
A RATIONAL DESIGN THEORY OF TRANSGOVERNMENTALISM: THE CASE OF E.U.-U.S. MERGER REVIEW COOPERATION

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I. INTRODUCTION

International legal theory and international relations theory have long focused on the state as the principal unit of analysis.¹ From this traditional *interstate* perspective, the state is a unitary actor that “faces the outside world as an integrated unit” and speaks with one voice in its interactions with other unitary states.² According to this view, “the paradigmatic form of international cooperation is the multilateral international convention, negotiated over many years in various international watering holes, signed and ratified with attendant flourish and formality, and given continuing life through the efforts of an international secretariat.”³ The implication of the traditional interstate approach is that the key to understanding international legal and regulatory cooperation is to

¹ Regarding international law, see e.g., J.L. BRIERLY, *THE LAW OF NATIONS* 1 (6th ed. 1963) (defining international law as “the body of rules and principles of action which are binding upon civilized states in their relations with one another”) and IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 59 (5th ed. 1998) (identifying states as most important category of legal persons under international law). Regarding international relations theory, see e.g., PAUL R. VIOTTI & MARK V. KAUPPI, *INTERNATIONAL RELATIONS THEORY: REALISM, PLURALISM, GLOBALISM, AND BEYOND* 6 (3d ed. 1999) (noting that according to realist international relations theory, states are the most important actors) and KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 79 and 94-95 (1979) (arguing that states are the defining units of the international system). In international law, a state is defined as possessing the following characteristics: (a) a permanent population, (b) a defined territory, (c) government, and (d) capacity to enter into foreign relations with other states. BROWNLIE, at 70. This definition generally does not include states in federal unions (such as state of the United States), provinces, or other sub-state units. THOMAS BUERGENTHAL & HAROLD G. MAIER, *PUBLIC INTERNATIONAL LAW* 2 (2d ed. 1990).

² VIOTTI & KAUPPI, *supra* note 1 at 6.

³ ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 12-13 (2004) [hereinafter SLAUGHTER, *NEW WORLD ORDER*]

understand interactions among unitary states within frameworks agreed upon in formal treaties.

Notwithstanding the importance of interstate cooperation in world politics, this traditional approach obscures an increasingly important form of cooperation: *transgovernmental* cooperation. This form of cooperation is characterized by transgovernmental networks, which are “pattern[s] of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the ‘domestic’ from the ‘international’ sphere.”⁴ Political scientist and legal scholar Anne-Marie Slaughter argues in a new book that this form of cooperation is becoming so widespread and important that it constitutes a “new world order.”⁵

To understand this new order, Slaughter calls on scholars to change the way they look at the world substantially:

[T]o see these networks as they exist, much less to imagine what they could become, requires a deep conceptual shift. Stop imagining the international system as a system of states—unitary entities like billiard balls or black boxes—subject to rules created by international institutions that are apart from, “above” these states. Start thinking about a world of governments, with all the different institutions that perform the basic functions of governments—legislation, adjudication, implementation—interacting both with each other domestically and also with their foreign and supranational counterparts.⁶

This conceptual shift promises new insights on international legal and regulatory cooperation. Indeed, the existing scholarship on transgovernmental cooperation, which includes Slaughter’s book as well as her earlier articles,⁷ the seminal work of political scientists Robert Keohane and Joseph Nye,⁸ and recent work by legal scholar and political scientist Kal

⁴ *Id.* at 14.

⁵ *Id.* at 15-18. See also Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF. 184 (Sept./Oct. 1997) [hereinafter *Real Order*].

⁶ SLAUGHTER, NEW WORLD ORDER, *supra* note 3, at 5.

⁷ SLAUGHTER, NEW WORLD ORDER, *supra* note 3; Slaughter, *Real Order*, *supra* note 5; Anne-Marie Slaughter, *Agencies on the Loose? Holding Government Networks Accountable*, in TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS 521 (George A. Bermann, Matthias Herdegen & Peter L. Lindseth, eds., 2000) [hereinafter Slaughter, *Agencies on the Loose*]; Anne-Marie Slaughter, *Governing the Global Economy through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW (Michael Byers ed., 2000) [hereinafter Slaughter, *Global Economy*]; and Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347 (2001) [hereinafter Slaughter, *Accountability*].

⁸ Joseph S. Nye, Jr. & Robert O. Keohane, *Transnational Relations and World Politics: An Introduction*, 25 INT’L. ORG. 329 (1971) and Robert O. Keohane & Joseph

Raustiala,⁹ has already documented the rise of transgovernmental legal and regulatory networks, addressed important normative and empirical implications, and identified factors that help explain the rise of transgovernmentalism in general.¹⁰

But why is legal and regulatory cooperation among some states and in some issue areas principally interstate, while among other states and in other issue areas it is primarily transgovernmental? In other words, what determines whether cooperation is likely to be interstate or transgovernmental? More generally, what explains variations in levels of transgovernmentalism across different groups of states and across different issue areas? So far legal scholars and political scientists have devoted relatively little attention to these questions, leaving a significant gap in the literature on transgovernmental cooperation.¹¹

The principal goal of this article is to contribute to the scholarship on transgovernmental legal and regulatory networks and transgovernmentalism in general by taking a modest step toward filling that gap. To accomplish this, this article uses two analytical tools from the discipline of political science: the concept of transgovernmental relations¹² and the theory of rational institutional design.¹³ It applies these tools to develop a rational design theory of transgovernmentalism aimed at explaining the conditions under which legal and regulatory cooperation is more likely to be transgovernmental versus interstate.¹⁴

Because transgovernmentalism has potentially profound implications not only for cooperation across borders but also for governance within borders, the questions raised by this article have not only international but also domestic importance. By definition, transgovernmental networks involve domestic legal and regulatory agencies that are part of domestic governmental structures. On the one hand, transgovernmental cooperation can enhance the ability of these agencies to efficiently and effectively pursue their domestic mandates. On the other hand, there is considerable concern that domestic agencies participating in transgovernmental networks lack democratic accountability, leading some to fear the

S. Nye, *Transgovernmental Relations and International Organizations*, 27 *WORLD POL.* 39 (1974) [hereinafter Keohane & Nye, *Transgovernmental Relations*].

⁹ Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *V.A. J. INT'L L.* 1 (2002).

¹⁰ See *infra* Part II.C.

¹¹ See *infra* Part II.C.

¹² See *infra* Part II.B.

¹³ See *infra* Part III.A. A secondary goal of this article is to contribute to rational institutional design scholarship. The existing scholarship focuses primarily on formal international organizations and has not yet been explicitly applied to transgovernmental networks. This article's rational design theory of transgovernmentalism attempts to do exactly that, using the logic of rational design to help understand the emergence of transgovernmental legal and regulatory networks.

¹⁴ See *infra* Part III.

advent of “agencies on the loose.”¹⁵ Among the concerns are lack of transparency and the distortion of domestic political processes.¹⁶ Thus, understanding transgovernmental networks is important not only for scholars of international law and politics, but also domestic law and politics.

The article proceeds in four main parts. Part II will compare the traditional concept of interstate relations with the concept of transgovernmental relations. Part II will then review the existing scholarship on transgovernmental relations, relating it to the article’s central research question: What accounts for varying levels of transgovernmentalism across different groups of states and across different issue areas? Part III will develop a rational design theory of transgovernmentalism that responds to this question. The first section of Part III will apply the theory of rational institutional design to the concept of transgovernmentalism, framing interstate versus transgovernmental cooperation as a design choice by heads of state or regulators. The second section of Part III will state several preconditions for transgovernmental cooperation that are assumed by the rational design theory of transgovernmentalism. The third section of Part III will identify the theory’s dependent and explanatory variables. The final section of Part III will use the rational design theory of transgovernmentalism to derive a series of conjectures about how the level of transgovernmentalism (the dependent variable) is likely to be affected by distribution problems; preference heterogeneity; enforcement problems; high politics; issue complexity; agency autonomy; and antecedent interactions in interstate organizations (the explanatory variables). Part IV will apply the conjectures from Part III to the case of European Union (E.U.)-United States (U.S.) merger review cooperation as an initial plausibility test of the rational design theory of transgovernmentalism. The theory and case study suggest that issue complexity, preference heterogeneity among states, and enforcement problems are among the factors that may significantly influence levels of transgovernmentalism.

II. TWO FORMS OF INTERNATIONAL LEGAL AND REGULATORY COOPERATION

This article considers two forms of international legal and regulatory cooperation. First, international legal and regulatory cooperation may consist of *interstate* cooperation between two states. For example, the states may negotiate, sign and ratify a treaty requiring them to cause certain legal or regulatory steps to be taken inside their respective borders.

¹⁵ This phrase is from the title of a book chapter by Anne-Marie Slaughter, in which she discusses and responds to these concerns. Slaughter, *Agencies on the Loose*, *supra* note 7.

¹⁶ See SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at 219-224 (acknowledging these concerns) and 230-244 (proposing solutions to these problems).

Alternatively, international legal and regulatory cooperation may entail *transgovernmental* cooperation, involving direct cross-border interaction between the states' government lawyers and regulators. This part of the article explains these two forms of international legal and regulatory cooperation in more detail, briefly surveys the existing scholarly literature on transgovernmentalism, and relates this literature to the article's central research question: What accounts for varying levels of transgovernmentalism across different groups of states and across different issue areas?

A. *Interstate Cooperation*

As Nye and Keohane explain, "Students and practitioners of international politics have traditionally concentrated their attention on relationships between states. The state, regarded as an actor with purposes and power, is the basic unit of action . . . Most political scientists and many diplomats seem to accept this view of reality, and a state-centric view of world affairs prevails."¹⁷ This interstate vision of international cooperation relies on two central assumptions: (1) that states are the most important actors in world politics, and therefore the key unit of analysis for scholars of international cooperation; and (2) that states are unitary actors.¹⁸ Various forms of these simplifying assumptions are shared by many of the most influential theories of world politics, including realism,¹⁹ regime theory,²⁰ constructivism,²¹ and, to a limited extent, liberal international relations theory.²² Moreover, these assumptions are implicit in traditional definitions of international law.²³

A critical implication of the first assumption, that the state is the principal unit of analysis, is that heads of state are the principal negotiators of cooperation in world politics. As Slaughter characterizes this assumption,

¹⁷ Nye & Keohane, *supra* note 8, at 329.

