] For the exact remedies, see BMD (1997b).

[405] The BMD case may also suggest that elements of "balancing" were at work (see Chapter 4). Commenting after the merger review, the EU's Director-General of Competition Alexander Schaub suggested possible reasons why the Commission appeared so intransigent in its position:

> the Commission, often perceived in the US as a 'junior partner,' emerged stronger from this case… it must be noted that the credibility of the Commission in Europe was reaffirmed. We have proven our capacity to withstand pressures and we were able to obtain from Boeing concessions that no Member State could have obtained on its own (Schaub 1998, 4).

Thus, in addition to the EU's legitimate competition concerns, the Commission's behavior in the BMD case may have reflected a desire to increase its credibility in the US and among its Member States (Damro 2001). By standing firm in its position, the Commission may have seen itself as balancing its relations with the more experienced US competition agents—no longer would the Commission be perceived as a "junior partner" to the DoJ and FTC. Likewise, by standing firm in its position, the Commission may have seen itself as increasing its credibility in the eyes of its Member States as capable of representing and standing up for EU interests in international relations.

threats to national and/or constituent interests. Based on this perception, US principals decided to intervene in the case with a variety of foreign intervention instruments.

In addition, this flawed case served as a valuable learning experience for many actors involved in the merger review process.[406] While the Bilateral Agreement had been signed six years prior, the competition agents' experience at cooperating under the provisions was still limited. As Parisi argues "Unfortunately, despite the enforcement agencies' best efforts to explain the Agreement and operations under it, some misunderstandings of the Agreement were reported, particularly during the course of the *Boeing/McDonnell Douglas* merger case" (1999, 137).[407] Charles S. Stark, Chief of the Foreign Commerce Section in the DoJ's Antitrust Division, makes clear the valuable lessons learned from BMD:

> Divergent antitrust approaches to the same transaction undermine confidence in the process; they risk imposing inconsistent requirements on the firms, or frustrating the remedial objectives of one or another of the antitrust authorities; and they may create frictions or suspicions that can extend beyond the antitrust arena—as we witnessed in the Boeing/McDonnell Douglas matter. *The Boeing/McDonnell Douglas experience led the agencies on both sides to draw a deep breath and commit themselves to extra and sustained efforts to make the coordination process work as well as it possibly can* (italics added) (Stark 2000, 5).

Interviewees familiar with the BMD case agree that the merger showed competition agents that they should share more information in the early stages of their respective review processes in order to reduce the likelihood of surprising their foreign counterparts with an analysis that will likely result in a divergent decision. This lesson was not lost on subsequent EU-US implementation cooperation. In fact, after BMD, the US and EU competition agents began exchanging and discussing mergers much sooner in their respective review process (i.e., initial contacts) and more intensively. Indeed, research interviewees agree that the lessons learned from the BMD merger contributed to the success of the "best practice" case of WorldCom/MCI a year later.

[406] For an argument on the lessons of BMD, see Fox (1997b).

2. The GE-Honeywell Merger of 2001

The 2001 GE/Honeywell (GEH) merger is another flawed case of EU-US implementation cooperation in competition policy. Like the BMD merger, the case provoked considerable public and private attention because it showcased a merger between two large US firms that was challenged in the EU but approved in the US. As discussed above, such an outcome should certainly prompt political intervention. Unlike the BMD case, GEH ended with the firms abandoning the merger instead of agreeing to implement the remedies required by the EU.[408] If the BMD merger case served as a valuable learning experience for the EU and US competition agents, how and why did the GEH merger case become flawed? Did the competition agents forget the lessons learned from BMD?

The following discussion of the GEH merger again focuses on the insights that demonstrate the revised cross-level approach and the help to illustrate the patterns of behavior posited in Chapter 2 (i.e., P4 and P6). More detailed discussions of the GEH merger and the divergent analyses taken by the EU and US are reported elsewhere.[409] The following analysis of the merger focuses on the behavior of the EU competition agents as the regulators who withheld approval of the merger.[410]

On October 22, 2000, two US firms—the General Electric Company (GE) and Honeywell International Inc. (Honeywell)—entered into an agreement under which "General Electric 2000 Merger Sub, Inc.", a wholly owned subsidiary of GE, would be merged with Honeywell. As a result, Honeywell would become a wholly owned subsidiary of GE.[411] While GE's diversification strategy had included a number of prior mergers, the transaction with Honeywell was its largest ever.

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[407] "One such misconception was the assertion that, in a merger notified to both parties, one party 'goes first' while the other defers. This is clearly wrong… (Parisi 1999, 137).

[408] As the Commission notes, the GE/Honeywell merger "is only the 15th time the Commission has blocked a merger since September 1990, when it became the one-stop shop for mergers and acquisitions requiring regulatory approval in the European Economic Area – the 15 European Union states plus Norway, Iceland and Liechtenstein. And it is only the second time it prohibited a merger involving only American firms" (2001c, 2). In MCI/Sprint, both the EU and US blocked the merger between only American firms.

[409] For example, see Burnside (2002), Evans (2002), European Commission (2002, 72-73) and Pflanz and Caffarra (2002).

[410] For more on the US DoJ's review of the GEH merger and differences with the EU, see Evans (2002).

[411] GE and Honeywell are very diversified industrial firms. According to the European Commission, GE is "active in fields including aircraft engines, appliances, information services, power systems, lighting, industrial systems, medical systems, plastics, broadcasting (through the NBC media channel), financial

On February 5, 2001, the Commission received the formal notification of the proposed merger pursuant to Article 4 of the MCR. Proposed as the largest industrial merger in history and active in the SEM, the GE/Honeywell merger easily met the thresholds in the MCR for MTF review and fell within the EU's jurisdiction.[412] At the time, GE's CEO Jack Welch announced publicly "This is the cleanest deal you'll ever see… Every single activity, there is no product overlap… Everything is complementary. That's not a speech for the antitrust people, that's fact" (Murray et al. 2001, A1). However, on March 1, 2001, the Commission took an alternative view and decided to initiate Phase II proceedings in the case.

On May 8, 2001, the Commission released a Statement of Objections identifying competition concerns surrounding the proposed GE/Honeywell merger. According to the Commission's press release,

> GE alone already had a dominant position in the markets for jet engines for large commercial and large regional aircraft. Its strong market position combined with its financial strength and vertical integration into aircraft leasing were among the factors that led to the finding of GE's dominance in these markets. The investigation also showed that Honeywell is the leading supplier of avionics and non-avionics products, as well as of engines for corporate jets and of engine starters (i.e., a key input in the manufacturing of engines). The combination of the two companies' activities would have resulted in the creation of dominant positions in the markets for the supply of avionics, non-avionics and corporate jet engines, as well as to the strengthening of GE's existing dominant positions in jet engines for large commercial and large regional jets.

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services and transportation systems" while Honeywell is "an advanced technology and manufacturing company serving customers worldwide with aerospace products and services, automotive products, electronic materials, specialty chemicals, performance polymers, transportation and power systems as well as home, building and industrial controls" (2001b, 2).

412 Due to confidentiality provisions, the exact numbers for GE and Honeywell turnover are not available. According to the Commission,

> The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5 000 million (for the full year 1999, EUR [...] * for GE and [...]* for Honeywell). Both GE and Honeywell have a Community-wide turnover in excess of EUR 250 million (for the full year 1999, [...]* for GE and [...]* for Honeywell), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension" (European Commission 2001b, 3).

The parts of this text that are enclosed in square brackets and marked with an asterisk were edited to ensure that confidential information was not disclosed.

> The dominance would have been created or strengthened as a result of horizontal overlaps in some markets as well as through the extension of GE's financial power and vertical integration to Honeywell activities and of the combination of their respective complementary products. Such integration would enable the merged entity to leverage the respective market power of the two companies into the products of one another. This would have the effect of foreclosing competitors, thereby eliminating competition in these markets, ultimately affecting adversely product quality, service and consumers' prices (European Commission 2001c, 1-2).

In its objection, the Commission clearly stated its concerns over GE's existing dominant position in specific relevant markets. According to the MCR, a merger that strengthens such a dominant position is likely to be anticompetitive and, therefore, should not be approved.[413] However, the EU's objections were also based on the use of an analytical tool in merger review known as "bundling" (Pflanz and Caffarra 2002). The economic theory of bundling suggests that competition may be undermined if a firm "bundles" its products from different markets because the combined range of products would give it "undo power" (Murray et al. 2001, A4). Reflecting this concern over bundling, an EU competition official in the MTF, Enrique Gonzalez Diaz, "argued that by buying Honeywell, GE could parlay its powerful position in the large jet-engine market into possible dominance of a related industry, avionics, which produces crucial flight equipment. Honeywell is one of the strongest players in this market" (Murray et al. 2001, A4). Thus, a central problem with the proposed GEH merger was that GE could abuse its dominance *in the future* by bundling aircraft engines with flight equipment.

Because bundling relies on a prediction of the future structure of the market(s) and behavior of the firm, analysis of dominance may be particularly problematic when combined with or replaced by concerns over "bundling". On this basis, GE rejected the Commission's use of the economic theory of bundling from the beginning of the review process. In the US, the DoJ did not use bundling in its analysis.[414] This divergence in the

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[413] Under the MCR, the Commission is mandated to prevent the creation or strengthening of "a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it" (Article 2[2]).

[414] The Chicago School was largely "responsible for discrediting the theory of 'bundling' in the US" (Hargreaves and Spiegel 2001, 4). In addition, US commentators have argued "Although often applied in

analytical concepts used by the EU and US agents might have been overcome by closer cooperation at an earlier stage. However, as discussed below, initial contacts between the two competition agents were limited due, in part, to the speed with which the merger agreement had been reached between GE and Honeywell and the firms' reluctance to authorize pre-notification contacts between its legal counsel and the Merger Task Force.

After months of contentious negotiations, on June 14, 2001, GEH submitted a proposal to address the Commission's concerns about the proposed merger. While this submission came before the MCR's formal deadline, GEH made it clear to the Commission that this was its "last offer" (European Commission 2001d, 1). As the Commission notes,

> GE submitted a proposal for a package of undertakings to address the competition concerns identified by the Commission in its Statement of Objections of 8 May 2001. The proposal comprised structural undertakings relating to avionics- and non-avionics products, engine starters, small marine gas turbines, large regional jet engines and behavioural undertakings concerning corporate jet engines, the commitment not to engage in bundling practices and GECAS (2001b, 112).

The role of GECAS (GE Capital Aviation Services) would become a prominent point of contention between the merging firms and the Commission.[415] In particular, GEH's dominant position could be used to leverage GECAS—"the largest purchaser of aircraft, ahead of any airline" (EU Press Release 2001)—into purchasing and/or leasing only planes with GEH aircraft engines and flight equipment.

On the same day that GEH submitted its "last offer", the Commission announced that the proposal was insufficient to remove the competition problems identified in the Statement of Objections (European Commission 2001c, 2). The Commission also noted that it was regretful that GEH's proposal did not reflect remedies that the Commission had suggested earlier in the review process. These remedies were structural commitments that would have addressed the Commission's concerns over GECAS:

> In particular, we have explored with the parties commitments which would not have entailed further

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the computer industry, the bundling theory isn't widely accepted in aerospace… where sophisticated buyers, not consumers, choose among a relative handful of players" (Murray et al. 2001, A4).

[415] GE Capital is GE's financial arm, while GECAS is GE Capital's aircraft leasing unit.

> divestments in the aerospace industry but rather a structural commitment to modify the commercial behaviour of GECAS. We regret that this avenue has not been pursued. Unless the merger notification is formally withdrawn, the Commission will continue with the review procedure (European Commission 2001d, 1).

GEH did not withdraw the merger notification, and the Commission continued its review in accordance with the procedures established under the MCR. In response to the Commission's rejection of the offer, GE's Jack Welch declared publicly "You are never too old to get surprised… The European regulators' demands [for divestitures] exceeded anything I or our European advisers imagined and differed sharply from antitrust counterparts in the US and Canada" (Hargreaves and Spiegel 2001, 1).

Following the EU's rejection, negotiations continued between the Commission and the firms. However, by this time, political principals in the US began intervening in the merger review process. For example, US Attorney General Ashcroft dispatched a senior political appointee, Deborah Herman, to meet with EU officials to explain why the DoJ had approved the merger. In addition, "On June 15th, [President] Bush said he was 'concerned' about the European position" (Economist 2001, 5). Finally, Senator Jay Rockefeller wrote a letter to the Commission supporting the merger (Sorkin 2001, C9).

This political pressure was likely supported (if not initiated) by GEH. As Hill reports, "'At the time, we thought it would be impossible that the Europeans would try to block a U.S.-U.S. deal that had been given the go-ahead by Washington,' said an executive close to G.E. who spoke on the condition of anonymity. 'The conventional wisdom was that the political pressure would be too great'" (2001, C4).

In addition to the increasing political intervention by US principals, GEH also stepped up its publicity campaign to increase pressure on the Commission. This strategy of publicity and any belief that political pressure might change the Commission's decision were clearly not informed by the lessons of the BMD merger five years earlier. Rather, such a strategy reflects a lack of knowledge about the Commission's commitment to resist external threats to its basic interest in regulatory independence. For example, in response to the publicity campaign, Monti deplored GEH's attempts at politicization as unjustified because the Commission had not yet issued its final decision in the case: "I deplore attempts to misinform the public and to trigger political intervention. This is entirely out of place in an antitrust case and has no impact on the Commission whatsoever. This is a matter of law and economics, not politics" (European Commission 2001e). A US competition agent himself, John Parisi (Counsel for European Union Affairs in the International Antitrust Division of the FTC) provides a similar argument:

> trying the case in public is of little utility. The U.S. agencies normally keep silent during the course of an investigation—even where the press reports on it.[416] And FTC Commissioners are constrained by judicial decisions limiting their utterances while an action is pending, lest their decision be tainted with prejudice.[417] Suffice it to say that trying to use the press as a separate front for advocacy of your case is a diversion from the necessary task of dealing effectively with the enforcement agency on the merits of the case. The same can be said for 'politicizing' the matter by appeals to parliamentarians or officials of other government agencies (1999, 141).

Undaunted, and perhaps emboldened, by the political and public challenges to the EU's merger review process, Commissioner Monti reiterated the Union's opposition to the merger on June 18, declaring that it

> would combine GE's strong position in the aircraft engine markets with Honeywell's similarly strong position in avionics and non-avionics such as weather turbulence detection products, collision avoidance and flight management systems and so-called black boxes. To this powerful combine, one must also add GE's leasing and financial arms, respectively GECAS, the largest purchaser of aircraft, ahead of any airline—and GE Capital. This could lead to less competition in the engine and in the aerospace sectors and result in higher prices for customers in the medium term (European Commission 2001e).

On June 26, 2001, the EU's Member States entered the merger review process. In accordance with the MCR, the representatives of the fifteen national competition authorities convened as the Advisory Committee on Concentrations (ACC) and endorsed

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416 FTC policy does permit public confirmation of the existence of a merger or non-merger investigation under certain circumstances, particularly where the subjects of the investigation themselves have disclosed the existence of the investigation to the public. See FTC Policy Concerning Disclosures of Non-merger Competition and Consumer Protection Investigations, 63 Fed. Reg. 219 (Nov. 13, 1998).

417 See *Texaco, Inc. v. FTC*, 336 F.2d 754 (1964); *Cinderella Career and Finishing Schools, Inc., et al. v. FTC*, 425 F.2d 583 (1970).

the Commission's draft decision to block GE/Honeywell merger.[418] Before the ACC decision, GE initiated extensive lobbying efforts in the Member States (Sorkin 2001, C9).[419] This strategy was not likely to be useful because the ACC is simply advisory, it cannot reject or amend such reports. In any event, the ACC's endorsement of the Commission's draft decision suggests that GEH's lobbying efforts had little effect on the Member States.

The Commission's final decision was scheduled for June 30, 2001. Despite having submitted its "last offer", GE re-entered negotiations with the EU on July 27. This reversal of position may have been the result of the original GEH merger agreement that required GE to make its "best effort" to pursue regulatory approval of the merger (Sorkin 2001, C9). Under the terms of the merger agreement, had GE not re-entered negotiations with the Commission, Honeywell may have taken them to court and GE could have faced penalties.

During the renewed negotiations, GE did propose additional remedies, which were submitted to the Commission on June 28, 2001. According to the Commission,

> At a very late stage in the procedure… the parties withdrew the package of undertakings submitted on 14 June 2001 and proposed a new and substantially modified set of undertakings. The new proposal relates to the sale of a minority interest in GECAS to third parties selected by GE combined with the behavioural commitments already submitted concerning GECAS's conduct in its dealings with Honeywell. In parallel, the parties reduce their proposed divestitures of Honeywell aerospace products (European Commission 2001b, 122-123).

However, the Commission remained unconvinced by the new offer, arguing that "In the present case the proposed undertakings are insufficient, they do not allow sufficient time for consultation and in any event they do not solve the competition problems identified" (European Commission 2001b, 125).

In the US, political attention remained focused on the case. For example, Paul H. O'Neill, US Secretary of the Treasury "attacked the European Commission, saying that it

[418] The exact voting in the ACC is not publicly available. However, leaks to the press suggest that only two members did not support the draft: Greece was not present and Ireland abstained from the vote (Sorkin 2001, C9).
[419] For more on these national lobbying efforts, see Meller (2001).

would be ‘off the wall’ for European regulators to block the deal, which American regulators have already approved” (Sorkin and Meller 2001, C1). Mr. O’Neill also intervened publicly stating

> that the European Commission had too much power. ‘They are the closest thing you can find to an autocratic organization that can successfully impose their will on things that one would think are outside their scope of attention,’ he said. ‘When I see things like this, they’re irritating,’ Mr. O’Neill added, ‘and yes, I’d like to say they need to stop, but they will stop in time’ (Sorkin and Meller 2001, C2).