¹⁸ VIOTTI & KAUPPI, *supra* note 1, at 6.

¹⁹ *Id.* at 6. For an important statement of classical realism, see HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th ed. revised, 1978), and for a leading statement of neorealism (sometimes called "structural realism"), see WALTZ, *supra* note 1.

²⁰ See, e.g., Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* 25 (1984) ("our analysis of international cooperation and regimes therefore focuses principally on states") [hereinafter *KEOHANE, AFTER HEGEMONY*].

²¹ See, e.g., ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 43 and 197 (1999) (defending the unitary actor assumption).

²² Mark A. Pollack & Gregory C. Shaffer, *Transatlantic Governance in Historical and Theoretical Perspective*, in *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY* 24 (Mark A. Pollack & Gregory C. Shaffer, eds., 2001) (noting that in the two-level games model, heads of state enjoy a monopoly on the external representation of their respective states).

²³ See, e.g., BRIERLY, *supra* note 1.

“it is the head of state who is the embodiment and representative of the State in the international system, the gatekeeper for all interactions, both domestic and international.”²⁴ In the words of Mark Pollack and Gregory Shaffer, the assumption is that heads of state “enjoy a monopoly on the external representation of their respective states.”²⁵ This suggests that significant international legal and regulatory cooperation is likely to occur only if heads of state agree to it.

The second assumption, that states are unitary actors, implies that international cooperation is cooperation between states *qua* states. In negotiations, each state is presumed to speak with a single voice, represented by either its head of state or foreign minister. To the extent there are policy disagreements between different institutions within a state, such as disagreements with or between relevant legal or regulatory agencies, the assumption is that these differences are worked out domestically. As Slaughter notes, “the analytical lens of the unitary state obscures the very existence of these different government institutions.”²⁶ Moreover, if an agreement is reached, the resulting cooperation is deemed to consist of actions taken by states as such. For example, if a state joins a treaty for reducing emissions of a pollutant, the only relevant question is whether the state’s emissions conform to agreed-upon levels. The state’s efforts to comply with the treaty may involve activities of a governmental subunit, such as an environmental agency; but the interstate image implies that the scope of such activity is principally domestic and does not significantly extend beyond the state’s borders.²⁷

B. *Transgovernmental Cooperation*

An alternative to the interstate approach began to emerge in the 1970s in the work of political scientists Keohane and Nye, who developed a concept of transgovernmental relations.²⁸ Keohane and Nye define

²⁴ Slaughter, *Global Economy*, *supra* note 7, at 177

²⁵ Pollack & Shaffer, *supra* note 22, at 24. This is not an assumption that these authors are necessarily committed to.

²⁶ SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at 13.

²⁷ This is consistent with the current state of public international law: “individual government institutions cannot be subjected to specific obligations or duties under international law. Nor can they exercise specific rights. Sovereignty is possessed by the state as a whole, not by its component parts.” SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at 34.

²⁸ Nye & Keohane, *Transnational Relations*, *supra* note 8. Keohane and Nye note, however, that other scholars, such as Raymond Aron, Philip Jessup, Karl Kaiser, Horst Menderhausen, and James Rosenau used non-“state centric” concepts like “transnational relations” before they did. Robert O. Keohane & Joseph S. Nye, Jr., *Preface*, 25 *INT’L ORG.* v (1971). Keohane and Nye explain that their interest in the concept of transnational relations was originally a response to what they viewed as an overemphasis on the study of formal international organizations. *Id.* Later, they refined their concept to distinguish between *transnational* relations, which they

transgovernmental relations as “sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments.”²⁹ Based on their definition, the transgovernmental approach differs from the interstate approach in two fundamental ways. First, the transgovernmental approach focuses on interactions among government subunits, whereas the interstate approach emphasizes interactions among states.³⁰ Second, the transgovernmental approach assumes that government subunits can act autonomously from states,³¹ whereas the interstate approach treats states as unitary actors.³²

Recently, Slaughter began building on earlier work on transgovernmental relations, introducing her own concept of “transgovernmental networks” in an influential 1997 article in *Foreign Affairs*.³³ Reacting to an argument made in an earlier issue of *Foreign Affairs*³⁴ that power in world politics is shifting from states to non-state actors,³⁵ Slaughter argued that “[t]he state is not disappearing, it is disaggregating into its separate functionally distinct parts. These parts—courts, regulatory agencies, executives, and even legislatures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order.”³⁶ Emphasizing the growing importance of these networks, Slaughter contends that the most important actors in world politics are no longer foreign ministries and heads of state, but rather the same types of government institutions that are important in domestic politics, such as administrative agencies, courts, and legislatures.³⁷

restricted to nongovernmental actors, and *transgovernmental relations*, which refers to interactions among sub-units of governments. Keohane & Nye, *Transgovernmental Relations*, *supra* note 8.

²⁹ *Id.* at 43. Keohane and Nye also distinguished between two major types of transgovernmental relations: policy coordination and coalition building. “Transgovernmental policy coordination refers to activity designed to facilitate smooth implementation or adjustment of policy, in the absence of detailed higher policy directives.” At its most basic, this simply involves “informal communication among working-level officials of different bureaucracies.” In contrast, “transgovernmental coalition building takes place when sub-units build coalitions with like-minded agencies from other governments against elements of their own administrative structures.” *Id.* at 44.

³⁰ See *supra* Part II.A.

³¹ As Keohane and Nye note, subunit autonomy is a “matter of degree.” Keohane & Nye, *Transgovernmental Relations*, *supra* note 8, at 44.

³² See *supra* Part II.A.

³³ Slaughter, *Real Order*, *supra* note 5.

³⁴ Jessica T. Mathews, *Power Shift*, FOREIGN AFF. 50 (Jan./Feb. 1997).

³⁵ Slaughter, *Real Order*, *supra* note 5, at 183 (discussing Mathews, *supra* note 34).

³⁶ Slaughter, *Real Order*, *supra* note 5, at 184.

³⁷ Slaughter, *Global Economy*, *supra* note 7, at 178.

Slaughter defines transgovernmental networks as “pattern[s] of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the ‘domestic’ from the ‘international’ sphere.”³⁸ She then distinguishes among three different types of transgovernmental networks.³⁹ First, there are government networks within international organizations.⁴⁰ Second, there are government networks within the framework of agreements negotiated by heads of state,⁴¹ a network type that Slaughter says “is more striking as a form of governance, in that it emerges outside formal international institutions. Nevertheless, the members of these networks operate within a framework agreed on at least by the heads of their respective governments.”⁴² Finally, there are “spontaneous” transgovernmental networks.⁴³ Spontaneous transgovernmental networks arise without interstate agreement and may either formalize themselves as transgovernmental regulatory organizations or result from agreements among domestic regulatory agencies of two or more states.⁴⁴ As Slaughter notes, “[t]he last few decades have witnessed the emergence of a vast network of such agreements effectively institutionalizing channels of regulatory cooperation between specific countries. These agreements embrace principles that can be implemented by the regulators themselves; they do not need further approval by national legislators.”⁴⁵

C. *An Assessment of Transgovernmental Relations Scholarship*

The point of the foregoing discussion is not that interstate legal and regulatory cooperation is not important (it is) nor that all significant legal

³⁸ SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at 14.

³⁹ SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at 45-49. See also Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1053-1058 (2003).

⁴⁰ SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at 45-46. Examples of this type include networks among trade ministers in the framework of the General Agreement on Tariffs and Trade, finance ministers in the International Monetary Fund, defense and foreign ministers in NATO, central bankers in the Bank for International Settlements, and economic and regulatory officials in the Organization for Economic Cooperation and Development. *Id.* at 46.

⁴¹ *Id.* at 46-48. Examples of this type include interactions between American and European regulators in called for by heads of state in the Transatlantic Declaration of 1990, the New Transatlantic Agenda of 1995, and the Transatlantic Economic Partnership agreement of 1998. *Id.* at 47.

⁴² *Id.* at 46-47.

⁴³ *Id.* at 48-49.

⁴⁴ *Id.* Examples of this type include the Basel Committee, the International Organization of Securities Commissioners, and the International Network for Environmental Compliance and Enforcement. *Id.* at 48.

⁴⁵ *Id.* at 49.

and regulatory cooperation is transgovernmental (it is not).⁴⁶ Rather, the point is that there are at least two basic ways that international legal and regulatory cooperation can be structured—interstate and transgovernmental—and that exclusive reliance on the traditional approach that is conceptually based on the former carries with it the risk of neglecting the latter.⁴⁷

The existing literature on transgovernmentalism has already gone a long way toward helping scholars avoid this risk of overlooking transgovernmental forms of international legal and regulatory cooperation. As noted above, this literature has provided a valuable concept for recognizing and analyzing transgovernmental networks to complement the traditional concept of interstate cooperation.⁴⁸ Moreover, the literature presents the advantages of transgovernmental networks compared to interstate forms of cooperation. A fundamental advantage is that transgovernmental networks may be able to solve global problems in a manner that does not involve concentrating power in international organizations, power which then might be abused.⁴⁹ Moreover, “[networks] are fast, flexible, cheap, and potentially more effective, accountable, and inclusive than existing international institutions.”⁵⁰ Raustiala adds that trans-

⁴⁶ SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at 39; Raustiala, *supra* note 9, at 50.

⁴⁷ There is, in fact, a third category of interactions that represent another form of cooperation: *transnational* relations, defined as “regular interactions across national boundaries when at least one actor is a non-state agent or does not operate on behalf of a national government or an intergovernmental organization.” Thomas Risse-Kappen, *Bringing Transnational Relations Back In: Introduction*, in *BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS* 3 (Thomas Risse-Kappen ed., 1995). Among the nongovernmental actors that are widely studied by scholars of transnational relations are nongovernmental organizations (NGOs). *See, e.g.*, MARGARET E. KECK AND KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

⁴⁸ *See supra* Part II.B.

⁴⁹ SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at 8-11. Slaughter argues that “we need global rules without centralized power but with government actors who can be held to account through a variety of political mechanisms. . . . Government networks can help address [this] governance tri-lemma, offering a flexible and relatively fast way to conduct the business of global governance, coordinating and even harmonizing national government action while initiating and monitoring different solutions to global problems. Yet they are decentralized and dispersed, incapable of exercising centralized coercive authority. Further, they are government actors.” *Id.* at 10-11.

⁵⁰ Slaughter, *Global Economy*, *supra* note 7, at 179-181. The claim regarding accountability is controversial. For an example of a more skeptical take on the question of network accountability, *see, e.g.*, Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *AM. POL. SCI. REV.* 29, 38-39 (2005). In her 2004 book, Slaughter acknowledges and responds to such

governmental networks have the advantages of fostering experimentation and innovation, and dispensing “the time-consuming formality of traditional international organizations.”⁵¹

The literature has also begun to examine the consequences of the rise of transgovernmental networks. For example, Raustiala argues that transgovernmental networks are “conduit[s] for the diffusion of regulatory ideas, rules, and practices” that can lead to international policy convergence.⁵² Raustiala also argues, along with Slaughter, that transgovernmental networks can improve compliance with international law.⁵³ Transgovernmental networks may also contribute to world order by “increasing the scope, nature, and quality of international cooperation.”⁵⁴

In addition, the transgovernmentalism literature suggests a variety of reasons for increases in transgovernmental interactions in general, including increased regulatory interdependence;⁵⁵ the proliferation of functionally similar regulatory agencies within states;⁵⁶ increased levels of trade and resulting pressures for regulatory harmonization to address non-tariff barrier concerns;⁵⁷ increased institutionalization of world politics;⁵⁸ and technological change, which has made transgovernmental cooperation both more desirable (since the involvement of technically sophisticated government agencies can facilitate the regulation of issue areas characterized by increasing technical complexity)⁵⁹ and possible (since technology provides the means of communication necessary for transgovernmental cooperation).⁶⁰ As Raustiala summarizes, “[i]n short, three core factors—technological innovation, the expansion of domestic regulation,

accountability concerns, including the charge that transgovernmental networks will result in technocratic governance by unelected bureaucrats and the claim that transgovernmentalism distorts domestic political processes. See Slaughter, *Global Economy*, *supra* note 7, at 181 and SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at chap. 6.

⁵¹ Raustiala, *supra* note 9, at 24.

⁵² Raustiala, *supra* note 9, at 51-70; see also SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at 171-177.

⁵³ Raustiala, *supra* note 9, at 76-83; see also SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at 183-186.

⁵⁴ SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at 24 and 86-88.

⁵⁵ Keohane & Nye, *Transgovernmental Relations*, *supra* note 8, at 41-42.

⁵⁶ Raustiala, *supra* note 9, at 13.

⁵⁷ Pollack & Shaffer, *supra* note 22, at 27; Raustiala, *supra* note 9, at 12.

⁵⁸ ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 210 (3d ed. 2001) [hereinafter KEOHANE & NYE, *POWER AND INTERDEPENDENCE*]; Keohane & Nye, *Transgovernmental Relations*, *supra* note 8, at 42 and 50; and Risse-Kappen, *supra* note 45, at 30-31.

⁵⁹ KEOHANE & NYE, *POWER AND INTERDEPENDENCE*, *supra* note 58, at 210.

⁶⁰ Raustiala, *supra* note 9, at 12.

and the rise of globalization—have promoted the development of networks.”⁶¹

These factors may help explain the overall rise of transgovernmentalism. These factors, however, are general, macro-level phenomena and are therefore less useful for explaining variations in levels of transgovernmentalism across different groups of states and across different issue areas. This leaves important questions about the form of international legal and regulatory cooperation largely unanswered. What determines whether cooperation is likely to be transgovernmental or interstate? Why is legal and regulatory cooperation among some states and in some issue areas principally interstate, while among other states and in other issue areas it is primarily transgovernmental? More generally, what accounts for varying levels of transgovernmentalism across different groups of states and across different issue areas? With some exceptions,⁶² legal scholars and political scientists have devoted relatively little effort overall to finding answers to these questions, leaving a significant gap in the literature on transgovernmental cooperation.

III. A RATIONAL DESIGN THEORY OF TRANSGOVERNMENTALISM

The primary goal of this article is to make a modest contribution toward filling this gap. The article pursues this goal by developing a rational design theory of transgovernmentalism aimed at explaining variations in levels of transgovernmentalism across different groups of states and across different issue areas. This part of the article proceeds in four steps to explain the theory. First, it applies the theory of rational institutional design to the concept of transgovernmental relations, framing interstate versus transgovernmental as a design choice by heads of state and regulators. Second, it states some of the preconditions for transgovernmental cooperation that the theory assumes have been satisfied. Third, it identifies the theory’s dependent and explanatory variables. Finally, this part uses the rational design theory of transgovernmentalism

⁶¹ Raustiala, *supra* note 9, at 16.

⁶² For an example of earlier work that addresses this issue, see Part III of the 1971 special issue of *International Organization* on transnational relations, including the introduction to that part. 25 INT’L ORG. 519-521 (1971). See also Keohane & Nye, *Transgovernmental Relations*, *supra* note 8, at 55, and KEOHANE & NYE, POWER AND INTERDEPENDENCE, *supra* note 58, at 271 and, generally, chap. 2 (noting that levels of interdependence vary by issue area, and that these varying levels may in turn affect the level of transnational and transgovernmental activity). For a recent example of work addressing this issue, see Raustiala, *supra* note 9. Raustiala’s theory is based on the proposition that incentives for interstate cooperation are lower when substantive regulatory differences are large, regulators do not want to compromise their own domestic systems, or regulatory power is highly asymmetric. In those cases, transgovernmentalism is a likely alternative form of cooperation. *Id.* at 16, 72-76, and 88-89.

to derive a series of conjectures about how the level of transgovernmentalism (the dependent variable) is likely to be affected by distribution problems; preference heterogeneity; enforcement problems; high politics; issue complexity; agency autonomy; and antecedent interactions in interstate organizations (the explanatory variables).

A. *Transgovernmental versus Interstate as a Design Choice*

This article applies rational institutional design theory to the concept of transgovernmentalism in order to understand transgovernmental versus interstate cooperation as a “design choice.” Two different types of “designers” may seek to influence how cooperation is structured: (1) heads of state and other high-level officials (such as foreign ministers), and the diplomats and lawyers who negotiate on their behalf; and (2) regulatory agencies and individual regulators and government lawyers acting autonomously from the first type of designers. For efficiency of expression, the article will henceforth refer to these two types of designers by using the terms “heads of state” and “regulators.” Simply stated, the rational design theory of transgovernmentalism proposed in this article claims that whether legal and regulatory cooperation is interstate or transgovernmental depends largely on the rational choices of heads of state and regulators taking into account the costs and benefits of the two forms of cooperation.⁶³ This section first discusses the choice, then the designers.

1. The Design Choice

Transgovernmental cooperation and interstate cooperation have different attributes, and therefore different costs and benefits. The starting point for the rational design theory of transgovernmentalism is the assumption that designers consider these attributes in light of the problems they face, and make a rational choice between the two

⁶³ This conceptualization implicitly assumes that heads of state and regulators are not only the leading actors in international cooperation but also the leading designers of the structures of international cooperation and that they are not influenced by other domestic political factors. Moreover, in the context of delegation, this article conceptualizes the head of state as the principal and the regulators as agents. Future research should involve relaxing these simplifying assumptions. For example, in some cases domestic legislation might be used to specify the form of cooperation, making the design preferences of legislative bodies (as well as the preferences of interest groups that influence legislation) potentially significant in addition to the preferences of heads of state and regulators. Moreover, in some issue areas and in some states, it may be more accurate to conceptualize the legislature as the principal who delegates functions to heads of state or regulators. Incorporating these considerations into this article’s rational design logic would lead to a substantially more complex and difficult analysis, but may yield additional insights.

approaches based on their relative costs and benefits.⁶⁴ This approach is inspired by Barbara Koremenos, Charles Lipson and Duncan Snidal's recent work on the rational design of international institutions. Their "basic strategy is to treat institutions as rational, negotiated responses to the problems international actors face."⁶⁵ Like them, this article's "basic presumption, grounded in the broad tradition of rational-choice analysis, is that states use international institutions to further their own goals, and they design institutions accordingly."⁶⁶ This article also agrees with Koremenos *et al.* "that rational design can explain much about institutions, but not everything,"⁶⁷ and that not all institutional design is the product of conscious design.⁶⁸

The theory developed here, however, differs from Koremenos *et al.* in two respects. First, while their approach is limited to explicitly agreed upon institutions and excludes "tacit bargains and implicit guidelines,"⁶⁹ this article extends the argument of Koremenos *et al.* to transgovernmental networks, which often consist of just these sorts of "tacit bargains and implicit guidelines."⁷⁰ This extension, however, is consistent with Koremenos *et al.*'s logic of rational design. As they point out, "[e]ven institutions that are not highly formalized and arise through informal and evolutionary processes may embody significant rational design principles."⁷¹

2. The Designers: Heads of State and Regulators

The second difference between this article's rational design theory of transgovernmentalism and the approach of Koremenos *et al.* relates to

⁶⁴ Although this assumption makes intuitive sense, it should be noted that it is not uncontroversial. Among other things, the deliberate efforts of "designers" are only one of a variety of factors that influence how cooperation is structured. For an important critique of the concept of "design" in the context of domestic constitutions, see Donald L. Horowitz, *Constitutional Design: An Oxymoron?* 42 NOMOS 253 (2000). In addition, although the rational choice approach is helpful for understanding transgovernmentalism, it is not the only approach that can produce insights. Moreover, rational choice approaches have their own limitations. For a critique of rational choice approaches in general, see DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* (1994). For a critique of the rational institutional design approach, see Alexander Wendt, *Driving with the Rearview Mirror: On the Rational Science of Institutional Design*, 55 INT'L ORG. 1019 (2001).

⁶⁵ Barbara Koremenos *et al.*, *The Rational Design of Institutions*, 55 INT'L ORG. 761, 768 (2001).

⁶⁶ *Id.* at 762.

⁶⁷ *Id.* at 763.

⁶⁸ *Id.* at 766.

⁶⁹ *Id.* at 762.