For its part, GEH began to view its proposed merger as a lost cause. In candid terms, GE’s soon-to-be chairman and CEO Jeffrey Immelt revealed the dire circumstances when he admitted “We [GEH and the Commission] are so far apart that this is not a place where we would use political pressure” (Sorkin 2001, C9). Immelt’s comments are notable for their implied understanding that political pressure was viewed as a possible (but no longer useful) option for winning regulatory approval of a concurrent jurisdiction merger.

Despite the publicity and political pressure, the EU regulatory agents stood firm on their economic analysis of the proposed merger. On what would this time be GE’s actual last offer, the Commission remained unconvinced for a number of reasons:

> On 28 June 2001, two weeks later and well beyond the deadline for the submission of undertakings, GE proposed a new set of remedies. Apart from the fact that these remedies were not adequate to deal with the competition concerns, they were submitted at a very late stage in the procedure and continued to present a series of technical shortcomings. Indeed, according to the Commission’s Notice on remedies acceptable under the Merger Regulation, the Commission can only accept modified commitments when these solve the competition concerns in a clear and straightforward manner without the need for a further market test. The offer submitted by GE on 28 June did not meet this condition. The remedies proposed post-deadline were not sufficiently clear-cut to solve the identified competition concerns in a straightforward manner and could therefore not be accepted (Giotakos et al. 2001, 12-13).

The formal rejection of this final offer came on June 30, 2001, when the EU declared the merger incompatible with the SEM.[420] While the decision ended EU-US implementation cooperation in this specific case, the GEH merger saga is not over yet. Feeling aggrieved and particularly concerned about the possibility of similar EU economic analyses in future merger reviews, "Both GE and Honeywell appealed against the prohibition decision before the Court of Justice in September" (European Commission 2002, 72). The ECJ's final decision is still pending.

On its own, the GEH merger case is significant because, as Monti acknowledged, "this was the first time the European Union and U.S. antitrust agencies have looked at the same facts in the same market and gone different ways" (Lawsky 2001, 1). Like the BMD merger case, GEH also provides lessons for implementation cooperation. For the competition agents, information asymmetries may have contributed to the divergent analyses, in particular the likelihood of using the economic concept of bundling.[421] Despite the lessons of BMD, the agents' ability to engage in extensive initial and review process contacts was limited in this case by the speed with which the original merger agreement was reached between the firms (see below). In addition, the GEH case reveals how tenaciously competition agents (in this case, the Commission) will resist external threats to their basic interest in regulatory independence. The external threats came in the form of political pressure and publicity campaigns, both of which challenged the agent's

[420] For more on the EU's reasons for blocking the merger, see Pflanz and Caffarra (2002) and Giotakos et al. (2001).

[421] The EU's readiness to use bundling may also reflect the fact that the Commission has fewer resources and legal opportunities to review market-distorting behavior *after* a merger has been approved. According to this argument, in the US, less emphasis is put on predicting the future implications of a merger because the competition agents can more easily police the post-merger behavior of the newly-merged firms. In comparison, the EU lacks the resources necessary to continue such policing of post-merger dominance; they simply do not have the staff resources. In addition, the US regulators can rely on private litigants to assist in the policing of post-merger dominance. This role for private litigants does not exist in the EU. The EU also appears to have fewer legal opportunities to impose remedies after a deal has been approved. As Raghavan and Davis argue, "European antitrust regulators don't have post-merger behavioral and structural remedies that they can resort to if a deal turns anti-competitive… meaning that regulators can't impose remedies after a deal is approved. The lack of that option tends to make them scrutinize merger deals more aggressively at the outset" (2001, A11). *The Economist* agrees that EU has fewer legal opportunities to intervene after mergers have been cleared and, "Hence, they reckon they need to be more vigilant to market-distorting problems that might arise in the future" (*Economist* 2001). Due to these limitations on the policing of post-merger dominance, merger review in EU is likely to be more concerned about the future implications of bundling.

own preference to maximize certainty and decision-making authority, and, therefore, were resisted.

For the US political principals, the EU's divergent decision—blocking a merger between two US firms that, at the time, was the largest industrial merger ever and was approved by the US competition agents—was perceived as an unequivocal threat to national and/or constituent interests. In conformity with their preferences and patterns of behavior, the US principals found that the costs of not intervening in this major case exceeded the costs of intervening and acted accordingly. The precise intervention cost calculations of the principals and the role of the merging firms in agitating for political intervention are addressed more fully in Chapter 6.

The GEH case also provides lessons for firms engaging in concurrent jurisdiction mergers. Up to this point, the current study has emphasized the fact that merging firms can exert influence in implementation cooperation by exercising their rights to confidentiality of sensitive business information. However, the GEH merger case provides additional insights into how firms can influence the merger review process. These lessons are based on (mis)calculations made by the merging firms in the merger review process, not necessarily on the general process of implementation cooperation. Nevertheless, they reveal additional means by which the likelihood of political intervention may be increased significantly in the merger review process.

The first lesson concerns the speed by which the merger was originally agreed. The GEH deal was notable for being "negotiated over a three-day weekend, too fast for the company to even consult its outside antitrust counsel or notify regulators" (Murray et al. 2001, A1).[422] GE itself admitted that the deal had been reached too quickly to engage actively in pre-notification contacts with the European Commission. As Hill argues,

> Mr. Welch's first mistake on the Honeywell deal was apparent the day he announced it. 'We haven't touched every base,' he said when asked whether G.E. and Honeywell had contacted regulators in the United States and Europe, as is often the case on big transactions. Indeed, the deal was negotiated in only 72 hours by Mr. Welch, who rushed to break up a planned merger between Honeywell and United Technologies, an old-style

[422] In addition, "GE conceded yesterday that the Honeywell deal came together too quickly for it to consult its European merger lawyers" (Murray et al. 2001, A4).

> conglomerate that makes Pratt & Whitney aircraft engines and Otis Elevators (2001a, C4).

While Welch was renowned for his decisiveness, the decision to proceed quickly with the merger created early problems with the regulators: "Mr. Welch's decisiveness… led him to put the deal together in just a few days without sounding out regulators. And when they balked, he refused to make enough concessions to satisfy them" (Sorkin 2001a). As a result of these limited contacts with the regulators, "It was more than two months before Mr. Welch realized that the deal could face serious obstacles in Europe, executives close to him said" (Hill 2001a, C4). Thus, regarding the initial merger agreement, the preceding analysis suggests that no matter how quickly a merger deal is agreed, legal counsel in Brussels and/or Washington should be consulted immediately. GE's problems in this regard appear to have emerged because of the firm's desire to sign a merger agreement as quickly as possible (72 hours) in order to beat United Technologies to the punch.

A separate but related lesson from the GEH merger relates to pre-notification contacts (PNCs) between the merging firms and the EU's Merger Task Force (MTF). PNCs occur under the discretionary authority of the MTF as confidential meetings and other less formal contacts arranged between the merging firms and competition authorities *prior to formal notification of a merger deal*.[423] At these meetings, MTF case handlers usually inquire about what markets will be involved, what the current market

[423] The EU's MCR requires merging firms to file a notification within seven days "after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs" (Article 4[1]). While not formally mentioned in MCR, first contacts between regulators and firms are often taken prior to this seven-day period, during a so-called pre-notification phase. Once merging firms have notified formally the MTF of their plans to merge, a strict timetable is set in motion.

There is a great deal of variation in duration of PNCs because merger agreements are constructed in very different ways. The actual process by which firms agree to a merger can begin as a "golf-course" agreement or a formal Memo of Understanding between the firms. As an agreement is being reached, the merging firms generally will contact their legal counsel (whether in-house or a private practice law firm) to inquire about regulatory requirements. (Sometimes firms notify their lawyers of a merger at the same time the news is made publicly available. When this happens, the firms must meet the seven-day deadline for filing a completed Form CO. In such cases, lawyers have been known to ask for additional time, arguing that the Form CO cannot be completed by the deadline. When an incomplete Form CO is submitted, the MTF is required to ask for another filing, which further delays the entire merger review process. Thus, such firms are occasionally granted extensions beyond the deadline.)The legal counsel in Brussels then typically contacts the Head of the MTF, explaining that a merger filing is expected. Usually that same day, the legal counsel is informed of which MTF case manager to contact. Within a few days, the legal counsel has shares are of the merging firms and what the future market position will be of the merged firm.[424] The Competition Directorate publicly advocates the use of PNCs, which are becoming increasingly viewed as standard operating procedures (see Chapter 3).[425] Indeed, some Commission officials estimate that 90-95 percent of mergers involve such discretionary and confidential contacts. Because they occur prior to the formal notification of the merger, PNCs are a crucial part of the merger review process where firms begin making their arguments for approval of a proposed merger before the tight statutory deadlines are set in motion. In addition, PNCs function as an early warning system through which merging firms can be alerted to potential problems the Commission may have with a proposed merger.

Despite the benefits and growing use of PNCs, the sense of urgency in the GEH merger case limited their utility. GE and Honeywell did not authorize their legal counsel to engage in active and vigorous PNCs with the Commission. Had the firms done so, they would have been alerted that the MTF had problems with the merger and, possibly even that it was considering the use of the economic theory of bundling. Armed with this information, GE and Honeywell would have had more time to formulate and press their arguments and/or adjust their deal accordingly.

Another lesson for merging firms relates to GEH's strategy of generating publicity to challenge the EU's opposition to the merger. Put simply, this case suggests that agitating for media exposure does not increase the likelihood that the MTF will approve a merger. Such efforts simply challenge and irritate the Competition Directorate. Therefore, a media campaign may actually make the Commission less likely to change its position on a merger. Similarly, the Commission is challenged and irritated when merging firms attempt to generate political intervention through the Member States of the EU. In the GEH case, the firms lobbied in the national capitals prior to the ACC meeting.

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organized a PNC meeting and submitted a memo—about five pages detailing which firms, sectors and markets will be involved in the proposed merger.

[424] PNCs are usually attended by the case manager, two handlers, representatives of the parties and their outside counsel. The actual negotiators of the merger are often advised by their legal counsel to be present as the representatives of the merging firms.

[425] Such contacts are in the interest of MTF case teams because by the time the formal notification is received, they are already familiar with the merger case, accelerating the decision-making process by reducing considerably the learning curve of these resource-strapped individuals. PNCs also are generally in the interest of the merging firms because they allow firms to begin testing their arguments and can delay the onset of the strict timetables in the MCR.

However, as mentioned above, the Member States are not particularly productive targets for such influence because the ACC is simply advisory and operates according to a majority decision-making rule. The only clear impact of these strategies is that they raise the suspicions of the Commission that the merging firms have something to hide.

These lessons are valuable not only for firms engaging in concurrent jurisdiction mergers but for all firms considering mergers that will meet the MCR's thresholds for review. In short, this case suggests that the EU is better consulted than challenged. But, what does the analysis reveal about why the GEH merger case became flawed? The divergent decision appears to be a central cause of the political intervention—politicians and commentators alike were surprised that the EU could block a merger between two US firms that had been approved by the US competition agents. However, had the EU and US competition agents engaged in initial contacts, they might have avoided the divergent decisions, including the EU's use of bundling.[426] Based on the BMD merger, the competition agents should have been aware of this fact. So, what happened to flaw their cooperative system? It appears that the merging firms are responsible for the flaw: the speed with which the merger agreement was reached and the resulting decision not to engage in PNCs severely limited the ability of the EU and US competition agents to share information and reach a convergent decision. In addition, the merging firms' media campaign and efforts to generate political pressure only reduced the likelihood that the Commission would change its decision to one that was convergent with the US competition agent's decision.

The preceding discussion of implementation cooperation reveals the means by which EU and US competition agents are pursuing cooperative bilateralism in practice on a general and case-by-case basis. This implementation cooperation occurs simultaneously with additional efforts to expand discretionary EU-US cooperation in competition policy—exploratory institutional cooperation. Two recent examples of exploratory institutional cooperation are discussed in the next section. The final section of this

[426] It is useful to point out that the divergent decisions were inconsistent, not conflicting. While the US approved and the EU prohibited the merger, the EU's demands did not include remedies with which GE and Honeywell would have been unable to comply simultaneously in both jurisdictions (see Chapter 2).

chapter summarizes the findings on both implementation and exploratory institutional cooperation.

III. Exploratory Institutional Cooperation—Enhancing Bilateral and Multilateral Dispute Prevention

After successful rule-making cooperation, informal efforts at exploratory institutional cooperation emerge as new ways to review and evaluate international cooperation in competition relations. This exploratory institutional cooperation, which can occur bilaterally and/or multilaterally, is the most recent and experimental process of EU-US cooperation in competition policy. This section investigates the causes and effects of EU-US exploratory institutional cooperation in competition policy with two case studies: the bilateral EU-US Merger Working Group (MWG) and the multilateral International Competition Network (ICN).

According to the fifth pattern of behavior (P5) posited in Chapter 2, EI will prompt competition agents to continue shirking via attempts at exploratory institutional cooperation. The agents' intent is to maximize their independence from political principals. By pursuing discretionary cooperation, competition agents expand their regulatory independence and face fewer veto points (via domestic oversight) than they would changing the non-discretionary, domestic rules that govern the establishment of new international institutions. In addition, exploratory institutional cooperation reduces the likelihood of divergent decisions in individual merger cases, which, in turn, reduces the likelihood of political intervention. However, according to the sixth pattern of behavior (P6), political principals continue to intervene in domestic and foreign agent attempts to shirk if the costs of not intervening exceed the costs of intervening. Therefore, the following analysis should reveal examples of political intervention if and when the costs of not intervening in exploratory institutional cooperation exceed the costs of intervening.

Had the remedies demanded by the EU impacted the remedies available in the US, the decision would have been the first concurrent jurisdiction merger in which a conflicting decision occurred.

A. The 1999 Mergers Working Group—An Institution for Exploring Bilateral Convergence

Transatlantic competition relations are further enhanced by efforts at exploratory institutional cooperation. In 1999, the EU and US competition agents began engaging in exploratory institutional cooperation when they established the EU-US Mergers Working Group (MWG).[427] The bilateral MWG is an ad hoc forum mandated to study different EU and US approaches to the formulation of remedies and the scope for convergence of merger analysis and methodology. The MWG was initiated entirely under the discretionary authority of the EU and US competition agents in a manner that did not require direct review and approval by the respective political principals.

The MWG was launched during an annual bilateral meeting on October 5, 1999, when the European Commission, the US FTC and the US DoJ agreed to create a new working group to address common problems created by concurrent jurisdiction competition cases (European Commission 2000a, 6). At this meeting, the top EU and US competition agents discussed how to achieve the "best remedies" in merger cases.[428] As the Commission reports, EI played a significant role in the competition agents' decision: "It was felt that, while EU/US cooperation in merger cases is very successful, there is still scope for improvement, *particularly in view of the current merger wave and the exponential increase in large-scale cross-border transactions*" (italics added) (European Commission 2000a 6). Following the meeting, the *Financial Times* reported an EU-US agreement to set up a "joint committee to discuss how to intensify their co-operation in policing mergers that require approval on both sides of the Atlantic" (Hargreaves 1999). This so-called "joint committee" was actually the very informal and ad hoc EU-US MWG. In fact, the MWG was not established by a formal agreement. However, according to Assistant Attorney General Joel Klein, the group "will attempt to fomalise some of the lessons learned over the last few years" (Hargreaves 1999).

The competition agents established the MWG under two provisions of the 1991 Bilateral Agreement: the general provisions in Article III for increasing information exchanges and Article VII on consultations. The agents decided early that they wanted

[427] For more on the MWG, see Damro (forthcoming 2003a).
[428] Interview with US State Department official, May 2001.

the group to be informal and flexible. As one US official familiar with this group asserts, the competition agents wanted to avoid setting up a new formal structure, because "we seem to have enough of those." Ad hoc flexibility was also a priority because EU and US competition agents "are very busy people working daily on cases with limited time available in their schedules."[429] Such people had little patience for tying themselves to a regularized schedule of additional transatlantic meetings.

Competition officials on both sides of the Atlantic are quick to point out that the MWG is not a formal group—the MWG is not a new institution that would require approval of or report to political principals. Obscuring the MWG further, the group has no fixed membership and none of its work is made publicly available. The membership is reported to be "senior officials" (Hargreaves 1999). More specifically, the MWG functions as an analytical dialogue for those EU and US competition agents most involved with transatlantic cooperation, including individuals from both competition authorities and occasionally officials from the EU and US diplomatic missions. While the group does generate working papers and shared notes, all are considered internal documents.[430]

The MWG has been likened to a useful and low-pressure "brainstorming" session. Officially, the group was mandated to explore new ways to expand cooperation in discretionary areas like the determining market definitions and analyzing collective dominance and oligopolies.[431] More specifically, the MWG's mandate focuses on

> (1) an in-depth study of the respective EU and US approaches to the identification and implementation of remedies (in particular, divestitures), and to post-merger

[429] Interview with US State Department official, May 2001.

[430] Interview with US State Department official, May 2001; interview with EU Merger Task Force official, September 2001.

[431] EU Competition Commissioner Mario Monti explains the problems raised by oligopolistic dominance:

> The phenomenon of oligopolistic dominance is, in my view, of particular pertinence in the examination of global markets. While a finding of single firm dominance is in most instances unlikely in such markets, theses markets can often be characterized by the presence of a small number of globally active companies. Such a market structure can be the result of a wave of concentration in a particular sector, such as the one that has recently occurred in the oil industry. In order to be able to address—in the merger control context—the potential competition problems that may arise in such oligopolistic markets, it is necessary to develop a concept of collective dominance; such a concept is now well established in EC law (2001a, 5).