⁷⁰ See *infra* Part II.B.

⁷¹ Koremenos *et al.*, *supra* note 65, at 767.

the actors that influence the design of cooperative frameworks. Whereas Koremenos *et al.* emphasize the role of states,⁷² the present article argues that the relevant “designers” may also include regulators. There are three steps to this argument. First, applying the concept of delegation, the head of state (the principal) is distinguished from the regulator (the agent) to which the head of state delegates regulatory functions.⁷³ Second, regulators are assumed to be capable of acting independently from heads of state.⁷⁴ The extent of this autonomy varies and thus the potential for agency slack (action by the agent that is neither authorized by the principal nor within the scope of discretion granted to the agent by the principal) also varies, depending on the extent and nature of the control mechanisms that the principal has put in place.⁷⁵ Agent autonomy may also vary depending on asymmetrical expertise and information between the principal and agent.⁷⁶

Third, it is assumed that the interests of regulators as agents *may* differ from the interests of the head of state as principal. Specifically, the assumption is that regulators may have their own preferences about the design of institutions. This argument is consistent with one of the central propositions of principal-agent theory, namely that the principal and agent each seek to maximize its interests, leading to potential conflicts of interest between them, and that agents may behave opportunistically.⁷⁷

⁷² *Id.* at 763 (also considering the role of non-state actors).

⁷³ On the concept of delegation and the principal-agent framework, *see, e.g.*, PETER D. FEAVER, *ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS* (2003); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION* (1991); and Arthur Lupia & Mathew D. McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 *J. LAW, ECON. & ORG.* 96 (1994). For applications of the principal-agent framework to world politics, *see* Daniel L. Nielson & Michael J. Tierney, *Delegation to International Organizations: Agency Theory and World Bank Environmental Reform*, 57 *INT’L ORG.* 241 (2003) and Darren Hawkins, David A. Lake, Daniel Nielson, and Michael J. Tierney, *States, International Organizations, and Principal-Agent Theory*, Nov. 16, 2004 (unpublished manuscript, available at <http://mjtier.people.wm.edu/papers/lake.pdf>).

⁷⁴ This is a fundamental assumption of the principal-agent literature. *See, e.g.*, KIEWIET & MCCUBBINS, *supra* note 73, at 24.

⁷⁵ Hawkins *et al.*, *supra* note 73, at 8-9. These control mechanisms may include specifying rules rather than granting discretion; establishing monitoring and reporting requirements; carefully screening and selecting agents so that their preferences are as close to the principal’s as possible; devising institutional checks and balances; and providing for the imposition of sanctions in response to slack and rewards in the case of desired action. *Id.* at 40-50; Nielson & Tierney, *Delegation to International Organizations*, *supra* note 73, at 246.

⁷⁶ *See, e.g.*, Lupia & McCubbins, *supra* note 73, at 100.

⁷⁷ KIEWIET & MCCUBBINS, *supra* note 73, at 5. As indicated by the italics at the beginning of this paragraph, it bears emphasizing that the preferences of the principal and agent regarding the design of cooperation are not *necessarily* inconsistent. For a much stronger version of the assumption, consult public choice theory, which

It also is supported by the core claim of transgovernmentalists that the state “is disaggregating into its separate, functionally distinct parts.”⁷⁸ If these parts on their own initiative are able to cooperate with their foreign counterparts, then they also should be able to influence the design of institutions for that cooperation. Thus, the claim is that not only cooperation, but also decision-making about the design of cooperation, is disaggregating.

B. *Preconditions for Transgovernmental Legal and Regulatory Cooperation*

This article’s rational design theory of transgovernmentalism assumes several necessary conditions for transgovernmental cooperation have been met. First, it assumes the necessary conditions for cooperation in general (such as the potential for mutual gains) have been satisfied.⁷⁹ The theory does not attempt to explain cooperation in general. Rather, the theory takes cooperation as a given, and seeks to explain the extent to which it is transgovernmental versus interstate.

Second, the theory assumes each of the states that are cooperating on an issue has an agency or other governmental subunit with legal or regulatory functions related to that issue. Since transgovernmental cooperation is, by definition, cooperation at the level of governmental subunits, it is not possible unless all of the cooperating states have such subunits in the relevant issue area. Closely related to this is a third assumption, that the relevant agencies have the resources (for example, staff and communications capabilities) enabling them to engage in cooperation with agencies in other states.

C. *Dependent and Explanatory Variables*

The rational design theory of transgovernmentalism seeks to explain the conditions under which legal and regulatory cooperation is most

“assumes that politicians, bureaucrats, and other decision-makers in public life are rationally self-interested” and “attempt to maximize their personal power and wealth even when these selfish ends conflict with public-spirited goals.” Jonathan R. Macey, *The ‘demand’ for international regulatory cooperation: a public-choice perspective*, in *TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 149-151 (George A. Bermann et al. eds., 2000). For a challenge to the assumption that bureaucrats are necessarily opportunistic, see JOHN BREHM & SCOTT GATES, *WORKING, SHIRKING AND SABOTAGE* (1997).

⁷⁸ Slaughter, *Real Order*, *supra* note 5, at 184.

⁷⁹ For example, cooperation will not arise under zero-sum situations since “one actor’s loss is another’s gain;” nor will it arise in situations of harmony, in which case “there is no reason to create a regime, because each individual player, acting without regard for the behavior of others, maximizes both its own utility and that of the system as a whole.” Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 *WORLD POL.* 336, 338 (1991).

likely to be transgovernmental as opposed to interstate. In other words, the dependent variable is transgovernmentalism. Moreover, the theory implies a variety of factors that may influence designers' choices regarding how to structure cooperation. These factors, the theory's explanatory variables, may help determine levels of transgovernmentalism. These factors are the theory's explanatory variables. This section explains the dependent variable in more detail and briefly identifies the explanatory variables.

1. Dependent Variable: Transgovernmentalism

The dependent variable is *transgovernmentalism*. The variable's purpose is to measure the extent to which cooperation between two or more states on a given issue is transgovernmental versus interstate. The concept of cooperation used in this article is based on a standard definition:

Cooperation occurs when actors [which are not in pre-existent harmony] adjust their behavior to the actual or anticipated preferences of others, through a process of policy coordination. [. . .] [C]ooperation takes place when the policies actually followed by one government are regarded by its partners as facilitating realization of their own objectives, as the result of a process of policy coordination."⁸⁰

This article emphasizes, however, that cooperation may include efforts to coordinate behavior *before* the behavior actually takes place. That is, cooperation includes not only changing policies after the fact, but also working together to adjust policies during the policymaking process to ensure they are compatible in the first place. Moreover, this article's concept of cooperation explicitly includes interactions between heads of state or regulators, even if they do not in fact result in any observable policy changes, provided that these interactions directly relate to the given issue area.⁸¹ The goal is to establish the *existence* of interstate and transgovernmental structures for solving problems of mutual concern, not necessarily their *effectiveness* in solving these problems.⁸²

⁸⁰ KEOHANE, AFTER HEGEMONY, *supra* note 20, at 51-52.

⁸¹ Even in situations where transgovernmental networks are "mere talking shops," they are important. As Slaughter points out, "[T]alk is the first prerequisite of information exchange; in the process, trust is fostered, along with an awareness of common enterprise. . . . Indeed, what sometimes starts as haphazard communication may lead officials to recognize the need and opportunity for coordination, across the range of domestic governmental concerns—from enforcement efforts to codes of best practices." Anne-Marie Slaughter, *Everyday Global Governance*, 132 DAEDALUS 83, 86-87 (2003).

⁸² Although this article focuses on the *causes* of transgovernmentalism, the *consequences* of transgovernmentalism—including its effectiveness at solving problems of cooperation—constitutes another interesting and important research agenda.

Because of the difficulty of establishing a baseline with reference to which absolute levels of interstate and transgovernmental cooperation could be assessed, and because most areas of cooperation involve a mix of interstate and transgovernmental cooperation,⁸³ this article uses a measure that aims to assess the *relative* levels of these two types of cooperation on a case-by-case basis. For example, transgovernmentalism is low when cooperation is primarily interstate and the level of transgovernmental cooperation is comparatively low; and high when cooperation is primarily transgovernmental and the level of interstate cooperation is comparatively low.

To determine levels of interstate and transgovernmental cooperation, the article looks for three types of evidence. First, it determines whether there are agreements or other formal documents between heads of state (interstate) or regulators (transgovernmental) providing guidelines for cooperation on a given issue. These documents are not only evidence of cooperation in the form of the negotiations leading up to agreement, but also evidence of the relative levels of interstate and transgovernmental cooperation intended by the parties. Second, the article seeks quantitative data about interactions between heads of state and regulators in connection with mutual problems in the issue area as one way of assessing the actual levels of interstate versus transgovernmental cooperation. Third, the article examines whether experts and practitioners from the cooperating parties characterize cooperation as primarily interstate or transgovernmental.⁸⁴

2. Explanatory Variables

This article focuses on seven explanatory variables that may help explain variations in levels of transgovernmentalism in legal and regulatory cooperation across different groups of states and different issue areas: (1) *distribution problems* (the extent of disagreement among actors about the preferred outcome when there are multiple Pareto-optimal equilibria); (2) *preference heterogeneity problems* (the extent to which divergence between actors' fundamental preferences makes any agreement in a given issue area difficult); (3) *enforcement problems* (the extent

⁸³ Mark A. Pollack & Gregory C. Shaffer, *Who Governs?*, in *Transatlantic Governance in the Global Economy* 287, 301 (Mark A. Pollack & Gregory C. Shaffer eds., 2001).

⁸⁴ Although there are sources of empirical evidence that can be used to assess levels of transgovernmentalism, classifying this level in a given situation as "low" or "high" is, of course, a qualitative judgment. Therefore, the case study in Part IV of this article presents the evidence in some detail so that the reader can critically evaluate judgments regarding the level of transgovernmentalism, as well as judgments about the values of other variables. The author acknowledges the formidable challenges associated with the operationalization of the variables examined in this article, a challenge that must be addressed in further work on this project.

to which actors have incentives to defect from a cooperative arrangement); (4) *high politics* (whether the intended cooperation involves “high politics,” such as national security or military issues, versus “low politics”); (5) *issue complexity* (complexity of the issue area in which states seek to cooperate); (6) *agency autonomy* (the autonomy of regulators in a given issue area); and (7) *antecedent interaction* (the extent of antecedent interactions among regulators in interstate organizations).⁸⁵ These variables are explained in more detail in the conjectures that follow.

D. *Conjectures about the Determinants of Transgovernmentalism*

In this section, a series of conjectures are derived from the rational design theory of transgovernmentalism. Each of the conjectures contains a hypothesis about the relationship between the dependent variable, transgovernmentalism, and one or more of the explanatory variables.

The baseline for the conjectures is the assumption that transgovernmental cooperation involves lower negotiating costs than interstate cooperation.⁸⁶ Transgovernmentalism therefore can be considered the “default mode” of cooperation before other costs and benefits are taken into account. One reason interstate negotiating costs tend to be higher is they typically involve a higher level of diplomatic formality, which consumes the time of heads of state and their staffs’ resources. When formal approval is needed within a state, as is often the case for interstate institutions, the diplomatic formalities are compounded by domestic political formalities.⁸⁷ Transgovernmental networks, in contrast, are “fast, flexible

⁸⁵ In some cases, such interactions—to the extent they involve work on specific issue-related problems—may be tantamount to one of the types of transgovernmental networks identified by Slaughter: networks within international organizations. See *supra* text accompanying note 38. Therefore, this explanatory variable cannot be applied to Slaughter’s first type of transgovernmental network—networks within international organizations—without running the risk of circularity. In other cases, such interactions are an independent factor that may facilitate future substantive interactions.

⁸⁶ Lower sovereignty costs might be another reason to prefer transgovernmental to interstate cooperation. However, since interstate institutions can be designed to minimize sovereignty costs (see, e.g., Koremenos et al., *supra* note 65, at 771), sovereignty costs are not included in this analysis. Moreover, it is possible that transgovernmental cooperation could be more expensive in one way, namely higher agency costs. Delegation, however, can be designed to mitigate these costs. See, e.g., Hawkins et al., *supra* note 73. Therefore, although agency costs can never be eliminated in a principal-agent relationship, this article does not consider agency costs to be a decisive factor in the choice between transgovernmental and interstate cooperation.

⁸⁷ Negotiation costs are likely to be especially high in the case of relatively legalized interstate cooperation.

“[A]doption of a highly legalized agreement entails significant contracting costs. Any agreement entails some negotiating costs—coming together, learning about

[and] cheap.”⁸⁸ They “bypass a great deal of cumbersome and formal international negotiating procedure”⁸⁹ and typically involve a lower degree of legalization, resulting in lower negotiating costs. Indeed, trans-governmental networks can be created almost spontaneously.⁹⁰ As Slaughter notes, the use of “memoranda of understanding” (MOUs) and even less formal methods of agreement allow transgovernmental interaction to expand quickly, in contrast to the “lethargic pace” of traditional treaty negotiations.⁹¹

Conjectures 1 and 2 discuss conditions under which the benefits of interstate cooperation may outweigh these general benefits of trans-governmental cooperation, leading to lower levels of transgovernmentalism. There are situations in which there may be compelling reasons for the designers of cooperation to prefer interstate cooperation notwithstanding the advantages of transgovernmentalism. In contrast, conjectures 3, 4 and 5 discuss conditions under which there may be advantages of transgovernmental cooperation that are specific to a given group of states or a given issue area. These advantages go beyond the baseline advantages discussed above and are likely to increase levels of transgovernmentalism.

Conjecture 1: *Transgovernmentalism decreases as distribution, preference heterogeneity or enforcement problems increase.*

Coordination, distribution, preference heterogeneity and enforcement problems are among the problems that actors may face when seeking gains from cooperation. Both transgovernmental and interstate structures of cooperation can be designed to facilitate cooperation under conditions characterized by simple coordination problems. Under such conditions, actors are likely to prefer transgovernmentalism because, as discussed above, it generally is less costly than interstate cooperation. However, interstate institutions generally can be designed to mitigate distribution, preference heterogeneity, and enforcement problems more effectively than transgovernmental structures of cooperation. Therefore, when any of these three types of problems exist, actors are, *ceteris*

the issue, bargaining, and so forth—especially when issues are unfamiliar or complex. But these costs are greater for legalized agreements. States normally exercise special care in negotiating and drafting legal agreements, since the costs of violation are higher. Legal specialists must be consulted; bureaucratic reviews are often lengthy. Different legal traditions across states complicate the exercise. Approval and ratification processes, typically involving legislative authorization, are more complex than for purely political agreements.”

Kenneth W. Abbott and Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG 421, 434-436 (2000).

⁸⁸ Slaughter, *Global Economy*, *supra* note 7, at 179.

⁸⁹ *Id.* at 180. See also Raustiala, *supra* note 9, at 24.

⁹⁰ See SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at 48-49 (describing spontaneous government networks).

⁹¹ *Id.* at 49.

paribus, more likely to prefer interstate than transgovernmental cooperation. Drawing on game theory, the following discussion explains coordination, distribution, preference heterogeneity, and enforcement problems, as well as possible institutional solutions and their relevance to levels of transgovernmentalism.

Simple coordination problems exist when (1) the players need to coordinate their policies in order to avoid a mutually undesirable outcome; (2) there are multiple Pareto optimal equilibria (that is, there is more than one policy alternative around which the players can agree to coordinate that represents an equilibrium and has the property that no other alternative can make either player better off without making the other player worse off);⁹² and (3) the players are indifferent as to which Pareto optimal policy is agreed upon.⁹³

FIGURE 1: SIMPLE COORDINATION PROBLEM⁹⁴

	Coffee House	Bar
Coffee House	1 1	0 0
Bar	0 0	1 1

A “Simple Coordination Problem” game is depicted in Figure 1. In this game, the two players are friends who wish to meet for a discussion. They can either meet at the coffee house for a cup of coffee, or the bar for a glass of beer. The choices available to one friend—referred to as the “row player”—are depicted in the rows (first row coffee house, second row bar) and the row player’s preferences are represented by the

⁹² One outcome “Pareto dominates” another outcome if all players are at least as well off, but at least one player is better off, with the first outcome rather than the second. An outcome is “Pareto optimal” if there is no other outcome that Pareto dominates it. In other words, when an outcome is Pareto optimal, there is no alternative outcome that can make any player better off without making another player worse off (i.e., the outcome cannot be improved without hurting at least one player). An outcome is “Pareto sub-optimal” if it is not Pareto optimal, i.e., if an alternative outcome does exist that can make a player better off without making any other player worse off. HERBERT GINTIS, *GAME THEORY EVOLVING* 28 (2000); RUSSELL HARDIN, *COLLECTIVE ACTION* 91 (1982). An equilibrium in two-player games such as those referred to in this article is “a pair of strategies, each of which is a *best response* to the other; i.e., each gives the player using it the highest possible payoff, given the other player’s strategy.” GINTIS at 6.

⁹³ Krasner, *supra* note 79, at 338-339; Hawkins et al., *supra* note 73, at 20; Lisa L. Martin & Beth A. Simmons, *Theories and Empirical Studies of International Institutions*, INT’L ORG. 729, 744 (1998).

⁹⁴ This problem is illustrated in Krasner, *supra* note 79, at 338-339, using a different scenario.

“payoffs” in lower-left corner of each cell of Figure 1. The other friend is the “column player” whose payoffs are in the upper-right corner of each cell. The important point is that each friend’s payoff depends not only on his or her own choice, but also on the choice of the other. If the row player goes to the bar but the column player goes to the coffee house (or vice versa), they cannot have their discussion—the payoff for both friends is zero, as shown in the lower-left and upper-right cells. If both friends, however, go to the coffee house or if they both go to the bar, each player gets a payoff of one, indicating they prefer that situation because they are able to have their discussion.⁹⁵ The coordination problem faced by the two friends is a relatively simple one: they merely need to agree on where to meet. In the language of game theory, they need to identify a “focal point” for coordination.⁹⁶

FIGURE 2: BATTLE OF THE SEXES⁹⁷

	Coffee House	Bar
Coffee House	3 2	0
Bar	0	2 3

The “Battle of the Sexes” game depicted in Figure 2 is also a coordination game, but it adds a distribution problem. In the Battle of the Sexes: (1) the players (traditionally depicted as a male and a female) again need to coordinate their policies in order to avoid a mutually undesirable outcome (the lower-left or upper-right cells, which do not provide any payoffs); (2) again, there are multiple Pareto optimal equilibria; that is, there is more than one outcome—the upper-left cell and the lower-right cell—that represents an equilibrium and has the property that no other alternative can make either player better off without making the other player worse off;⁹⁸ but (3) the players are no longer indifferent as to which Pareto optimal policy is agreed upon: as the payoffs indicate, the column player would prefer to meet at the coffee house whereas the row player would prefer the bar.⁹⁹

⁹⁵ *Id.*

⁹⁶ Martin & Simmons, *supra* note 93, at 744.

⁹⁷ This game is illustrated in Krasner, *supra* note 79, at 339-340, using a different scenario.

⁹⁸ A move from the upper-left to the lower-right cell would make the row player better off by increasing her payoff from 2 to 3, but it would make the column player worse off by reducing his payoff from 3 to 2 (and vice versa). The lower-left and upper-right cells make both players worse off.

⁹⁹ Krasner, *supra* note 79, at 339-340; Martin & Simmons, *supra* note 93, at 744.

This third point is what introduces a distribution problem, and this is what distinguishes the Battle of the Sexes from the Simple Coordination Problem. The distribution of the payoffs favor the column player if the meeting is at the coffee house and the row player if the meeting is at the bar. In either case, they both get some payoff since they get to have their discussion, but since they are not indifferent to the meeting place, they will have to negotiate where to meet. The problem is not—as was the case in the Simple Coordination Problem—merely to coordinate on a Pareto optimal outcome in order to avoid a Pareto sub-optimal outcome that neither player desires. Now the problem is to resolve a conflict of interests regarding *which* Pareto-optimal outcome to select. Ordinarily, this is a more difficult problem to solve than simple coordination and, as explained below, one that interstate structures generally are better able to mitigate than transgovernmentalism.