> compliance-monitoring;[432] and (2) the scope for further convergence of analysis/methodology in merger cases being dealt with in both jurisdictions, particularly as regards the respective EU and US approaches towards oligopoly/collective dominance (European Commission 2001, 118).[433]

In 2000, the MWG finished its work on remedies in merger cases. According to EU Competition Commissioner Mario Monti, the MWG focused its discussions on

> how remedies should be designed; the suitability of various types of remedies in addressing different problems; how they should be structured and market-tested; how purchasers should be identified; and so on. Satisfactory progress is being made, and both sides are finding these discussions enlightening and useful (Monti 2000b, 5).

The MWG's work in the area of remedies has produced practical results that suggest a limited degree of convergence. The European Commission noted the MWG's productivity in this area:

> During the course of last year (2000), there were extensive tri-partite (Commission/DoJ/FTC) discussions, including a meeting and a number of tele/video-conferences. The deliberations have been mutually beneficial to all three authorities, and were particularly helpful to the Commission in its preparation of the recently adopted Notice on Commitments [i.e., remedies] in Merger Cases[434] (European Commission 2001a).

During these deliberations, the Commission floated a preliminary draft of this recent Notice on remedies by the US competition agents for comments. As one member of the EU's Merger Task Force admits, the EU solicited US input because "we can learn from them because they're more experienced, they've been doing it longer".[435] Commissioner Monti also admitted the role of the MWG in the EU's preparation of its Notice on remedies:

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[432] In other words, the MWG is designed to identify "best practices" and areas for potential convergence (Monti 2000b, 5).

[433] Hargreaves has also reported that the MWG would discuss "the transatlantic exchange of confidential information" and that Klein says "We are looking to see how we can work together to ensure, where possible, parties' consent to transfer confidential information" (1999). However, the US and EU competition agents have been reluctant to confirm officially discussions of this sensitive issue.

[434] Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, OJ C 68, 2.3.2001. pp. 3-11.

[435] Interview with EU Merger Task Force official, September 2001.

> I have no hesitation in acknowledging that the Commission's approach to remedies as set out in the Notice was influenced by the FTC's previous study on the divestiture process, which demonstrated that some remedies secured by the FTC had proved less effective than intended. Furthermore, the EU and US antitrust authorities discussed their respective approaches to remedies within the framework of a working group on merger control. The exchange of expertise in this group proved invaluable to the drafting of our Notice on remedies" (2002, 2).[436]

In particular, the FTC's experience with structural and behavioral remedies proved useful for the EU's competition agents.

The work of the MWG provides a basis for convergence between EU and US competition policy. For example, Monti claims "The Notice adopted by the Commission represented a good step towards convergence between the EU and US policies and our ad hoc co-operation in individual cases clearly confirms this trend" (Monti 2002, 7). This comment provides a specific example of the MWG contributing to convergence of remedial actions taken by the EU and US in merger cases. However, it is notable that the convergence occurred in an area under the discretionary authority of the Commission (i.e., the Notice on remedies), not a change to the non-discretionary statutes governing competition policy in the EU.

Following the completion of its initial mandate, the MWG's agenda continues to evolve. As the European Commission claims, "In the longer term, the Working Group could be further mandated to study other competition issues of common concern" (2000a 6). Thus, the MWG functions more as an ongoing, mutual learning process through which agents can exchange notes and ideas on how best to cooperate.

While the MWG is informal and non-binding, it serves as a forum for devising ways to limit political intervention, at least indirectly, by increasing implementation cooperation and exploring the potential for convergence in discretionary areas of the EU and US merger review processes. By exploring areas ripe for convergence, the MWG reduces the likelihood of divergent merger decisions. This function reduces the likelihood

[436] Monti notes that in order to develop "best practice guidelines" for merger remedies, the MTF's Enforcement Unit will "take into account the experience of other competition authorities in the Member States, the US and elsewhere" (2002, 3). For more on the Enforcement Unit and similarities between EU and US remedial actions, see Chapter 3.

of political intervention in individual merger cases. By remaining informal and under the discretionary authority of the competition agents, the MWG also avoids political intervention in its general activities. In short, as the EU's former Director-General for Competition Alexander Schaub argues, the MWG facilitates the prevention of "high-profile transatlantic political disputes" (2001, 11). While the MWG provides a useful discretionary forum for exploring bilateral avenues for convergence and dispute prevention, the EU and US competition agents have also turned their attention to the challenges facing cooperation in competition relations at the multilateral level.

B. The 2001 International Competition Network—An Institution for Exploring Multilateral Convergence

In another example of exploratory institutional cooperation, the EU and US have been engaging for the last two years in discussions to establish an International Competition Network (ICN).[437] Instead of a formal international organization, the ICN is an informal venue for discussing the multilateralization of cooperation in competition policy. The negotiations over the ICN also present a useful case in which the EU and US regulatory agents initially disagreed over the means by which to pursue international cooperation in competition policy. As with the other cases of cooperation investigated in the current study, the ICN displays evidence that the competition agents, in particular the US agents, preferred to avoid political intervention or any other limitations on their discretionary decision-making authority.

The 1990s witnessed considerable developments in transatlantic cooperation in competition relations. At the same time, the EU spent much of the 1990s striving to export its version of competition policy to other states (Damro 2001, Devuyst 2000, Devuyst 1998).[438] Due to the gradual negotiations on EU enlargement, the newly democratized and marketized states of Central and Eastern Europe were natural targets for the creation of new competition laws based on the Union model. The EU also provided and continues to provide technical assistance to other states currently developing competition policies. The US was generally less active on this front, but did

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[437] For more on the ICN, see Damro (forthcoming 2003b).
[438] For official EU positions, see also Brittan (1999, 1997), Schaub (1998) and Van Miert (1998a, 1997a).

and continues to provide antitrust assistance to a number of states developing competition policies, including the EU applicants in Central and Eastern European.[439]

Throughout most of the 1990s, the EU and US discussed the possibility of multilateralizing competition rules. However, during this dialogue, a fundamental transatlantic disagreement emerged regarding whether competition policy should be subsumed within the framework of the World Trade Organization (WTO). While the EU pushed for inclusion of competition policy on the WTO agenda,[440] the US steadfastly refused such a move during most of the decade.

US opposition to including competition policy on the WTO agenda was frequently articulated by former US Assistant Attorney General for Antitrust Joel I. Klein.[441] In a speech at an OECD conference on trade and competition policy, Klein outlined three primary reasons for his opposition to including competition matters on the WTO agenda.[442] First, Klein argued that it was premature to begin negotiations over competition rules in the WTO because of the limited experience the EU, US and international community had with competition policy. In addition, because the WTO had no previous experience with the complicated area of competition policy, Klein worried that "if we try to run before we have learned to walk, we will stumble and badly injure what we are all tying to promote—sound antitrust enforcement" (1999, 4).

Second, Klein was concerned that many other WTO members had only recently established competition policies of their own, making it difficult to achieve an

[439] According to former FTC Chairman Janet D. Steiger, the FTC and DoJ sent representatives to Central and Eastern European states to "provide technical assistance, comment on draft competition and consumer protection laws, and explain the structure and administration of our agencies. We describe our investigative techniques and the tools of economic analysis of competition issues… our lawyers and economists have been sent to work at the new agencies for up to nine-month periods" (1995, 2). For a useful discussion of the types of and challenges (including funding limitations) to technical assistance in competition policy as experienced by the US, other countries and international organizations, see Melamed (2000, 17-18).
[440] One of the EU's earliest proposals for multilateral competition rules on competition policy came from Sir Leon Brittan (1992b). For the EU position on multilateralizing competition rules, see, for example, European Commission (2002, 118-120) and Fox (1997a).
[441] For examples of the US argument against WTO negotiations on antitrust rules, see also Griffin (1999, 197) on fear of trade-offs across policy areas within the WTO, and Varney (1996). The DoJ's former Acting Assistant Attorney General of Antitrust Division A. Douglas Melamed argues that "the WTO is not, in any event, a suitable forum for negotiation of antitrust rules, and the cause of encouraging sound antitrust enforcement in world markets would be undermined by the application of WTO dispute settlement procedures to the kind of abstract rules that would result from negotiations in that forum" (2000, 11).
[442] Klein's objections were a reaction to an EU proposal advocated by Sir Leon Brittan and presented to the WTO's Working Group on Trade and Competition (Klein 1999).

international consensus on what common rules for competition might be most appropriate. As Klein argues, "a trade-focused forum like the WTO is (despite its many other virtues) not the right place to develop such a consensus. Roughly half of the WTO's 135 members do not even have antitrust laws, and most of the members that do have them have only a very few years of very limited enforcement experience" (1999, 5).

Third, and, according to Klein, probably most important, the inclusion of competition policy in the WTO would increase the likelihood of politicizing competition issues. As Klein argues,

> extending the WTO dispute settlement mechanism to antitrust enforcement would necessarily involve the WTO in second-guessing prosecutorial decision making in complex evidentiary contexts—a task in which the WTO has no experience and for which it is not suited—and would *inevitably politicize* international antitrust enforcement in ways that are not likely to improve either the economic rationality or the legal neutrality of antitrust decision making (italics added) (1999, 5).

Because of the binding nature of the WTO's dispute settlement mechanism any agreement to move trade-related competition issues into this system would require treaty ratification.[443] Summarizing his opposition to bringing competition policy into the WTO's binding framework, Klein forcefully stated "at this point in time, WTO antitrust rules would be useless, pernicious, or both, and would serve only to politicize the long-term future of international antitrust enforcement, including through the intrusion of trade disputes disguised as antitrust problems" (1999, 5).[444]

Fox presents a fourth argument for why US competition authorities resisted a multilateralization of competition rules: "many U.S. antitrust enforcers, lawyers and scholars fear a shift of the antitrust/trade issue from the hands of antitrust experts to the hands of trade experts and a consequent shift of focus from what is anticompetitive and

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[443] As Klein admits, the EU did eventually moderate its position regarding the applicability of the WTO's dispute settlement mechanism for competition disagreements: "The EU and others favoring negotiations seem to accept the validity of this concern, and thus have spoken of modifying the extent to which ordinary WTO dispute settlement mechanisms might apply to individual antitrust decisions" (Klein 1999, 5).

[444] It should be noted that in 2001, competition policy was included on the agenda for the Doha Round of WTO trade negotiations. However, the Doha Ministerial Declaration reflects the US position of limiting discussion of competition matters to only "focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for

harmful to consumers to what is unfair and harmful to domestic producers" (1997a, 12).[445] Thus, US competition agents strongly oppose making their statutory obligations subservient to other domestic public actors, especially trade authorities like the United States Trade Representative. This concern reflects the competition agents' belief that they are most capable of "best" implementing competition policy (see Chapter 2).

The difference between the EU and US on whether or not to multilateralize competition rules presents a surprising disagreement between competition agents with similar preferences. However, according to Fox, the US resistance to a multilateralization of competition rules should not be surprising. In comparison to the EU, "Americans are not steeped in the postwar Western European tradition of community building. They have the tools of unilateralism, they fear the compromises of bargaining, and they abjure the 'relinquishment' of sovereignty" (1997a, 12). Thus, because of the different institutional environments (and, subsequently, experience with competition policy) that constrain their respective behavior, the US and EU competition agents presented contradictory positions on this issue. However, as discussed below, the EU and US competition agents did ultimately find a mutual solution that served their similar preferences—the informal and non-binding ICN.

While the US continued to resist the multilateralization of competition rules within the WTO's binding framework, it soon became clear that some type of internationally-oriented initiative on competition policy would be useful because of the increasing levels of cross-border business activity and the number of states adopting competition policies. An important effort on the US side emerged to establish in November 1997, an International Competition Policy Advisory Committee of antitrust experts to investigate the new international competition landscape.[446] As Klein reports, "In order to provide an independent perspective in wrestling with… changes in the international antitrust environment, in the Fall of 1997 Attorney General Reno and I established an International Competition Policy Advisory Committee (ICPAC) to look at

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voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building" (Article 25).

[445] This argument is supported by research interviews conducted for the current study. Fox also argues that "many worry that, in a world arena, disputes will be resolved by arbitrators or judges who do not understand antitrust law and the sometimes-complex analysis that it entails" (1997a, 12).

[446] For the exact membership of this prestigious committee, see ICPAC, Annex 1-B.

these challenges with a fresh perspective" (Klein 1999, 4). ICPAC was mandated to focus on three topics with international implications: multijurisdictional merger review, enforcement cooperation between US competition officials and their counterparts around the world (particularly in anti-cartel prosecution efforts), and the interface of trade and competition issues (ICPAC 2000, 34).[447]

After two years of discussions and extensive public hearings—including participation by competition authorities from outside the US—in Washington, DC, ICPAC presented a lengthy and widely-disseminated report. The report identified numerous policy recommendations for the US competition agents to undertake in their efforts at increasing international cooperation in competition policy. One noteworthy policy recommendation contained in the final report was for the creation of a new "Global Competition Initiative." ICPAC suggested that the membership of this initiative should include government officials, private firms, non-governmental organizations and others, with the intent of exchanging ideas and facilitating common solutions on international competition issues. Following ICPAC's final report, momentum for what became known as a Global Competition Forum (GCF) grew rapidly. Ultimately, the GCF concept was launched as the International Competition Network (ICN).[448]

The successful launching of the ICN was assured by the US's endorsement of the project in September 2000. At the EU's 10th Anniversary Conference for Merger Control in Brussels, Belgium, Klein made public his support for a global competition forum for the first time.[449] At two subsequent speeches in October 2000, EU Competition Commissioner Mario Monti added his endorsement to the ICN approach (IBA 2001, 1).

Following these crucial expressions of support, the International Bar Association convened an organizational session in Ditchley Park, England on February 4-5, 2001.

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447 ICPAC's final report includes a broader list of topics than that originally mandated. For a summary, see ICPAC (2000, 34).

448 The GCF/ICN should not be confused with the OECD's Global Forum on Competition. In October 2001, the OECD organized its first Global Forum on Competition. The OECD's Competition Law and Policy Division and its Centre for Co-operation with Non-Members organized the inaugural meeting of this group in Paris on October 17-18. This group is one of eight "Global Forums" created by the OECD to increase contacts with non-OECD members. As the OECD advertised, "This Forum will not replicate the universality of other institutions (or address trade issues); rather, it will create an expanded network of high-level officials from about 55 economies who meet regularly (in principle twice a year) to share experiences on 'front burner' competition law and policy issues" (2001). For a list of this group's membership, see OECD (2001).

The meeting gathered together forty-three competition law officials and professionals acting in their individual capacities. According to the IBA, “This was the first ‘brainstorming’ between like-minded leading figures in the competition law enforcement world. Participants represented 23 countries, 20 competition authorities and nine other international institutions” (IBA 2001, 1).[450] Following Ditchley Park, the IBA was requested to provide services and support for the official launching of the ICN.[451]

The Ditchley Park process made clear the concern of participants regarding the need to avoid political intervention. The participants decided that the ICN would be an “evolutionary process without formalization of structure or activities until consensus on approaches has emerged and participation has expanded” (IBA 2001, 11). The Ditchley Park participants described the ICN as a “virtual organization” and emphasized that it was not intended to be a new international organization of competition policy: “The [ICN] should not be a new institution—it is not meant as an alternative to the involvement of the OECD or the WTO in competition policy. It should be first and foremost a competition authority forum, involving a minimum of permanent infrastructure, with support primarily provided by participating authorities and facilitators” (IBA 2001, 2).

For the EU, Commissioner Monti reiterated the desire that the ICN be informal: “We agreed that the forum should not be a new international institution and that it should involve a minimum of permanent infrastructure, with support primarily provided by its participants…” (Monti 2001a, 7). A. Douglas Melamed, the DoJ’s former Acting Assistant Attorney General for Antitrust, made clear the inherent political obstacles to creating a new formal international organization. Comparing the ICN to the G-8 model, he emphasized the problems of acquiring funding from political principals for a new organization:

> ...something more akin to the G-8, ‘but with less formality.’ That strikes me as pointing in the right direction, though of course the G-8 model would be hard to transplant directly to an enterprise with vastly broader participation. We need to recognize that the chances of getting government

[449] For Monti’s comments on Klein’s apparent shift of position, see (2000a, 5-6).
[450] For a list of the Ditchley Park participants, see IBA (2001, 3-4).
[451] For more on the Ditchley Park process, see European Commission (2002, 121).

> funding, in the U.S. or elsewhere, for an expensive new multilateral organization are very slim indeed and that creating a bricks-and-mortar organization (even deciding where to locate it) would create complex legal and jurisdictional issues, coupled with intra- and intergovernmental disputes, that would surely delay any useful work by a [ICN] for years (2000, 12-13).

The ICN was not designed to eliminate the possibility of future competition discussions in the WTO.[452] This stipulation was crucial for the EU's official support of the ICN because the Union was still striving to place competition on the WTO agenda.

While Klein's endorsement of an ICN was crucial, the arrival of the new Bush Administration in the White House in 2001, stirred European fears that the US would ignore a multilateral initiative like the ICN. However, shortly after his appointment as the new US Assistant Attorney General for Antitrust, Charles James strongly endorsed the idea. While noting the useful contributions of other international organizations, James critiqued their mandates as too broad to address the practical issues raised by international competition enforcement. Using the term employed in the ICPAC final report, James argued for the creation of a "Global Competition Initiative": "What is needed is another forum, focused specifically on the substantive and procedural issues surrounding international antitrust enforcement. To the extent that the Global Competition Initiative (GCI) can be this new and different forum, I fully support it" (James 2001, 8).

James' support for an ICN/GCI was unequivocal. Stating that the initiative should be operational by mid-2002, he "devoted much time during my first few months at the Antitrust Division thinking about GCI and consulting with [EU competition agents] and others about getting GCI off the ground" (2001, 8).[453] In discussing the mandate of an ICN/GCI, he emphasized that it should operate as a forum for developed and developing countries to exchange views on international antitrust enforcement.

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[452] Monti specifically stated "A global competition forum is not being proposed as an alternative to a WTO multilateral competition law framework. The two should be regarded as complementary" (2001a, 5).