FIGURE 3: PREFERENCE HETEROGENEITY¹⁰⁰



An even more difficult cooperation problem can be posed by preference heterogeneity. A preference heterogeneity problem exists when two states cannot agree on cooperation due to fundamentally different preferences. For example, in the one dimensional policy space depicted in Figure 3, states *A* and *B* may have ideal points *a* and *b*, respectively. These points are different, indicating preference heterogeneity. However, the status quo (indicated by point *SQ*) lies outside (in this case, to the left of) the range bounded by the two states' ideal points. This means that even though *A* and *B* have different preferences, they can both move closer to their ideal points by agreeing to move the status quo to the right, say to some point *p* that lies somewhere between point *a* and *a* plus the distance between *SQ* and *a*. Under these circumstances, *A* and *B* would both prefer such an agreement instead of the status quo.

However, as the two states' ideal points diverge (say, to points *a'* and *b'*)—representing increased preference heterogeneity—the status quo may lie between the two states' ideal points. In such a case, *A* would reject any proposal to the right of *SQ* because this would be farther from *A*'s ideal point, and *B* would reject any proposal to the left of *SQ* because this would be farther from *B*'s ideal point. Thus, *A* and *B* will have little if any incentive to negotiate with each other, making cooperation unlikely.¹⁰¹ In the Simple Coordination Problem and Battle of the Sexes games, there is at least a possibility of agreeing to a solution that overcomes barriers to Pareto-improvement. The lesson of Figure 3, however,

¹⁰⁰ This figure and the discussion is generally based on the earlier version of Hawkins et al., *supra* note 73, dated December 4, 2003, at 42 (on file with the editors).

¹⁰¹ This discussion is substantially based on *id.* at 40-41.

is that high levels of preference heterogeneity and the configuration of ideal points relative to the status quo may preclude agreement.

FIGURE 4: PRISONERS' DILEMMA

	Cooperate	Defect
Cooperate	3, 3	1, 4
Defect	4, 1	2, 2

Even if coordination, distribution and preference heterogeneity problems are overcome and an agreement is reached on the terms of cooperation, there may be enforcement problems that make it difficult to sustain cooperation over time. Enforcement problems exist when individual actors have incentives to defect from an agreement.¹⁰² One way of understanding enforcement problems is by considering the implications of another game, the “Prisoners’ Dilemma.” In this game, the two players are being held in a prison pending trial for a crime. They are being interrogated in separate rooms and cannot communicate. The prosecutor has only enough evidence to convict the prisoners of misdemeanors and keep them in prison for one year. Therefore, if neither prisoner provides information to the prosecutor—that is, if the prisoners cooperate with each other—their sentences will both be relatively light, represented by the payoffs of 3 in the upper-left cell. However, if one of the prisoners defects by confessing and providing the prosecutor with incriminating evidence about the other prisoner, the prosecutor will drop all charges against the defecting prisoner and set her free—but, armed with the additional evidence, the prosecutor will now be able to convict the non-confessing prisoner of a felony and send him to jail for ten years. For example, as shown by the payoffs in the lower-left cell, if the row player defects but the column player cooperates, the row player gets a payoff of 4 (the best possible outcome for her) but the column player gets a payoff of only 1 (the worst possible outcome for him). If both prisoners confess—that is, if they both defect—they will each get eight years in jail (ten years for the crime, less two years for confessing), represented by the payoffs of 2 in the lower-right cell.¹⁰³

In the Prisoner’s dilemma, each player’s dominant strategy is to defect. This is because regardless of the column player’s move, the row player will get a higher payoff by defecting; and regardless of the row player’s

¹⁰² Koremenos et al., *supra* note 65, at 776.

¹⁰³ For accounts of the prisoner’s dilemma game, see GINTIS, *supra* note 92 at 19, Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT’L L.* 335, 358-360 (1989); and KEOHANE, *AFTER HEGEMONY*, *supra* note 20, at 68-69.

move, the column player will get a higher payoff by defecting. Therefore, the only equilibrium is in the lower-right cell (defect, defect).¹⁰⁴ The dilemma is that in the lower-right cell both players get a relatively low payoff of 2—an outcome that is not Pareto optimal because there is another outcome, cooperate-cooperate in the upper-left cell, that could make both players better off. One way of resolving the dilemma might be an agreement by the prisoners to cooperate with each other, and this is one reason why states in Prisoners' Dilemma situations often seek international rules designed to restrain defection.¹⁰⁵ But why should states be expected to comply with such rules when their dominant strategy is to defect? Unlike the Simple Coordination Problem and the Battle of the Sexes in which the payoffs are 0 for both players if either defects, in the Prisoners' Dilemma the row player can increase her payoff from 3 to 4 by defecting (as can the column player), creating incentives to defect.¹⁰⁶ This is the enforcement problem.

It is important to note, however, that the conclusion that defection is the dominant strategy in the Prisoners' Dilemma game depends on the assumption that the game is played only once or a small number of times. In an iterated Prisoners' Dilemma game—that is, when the game is played repeatedly by the same players—the players may find it rational to cooperate instead.¹⁰⁷ This is, as Keohane explains, because “in multiple-play Prisoners' Dilemma, defection is in the long run unrewarding, since the short-run gains thereby obtained will normally be outweighed by the mutual punishment that will ensue over the long run,” including retaliatory defection by other players in future iterations of the game.¹⁰⁸ Therefore, enforcement problems generally are not as serious in iterated or ongoing interactions as they are in single isolated interactions. On the other hand, if the players do not sufficiently value the future gains of cooperation—that is, if the “shadow of the future” is not long enough—cooperation might not be sustainable.¹⁰⁹

Finally, in addition to iteration, depth of cooperation may affect the seriousness of enforcement problems. According to George Downs,

¹⁰⁴ Abbott explains this result in terms of offensive and defensive incentives. Offensively, each player wants to get the maximum payoff of 4, which can only happen if she defects. Defensively, each player wants to avoid the so-called “sucker's payoff” of 1, which can only happen if he cooperates. Abbott, *supra* note 103, at 359.

¹⁰⁵ *Id.*

¹⁰⁶ Or, using Abbot's terminology, the offensive and defensive incentives to defect that are created by the payoff structure “pull inexorably toward non-cooperation.” *Id.* at 362.

¹⁰⁷ KEOHANE, AFTER HEGEMONY, *supra* note 20, at 75-76; Abbott, *supra* note 103, at 363.

¹⁰⁸ KEOHANE, AFTER HEGEMONY, *supra* note 20, at 75; Abbott, *supra* note 103, at 363. This outcome was demonstrated by ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

¹⁰⁹ Koremenos et al., *supra* note 65, at 781.

David Rocke and Peter Barsoom, “depth of cooperation” refers to “the extent to which [an agreement] requires states to depart from what they would have done in its absence.”¹¹⁰ They argue that the greater the depth of cooperation, the higher the magnitude of enforcement that will be necessary to prevent defection.¹¹¹

How can actors mitigate the problems of coordination, distribution, preference heterogeneity and enforcement that create barriers to cooperation? Returning to Figure 1, the Simple Coordination Problem suggests that coordination problems are relatively easy to solve if they do not also involve distribution problems. The players simply need to establish a focal point for coordination. A basic tool of transgovernmentalism such as an informal memorandum of understanding could be used to accomplish this. There is no need for an enforcement mechanism to ensure that the players don’t break from the agreed-upon focal point. Because the players in Figure 1 have no disagreement between the upper-left (coffee house, coffee house) and lower-right (bar, bar) outcomes, and because these outcomes are both Pareto optimal (in this game, none of the other outcomes can make either player better off), there is no incentive for either player to defect.¹¹² Under these conditions, the more costly alternative of interstate cooperation will be “overkill” and transgovernmentalism will be more likely.

In contrast, interstate structures of cooperation generally can be better designed than transgovernmental structures to mitigate the other three types of problems: distribution, preference heterogeneity and enforcement problems. Most importantly, the scope of issues covered by an interstate institution may be increased to allow issue linkage. Issue linkage can facilitate compromises across issue areas when preference heterogeneity or distribution problems might otherwise preclude cooperation. In the case of preference heterogeneity, imagine that in addition to the policy space represented by Figure 3 there are other issue areas in which the actors are attempting to coordinate policies. Even if state *A*’s ideal point is *a*, *A* may be willing to agree to a coordination point that is to the right of the status quo and therefore farther from its ideal point but closer to *B*’s ideal point *b*, provided that in the second issue area state *B* agrees to a coordination point that is closer to *A*’s ideal point. More generally, if state *A* values the second issue more than the first, and state *B* values the first issue more than the second, “both can be made better off by exchange, that is, by agreeing to defer to each other on these

¹¹⁰ George W. Downs et al., *Is the Good News about Compliance Good News about Cooperation?*, 50 INT’L ORG. 379, 383 (1996).

¹¹¹ *Id.*

¹¹² Krasner, *supra* note 79, at 338. For example, if the players agree on the coffee house (upper-left cell), neither player can get a higher payoff by going to the bar instead.

issues.”¹¹³ Thus, by linking together two or more issue areas, the parties may be able to reach agreement even when one or more individual issue areas are characterized by a high degree of preference heterogeneity. For this reason, the issue scope of rationally designed cooperative arrangements is likely to increase with greater preference heterogeneity.¹¹⁴

The same solution can be used to address distribution problems. In the Battle of the Sexes game depicted in Figure 2, imagine that after their meeting the friends wish to go to a movie, that they would rather spend time together at the same movie than see separate movies, but that one friend prefers to see a comedy and the other a drama. By linking together the coffee house-bar and comedy-drama issues, it may be easier to reach an agreement—one friend gets her preference for the bar in exchange for the other friend getting his preference for the comedy—than if the issues were treated separately. Therefore, the issue scope of rationally designed cooperative arrangements is likely to increase with the severity of distribution problems.¹¹⁵ In summary, to use Keohane’s words, by linking issues under an interstate institution, “more potential *quids* are available for the *quo*.” This can help mitigate both interest heterogeneity and distribution problems.¹¹⁶

In addition, increasing the scope of issues covered by an institution may help solve enforcement problems. As noted above, in a Prisoners’ Dilemma situation, iteration over time can mitigate enforcement problems by altering incentives to defect. As Kenneth Abbott explains, “[c]ooperation can also emerge and be maintained through ‘horizontal’ iteration—the linkage of different issue areas. [. . .] [L]inkage makes it possible for states to respond to cooperation or defection in one area with appropriate actions in another, much as in an iterated game.”¹¹⁷ In other words, even if two actors reach an agreement for coordinating a policy in an issue area, cooperation will be difficult to sustain if one of the actors later comes to value the benefits of defection in the present over the costs of defection in terms of lost benefits of cooperation in the future. However, if this first issue area is linked to a second issue area, such that if an actor defects from cooperation on one issue area then the other actor will

¹¹³ Koremenos et al., *supra* note 65, at 786.