[453] James was surprisingly supportive of the GCI:

> Getting GCI off the ground will not be easy, but I have made it a personal priority. Indeed, this is one reason why I have committed to do what I can to help launch GCI by no later than mid-2002. It is also one of the reasons behind my decision to appoint Bill Kolasky as a Deputy Attorney General devoted almost exclusively to international

The original discussions over the ICN/GCI envisioned it playing a prominent role in promoting convergence among national competition regimes across the world. Likewise, James emphasized that the ICN/GCI would

> formulate and develop consensus on proposals for procedural and substantive convergence in antitrust enforcement. Because our *ultimate goal is convergence*, I believe GCI's general approach to issues should be as practical and concrete as possible and that we should avoid abstract discussions that are unlikely to lead to improvements in the practice of antitrust enforcement. Unlike OECD, WTO, and UNCTAD, the GCI would not deal with trade issues, or even non-antitrust issues that could reasonably be included in the rubric of 'competition policy.' It would be all antitrust, all the time (italics added) (2001, 8-9).

These comments reflect the concern of the former head of the DoJ's Antitrust Division Joel Klein that linking competition issues with trade matters would increase the likelihood of politicizing competition cases.

Further reflecting a desire to avoid political intervention, James also emphasized the non-binding nature of the ICN/GCI: "The projects would be aimed at leading to non-binding general guidelines or 'best practice' recommendations. Where the GCI reaches consensus on particular recommendations, it would be left to governments to implement them voluntarily, through unilateral, bilateral or multilateral arrangements, as appropriate" (2001, 9). Endorsing the positions of earlier US and EU competition agents, James also argued that the ICN/GCI should not have a permanent secretariat (2001, 9).

Because the ICN/GCI would focus on the promotion of convergence in government enforcement policies, James also argued for limited involvement by private parties:

> I do not believe it would be appropriate for the private sector to be involved in the decision-making functions of GCI. I do, however, hope that the private sector will play a critical role in the work of GCI. For example, I would expect legal and economic antitrust practitioners, academics, and businesspeople to help GCI to identify projects and develop work plans. They also would be called

antitrust matters. Bill is a distinguished antitrust practitioner who is known to many of you; he will lead the Antitrust Division's participation in GCI (2001, 10).

> upon to contribute papers or participate in hearings on topics (2001, 10).

These comments suggest the extent to which the current US competition agents prefer avoiding intervention in their decision-making authority, whether by political principals or private actors.

On October 25, 2001, the International Competition Network was officially created in New York City.[454] Unlike the bilateral MWG, the ICN exemplifies a new form of EU-US discretionary exploratory institutional cooperation at the multilateral level. Since its inception, the EU has continued to express its support for the project at high-levels. As the EU's former Director-General of Competition Alexander Schaub argues, the ICN will encourage "the dissemination of antitrust expertise and best practices, as well as facilitating further international cooperation" (2002, 12). According to Commissioner Monti, economic internationalization was an important underlying cause of the ICN: "This is the first time competition authorities worldwide have taken an autonomous initiative designed to enable them to share experience and exchange views on competition issues deriving from an ever-increasing globalisation of the world economy" (European Commission 2002, 5-6).

According to the ICN's *Memorandum on the Establishment and Operation of the International Competition Network*, the ICN is

> a project-oriented, consensus-based, informal network of antitrust agencies from developed and developing countries that will address antitrust enforcement and policy issues of common interest and formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure (2001, 1).

The ICN's activities take place "on a voluntary basis and rely on the high level of goodwill and cooperation among those jurisdictions involved" (ICN 2001, 1). Careful to avoid any claims that may be construed as non-discretionary, and/or binding by domestic political principals, the ICN makes clear that it will not exercise "any rule-making function" (ICN 2001, 1). Rather, the ICN will provide "the opportunity for its members to maintain regular contacts, in particular by means of annual conferences and progress

[454] For information on the ICN, including its mandate, membership, history and financing, see www.internationalcompetitionnetwork.org.

meetings" (ICN 2001, 1). It should be noted that the ICN does offer to *facilitate* rule-making, deciding that when the ICN "reaches consensus on recommendations arising from the projects, it will be left to the individual antitrust agencies to decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate" (ICN 2001, 1). Thus, the ICN defers to the discretion of national competition agents and allows them to weigh the costs of bringing recommendations before political principals. Conforming to the patterns of behavior posited in Chapter 2, ICN recommendations will address areas under the discretionary authority of national competition agents and, thus, not be likely to prompt or require political intervention.

One of the ICN's work programs is merger-specific. Among five working groups, the ICN has established its own Mergers Working Group. This working group "will develop best practice recommendations regarding three aspects of the process for reviewing multi-jurisdictional mergers: 1) procedures, including timing, for reviewing multi-jurisdictional mergers, 2) the analytical framework for merger review, and 3) investigative techniques for conducting effective merger review.[455]

The members of the ICN are national and multinational competition agencies. From this membership, the ICN draws a Steering Group that is responsible for developing a work plan. The ICN does not have a permanent secretariat.[456] The ICN also seeks advice and contributions from "non-governmental advisers"—private sector and non-governmental actors and organizations concerned with the application of antitrust laws. These advisers are not actual members and do not participate in the internal decisions of the ICN. The advisers include:

- International organisations, such as OECD, WTO, and UNCTAD
- Industry and consumer associations
- Associations and practitioners of antitrust law and/or economics
- Members of the academic community (ICN 2001, 2).

[455] See http://www.internationalcompetitionnetwork.org/wg1.html.

[456] The ICN notes, "Due to the project-oriented working group structure, it is not contemplated to establish a permanent secretariat for the time being" (2001, 3).

The ICN notes that it will seek input from the "non-governmental advisers" in particular for the purpose of identifying projects, participating in working groups for designated projects, contributing papers or participating in hearings related to ICN projects.

Because the ICN does not have a permanent secretariat, the network has had to develop an innovative financing mechanism for its conferences and meetings. According to the ICN's *Memorandum on Establishment*, "Logistical support for the conferences and meetings will be provided by the ICN member hosting the conference. There will be one ICN conference per year.[457] Antitrust agencies should commit to being represented by agency heads to the maximum extent possible for these high-level events" (ICN 2001, 3). In addition to the high-level conferences, the ICN will host meetings for the representatives of the Steering Group (not necessarily heads of competition agencies). Host countries are required to bear the organizational costs of these conferences and meetings. Participating agencies and non-governmental advisers are responsible for all other individual expenses.[458]

IV. Conclusions

In the current study, the transitional process to cooperative bilateralism is enhanced by implementation and exploratory institutional cooperation after the initial step (i.e., Bilateral Agreement) of rule-making cooperation. After the formal launching of the new framework for cooperative bilateralism, implementation and exploratory institutional cooperation can occur simultaneously with further efforts at rule-making cooperation (i.e., PCA and AAA). However, this need not always be the case. It is conceivable that the competition agents could engage in, albeit limited, implementation cooperation without first creating a formal and binding cooperative framework. Such implementation cooperation would likely be ad hoc, occurring on a case-be-case basis.

[457] The first annual ICN Conference will be held in Naples, Italy in September 2002, hosted by the Italian competition authority. At this conference, the ICN is expected to approve a draft conference schedule for its future activities: Mexico as host in 2003, Korea as host in 2004, Germany as host in 2005, and South Africa as host in 2006.

[458] The ICN does note "Should antitrust agencies be unable to participate because of the lack of financial resources, the possibility of financing the cost of participation would be appropriately considered" (ICN 2001, 4).

Similarly, exploratory institutional cooperation could conceivably occur without prior success at rule-making cooperation.

The central argument of the current chapter is that implementation and exploratory institutional cooperation both occur primarily under the discretionary authority of the competition agents, but in conformity with their respective domestic power-sharing arrangements. Thus, in practice, these two processes of cooperation conform to the patterns of behavior for agents and principals posited in Chapter 2. While implementation cooperation occurs in general and case-specific terms, exploratory institutional cooperation occurs both bilaterally and multilaterally.

The cooperative framework established under the 1991 Bilateral Agreement has gradually evolved into four distinct stages of EU-US implementation cooperation: initial contacts, notification contacts, review process contacts and remedial contacts. As each of these stages has been discussed above, the specific merger cases suggest that discretionary cooperation is increasing, tends to function smoothly and leads almost invariably to convergent decisions. When divergent decisions do occur, they are inconsistent, not conflicting. In fact, the EU and US competition agents have not yet reached a conflicting decision in a concurrent jurisdiction merger case.[459]

For analytical purposes, implementation cooperation can be conceptualized as occurring as two distinct types of behavior: general and case-specific. In general implementation cooperation, exchanges of information are increasing (P1), while respecting confidentiality provisions, the changing of which would increase the likelihood of political intervention in the activities of competition agents (P2). Therefore, the agents continue to shirk in implementation cooperation (P4). By doing so, the agents maximize their independence from political principals. These discretionary increases in implementation cooperation reduce information asymmetries through initial contacts, notification contacts, review process contacts, and remedial contacts in individual concurrent jurisdiction merger cases. It is useful to recapitulate the discretionary increases that have occurred in each stage of implementation cooperation. With the

[459] It is worth repeating that both the BMD and GEH mergers were cases of inconsistent decisions, not conflicting decisions. For a discussion of the implications of inconsistent versus conflicting decisions, see Chapter 6.

exception of notification contacts, these discretionary increases were not explicitly envisioned in the original Bilateral Agreement.

In the initial contacts stage, implementation cooperation is fundamentally discretionary. Initial contacts are, by their very nature, discretionary because they address behavior that is not explicitly detailed in domestic legislation and requires no direct political involvement. For example, neither the HSR nor the MCR explicitly provide for pre-notification contacts (PNCs) between competition agents and merging firms. As such, PNCs represent a discretionary way in which the agents can delay the statutory timetables that constrain their ability to acquire information necessary to analyze mergers (P2). In addition, during concurrent jurisdiction merger cases, the agents can exchange relevant information acquired through PNCs. However, again conforming to their domestic institutional environments, the competition agents are careful not to share confidential information (or call for changes to confidentiality provisions). Despite this constraint, the competition agents can bring relevant information to the attention of their foreign counterparts and discuss its implications in a hypothetical sense. In this way, initial contacts function as a discretionary early warning system—by discussing market definitions and analytical concepts,[460] even hypothetically, before receipt of the formal notification, the agents can alert each other to the potential use of different approaches to evaluating a merger that could lead to divergent decisions.

According to Table 9, the increasing levels of EU-US notifications since 1991 are positively correlated with the increasing number of concurrent jurisdiction competition cases since 1990. This correlation supports the influence of EI suggested by the revised cross-level approach. During notification contacts, the competition agents conform to the provisions established in the Bilateral Agreement. However, the competition agents must conform to different domestic statutes when engaging in notification contacts. The EU (pursuant to MCR) publishes the fact that it has received an official notification of a merger, while the US (pursuant to HSR) keeps it confidential until after a preliminary investigation and the decision is made to open an investigation. Thus, before the

[460] For example, recall that during the Exxon/Mobil merger case, EU and US competition agents were able to discuss the parameters of relevant product markets (oil and gas), the identification and characteristics of possibly dominant positions (super majors) and the future market impact of the transaction approximately

competition agents can formally notify each other of an investigation that might affect their counterpart's important interests, they conform to their respective domestic statutes governing disclosure of the receipt of the merger notification from the firms. The Bilateral's provisions for formal EU-US notifications have also modestly influenced internal procedures, such as the guidelines for notifying the US that have now been inserted in the Competition Directorate's internal manual of procedures.

Review process contacts can occur via telephone calls, faxes, emails and even face-to-face interactions through the reciprocal exchange of attendees as provided for under the AAA.[461] These review process contacts frequently target substantive issues such as the definition of relevant product and geographic markets and the assessment of the likely competitive effects of the proposed merger on those relevant markets. Such coordination and exchanges of information reduce the likelihood of divergent decisions in general implementation cooperation. However, even the use of similar market definitions does not always guarantee convergent decisions because of differing market conditions and competitive realities in the EU and US. How specifically then do review process contacts reduce the likelihood of divergent decisions? To answer this question requires a closer look at the review process contacts that occur in specific cases of concurrent jurisdiction mergers. Unfortunately, systematic and consistently reliable reporting of these intensive and sometimes mundane and technical contacts is not available. However, the Commission's descriptions of selected mergers from Table 10 provide insights into the practical means by which review process contacts reduce the likelihood of divergent decisions. For example, in the Lockheed Martin/Loral merger, the EU-US information exchanges provided the Commission with previously unknown information (an SEC filing that was on public record) from a foreign jurisdiction that was useful for reviewing a concurrent jurisdiction merger.

The BT/MCI (II) merger reveals the importance of cooperation during the review process for mergers that effect changing and/or new product markets. Without coordination, the definitions of new markets would very likely differ, which, in turn,

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five months before the official notification of the merger was received from the firms and the HSR and MCR timetables were set in motion.

[461] Of course, these exchanges of attendees occurred before they were regularized under the AAA. See, for example, the Guinness/Grand Metropolitan merger case.

would increase the likelihood of divergent decisions. The AOL/Time Warner, Time Warner/EMI and MCI WorldCom/Sprint mergers also reveal the importance of cooperation on new market definitions. Cooperation is also useful when dealing with more traditional, or established, market definitions as was the case in the Price Waterhouse/Coopers & Lybrand, WorldCom/MCI, Wolters Kluwer/Reed Elsevier, Exxon/Shell and Marsh & McLennan/Sedgwick mergers where the competition agents reached consistent market definitions. Even when the competition agents use different market definitions, they can still benefit from implementation cooperation (American Home Products/Monsanto, and Hoffmann-La Roche/Boehringer Mannheim) because review process contacts encourage the review and self-evaluation of market definitions and provide a sounding board for them to confirm their analytical approaches.

Specific merger cases also suggest limitations to the utility of review process contacts. For example, although Travelers/CitiCorp, Daimler Benz/Chrysler, and BP/Amoco were very large volume (i.e., size of transaction) mergers, implementation cooperation was limited for two reasons. When the main focus of the business activity occurs outside one jurisdiction (Travelers/CitiCorp) or when the merging parties come together from home positions in their respective territories and the competitive impact of the overlap is minimal, review process contacts may be largely unnecessary.

During remedial contacts, the EU and US competition agents are devising new discretionary ways to increase the likelihood of convergent decisions. For example, the "best practices" in the MCI/WorldCom merger saw the DoJ and Commission cooperate on market-testing and implementation of remedies. The competition agents also cooperated in the implementation of remedies in the Halliburton/Dresser merger. As the Commission argues, cooperation in the implementation of remedies may be an area of growth in future EU-US implementation cooperation. Due to its comparatively limited personnel resources, the Commission may find that cooperation with the US is vital to ensuring that firms implement the agreed remedies in concurrent jurisdiction merger cases.

The preceding discussion of general implementation cooperation provides specific examples of the discretionary ways in which EU and US competition agents are reducing the likelihood of divergent decisions despite the challenges of EI. Across each of the stages of implementation cooperation, the EU and US competition agents are engaging in discretionary behavior designed to reduce information asymmetries, which, in turn, reduces the likelihood of divergent decisions in individual merger cases. This behavior reflects the concern of the agents that such decisions are typically perceived by political principles as likely to affect adversely their national and/or constituent interests (se Chapter 2).

Thus, in general implementation cooperation, the agents have reduced the likelihood of divergent decisions through a variety of information exchanges. However, political intervention has occurred in specific cases because the EU and US principals retain their respective foreign intervention instruments. The continued existence of these foreign intervention instruments conforms to the revised cross-level approach and the structure of the cooperative framework established through rule-making cooperation. The continuing ability of principals to exercise foreign intervention instruments is particularly notable in the flawed BMD and GEH merger cases. These two cases are “flawed” in the sense that the outcome deviated from the preferences of the competition agents to avoid political intervention in the merger review process.

So, why did the principals intervene in these two cases? First, divergent decisions occurred in each case. Second, the principals perceived the divergent decisions as threats to national and/or constituent interests. Considering the size of the merging firms in both cases, it should not be surprising that the principals perceived the divergent decisions as costly enough to intervene (P6).[462]

According to the patterns of behavior, the fact that a divergent decision threatened national and/or constituent interests should have been enough for the principals to intervene. However, the two flawed cases suggest other potential factors that increased the likelihood of political intervention. Despite the lessons learned from the BMD experience, the competition agents were unable to avoid political intervention in the GEH case. In this regard, the merging firms appear largely responsible for creating the flaw: the speed with which the merger agreement was reached and the decision not to engage in active PNCs severely limited the ability of the EU and US competition agents to share information and reach a convergent decision. In addition, the merging firms’ publicity

[462] See Chapter 6 for a discussion of the intervention cost calculations made by the principals.

campaign and efforts to generate political pressure only reduced the likelihood that the Commission would change its decision to one that was convergent with the US competition agent's decision.

The preceding analysis of exploratory institutional cooperation through the MWG and the ICN illustrates the supposition in the fifth pattern of behavior (P5)—EI prompts competition agents to continue shirking (discretionary pursuit of their own preference to maximize certainty and decision making authority) via attempts at exploratory institutional cooperation to maximize their independence from political principals. In addition, the MWG and ICN provide evidence of the EU and US competition agents conforming to other patterns of behavior at both the bilateral and multilateral levels. Bilaterally, the MWG suggests that the competition agents are shirking to reduce information asymmetries with the intent of reducing the likelihood of divergent decisions (P1). This serves the interests of both the EU and US competition agents. Given the higher costs associated with changing non-discretionary authority, the competition agents were careful to ensure that the MWG was an informal and ad hoc dialogue established completely within the constraints of their discretionary authority (P2).