¹¹⁴ *Id.* at 785-786.

¹¹⁵ *Id.* at 786.

¹¹⁶ KEOHANE, AFTER HEGEMONY, *supra* note 20, at 91. Or, as Koremenos et al. explain, “[l]inkage . . . may allow [actors] to overcome distributional obstacles. When the benefits of an issue accrue primarily to a few, and the costs fall disproportionately on others, linkage to another issue with different distributional consequences allows cost-bearing states to be compensated by those who reap the gains. When each state cares relatively more about one of two issues, linking the negotiations may be the mutually preferred option. In particular, the more each state cares about ‘its’ issue, the more essential linkage becomes in an agreement.” Koremenos et al., *supra* note 65, at 786.

¹¹⁷ Abbott, *supra* note 103, at 363.

automatically defect from cooperation on the second one, the costs of the first party's defection is now higher: it includes not only lost future cooperation in the first issue area, but also lost future cooperation in the second one. By increasing the total costs of defection, issue linkage can reduce net incentives to defect, at least partially mitigating the enforcement problem.¹¹⁸ Therefore, the issue scope of rationally designed cooperative arrangements is likely to be higher when enforcement problems are more severe.¹¹⁹

In addition to linking multiple issue areas, interstate institutions can be designed to mitigate enforcement problems by providing centralized enforcement mechanisms. This can be accomplished by delegating enforcement powers to a third party. For example, the third party might be empowered to punish defectors by withholding financial resources or imposing reputation costs. When multiple issues are linked, the third party might be empowered to expel an actor who defects on one issue from the entire cooperative arrangement. Moreover, the third party might be empowered to monitor compliance, making it less likely that defection will go undetected.¹²⁰ Thus, centralized enforcement mechanisms like these can decrease the likelihood of defection by increasing the likely costs of defection. Because centralization is a way of mitigating enforcement problems, rationally designed cooperative arrangements are likely to have higher centralization when enforcement problems are more severe.¹²¹

Transgovernmental networks, however, generally cannot offer these solutions to distribution, preference heterogeneity and enforcement problems to the same extent as interstate institutions. First, while the issue scope of interstate institutions is variable by design, transgovernmental networks will usually be limited to a single issue area. This is because transgovernmentalism typically involves interactions between specialized regulatory agencies, which themselves are not likely to deal with multiple issue areas.¹²² Second, transgovernmental networks typically are not centralized. When transgovernmental networks do exhibit

¹¹⁸ Koremenos et al., *supra* note 65, at 787; KEOHANE, *AFTER HEGEMONY*, *supra* note 20, at 103. For example, “[t]he United States might be unable to resist domestic pressures to impose tariffs on European wine, for example, were it not for the realization that such action would invite retaliation from the Europeans on U.S. beef.” Koremenos et al., *supra* note 65, at 797.

¹¹⁹ Koremenos et al, *supra* note 65, at 786-787.

¹²⁰ *Id.* at 790.

¹²¹ *Id.* at 789-790.

¹²² In theory, almost any issue area can be divided into sub-issues, which raises the possibility of sub-issue linkage in transgovernmental networks. For example, although the case study in this article focuses on E.U.-U.S. merger review cooperation, it is possible that this cooperation could be linked to cooperation on other sub-issue areas within the more general issue area of antitrust. This conjecture does not take the possibility of sub-issue linkage into account. However, additional

some degree of centralization, as is the case with transgovernmental regulatory organizations such as the Basel Committee, they usually do not involve delegation of enforcement powers.¹²³ Therefore, when distribution, preference heterogeneity and enforcement problems are serious, rational designers may find that formal interstate institutions—particularly those creating issue linkage and centralization—are likely to be worth the higher costs of negotiating interstate structures of cooperation.¹²⁴ In contrast, if there are only simple coordination problems, rational designers are likely to find that transgovernmentalism is a more cost-effective form of cooperation.

Conjecture 2: *Transgovernmentalism decreases as high politics increases.*

“High politics” typically is defined as dealing with military and national security matters, whereas “low politics” refers to other issue areas such as trade or the environment.¹²⁵ This conjecture is based on the assumption that heads of state are less likely to surrender direct control over matters of high politics than over matters of low politics.¹²⁶ This conjecture is not meant to suggest that there is no transgovernmental interaction in high

case studies may show that this conjecture needs to be modified to consider this type of issue linkage within transgovernmental networks.

¹²³ SLAUGHTER, *NEW WORLD ORDER*, *supra* note 3, at 48. Other examples of transgovernmental regulatory organizations identified by Slaughter include the International Organization of Securities Commissioners and International Network for Environmental Compliance and Enforcement. *Id.* As Slaughter notes, “Nothing [transgovernmental regulatory organizations] do purports to be legally binding on the members, and there typically are few or no mechanisms for formal enforcement or implementation.” *Id.* This is not surprising, since heads of state are unlikely to allow regulators to delegate enforcement functions to a third party that could then be used against the state.

¹²⁴ This is not to say that transgovernmental networks offer no solutions to these problems whatsoever. To the contrary, they can foster iteration by regularizing interactions between different states’ regulators, which may help solve Prisoners’ Dilemmas. See AXELROD, *supra* note 108 and KEOHANE, *AFTER HEGEMONY*, *supra* note 20. Moreover, they may facilitate communication, and increased quantity and symmetry of information, which also may help mitigate these problems. *Id.* However, the point remains that interstate solutions generally will be able to mitigate distribution, preference heterogeneity and enforcement problems more effectively and thus are more likely to be preferred by rational designers of cooperation when these problems exist.

¹²⁵ KEOHANE & NYE, *POWER AND INTERDEPENDENCE*, *supra* note 58, at 20 (explaining the distinction as associated with realist international relations theory).

¹²⁶ See, e.g., *Introduction*, 25 *INT’L ORG.* 519, 520 (1971); Raustiala, *supra* note 9, at 5 (“[s]ome critics argue that . . . networks may arise only in areas of ‘low politics’”). The high-low politics distinction has been subject to substantial criticism. See, e.g., KEOHANE & NYE, *POWER AND INTERDEPENDENCE*, *supra* note 58, at 20-23 and Nye & Keohane, *Transnational Relations*, *supra* note 8, at 728-729 (1971). Because the distinction retains significant currency among international relations scholars, this

politics. To the contrary, even in areas of high politics cooperation is often necessary between governmental subunits of different states.¹²⁷ Consistent with this article's definition of transgovernmentalism as the level of transgovernmental cooperation relative to the level of interstate cooperation within a given group of states in a given issue area,¹²⁸ most cooperation—including cooperation on matters of high politics—is likely to involve a mix of interstate and transgovernmental interaction. When high politics is involved, however, levels of interstate cooperation are likely to be higher due to heads of states' insistence on tighter control, making the relative level of transgovernmental cooperation lower than when only low politics is involved.

Conjecture 3: *Transgovernmentalism increases as issue complexity increases.*

Transgovernmentalism is especially likely when high levels of expertise are necessary to understand and formulate policy in a given issue area.¹²⁹ Regulatory agencies are specialized by design, and within agencies expertise often is even more narrowly defined by methodology and profession.¹³⁰ Even when heads of state wish to be involved in an issue, they are likely to call on regulatory specialists to “ameliorate the uncertainties and help them understand the current issues and anticipate future trends” in complex areas such as monetary, macroeconomic, technological, environmental, health and population matters.¹³¹ An issue area may be intrinsically complex for reasons of technology, methodology, or professional specialization, or it may be complex because of differences

article nevertheless includes this conjecture in order to subject it to eventual empirical assessment.

¹²⁷ For example, consider cooperation between national militaries and defense bureaucracies in the context of interstate collective security arrangements such as the North Atlantic Treaty Organization.

¹²⁸ See *infra* text accompanying notes 80 to 84.

¹²⁹ KEOHANE & NYE, *POWER AND INTERDEPENDENCE*, *supra* note 58, at 210. Hawkins et al. make a similar point about delegation in general. *Supra* note 73, at 18.

¹³⁰ For example, the FTC has several divisions, including the Bureau of Competition, which deals with antitrust. Within the Bureau of Competition, there is a subunit dealing with merger review. For an organizational chart of the Bureau, available at <http://www.ftc.gov/bc/bcorgchart.pdf>. Merger review specialists include, among others, professional economists and lawyers.

¹³¹ Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 12-13 (Winter 1992). Actors may also desire flexibility in issue areas where high levels of complexity lead to uncertainty. See Koremenos et al., *supra* note 65, at 778 and 793 (hypothesizing that states are likely to design more flexible institutions when there is uncertainty about the state of the world). While transgovernmental cooperation generally is more flexible than interstate, interstate cooperation can be designed to be flexible. See *id.* (discussing how interstate institutions can be designed to be flexible as a response to uncertainty). Therefore, this article does not include flexibility as a key consideration.

between national regulatory systems that make coordination highly complicated.