Similarly, at the multilateral level, the ICN conforms to the same patterns of behavior for the competition agents (P1 and P2). However, the ICN demonstrates an instance in which the EU and US competition agents disagreed on the most appropriate means for shirking to increase multilateral cooperation in competition policy. Ultimately, the US position shifted after the ICPAC report called for a separate forum to discuss informally the challenges of EI to the enforcement of domestic competition policy in concurrent jurisdiction mergers. The final compromise on the ICN did not eliminate the possibility of discussing competition issues in the WTO or other international organizations in the future.[463] Rather, in order to satisfy the US's concerns, the ICN does not deal with issues that could increase the likelihood of political intervention, such as the linkages between trade and competition policies; as the DoJ's new Assistant Attorney General for Antitrust, Charles James, argues, the ICN is "all antitrust, all the time". This

[463] In this regard, this case of exploratory institutional cooperation did distance itself from pre-existing fora like the OECD, UNCTAD and WTO, which had proved insufficient to overcome the discordant transatlantic relationship that had existed before 1991. Such international organizations function only as advisors in the ICN; they do not provide a pre-existing institutional basis for the ICN's activities.

final compromise conforms to the agents' pattern of behavior to limit exploratory institutional cooperation to areas under their discretionary authority. By incorporating competition issues into the WTO's binding dispute settlement mechanism, the agents would have prompted political intervention (via ratification procedures), a fact that the Commission ultimately conceded before agreeing to pursue the ICN. As a result, the ICN is careful to limit its operations to generating general guidelines or 'best practice' recommendations, which can be implemented on a voluntary basis and remain under the discretionary authority of participating competition agents.

Regarding the likelihood of political principals intervening in exploratory institutional cooperation (P6), the preceding case are largely inconclusive. This limitation reflects the success with which the competition agents constructed the MWG and the ICN in a conscious effort to expand their ability to cooperate internationally while staying within the confines of their discretionary authority. Because of the great care taken by the competition agents to avoid behavior that might be perceived as threatening by the principals, the costs to political principals for not intervening in this shirking have remained lower than the costs of intervening.

One final and unexpected point emerges from the preceding analysis of exploratory institutional cooperation. The MWG and ICN display the strong desire of competition agents to seek *convergence* at the bilateral and multilateral levels. This convergence is not limited to convergent decisions. Rather, it also applies to convergence of substantive and procedural aspects of domestic merger review, which, in turn, reduces the likelihood of divergent decisions. It might be thought that the pursuit of such institutional convergence runs contrary to the preferences and patterns of behavior for the competition agents because convergence of domestic law requires approval by the political principals. However, as noted above, the MWG and ICN are both intended to enhance institutional convergence in areas under the discretionary authority of the respective competition agents. Assuming a continuing EI environment, this finding suggests that discretionary efforts at bilateral and multilateral convergence are likely to occur in the future. Should the competition agents overstep the bounds of their discretionary authority, principals will be likely to intervene, which would provide a useful comparative case for assessing P6.

CHAPTER 6: Expanding the Research Agenda of International Regulatory Cooperation

I. Introduction

The preceding analysis has attempted to ascertain the major causes of cooperation in a bilateral relationship that is extremely important for determining the likelihood of change and stability in the international system. Given the prominence of the transatlantic relationship in shaping international political decisions, scholarly investigations of the causes and consequences of cooperation between the EU and US are particularly useful for understanding the nature and likelihood of cooperation and conflict in the international system.

The current study identifies a policy area in which EU-US cooperation excels—competition policy—in order to investigate the causes of international cooperation. Examinations of transatlantic cooperation in competition policy are particularly informative for understanding the political, economic and legal dynamics of international relations more generally. Indeed, this case displays a useful synthesis of the political, economic and legal dynamics that motivate formal and informal efforts to enhance bilateral and multilateral governance. These dynamics are all the more important because they are occurring in a policy area that fundamentally organizes domestic economies but increasingly addresses cross-border activities. Thus, due to the international importance of this bilateral relationship across a number of policy areas, a better understanding of EU-US competition relations may provide crucial insights into the future modalities and organization of multilateral governance more generally.

This final chapter begins with a brief recapitulation of the central puzzle and discusses the theoretical implications of the current study. Next, it summarizes the findings of the study in terms of the patterns of behavior for agents and principals. The chapter then comments on the role of societal (in particular business) influences in EU-US cooperation in merger review. This section also investigates potential ways in which to determine the role of firms in the intervention cost calculations of principals. The chapter concludes with a discussion of the generalizability of the findings to international regulatory cooperation in other policy areas. In particular, insights from the current study are compared to the international politics of trade policy and the emerging political dynamics of cooperation in areas characterized by increasing international regulation. These comparisons raise additional interesting questions that form a clear and promising agenda for future research on the politics of international regulatory cooperation.

II. Theoretical Implications

Transatlantic competition relations were historically characterized by a political tit-for-tat of extraterritorial unilateralism and national countermeasures. During the 1980s, the historical trend of transatlantic discord in competition relations showed few signs of abating as Europe and the US continued to pursue their own interests in competition policy. In addition, the exogenous stimulus of EI was increasing the pressures on firms to engage in more cross-border mergers and consequently increasing the likelihood of concurrent jurisdiction merger reviews. Based on historical experience, the resulting jurisdictional overlaps could be expected to lead to further disagreements and political brinkmanship in transatlantic competition relations. To the contrary, however, transatlantic competition relations in the 1990s are more appropriately characterized as cooperative bilateralism. Despite the historical discord in transatlantic competition relations and the increasing challenges of EI, how and why has EU-US cooperation in competition policy increased since 1990?

Traditional systemic IR explanations and more recent cross-level approaches provide incomplete explanations for this transition to cooperation in competition policy because they tend to exclude important actors from the analysis and focus on the role of treaties when explaining international cooperation. In addition, these explanations fall short of explaining a crucial characteristic of the post-1990 cooperation—it is largely discretionary in nature and conducted by regulatory agents. To overcome these shortcomings, the current study relaxes the unitary actor assumption of the state and develops a revised cross-level approach. Relying on the work of Putnam (1988) and Milner (1997, 1998, 1999), the revised cross-level approach employs a two-level game metaphor to simplify political activity at the domestic and international levels and incorporates a strategic bargaining framework of domestic politics that simplifies the impact of both interests and institutions on policymaking.[464] However, this new approach is notably distinct from those advanced by Putnam and Milner. The differences are most readily apparent upon closer examination of the respective treatments of domestic politics.

Putnam and Milner's approaches emphasize the causal roles played by domestic executives and legislators in international negotiations. Alternatively, the revised cross-level approach emphasizes the causal role of domestic regulators (in addition to political principals such as executives and legislators) in international negotiations.[465] This is not to claim that Putnam and Milner reject any role for other domestic actors, just that they are more concerned with the behavior of executives and legislators in explaining international politics.

The revised cross-level approach places domestic regulators at a different analytical level. For Putnam and Milner, international negotiations among chiefs of government (COGs) occur at Level I, while domestic negotiations between executives and legislators occur at Level II. According to Putnam, if domestic regulators play a role, it is at Level II.[466] Alternatively, in the current study, domestic regulators are actors in Level I negotiations. This distinction also changes the actors for Level II negotiations, which, according to the cross-level approach, occur between multiple principals and agents instead of between executives and legislators. For Putnam and Milner, the COGs become the interface between the two levels, while the revised cross-level approach presents regulators as the interface between the domestic and international levels.

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[464] However, it should be cautioned that the current study is not a two-level game in the traditional sense because the preferences of the competition agents are so similar as to reduce the contentious nature of the external bargaining that characterizes Putnam's level II.

[465] While emphasizing the role of regulators, the current study moves beyond the bureaucratic politics literature to employ a strategic bargaining framework of domestic politics. Similar to the work of Ferejohn and Shipan (1990), the current study shows "how the interaction among bureaucracies and the legislature leads to certain policy choices and how changes in various conditions, such as the preferences of either of these groups or the institutional structure, alter the outcomes. This form of rationalist institutionalism then provides a way of understanding how policy results from the strategic interaction of bureaucrats and other governmental actors within specific institutions" (Milner 1999, 137). Also, while studies of the bureaucracy often portray bureaucrats as a source of *resistance* to policy change, the current findings suggest that bureaucrats can function as *positive* forces for policy change. The current study also moves beyond transgovernmentalist explanations by considering domestic institutions as causally significant determinants of regulators' behavior.

[466] For example, Putnam notes "The actors at level II may represent bureaucratic agencies, interest group, social classes, or even 'public opinion'" (1993, 438).

The differences between the approaches emerge because the revised cross-level approach considers an extremely important but understudied aspect of foreign policymaking and international relations: executive agreements.[467] Instead of focusing on the domestic politics that follow from battles over treaty ratification, the current study elucidates the domestic politics that emerge over the negotiation and signing of executive agreements.[468] As a result, regulators become central actors in the explanation, reflecting the fact that executive agreements do not require the ratification procedures common to non-discretionary treaty-making. Regulators (try to) negotiate and sign executive agreements under their discretionary authority. Absent the ratification procedures that, among other domestic political institutions, are fundamentally important to domestic power-sharing in the Putnam and Milner frameworks,[469] the revised cross-level approach incorporates the domestic political institutions that embody the delegation of regulatory authority from politicians to regulators. The domestic institutions of regulatory control are incorporated because, unlike Putnam and Milner, the revised cross-level approach employs the principal-agent framework of delegation (PAF) to simplify domestic politics.

Despite these differences, the current study provides an example of the type of research that Milner argues is likely to be fruitful for IR theory (1998, 768). In particular, Milner argues for the use of cross-level analyses that incorporate rational choice

[467] These differences also reflect, in part, the fact that the revised cross-level approach was developed to answer questions regarding rule-making in international regulatory cooperation in competition policy, not the questions surrounding treaty-making in trade and other policy areas that inform much of the Putnam and Milner approaches. The potential applicability of the revised cross-level approach to trade policy is taken up below in comparison to international regulatory cooperation.

[468] Such executive agreements are rough equivalents of Putnamian Level I agreements. As noted in Chapter 4, two of the three agreements considered in the current study (Bilateral and PCA) are asymmetrical: while they were negotiated under the discretionary authority of the US competition agents, they both required approval of the principals and agents (following the ECJ's decision) in the EU. The AAA was negotiated and signed completely under the discretionary authority of the US and EU competition agents with no principal intervention required. All three agreements are labeled "executive agreements" in the US. However, in the EU, the three agreements are labeled "administrative agreements". For a useful discussion of the legal effects and binding nature of international agreements signed by the EU, see Macleod et al. (1996, 122-141). Despite these differences in terminology, this chapter uses the term "executive agreement" in a general sense to cover all three agreements.

[469] More specifically, Putnam uses the term ratification "to refer to any decision-process at Level II that is required to endorse or implement a Level I agreement, whether formally or informally" (1993, 438). Milner expands on Putnam emphasizing four elements of the policymaking process that are embedded in domestic power-sharing arrangements: "the ability to initiate and set the agenda, to amend any proposed policy, to ratify or veto policy, and to propose public referendums" (1997, 18). In addition, Milner considers the degree of divided government a key explanatory variable for the likelihood of international cooperation.

institutionalist approaches to understand domestic politics.[470] In this view, institutions are the means by which the "diverse preferences of individuals are aggregated into choices or outcomes for the collective. Institutions here both shape and reflect the strategic interaction among agents. Critical is the attention both to institutions and to strategic interaction among agents" (Milner 1999, 760-61). Despite these benefits, rational choice institutionalism has been criticized for being too static because of its focus on equilibria conditions (Green and Shapiro 1994). This criticism suggests that the explanation has difficulty accounting for change over time. However, as shown in the current study, the approach can explain change over time when supplemented with careful process-tracing that reveals the ascendancy, within the constraints of domestic institutions, of certain actors' preferences over others.[471]

As mentioned above, in order to simplify the domestic politics surrounding international cooperation in competition policy, the study relies on insights from PAF. While PAF is common in American and Comparative Politics, the framework has yet to gain widespread application in IR/IPE.[472] Nevertheless, as the current study shows, PAF proves a useful and parsimonious tool for simplifying the complex domestic politics of international regulatory cooperation. In particular, PAF directs the analysis toward the interests of the most important actors and incorporates a causal role for domestic institutions. The dynamics of control and independence between principals and agents provide compelling insights into the domestic politics of EU-US cooperation in competition policy.

[470] For broader assessments of the institutionalist debates, see Peters (1999), Pierson (1996) and Hall and Taylor (1994).

[471] This process-tracing reflects the process-oriented approach suggested by Keohane's definition of international cooperation. Similarly, the process-oriented approach is advocated by Pollack as a means for overcoming potential empirical pitfalls of the PAF approach. Specifically, Pollack encourages analysts to "engage in careful process-tracing in order to establish the respective preferences of the [relevant actors], and the subtle influences that these actors may exert upon each other. Process-tracing may also… reveal the path-dependent effects of early decisions… which become 'locked-in' and affect the outcome of later principal-agent interactions (1998, 223).

[472] For notable exceptions that employ PAF to explain international policy change and cooperation in the process of European integration, see Elgie (2002) and Pollack (1998, 1997).

III. Summary of Findings

The elaboration of the patterns of behavior for principals and agents in the preceding chapters demonstrates the analytical value of the revised cross-level approach. The current study finds that EU-US cooperation in competition policy occurs primarily as three bottom-up processes[473]—rule-making, implementation and exploratory institutional cooperation—which are driven by the discretionary authority of utility-maximizing competition regulators reacting to the exogenous stimulus of EI and the constraints of domestic political institutions.

The different and often conflicting interests of the EU and US resulted in discordant competition relations before 1990.[474] However, the interests and preferences of the respective principals and agents did not change after 1990.[475] Given these stable preferences, how can the current study explain the change in transatlantic competition relations from discord to cooperative bilateralism? While the preferences of the "states" (i.e., elected politicians in the EU and US) may *appear* to have changed after 1990 due to the systemic stimulus of EI, this apparent change of "state" preferences is actually more reflective of the agent preferences emerging over principal preferences due to the expansion of discretionary authority. In short, prior to 1991, "the state's" preference was more reflective of principal preferences to retaliate if national and/or constituent interests were threatened. After 1991, "the state's" preference is more reflective of agent preferences to avoid principal intervention.

The transition to cooperative bilateralism occurred because, as regulatory authority has gradually expanded via discretionary means, the preferences of the

[473]The preceding analysis has relied on a specification of international cooperation beyond Keohane's definition to differentiate three explicit processes of international cooperation. Keohane defines international cooperation as occurring "when actors adjust their behavior to the actual or anticipated preferences of others, through a process of policy coordination" (Keohane 1984, 51).

[474] Chapter 3 provides a summary of these different interests and the resulting discordant transatlantic competition relations.

[475] When trying to explain systemic level phenomena, consideration of domestic politics can create apparent variance in state preferences. In order to overcome this complication, systemic IR explanations often "capture" domestic preferences with simple assumptions about stable preferences (Moravcsik 1993, 11). Instead of employing such simple assumptions, the current study traces the process of cooperation to reveal the stability or susceptibility to change of the preferences of relevant domestic actors. As argued in Chapter 2 and supported in Chapter 3, this approach suggests that the preferences of relevant domestic actors have remained stable for a considerable period of time—since the US and EU principals initially delegated regulatory authority in competition policy to their respective agents.

competition regulators have emerged as the dominant (albeit constrained by domestic institutions) force driving the adjustment of EU and US behavior in transatlantic competition relations. More specifically, EU-US cooperation in merger review occurs when regulatory agents adjust their behavior (via shirking) to reduce the likelihood of divergent decisions. This adjustment of behavior occurs as discretionary policy coordination that can be disaggregated into three specific processes—rule-making, implementation and exploratory institutional cooperation.

The PAF literature typically argues that increases in agent shirking will lead to increases in political intervention via control instruments. Political principals prefer intervening to prevent domestic and foreign agents from shirking when the costs of that shirking exceed the costs of intervention. However, the current study suggests a counter-intuitive argument that as agent shirking increases in international competition relations, political intervention (both domestically and internationally) decreases. While agent shirking increases in order to cope with the new challenges presented by merger activity in an EI environment, political intervention decreases because agent shirking to expand cooperation reduces the likelihood of divergent decisions that might prompt politicians to intervene. Indeed, agent shirking is the conscious construction (via three distinct processes of international cooperation) of a dispute prevention system that would preclude the need for dispute resolution by political principals. In other words, the *principals are less likely to encounter situations in which the costs of no intervention (perceived threats to national/constituent interests) exceed the costs of intervention (exercising any variety of domestic control instruments and/or foreign intervention instruments)*.

A. The Stimulus of Economic Internationalization

The EU and US regulatory agents are primarily responsible for the transition to cooperative bilateralism in competition relations. However, EU-US cooperation in competition policy was not simply initiated by competition agents enjoying and expanding discretionary authority for external rule-making. If it were, the transition to cooperative bilateralism would have occurred much earlier than 1991, because discretionary authority for this rule-making cooperation dates for the US from the 1972

CZA and, for the EU, somewhat ambiguously from the 1962 Regulation 17. While the US and EU competition agents enjoyed such discretionary rule-making authority, they did not exercise it transatlantically until 1991. Thus, the existence of discretionary rule-making authority cannot be the sole explanation of the transition to cooperative bilateralism after 1990.

The desire of competition agents to exercise their discretionary authority to cooperate internationally was triggered by a systemic stimulus that affected both jurisdictions—the external threat of EI increasing the likelihood of concurrent jurisdiction mergers. Under the pre-1991 framework, the prospect of increasing concurrent jurisdiction merger activity was likely to lead to an increasing number of divergent decisions and subsequent political interventions. The increasing threat of EI appears to be an important change in the external environment from the period of the CZA and Regulation 17 to the negotiation of the 1991 Bilateral Agreement.[476] However, the threat of EI is a necessary, but not sufficient, condition for the discretionary international cooperation that emerged in EU-US competition relations. Competition agents seeking to avoid political intervention must also be present to translate this external threat into a desire to pursue international cooperation via shirking.

From the perspective of the competition agents, the immediacy of their desire to avoid political intervention was increased by domestic institutional developments in Europe and America, including the US's Section 301 and the Exon-Florio amendment, and the EU's Wood Pulp decision, pending completion of the SEM, and signing of the MCR. In the eyes of the competition agents, these developments created imbalances in their relations that would be exacerbated by the threat of EI. Both competition agents perceived the imbalances as favoring their foreign counterpart. Taking advantage of the imbalance, one competition agent could directly threaten the desire of the other to maximize its regulatory independence as a way to increase its certainty and decision-making authority in an EI environment.

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[476] As discussed in Chapter 3, this period also witnessed the signing of other competition agreements, including the OECD Recommendations and bilateral agreements between the US and three individual OECD members. Closer investigation of these cases may provide useful insights into the role of EI (if any) in the signing of other international competition agreements. Such future research will require more detailed studies of the domestic politics in the respective countries at the time the agreements were signed.

B. The Role of Domestic Politics

The basic motivation of political principals and competition agents is a desire to maximize their own certainty and decision-making authority. As such, political principals are interested in maintaining control over competition agents, while competition agents are interested in increasing their regulatory independence from political principals. However, EI changes the traditional principal-agent dynamic because mergers become more internationally-oriented in nature, which introduces foreign political principals and competition agents into the calculus.

The role of domestic politics is explicitly reflected in the patterns of behavior introduced in Chapter 2. Therefore, a brief recapitulation of the patterns of behavior for principals and agents is useful at this point (see Figure 5).

In particular, these cases may indicate other systemic stimuli that create similar incentives for signing non-binding recommendations and executive agreements without a significant role for EI.

Figure 5: Patterns of Behavior for Principals and Agents

P1: Because EI increases the likelihood of concurrent jurisdiction mergers, regulatory agents will pursue ways to reduce information asymmetries that could lead to divergent decisions.

P2: Given the higher costs associated with changing non-discretionary authority, competition agents will pursue increases in rule-making cooperation (aimed at increasing exchanges of information) with foreign agents via discretionary means (i.e., shirking).

P3: Political principals will intervene in domestic agent attempts to shirk (increase discretionary rule-making cooperation) if the costs of not intervening exceed the costs of intervening.

P4: Following successful rule-making cooperation, EI prompts competition agents to continue shirking (discretionary pursuit of their own preference to maximize certainty and decision making authority) via attempts at implementation cooperation to maximize their independence from political principals.

P5: Following successful rule-making cooperation, EI prompts competition agents to continue shirking (discretionary pursuit of their own preference to maximize certainty and decision making authority) via attempts at exploratory institutional cooperation to maximize their independence from political principals.

P6: Following successful rule-making cooperation, political principals will continue to intervene in domestic and foreign agent attempts to shirk (increase discretionary implementation and exploratory institutional cooperation) if the costs of not intervening exceed the costs of intervening.

1. The Patterns of Agent Behavior

The first pattern of behavior (P1) addresses the crucial role of information in international cooperation. Across all three processes of discretionary cooperation, information plays an important role in explaining the emergence and subsequent implementation of EU-US cooperation. Information asymmetries increase the likelihood of divergent decisions between competition agents, which increases the likelihood of political intervention. In order to reduce the likelihood of divergent decisions and, in turn the likelihood of political intervention, EU and US competition agents have engaged in rule-making cooperation to construct a cooperative framework for increasing information exchanges.

Likewise, during implementation cooperation, competition agents actively exchange information on individual merger cases. In implementation cooperation, competition agents remain constrained by their respective domestic institutions. However, the competition agents are able to overcome these constraints to a certain degree in their discretionary efforts to reduce information asymmetries. For example, through shirking, the agents have largely overcome the domestic limitations on exchanging confidential information and have developed cooperative means for determining the appropriateness of remedies offered and ensuring that remedies are implemented by the merging firms. None of these discretionary developments were envisioned or explicitly mentioned in the original Bilateral Agreement.

The centrality of information exchanges in EU-US competition relations raises the prospect of influence by firms. The current study intentionally minimizes the role of firms for analytical simplification. However, the preceding analysis suggests that firms generally support—as witnessed in the International Chamber of Commerce's endorsements—cooperation in rule-making and exploratory institutional cooperation. This support is conditional; formal cooperation must respect domestic laws that protect confidential information.[477]

In comparison, in implementation cooperation, individual firms may not support cooperation, especially if they are the target of an investigation. In such cases, individual firms can limit information exchanges on a case-specific basis by refusing to waive their rights to confidentiality. This influence may vary between merger and non-merger cases (Damro 2003 forthcoming; ICPAC 2000, 65). Rights of confidentiality are less problematic in merger cases because firms typically waive them and competition agents have devised ways to reduce their dependence on waivers. As discussed in Chapter 5, through discretionary implementation cooperation, agents can overcome the limitations of rights of confidentiality by engaging in hypothetical discussions during initial contacts and discussions of previous related experiences during remedial contacts. During these

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[477] For evidence of strong corporate desire to maintain the confidentiality of sensitive business information in merger review, see International Chamber of Commerce (1999). The ICC opposes the removal of the right to confidentiality because "Confidential information supplied by companies to competition authorities in the context of merger reviews or anti-trust investigations often includes extremely sensitive information relating to the strategy of the company, its investment plans and its marketing goals and methods. If such information falls into the hands of competitors of the company involved, or into the public domain, this have serious adverse consequences on the competitive position of the company, or its share value. This risk is not theoretical, especially when information is sent to countries where the company providing the information faces strong competition, especially from state-owned companies, or in the context of mergers, when share prices are particularly volatile."

hypothetical discussions, the agents do not exchange confidential information, but they do largely overcome the constraints on implementation cooperation that are raised by such domestic confidentiality protections and reduce potentially problematic information asymmetries. Thus, firms are more likely to affect implementation cooperation through actions witnessed in the GEH merger case: merger agreements may be reached too quickly to consult competition authorities, pre-notifications contacts may be limited, and publicity campaigns and efforts to increase political intervention may be attempted.

These preliminary findings suggest the need for further systematic analysis of the role of firms across all three processes of international cooperation. Likewise, the findings may suggest a fundamental weakness in PAF—the framework needs to be flexible enough to consider more fully the role of firms. To address their role more fully, this chapter discusses firms in the political intervention cost calculations in the next section.

EU and US competition agents also have devised ways to overcome the obstacles to implementation cooperation that arise from different domestic budgetary constraints. The impact of different domestic budgetary constraints is most noticeable in the EU where the Commission's limited personnel resources reduce the agent's ability to determine the appropriateness of remedies offered and to ensure that remedies are implemented properly. These limitations increase the likelihood of the EU and US competition agents reaching divergent decisions on remedies. However, discretionary efforts to increase remedial contacts have overcome this threat and reduced the limitations presented by the Commission's budget constraints. For example, the EU and US are increasingly cooperating in market-testing and the implementation of remedies. Given the US's comparatively larger resources to engage in such activities, these types of discretionary remedial contacts reduce problematic information asymmetries during and after remedial contacts. As a result, they also reduce the likelihood of divergent decisions and allow the Commission to overcome its domestic budgetary constraints.[478]

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[478] Despite these means to overcome certain domestic constraints, the GEH merger case suggests that institutional differences may still play an important role in the likelihood of divergent decisions. For example, US competition agents have greater resources for following up on decisions after final approval of a merger. As Schaub argues, "In the US post-closing merger enforcement is a possibility, a merger that went unchallenged at the level of the merger review procedure can still be attacked later on. Contrary to the US system, the European system of merger control is a preventive one. The Commission has only a one-

The desire of competition agents to reduce information asymmetries is also demonstrated in exploratory institutional cooperation. The bilateral MWG and multilateral ICN are informal fora for increasing contacts among competition agents and increasing information exchanges in a general, non-case-specific sense. Both the MWG and the ICN also suggest that the competition agents are keen on pursuing procedural and substantive convergence as a means to reduce further the likelihood of divergent decisions. As discussed in Chapter 5, this desire for institutional convergence is limited to areas under the discretionary authority of the respective competition agents. Pursuing convergence of the domestic laws governing competition policy would require approval by the political principals, a circumstance the competition agents find undesirable (P2). Assuming a continuing EI environment, this finding suggests that further *discretionary* efforts at bilateral and multilateral convergence are likely to occur in the future.

Each of these efforts to reduce information asymmetries reflects the desire of competition agents to increase cooperation *via their discretionary authority* (P2). Across all three processes of cooperation, EU and US competition agents first attempted to shirk as a means to maximize their own certainty and decision making authority. This should not be particularly surprising given the fact that pursuing changes via non-discretionary authority (e.g., treaty-making, statutory adjustment and judicial adjudication) are more costly and less certain for regulators than pursuing changes via discretionary authority.

In rule-making cooperation, the competition agents attempted to establish international agreements (executive agreements) under their discretionary authority (P2). The agents consciously crafted these executive agreements so as not to require changes in domestic statutes, such as those governing the protection of confidentiality. Indeed, without the constraints of domestic institutional environments, the competition agents likely would have pursued IAEAA agreements and/or MLATs (see Chapter 3). In implementation cooperation, the competition agents attempted to reduce information asymmetries by creating initial contacts, expanding the means and frequency of review

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shot possibility to approve or block a notified merger – that is, at the time of its review. After the Commission has decided, no further action can possibly be taken with regard to a merger. As a consequence, the Commission has to ensure that the competitive structure of the relevant markets is not harmed as a result of the merger" (2001, 9). Due to these institutional differences, the Commission may have been more prone to use the economic concept of bundling (and its predictions about future market structure) in its analysis, which contributed to the divergent decision with the US competition agents.

process contacts, and devising techniques for market-testing and the implementation of remedies. During all of these activities, the competition agents were careful to remain within their discretionary authority (P4). In exploratory institutional cooperation, competition agents also were careful to remain within their discretionary authority when they created two new informal fora for pursuing convergence (P5). These two new fora were consciously constructed in a manner that would reduce the likelihood of political intervention: neither is a new "bricks and mortar" organization and, therefore, they require no, or very limited, financing and political approval.

By increasing cooperation via their discretionary authority, the competition agents reduce the likelihood of political intervention. However, as discussed below, this "shirking strategy" adopted by the competition agents does not guarantee that no political intervention will occur.

Before recounting the patterns of behavior for principals, another point should be made regarding the preferences of competition agents. The preferences of EU and US competition agents are similar but different. Both agents prefer increasing cooperation via *their own* discretionary authority. This subtle distinction reflects the belief of both competition agents that they are capable of "best" implementing competition policy. As such, competition agents do not conveniently engage in international cooperation simply because they have the same preferences or to make their jobs easier. Rather, the decision to engage in international cooperation is part of a strategic calculation made by each competition agent.

In practice, this distinction has different implications depending on the specific process of cooperation. If EU and US agents cooperated simply because they have the same preferences and to make their jobs easier, they could have continued to cooperate under the pre-1991, non-binding OECD framework without signing the Bilateral Agreement. However, in rule-making cooperation, the agents decided to pursue a new *binding* framework because they feared increasing extraterritoriality by their foreign counterpart,[479] which could increase the likelihood of domestic political intervention. Thus, the EU and US competition agents may have similar preferences, but they do not

[479] The US feared the Wood Pulp doctrine and the pending completion of the SEM and MCR. The EU feared Section 301 and the Exon-Florio amendment.

believe that their overseas counterpart will act in accordance with their own preference at all times. Therefore, both the EU and US agents decided that they needed a *binding* framework in order to balance the relationship and to assure cooperation.[480]

Another important finding of the analysis of rule-making cooperation differs from that which might be expected from a direct application of PAF's insights on domestic regulatory relations to international regulatory relations. The logic of PAF suggests that regulatory agents might resist cooperating internationally because binding commitments with foreign competition regulators imply a sacrifice of some regulatory independence (Macey 2000). However, the current study finds that, again, EI plays a crucial role in overcoming this problem. Without finding a way to meet the challenges of EI in concurrent jurisdiction merger cases, political principals would become more involved in implementing competition policy through their domestic and international control instruments. As a result, regulatory agents would lose a degree of discretionary authority to implement competition policy and, at the extreme, may become irrelevant as principals gradually "take over" the implementation of competition policy in concurrent jurisdiction merger cases. In conformity with the preferences listed in Chapter 2, regulatory agents fear such intervention by principals more so than any potential sacrifice of regulatory independence that might be implied by binding agreements on international cooperation.

2. The Patterns of Principal Behavior

P3 and P6 address the patterns of behavior for political principals across the three processes of cooperation. According to P3, political principals will intervene in domestic agent attempts to shirk in rule-making cooperation if the costs of not intervening exceed the costs of intervening. As noted in Chapter 2, this statement raises questions about how the principals calculate the costs of intervention. These questions are addressed in detail in the next section.

[480] This need for balance suggests that the EU and US competition agents behave as utility-maximizing actors. They remain suspicious of each other's commitment to cooperation and are not acting on some shared conception of a common interest. The reason for this appears simple: if one agent were to act extraterritorially, they would challenge the other agent's preference to maximize their own certainty and decision-making authority. Thus, the agreements are designed to reduce the likelihood of extraterritoriality by agents. This, in turn, reduces the likelihood of political intervention. This finding suggests that, when applied to international regulatory cooperation, the principal-agent insights of PAF must be expanded to cover the patterns of behavior that emerge from agent-agent dynamics.

The case studies in Chapter 4 demonstrate the pattern of behavior for principals in rule-making cooperation. Like competition agents, the pattern of behavior for principals is a function of their preferences and the domestic power-sharing arrangements that provide the basis for their control (i.e., intervention). On the US side, political principals did not intervene in rule-making cooperation because the costs were higher than those associated with intervening. The US political principals did not perceive rule-making cooperation as a threat to their national/constituent interests because the competition agents signed the Bilateral Agreement, the PCA and the AAA entirely at their own discretion and in conformity with the domestic power-sharing arrangements (i.e., CZA). Had the competition agents attempted to construct a cooperative framework that challenged or required changes in domestic statutes, principals would have certainly intervened, either by their own volition or due to the ratification requirements of treaty-making.

Unlike the US experience, EU political principals intervened in two of the cases of rule-making cooperation. This difference is the result of less-clearly established domestic power-sharing arrangements between the EU's political principals and competition agents. Beginning in 1991, the EU competition agents attempted to construct a cooperative framework through shirking. However, political principals perceived a threat to their national/constituent interests and calculated that the Commission had overstepped its discretionary authority. As a result, this instance of shirking prompted political intervention with France and other member states challenging the Bilateral Agreement before the ECJ. Thereafter, the agents conformed to the domestic power-sharing arrangements as clarified by the ECJ ruling. The subsequent examples of rule-making cooperation reflect the patterns of behavior for principals as they maintained their oversight capacity and co-signed the PCA along with the Commission. Because the AAA was non-binding, the Commission was able to negotiate and sign the agreement solely under its discretionary rule-making authority. These three cases suggest that political principals remain important actors in EU-US rule-making cooperation in competition policy due to the domestic power-sharing arrangements that constrain the Commission. It is only when rule-making cooperation results in non-binding agreements that the principals are comparatively less important actors.

Similarly, the two cases of exploratory institutional cooperation demonstrate the patterns of behavior for political principals (P6). Because the bilateral MWG and the multilateral ICN were carefully negotiated and created to remain within the limits of discretionary authority afforded to the competition agents, neither the EU or US principals perceived these instances of cooperation as threats to their national/constituent interests and did not intervene. However, should the competition agents overstep the bounds of their discretionary authority in their future pursuit of bilateral and multilateral institutional convergence, principals will be likely to intervene, which would provide a useful comparative case for assessing P6.

The examples of EU-US rule-making and exploratory institutional cooperation address the general dynamics between political principals and their domestic competition agents. However, the case-specific dynamics of implementation cooperation complicate the analysis by introducing the more frequent possibility of intervention by foreign political principals. These complications and possible solutions are discussed in the next section.

As discussed in Chapters 2 and 3, the current study has considered the judiciaries in the EU and US to function as principals according to the PAF logic.[481] Of course, judiciaries have not delegated any significant discretionary authority to regulatory agents and, therefore, are more limited than traditional principals in their ability to intervene. In addition, the ability of the judiciary to exercise control over regulatory agents is implemented through judicial review. The judiciary only intervenes when an actor (private and/or public depending on the jurisdiction in question) formally brings a case before them and, thus, triggers a review. During judicial review, EU and US courts do not cooperate when deliberating over appeals in their respective merger control systems. Judicial review can occur across all three processes of international cooperation,

[481] Here another important distinction from Milner's (1997) approach emerges. Milner focuses on three sets of polyarchic domestic actors: executive, legislature and societal interest groups (1997, 12). The current study also focuses on executives and legislatures, but includes judiciaries and competition agents. The role of societal interest groups is discussed below.

however, thus far, judicial review has only occurred in rule-making and implementation cooperation.[482]

The role of courts appears to vary depending on the clarity of domestic power-sharing arrangements and cross-national differences in domestic power-sharing arrangements. First, the case of the 1991 Bilateral Agreement suggests that the ECJ entered the process of cooperation because the domestic power-sharing arrangement governing principal-agent relations in the EU was insufficiently clear. This lack of clarity encouraged the EU competition agents to negotiate and sign the executive agreement under its discretionary authority. However, acting on a different interpretation of the domestic power-sharing arrangement, principals intervened in this behavior and brought the Commission before the ECJ. For its part, the ECJ clarified the power-sharing arrangement, to which the Commission conformed in subsequent efforts at rule-making cooperation (i.e., PCA and AAA).

Second, the role of the EU and US judiciaries varies considerably in implementation cooperation. This variance is based on cross-national differences in the power-sharing arrangement governing the implementation of merger review in the EU and US. In the US, courts are a central actor in the merger review process (see Chapter 3). Competition agents must try their cases before the courts. However, judicial review of individual merger cases in the US during the review process is not really intervention in the terms of PAF. Rather, judicial review is part of the domestic power-sharing arrangement drafted by the legislature. As part of the power-sharing arrangement, the US competition agents must consider the role (in particular, case law establishing competition precedents) of the courts throughout their review process. This influence on the behavior of US competition agents would benefit from further research comparing it with the influence of courts in the EU system.

The analysis of the judiciary in the US suggests an important insight into the role of private litigants in implementation cooperation. In the US, private litigants can bring cases of anticompetitive behavior before the courts. The DoJ/FTC resists private litigants bringing cases with international dimensions before the courts because of the foreign

[482] The two cases of exploratory institutional cooperation (MWG and ICN) have not required judicial review because the competition agents were careful to ensure that their shirking in these cases conformed

political reactions that can follow from the possibility of treble damages (see Chapter 3).[483] As a result, the competition authorities would be likely to prefer that private plaintiffs not bring cases with an international dimension before the courts because such actions shift any interest-balancing from the discretionary authority of the agents to the courts. When this occurs in cases with transatlantic dimensions, courts are more likely to reject comity considerations based on the *Hartford Fire* decision than competition agents operating under the system established by the 1991 Bilateral Agreement.

Alternatively, in the EU, the role of courts in merger review is limited to those cases that are legally challenged after the competition agents have reached a final decision. Such judicial review is a lengthy (1-2 year) process that arguably disadvantages merging firms that challenge EU merger decisions. This feature of the EU's domestic power-sharing arrangement has caused concern among merging firms because, by the time the court hands down its final decision, market conditions may have changed and the firms may no longer seek the merger.[484] This situation has led some commentators to decry the EU's lack of an effective, timely judicial remedy.[485]

The findings herein are largely inconclusive on the role of the judiciary as a political principal across the three processes of cooperation. The role of courts is similar in rule-making and exploratory institutional cooperation. However, their role in

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to the established power-sharing arrangements.

[483] According to Griffin, "The 'rogue elephants' of private treble damage suits and private challenges to transactions reviewed but not attacked by Government enforcers are especially troublesome because private plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government" (1999, 194).

[484] As *The Economist* argues, EU "Merger officials operate knowing that their decisions are unlikely to be challenged by firms whose only resort is to appeal to the European Court of Justice, a two-year marathon with uncertain prospects and in which even a victory can prove hollow, given the speed at which markets now move. 'In Brussels, officials can block a deal with impunity, whereas in America the FTC knows that a poorly constructed case against a merger will quickly end up in court,' says a banker involved in the EMI-Time Warner deal" (2000, 85-86).

[485] This lack of an effective, timely judicial remedy creates leverage for the competition authorities and pressure for merging firms to compromise on commitments, divestitures and other remedies. (The author is grateful to Jacques Bourgeois for the phraseology of "an effective, timely judicial remedy.") This pressure on merging firms is most often felt in "marginal" issues. For example, in cases where market definitions are being argued, merging firms might feel the pressure to accept the MTF's definition, even if it is questionable or untenable. The pressure on merging firms to compromise can be so immense that representatives of merging firms report offering more for remedies than they would have under a system that realistically provided for a judicial review. Whether these claims of merging firms are true or not, the current system does create the *perception* of leverage on the part of the competition authorities and limits the influence of merging firms. Indeed, such a perception must help to determine when a lawyer will "stop litigating and start negotiating."

implementation cooperation appears to differ considerably, primarily due to different merger review procedures that require the US competition agents to argue their cases before the courts. This fundamental difference limits generalizations on the role of the judiciary as a principal across the three processes of cooperation. However, one generalization holds: public and private actors requesting judicial review are required to prompt intervention by the courts. This condition limits the judiciaries' independent ability to intervene and suggests a basic difference from the roles played by other principals. This limitation may largely discount the consideration of the judiciary as a principal in the traditional terms set out by PAF.

IV. To Intervene or Not To Intervene—The Role of Societal Influences in Political Intervention Cost Calculations

As argued in Chapter 2, principals will decide whether or not to intervene in discretionary cooperation based on cost calculations that reflect their perception of threats to national/constituent interests. This approach relies on ex-post facto deductions of the political "intervention cost calculations" based on how the principals actually acted in any given situation. While this approach is limited in its predictive capacity, it has been useful as a means to demonstrate the patterns of behavior posited in Chapter 2. Nevertheless, it represents a fundamental limitation of the current study and raises two important questions: What determines a political principal's perception of threat? And how do principals calculate the costs of intervention? These questions relate to all three processes of cooperation, but become most complicated and interesting in implementation cooperation. A fuller account of the behavior of political principals requires a theory for determining how they calculate the costs of intervention. Such a theory may be generalizable to international regulatory cooperation in other policy areas and could inform testable hypotheses. In this regard, some preliminary comments are in order at this point.[486]

[486] The following discussion focuses on the role of firms in determining the behavior of political principals, not competition agents, in implementation cooperation. During implementation cooperation, competition agents may be limited in their ability to exchange information by firms not waiving their rights to confidentiality, which, in turn increases the likelihood of divergent decisions. However, firms are increasingly waiving their rights to confidentiality in an attempt to expedite the merger review and increase the likelihood of convergent decisions. In addition, competition agents have devised ways to reduce the

According to P6, political principals will intervene in domestic and foreign agent attempts to increase discretionary implementation cooperation if the costs of not intervening exceed the costs of intervening. In no cases discussed herein, did the costs of increasing discretionary implementation cooperation appear to exceed the costs of not intervening. In fact, the EU and US competition agents have only engaged in low-cost efforts/shirking as regards implementation cooperation—e.g., adjusting internal discretionary procedures for cooperation, exchanging information within the confines of pre-existing domestic statutes, coordinating investigations within pre-existing timetables, and coordinating remedial market-testing and implementation (see Chapter 5).

Because the competition agents' shirking has not seriously challenged the pre-existing domestic power-sharing arrangements, the principals did not intervene in *general* EU-US implementation cooperation in competition policy. Rather, political principals intervened in *case-specific* instances of EU-US implementation cooperation when they perceived their national/constituent interests as being threatened in individual merger reviews. As the analysis suggests, this is not a frequent occurrence. However, the BMD and GEH merger cases do provide informative examples of US principals intervening. It is to the decision of principals to intervene on a case-specific basis in merger review that the discussion now turns.

Two explanatory factors—the nature of divergent decisions and the role of firms—may help to explain the principals' intervention cost calculations in individual cases of implementation cooperation in merger review.

First, an important factor in a principal's decision to intervene may be the nature of the divergent decision. A necessary condition for a principal's decision to intervene in a concurrent jurisdiction merger case appears to be that a divergent decision must occur

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obstacle of merging firms not waiving their rights to confidentiality (hypothetical discussions, etc.). Thus, firms are likely to be less relevant in determining the likelihood of implementation cooperation between competition agents than in determining the likelihood of principal intervention.

In addition, it may prove fruitful to consider the role of firms in rule-making and exploratory institutional cooperation. In these two general processes of cooperation, firm influence may be greater because they simultaneously address merger and non-merger cases. This increased role for firms may have to do with the possibility that firm and agent preferences are the same in these two processes of cooperation—create framework for improving likelihood of convergent decisions and decreasing likelihood of political intervention—while they differ in implementation cooperation. If this is the case, PAF's assumption of different interests must be jettisoned and a means of overcoming possible mulitcolinearity would have to be devised.

(see Chapter 2). The decision to intervene in a concurrent jurisdiction merger case requires a divergent decision because it increases the political principals' perception of threat to national/constituent interests. If the competition agents were to reach a convergent decision that principals perceive as a threat to national/constituent interests, the principals would direct the majority of their interventionist efforts toward their domestic competition agents with domestic control instruments.

Domestic competition agents are targeted under such circumstances because, even if the principals exercise international control instruments over foreign competition agents and successfully pressure them to change their decision, the principals still must overcome the decision made by their domestic competition agents that they originally perceived as a threat to their national/constituent interests. From the principals' perspective, such a threatening decision made by their domestic competition agents can be countered with greater certainty through the exercise of domestic control instruments because these control instruments are embedded in the domestic power-sharing arrangements that limit the independence of domestic competition agents—no similar power-sharing arrangements exists between principals and foreign agents, which increases the uncertainty of exercising international control instruments.

For example, in the BMD and GEH cases, had the EU and US agents' decisions been convergent, US principals would have been less likely to intervene in the EU's merger review process. Instead, they would have been more likely to focus their interventionist efforts on the FTC's deliberations where they could have exercised their domestic control instruments with greater certainty. Assuming a convergent decision, had the US principals been able to pressure a change in the FTC's decision, they then would have targeted the EU's merger review process with their full arsenal of international control instruments. While such domestic and international interventions may occur simultaneously—it is not necessarily a sequential process of intervening domestically and then intervening internationally—principals are more likely to focus the majority of their interventionist efforts on changing domestic decisions first and foremost because of the greater certainty associated with control instruments embedded in domestic power-sharing arrangements.

Therefore, a divergent decision is a necessary condition for principals to intervene in implementation cooperation. However, this condition does not appear sufficient to prompt principal intervention because additional evidence in Chapter 5 suggests that principals do not necessarily intervene actively when competition agents reach divergent decisions. For example, in the BOC/Air Liquide merger case, the competition agents reached divergent decisions (i.e., inconsistent remedies), but principals did not actively intervene. This apparent contradiction of the principals' pattern of behavior may speak to a difference in the nature of divergent decisions. In other words, there is a difference in cost calculations made by principals between conflicting and inconsistent decisions.[487] Unfortunately, there is no way of confirming whether differences in the nature of divergent decisions cause predictable variation in principals' intervention cost calculations because there has never been a competition case of conflicting decisions in EU-US cooperation since the initiation of the cooperative framework in 1991. Therefore, because principals have intervened and not intervened in cases of inconsistent decisions, the potential explanatory power of this factor (nature of the divergent decision) is inconclusive. All that can be said at this point is that the existence of a divergent—in reality, an inconsistent—decision appears to be a necessary but not sufficient trigger for principal intervention.[488]

Second, another important factor in a principal's decision to intervene in an individual merger case may be the role of firms.[489] As noted in Chapter 2, the current

[487] See Chapter 2 on the difference between inconsistent and conflicting decisions.

[488] It is worth noting that this factor may help to explain variation in the control instruments used by political principals. For example, the fact that there has never been a conflicting decision may explain why EU and US principals have not used the extraterritorial intervention instruments that were so common before 1991. Rather, the preferred response to divergent decisions has been to exercise weak foreign intervention instruments (e.g., lobbying, threats, congressional resolutions), as was done in the BMD and GEH cases of inconsistent decisions. Again, because no cases exist of conflicting decisions, the ability to confirm this factor as an explanation of the preferred foreign intervention instruments of principals is limited.

[489] If the influence of firms is important for calculating intervention costs, then other societal influences may also prompt politicians to intervene, thus determining the relative costs of intervening versus not intervening. The relative impact of various societal influences has been the source of great debate between pluralists and capture theorists (Gormley 1986, 597). However, due to unique characteristics of competition policy, non-firm societal influences are unlikely to be particularly important. For example,

> Several aspects of antitrust law differentiate it from the types of regulation that are normally considered within the special interest framework. Regulation is normally concerned with one or a few industries, but the antitrust laws are considerably broader in scope. In addition, the courts play a much more visible role in antitrust than they do in regulation… Our thesis is that the antitrust laws are a result of a special interest struggle

study has not considered the influence of firms for analytical purposes. However, it bears repeating that the influence of firms does enter the analysis as a function of EI, which alters firms' incentives and leads them increasingly to pursue internationally-oriented mergers. In addition, firms may play a crucial role in determining the likelihood of political intervention.

When foreign competition agents reach a decision that is inconsistent with the decision reached by domestic competition agents, and that inconsistent decision adversely affects two domestic firms (e.g., BMD, GEH), the likelihood of political intervention (by the firms' principals) may be increased significantly. This claim requires more systematic analysis across all the internationally-oriented mergers reviewed simultaneously by EU and US competition agents. Nevertheless, it suggests another potentially important explanatory factor—the role of firms—in determining the likelihood of principals' to decide to intervene in an individual merger case.

Domestic merging firms adversely affected by an inconsistent decision made by foreign competition agents may increase the costs of not intervening for their principals.[490] Merging firms can increase the costs of not intervening for their principals by adjusting their political support (e.g., reducing, withholding or redirecting private campaign contributions and public endorsements). It would be naïve to think that firms never play a role in a principal's decision to intervene—certainly, principals would be less likely to intervene if they were not prompted to do so by their constituents, which

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> between small and large economic entities seeking changes in the general economic environment rather than the specific favors usually associated with special interest legislation (Benson et al. 1987, 30).

Therefore, the intervention cost calculations of principals are more likely to reflect the influence of merging firms on their political principals than the influence of other interest groups.

It is possible that the influence of non-firm societal actors varies across the three processes of international cooperation. For example, because rule-making cooperation has broader and more general implications across society, non-firm societal influences may play a larger role in the cost calculations made by principals. In such cases, theories are needed for determining the relative influence of the myriad actors in society. Notable and potentially useful approaches for addressing this problem have been put forth by Moravcsik (1998) and Sandhotlz and Stone Sweet (1998). Both of these approaches devise ways for determining the relative influence of domestic actors in the "costly" (in terms of national sovereignty) process of regional integration in Europe.

[490] In describing such firms, the term "constituent" may be preferred over "domestic" because, in an EI environment, foreign firms are increasingly contributing to and being perceived by principals as constituents whose interests are deserving of protection. The transnational character of such firms challenges typical notions of nationality (for example, see Reich 1996, 1991; Tyson 1991). However, for simplicity, the current study employs the term "domestic".

include firms. Nevertheless, the fundamental question that needs to be answered is how does a principal determine the comparative value of the claims of their domestic merging firms and the claims of those firms' competitors, all of whom may be constituents and may equate their interests with national interests? Answering this fundamental question requires further specification of the intervention cost calculations made by principals.

The BMD and GEH cases provide useful examples of the potential influence of firms on the intervention cost calculations of principals. If firms do play an important role in determining these calculations, then the US principals weighed the costs of not intervening (offending BMD and GEH) versus the costs of intervening (offending competitors of BMD and GEH,[491] EU competition agents and EU principals). Similarly, if US competition agents threatened to block a merger between EU firms A and B, EU principals would be expected to weigh the costs of not intervening (offending EU firms A and B) versus the costs of intervening (offending competitors of firms A and B, US competition agents and US principals).

This brief look at the BMD and GEH mergers suggests that the cost calculation of a principal for intervening in an individual merger case is a function of the relative values given to the claims of the merging firms, the merging firms' competitors, foreign competition agents and foreign political principals. Figure 6 provides a basic representation of these intervention cost calculations. The equations assume that domestic and foreign competition agents reached a divergent decision—absent this assumption, no or little intervention should be expected as discussed above. The claims of domestic competition agents are not included for reasons discussed above.

[491] US principals generally give greater weight to the claims of US-based competitors of BMD and GEH than foreign-based competitors. For example, the foreign-based competitors of BMD and GEH, like Airbus and Pratt & Whitney respectively, may be valued less if they contribute less to principals' campaigns and are not really considered constituents by the principals. For simplicity, the current study assumes no variation in the valuations attributed by political principals to competitors, regardless of whether they are more appropriately characterized as domestic or foreign.

Figure 6: Intervention Cost Calculations of Political Principals in Individual Merger Cases

Decision to intervene = value of domestic merging firms' claims > value of competitors' of merging firms claims + value of foreign competition agents' claims + value of foreign political principals' claims. Decision not to intervene = value of domestic merging firms' claims < value of competitors' of merging firms claims + value of foreign competition agents' claims + value of foreign political principals' claims.

According to Figure 6, principals will intervene with foreign intervention instruments when the relative value of their domestic merging firms' claims are greater than the sum of the values attributed to the claims of competitors of the merging firms, foreign competition agents and foreign political principals. Before 1991, this was the most common outcome of disputes over competition cases. Principals calculated that intervention was the most appropriate response because they attributed greater value to the claims of domestic merging firms. Such calculations and the resulting intervention led to a discordant transatlantic relationship based on the political brinkmanship of unilateral extraterritoriality versus national countermeasures. Add to this the increasing levels of EI and the attendant increases in concurrent jurisdictional mergers witnessed through the 1980s. Based on historical experience, the resulting jurisdictional overlaps caused by this pre-1991 combination were likely to lead to further disagreements and political brinkmanship in transatlantic competition relations during the 1990s.

However, the 1991 Bilateral Agreement signaled a significant change in the circumstance surrounding intervention cost calculations by principals. After 1991, principals still calculated that intervention was the most appropriate response to divergent decisions because they continued to attribute greater value to the claims of domestic merging firms in comparison to the other relevant actors. However, principals have been *less likely to find themselves in a situation where they even had to make such calculations*.[492] This is so because the cooperative framework constructed by the

[492] It is important to note that this statement in no way suggests that principals have lost any of their authority to control domestic competition agents as afforded by their power-sharing arrangements. Indeed, the institutional power-sharing arrangements (oversight and administrative procedures) remain fully intact. Likewise, the principals retain full command of their arsenal of foreign intervention instruments. It is

competition agents has reduced the likelihood of divergent decisions occurring. Without the necessary condition of a divergent decision, principals do not have to make the calculations for determining whether or not to intervene. Rather, assuming the merging firms disagree with the regulators' decision (one mutually arrived at with the foreign competition agents) and decide to pressure principals for intervention on their behalf, the principals will direct their various foreign intervention instruments to changing the behavior of their domestic competition agents.[493]

But, how can we theorize about the likely values given to the claims of these different actors? More specifically, when divergent decisions occur in cases of concurrent jurisdiction mergers, why are principals more likely to attribute the greatest value to the claims of domestic merging firms? It should not be surprising that the claims of foreign competition agents and foreign principals are de-valued in comparison to the claims of domestic firms (whether the merging firms or the competitors). This is expected because political principals are not seeking to protect the interests of foreign competition agents and foreign principals (as well as foreign competitors of the domestic merging firms). Thus, the crucial distinction is how principals value the claims of domestic merging firms versus the claims of competitors of the merging firms. For simplicity, the following discussion assumes no variation in the valuations attributed by political principals to the claims of competitors, regardless of whether they are more appropriately characterized as domestic or foreign. Two factors may prove useful for explaining the relative values attributed to these two different groups of domestic firms: size and organizational ability.

The privileged position given to the claims of domestic merging firms involved in concurrent jurisdiction mergers may reflect the size of such firms. As was the case in BMD and GEH, the merging firms were very large. They were large enough to meet the statutory thresholds of the HSR and the MCR. Also, given the fact that competition

precisely because the principals retain these various intervention instruments that the competition agents decided to create a binding cooperative framework to reduce the likelihood of divergent decisions.

[493] This may have occurred in the BMD case. As Coleman et al. note, French President Jacques Chirac and other European leaders became involved in an effort to resolve the standoff between the Commission and BMD in order to avert a trade war (1997, A1). Thus, the EU principals may have sided with their domestic firms (minus Airbus) against the wishes of its own domestic competition agents. Other than Airbus, most domestic EU firms likely would have wanted their politicians to intervene because a trade war would have seriously harmed their business interests. This insight suggests that all the preceding claims hold, unless there is an extreme case in which the situation very likely will precipitate a trade war that would harm the interests of numerous domestic businesses across a variety of sectors.

regulators challenged both mergers, BMD and GEH controlled a large enough portion of the market that they could be considered to have a "dominant position" in the parlance of EU competition law. This explanation implies that the larger the firm, the more resources that firm has at its disposal to pressure principals into intervening on their behalf. Such resources include, but are not limited to, campaign contributions, access to principals and access to the media. Such large firms can also argue that prohibition of their merger will result in the loss of numerous jobs, which may adversely affect the national/constituent interests of targeted principals. In comparison, competitors of the merging firms may be smaller and, in turn, have fewer political resources at their disposal. They may also have less of a desire to expend those resources obstructing a single merger than the merging firms' desire to complete the merger—the merging firms have already fully and publicly (to shareholders, etc.) committed to the merger and will do whatever it takes for approval. Regarding access to the media, the role of and arguments presented by competitors are typically not reported. Rather, they remain part of the confidential record of the oral hearing or market-testing procedures. Thus, competitors may have less access to and less of a desire to use the media. These limitations decidedly shift the principals' decision to intervene in favor of the claims of the larger firms.

A second potentially useful factor for explaining the relative values attributed to the claims of merging firms versus competitors may by the organizational abilities of the two groups. Merging firms are well-organized, committed and united in their determination to achieve one goal: quick approval of the merger. Alternatively, competitors of the merging firms behave in accordance with a number of possibly different preferences based on their share of the market, etc. As a result, the competitors of merging firms may be less well-organized, committed and united in their determination to obstruct the merger. Because competitors are typically more numerous than the merging firms and have different preferences vis-à-vis any given merger, it is more difficult for them to reach a common, united position. As a result, they may give conflicting signals to principals regarding whether a merger should be prohibited. These conflicting signals may be seen in conflicting testimony during pitch meetings and oral hearings, and conflicting arguments supplied (in the US) to competition agents trying cases in court. Even in market-testing, competitors may differ on the appropriate remedies necessary for approval of the merger: one competitor may support divestiture of assets that do not present anticompetitive challenges to another competitor; one competitor may seek divestiture of assets that they seek to purchase while another competitor opposes such a purchase on the grounds that it will create new anticompetitive problems in the market. These organizational problems for competitors again shift the principals' decision to intervene in favor of the merging firms.

V. Merger Review, Trade Policy and International Regulatory Cooperation—The Potential for and Limits of Generalizability

The findings in the current study reveal the means by which international cooperation has developed in a policy area that was traditionally discordant and still largely domestic in nature. The increase in this cooperation and the resulting reduction of political disputes has lead EU Competition Commissioner Mario Monti to argue that this policy area may serve as a model for transatlantic cooperation more generally (2001, 2). This section explores the potential for and limits of generalizing the findings herein to transatlantic as well as multilateral relations in other policy areas, in particular trade policy and international regulatory relations.

The majority of IPE studies has traditionally and continues to focus on the causes and consequences of trade policy.[494] This emphasis is understandable because governments have historically been primarily concerned with tariff barriers to trade as the most common, pervasive and readily apparent obstacles to international commerce. However, through subsequent WTO trade rounds, tariff barriers to trade in goods have been reduced dramatically. As a consequence, the international trade agenda began focusing on the removal of non-tariff barriers to trade—such as quotas, trade prohibitions, import licensing requirements and voluntary export restraints—as the next most common, pervasive and readily apparent obstacles to international commerce.[495]

Today, due to the success of previous trade rounds and the impact of EI on the global economy, the international trade agenda is increasingly targeting "new trade issues", such as investment (FDI), competition policy, intellectual property rights, public

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[494] Of course, many IPE studies have addressed non-trade issues.
[495] For a useful cross-national analysis of non-tariff barriers, see Mansfield and Busch (1995).

procurement and trade and the environment.[496] Unlike tariff and non-tariff barriers, these new trade issues address the removal of technical barriers to trade. However, such "behind-the-border" technical barriers are difficult to identify, modify and/or remove because they are embedded in domestic regulatory regimes that reflect complex sets of bargains and compromises among numerous private and public actors (Damro and Sbragia forthcoming 2003).

Despite this real-world shift in attention to "new trade issues", the scholarly debate in IPE remains largely dominated by questions about traditional tariff and non-tariff barriers to trade.[497] Due to the importance of FDI and its attendant concurrent jurisdiction merger activity, the new trade issues linked to investment will inevitably become a more prominent item on the international trade agenda.[498] International cooperation on FDI is fundamentally related to international regulatory cooperation in competition policy. Therefore, scholarly analysis should also begin to expand efforts at understanding the causes and consequences of this international regulatory cooperation.[499] For merger review, this call to arms is made all the more urgent by the increasing numbers of countries that are drafting and implementing competition policies for the first time.[500]

A useful starting point may be to investigate whether studies of international regulatory cooperation (such as the current study's investigation of competition policy)

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[496] This is not to say that tariff and non-tariff barriers to trade are no longer a concern in the international trading system. Rather, they now share the attention of policymakers with "new trade issues".

[497] A large body of literature has investigated in great detail the relationship between domestic politics and trade policy. However, this literature does not directly compare its findings with the relationship between domestic politics and regulatory policy. For examples of the trade policy literature, see Mansfield, Milner and Rosendorff (2000), Meunier (2000), Destler and Balint (1999), Morrow, Siverson and Tabares (1998), Hanson (1998), Frieden and Rogowski (1996), Alt et al. (1996), Garrett and Lange (1995), Destler (1995), Mansfield and Busch (1995), Goldstein (1993), Hayes (1993), Frieden (1991), Rogowski (1989), Milner (1988) and Destler and Odell (1987).

[498] Trade-related investment issues have already received attention in international trade negotiations. For example, see the WTO's Agreement on Trade-Related Investment Measures (TRIMs) and the Doha Ministerial Declaration. See also Graham (2000b) on the negotiations surrounding the failed Multilateral Investment Agreement.

[499] Examples of the various general and policy-specific efforts at explaining international regulatory cooperation can be found in Pollack and Shaffer (2001), Bermann et al. (2000), Evenett et al. (2000), Kagan (2000, 1991), Kagan and Axelrad (2000), Kang (1997), Vogel (1997; 1995), Kapstein (1992), Haas (1990) and Kapstein (1989).

[500] As ICPAC argues, "Today, more than 80 countries have antitrust laws, approximately 60 percent of which were introduced in the 1990s… Another 20 or more countries are in the process of drafting laws.

prove useful for understanding changes in traditional trade issues like the removal of tariff and non-tariff barriers. At the very least, the current study may help to explain the likelihood of discretionary cooperation emerging in trade and other regulatory policies. With this goal in mind, a brief comparison of trade and competition policy suggests the limits of generalizing the findings of the current study to future cooperation in trade policy.

The most important difference between trade and competition policy emerges from the fundamentally different nature of trade and competition policies. The difference has led some commentators to distinguish trade policy as more "political" and competition policy as more "legalistic" or "de-politicized". For example, Doern argues

> …trade policy is primarily about controlling the behavior of governments whereas competition policy is largely about regulating the behavior of firms and businesses… as a logical result of the first point, trade policy has less of an enforceable legal base to it than competition policy. Hence both trade and competition policy specialists tend to agree that trade policy is decided through more political processes than through legal processes. In short, trade policy is more political and competition policy is considerably de-politicized (Doern 1996, 281).[501]

Similarly, Egan argues that the different domestic nature of competition and trade policies have implications for international cooperation:

> In competition issues, cooperation is aimed at achieving a common regulatory result in terms of enforcement whereas trade negotiations are designed to protect, defend and maximize the benefits for domestic interests… While trade negotiations can operate through issue linkage across sectors, aiming to balance benefits and losses for domestic producers, competition is guided by case law, administrative discretion and leaves little or no market for political bargaining (Egan 2001, 16).

Due to the different natures of these two policies, trade regulators are likely to be more concerned with the distributional consequences of their cooperation while competition

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Moreover, those countries with competition laws accounted for nearly 80 percent of world output and 86 percent of world trade" (2000, 33 and note 1).

[501] Doern goes on to clarify this distinction, arguing "competition policy is in some ways simply politicized 'differently' rather than 'less' than trade policy" (1996, 281).

regulators are more concerned with the efficiency gains of their cooperation. As Devuyst argues

> The [EU and US] agencies cooperate to increase the effectiveness of their common regulatory task, not with a view of defending their domestic industry. On the contrary, competition cooperation often takes the form of enforcement requests to the agency based in the national territory of the companies under scrutiny because they are better placed to gather evidence. This constitutes a major difference with the trade world, in which the authorities do not cooperate to achieve a common regulatory result but rather to defend the interests of their domestic producers. The aim of trade negotiators is to manage the inevitable conflicts that arise from the attempts by each side to obtain an outcome that maximizes the benefits for their domestic producers. In brief, competition relations are characterized by 'regulatory cooperation' while trade relations have to focus on 'conflict management' (Devuyst 2001, 149).[502]

Regardless of the specific terminology employed, the differences in the nature of trade and competition policies have broad implications for variance in the processes and types of EU-US cooperation that can be expected. Because trade policy is inherently more politicized than competition policy, principals retain much stronger domestic

[502] Devuyst illustrates this difference with evidence from the BMD merger case (see Chapter 5):

> The very different negotiation dynamics in the trade and competition fields certainly contributed to the misunderstanding during the Boeing/McDonnell Douglas merger. Trade negotiators aim at agreements between governments that counterbalance economic losses in one sector by benefits in the other. Cross-issue linkages and attempts to obtain compensatory adjustment—sustained by retaliation threats—are common to trade bargaining. In competition cases, the formal structure of the negotiations is entirely different. A public regulator such as the European Commission has the authority to prohibit or block private transactions without any need for agreement by EU member states, third countries, or the enterprises under scrutiny, whether EU member states or their countries. The Clinton administration's attempts to influence the Commission's decision through contacts with top politicians of the member states had therefore no visible effect on the outcome of the case. When Commissioner Van Miert was summoned to the General Affairs Council, he simply explained to the foreign affairs ministers that the Commission was looking at the Boeing case under its own competences as defined in the merger regulation and that it would reach a decision based on Boeing's reply to the antitrust consideration listed in the Commission's statement of objections. In contrast to trade deals, competition decisions are guided by the law, especially the case law of the European Court of Justice. Any Commission decision deviating from the principles of the European Court of Justice is likely to be overturned. This leaves little margin for political bargaining. Trade policy elements such as the threat of retaliation are therefore hardly factors that can be taken into account during the competition decision-making process. Once Boeing realized this, it came forward with the necessary concessions to allow for a positive Commission decision (Devuyst 2001, 149-150).

control instruments. Political principals are much less likely to delegate authority to agents for rule-making in trade policy than in competition policy. As a result, it is not surprising that EU-US cooperation displays lower levels of discretion in trade policy than in competition policy. In those cases when political principals do delegate trade authority, they are less likely to tolerate shirking and, rather, more likely to intervene. For example, in rule-making cooperation, if trade agents (e.g., EU's Directorate for Trade, US's Department of Commerce) were to pursue executive agreements with foreign trade authorities, political principals would quickly perceive this as a threat to national/constituent interests and intervene accordingly.[503] As a result, principals remain more actively engaged in trade policy and rule-making is not surprisingly pursued primarily through the negotiation and signing of non-discretionary treaties. Similarly, in implementation cooperation, the rare occurrence of divergent competition decisions prompt political principals to intervene. However, in trade policy, "divergent" decisions occur daily, prompting political principals to intervene and strike compromises that are then typically codified in international treaties. Finally, it is not clear that discretionary efforts at exploratory institutional cooperation (which result in non-binding, informal fora) would be beneficial because cooperation in trade policy is already formalized via treaties that have established the WTO's binding dispute settlement mechanism.

Due to the fundamental differences between trade and competition policy, the patterns of behavior posited in the current study are unlikely to be generalizable to cooperation in trade policy. Despite this limitation, some of the dynamics uncovered herein may be consistent with international regulatory cooperation in other policy areas. The remainder of the discussion in this chapter is not intended to constitute a comprehensive research proposal for international regulatory cooperation. Rather, it is intended to suggest potential avenues for future research that may prove useful for understanding the increasingly important politics of international regulatory cooperation more generally.

First and foremost, the patterns of behavior for agents and principals in transatlantic competition relations (see Figure 6.1) may be evinced in other areas of

[503] In the EU, this intervention could occur through the CoM. In the US, this intervention could occur through the US Trade Representative, which coordinates trade policy across the federal government and,

regulatory cooperation. As such, these patterns of behavior could be translated into hypotheses for international regulatory cooperation that would benefit from future analysis across other regulatory policy areas. Each of the patterns of behavior present explicit testable statements of belief regarding the expected relationship between two or more concepts or factors and, thus, deserves analysis across other areas of regulatory cooperation. As Odell argues, “One of the most valuable contributions of any method would be the generation of a new hypothesis that turned out to be valid or generated fresh lines of investigation” (2001, 165). It is in this spirit that the chapter recommends comparing the patterns of behavior for agents and principals with behavior in other areas of international regulatory cooperation.

Second, as with the preceding discussion of trade policy, any future analysis of the patterns of behavior must take into consideration differences between competition policy and other regulatory policies. Such differences may suggest limitations to generalizing the findings of the current study, but may also suggest useful comparative insights for understanding the causes and effects of international regulatory cooperation more generally. One such difference may be that most regulatory policies cover a single or a few industries while competition policy broadly covers the entire economy (Benson et al. 1987, 30). This difference suggests that the role of targeted firms could be greater in other regulatory policies because their attention is more concentrated and their preferences are possibly less diverse than in competition policy. Similarly, because competition policy applies most directly to individual firms in individual cases, it does not seem to generate the same salience among non-firm actors in society as other regulatory policies that affect multiple non-firm actors in society. As a result, non-firm actors in society may be more important actors in other areas of regulatory policy. Another difference relates to the role of the judiciary. For example, in the US, courts play a much more active role in competition policy than in other regulatory policies (Benson et al. 1987, 30). This difference may suggest that the judiciary is less important as a political principal in other regulatory policies than it was found to be in competition policy. The comparatively high degree of discretion that characterizes competition policy presents another potentially important analytical distinction from other regulatory

thus, acts as a direct conduit through which the White House can exert political control.

policies. This difference may indicate that discretionary cooperation is more likely in competition policy than in other regulatory policies because competition agents operate under comparatively looser power-sharing arrangements in competition policy. These looser power-sharing arrangements allow greater latitude for competition agents to pursue their own preferences than that found in other policy areas. The important question is whether regulators in other policy areas can conform to their respective power-sharing arrangements and still shirk to increase cooperation. As the current study suggests, this is possible, if the agents pursue forms of rule-making cooperation that are non-binding (e.g., AAA), implementation cooperation that respects domestic law (e.g., exchanging non-confidential information), and exploratory institutional cooperation that is ad hoc, informal and that does not create new "bricks-and-mortar" international organizations.

Third, when investigating the patterns of behavior as hypotheses for the likelihood of cooperation in other regulatory policy areas, certain conditions that follow from the revised cross-level approach and the logic PAF must also be considered. For example, the revised cross-level approach suggests that the exogenous stimulus of EI must challenge the ability of regulators to manage activity within their domestic jurisdiction. In regulatory policies that are comparatively insulated from the effects of EI, the revised cross-level approach will have to be adjusted. In addition, regulators must agree 1) that they can best implement regulation in a given policy area without intervention by principals, and 2) that cooperating with foreign regulators will reduce the likelihood of political intervention. If these and other conditions found in the current study are determined not to exist in other areas of international regulatory cooperation, the utility of the revised cross-level approach will be in question and the existence of the patterns of behavior will be doubtful.

The jury remains out on Monti's suggestion that cooperation in competition policy can serve as a model for transatlantic cooperation more generally. However, this possibility and the potential benefits that do follow from the EU-US cooperative framework in competition relations are intriguing and deserving of further study. Indeed, because the Commission enjoys its greatest supranational authority in competition policy, the findings in the current study could be an indication of the future of transatlantic cooperation if the EU presses forward with its integration agenda. Ultimately, if the Commission does acquire greater discretionary authority in other policy areas, the likelihood of increasing transatlantic cooperation in those areas largely will depend on the levels of discretionary authority enjoyed by like-minded but self-interested, utility-maximizing US regulatory agents.

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