Conjecture 4: *Transgovernmentalism increases as agency autonomy increases.*

The more autonomy a legal or regulatory agency possesses in a given issue area or a given state, the more likely the agency is to engage in transgovernmental cooperation on the issue with foreign counterparts. This conjecture is based on two assumptions. The first assumption is that regulators prefer transgovernmental cooperation to interstate cooperation. This is because regulators are able to act more independently and with less direct supervision in transgovernmental cooperation than in interstate cooperation.¹³² Almost all regulatory agencies are subject to control mechanisms which significantly limit agency autonomy. Interstate cooperation, however, implies even more expansive control mechanisms and lower degrees of autonomy because heads of state are likely to supervise more closely regulators on issues that heads of state are directly engaged in. Moreover, in interstate cooperation, the regulators frequently “stay home” waiting for instructions from high-level leaders about how to conduct their domestic regulatory activities. In contrast, in transgovernmental networks, regulators interact directly with their counterparts abroad without any necessary increase in supervision from heads of state.¹³³

It is one thing for regulators to prefer transgovernmentalism as the first assumption states, but it is another thing for them to be able to actually engage in transgovernmentalism. The second assumption is that in order to engage in transgovernmental cooperation, regulators must either be directed to do so by the head of state or have sufficient autonomy to engage in transgovernmental cooperation on their own initiative.¹³⁴ Given that regulators prefer transgovernmentalism, they are likely to use

¹³² As one U.S. government official put it, regulators are often afraid that high level involvement can mean the “kiss of death” for their informal yet productive interactions with their counterparts abroad. Presentation of Peter Secor, Deputy Director, Office of European Union and Regional Affairs, Bureau of European and Eurasian Affairs, U.S. Department of State, to the Seminar on Transatlantic Relations, Duke University (Mar. 22, 2004).

¹³³ This type of direct interaction between government subunits is the essence of transgovernmentalism. Many examples of transgovernmental interactions are documented in SLAUGHTER, *supra* note 3, including transgovernmental interactions among regulators (chapter 1), judges (chapter 2) and legislators (chapter 3).

¹³⁴ Autonomy is “the range of potential independent action available to an agent after the principal has established mechanisms of control.” Hawkins et al., *supra* note 73, at 8-9. Control mechanisms may include specifying rules rather than granting discretion; establishing monitoring and reporting requirements; carefully screening and selecting agents so that their preferences are as close to the principal’s as possible; devising institutional checks and balances; and providing for the imposition of

the full extent of their autonomy to pursue transgovernmental cooperation even if they are not directed by the head of state to do so. Therefore, this conjecture expects levels of transgovernmentalism to increase as agency autonomy increases.

Conjecture 5: *Transgovernmentalism increases as the extent of prior interactions among regulators in international organizations increases.*

This conjecture is based on the assumption that transgovernmental cooperation is more likely when regulators already have been interacting with each other in interstate institutions. In other words, transgovernmental cooperation is more likely to emerge in issue areas where interstate institutions already exist. Keohane and Nye's early work on transgovernmentalism emphasized the importance of the institutional context of transgovernmental relations, noting that international organizations facilitate contact among domestic regulatory officials, and that transgovernmental behavior is likely to be "particularly important in issue areas in which functionally defined international organizations operate".¹³⁵ Recently, Thomas Risse has gone further, arguing that "[t]he emergence of transgovernmental coalitions seems to be almost entirely a function of highly cooperative and institutionalized interstate relationships."¹³⁶

To summarize the conjectures, transgovernmentalism, being less costly than interstate cooperation, is more likely when simple coordination problems are the only barriers to cooperation. However, levels of transgovernmentalism are likely to be lower when distribution, preference heterogeneity or enforcement problems are more serious and in issue areas involving high politics. Transgovernmentalism is likely to be higher when issue complexity, agency autonomy, and antecedent regulatory interactions in interstate organizations are higher.

IV. THE CASE OF E.U.-U.S. MERGER REVIEW COOPERATION

In Part III, this article developed a rational design theory of transgovernmentalism aimed at explaining variations in levels of transgovernmentalism across different issue areas and different groups of states. Part III then used the theory to derive a series of conjectures about seven variables that are likely to affect levels of transgovernmentalism: distribu-

sanctions in response to slack and rewards in the case of desired action. *Id.* at 40-50; Nielson & Tierney, *supra* note 73, at 246.

¹³⁵ Keohane & Nye, *Transgovernmental Relations*, *supra* note 8, at 42 and 50.

¹³⁶ Risse-Kappen, *supra* note 47, at 30-31. As noted above, in some cases, such interactions—to the extent they involve work on specific issue-related problems—may be tantamount to one type of network identified by Slaughter: transgovernmental networks within international organizations. In other cases, such interactions are an independent factor that may facilitate future substantive interactions.

tion, preference heterogeneity and enforcement problems; high politics; complexity; agency autonomy; and prior regulatory interactions in interstate organizations.

Part IV of the article uses the case of European Union (E.U.)¹³⁷-United States (U.S.) cooperation on antitrust issues to subject the rational design theory of transgovernmentalism to a preliminary empirical plausibility test.¹³⁸ More specifically, this part focuses on merger review cooperation between the E.U. and U.S. Part IV first provides a brief overview of antitrust (or competition) policy in general and merger review in particular, with an emphasis on E.U. and U.S. law and practice. It then assesses the extent of interstate and transgovernmental cooperation in order to measure the level of transgovernmentalism in E.U.-U.S.

¹³⁷ The E.U. arguably satisfies the criteria for a state under the traditional international legal definition. See *supra* note 1. However, the E.U. is commonly considered to be a supra-national institution. In either case, E.U.-U.S. cooperation is appropriate for this study because of the E.U.'s competence in global antitrust issues. See *infra* text at notes 116-117. Since transgovernmental versus interstate refers to the organizational level at which cooperation takes place, it can be descriptive not only of states, but also other hierarchical institutions. In the case of the E.U., the president of the European Council (and, in certain cases, the president of the Commission) is the primary actor at the interstate level, and Commission staff members are the main actors at the transgovernmental level. See Pollack & Shaffer, *supra* note 22, at 23. Current members of the E.U. are Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. The E.U.'s principal institutions include the European Parliament, which represents the E.U.'s citizens and is directly elected by them; the Council of the European Union, which represents the individual member states; and the European Commission, which seeks to uphold the interests of the Union as a whole. For an overview of the E.U., visit EUROPA, at http://europa.eu.int/institutions/index_en.htm. Until the 1992 Treaty of Maastricht, which established the European Union, the E.U. was referred to as the European Community. See generally "The History of the European Union," at http://europa.eu.int/abc/history/index_en.htm. An overview of the history, institutions and activities of the E.U. is available at the E.U.'s web site at http://europa.eu.int/index_en.htm.

¹³⁸ Because it relies on only a single case study, this analysis cannot serve as more than a preliminary plausibility test of the rational design theory of transgovernmentalism. See, e.g., GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 211 (1994) (noting the limitations of single case studies). More rigorous testing will require increasing the number of cases and reducing the number of explanatory variables. *Id.* at 118-122. Additional cases would need to be selected according to a carefully developed case selection strategy in order to mitigate selection bias. *Id.* at chap. 4. Finally, improvements need to be made in the operationalization of concept of transgovernmentalism and of the explanatory variables, improvement that will depend on further theoretical and empirical work. Therefore, the theory remains preliminary and the conjectures tentative.

merger review cooperation. Third, Part IV examines each of the seven explanatory variables described in the conjectures of Part III.

A. *Overview of Competition Policy and Merger Review*

Competition policy involves the regulation of business arrangements that hinder economic competition. One branch of competition regulation is merger review, which involves the evaluation of proposed business combinations to determine whether the combinations are likely to have anticompetitive effects. A merger can, in essence, turn two formerly competing companies into a single company, thus reducing competition. Generally speaking, merger regulators will disapprove a merger if the surviving company is not likely to face significant competition after the proposed merger.¹³⁹

1. Merger Review in the E.U.

In the E.U., competition policy is enforced by the Directorate General for Competition (DGC) of the European Commission.¹⁴⁰ The E.U. derives its merger review authority from a regulation issued by the Council of the E.U. on the control of concentrations between undertakings (the Merger Regulation).¹⁴¹ The Merger Regulation applies to all mergers with a “Community dimension,” defined primarily in terms of “aggregate worldwide turnover” and “aggregate Community-wide turnover”—that is, aggregate turnover within the E.U. common market—of the companies planning to merge.¹⁴²

¹³⁹ See generally U.S. Department of Justice, “Antitrust Enforcement and the Consumer,” at http://www.usdoj.gov/atr/public/div_stats/9142.pdf ; Federal Trade Commission, “A Guide to the Federal Trade Commission,” at <http://www.ftc.gov/bcp/online/pubs/general/guidetofc.pdf> [hereinafter FTC Guide].

¹⁴⁰ See European Commission, “Mission of the Competition DG,” at <http://europa.eu.int/comm/dgs/competition/mission>; See also European Commission, “Merger Notification and Procedures Template,” Jul. 2, 2004, at 3, at <http://europa.eu.int/comm/competition/mergers/others/20040726template.pdf> [hereinafter Merger Procedures].

¹⁴¹ See Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, available at <http://europa.eu.int/comm/competition/mergers/legislation/>. This regulation entered into effect on May 1, 2004, replacing the E.U.’s prior merger regulation. European Commission, “E.U. gives itself new merger control rules for 21st century,” press release dated Jan. 20, 2004, available at <http://europa.eu.int/comm/competition/mergers/legislation/regulation/>.

¹⁴² The preamble of the Merger Regulation states that E.U. merger regulations are for governing “those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.” Preamble, sec. 5. More precisely, Art. 1, sec. 2 of the Merger Regulation provides: “A concentration has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5,000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings

Companies planning a merger with a Community dimension must notify the DGC and provide it with substantial information relevant to the transaction prior to the closing of the transaction.¹⁴³ The DGC then examines the notification to determine whether or not the merger is “compatible with the common market.” A merger “which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market”¹⁴⁴ and will be prohibited.¹⁴⁵ Ordinarily, the DGC must reach its decision within twenty-five working days following the receipt of notification, although it can increase the time period by an additional ninety working days if it determines that an in-depth inquiry is required.¹⁴⁶

2. Merger Review in the U.S.

In the U.S., two agencies, the Department of Justice (DOJ), through its Antitrust Division, and the Federal Trade Commission (FTC), through its Bureau of Competition, are responsible for competition regulation, including merger review.¹⁴⁷ These agencies enforce the Clayton Act, which prohibits mergers or acquisitions the effect of which “may be sub-

concerned is more than EUR 250 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.”

Merger Regulation art. 1, sec. 3 adds: “A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 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.”

¹⁴³ Merger Regulation, art. 4, sec. 1. Ordinarily, this notification is to occur after the signing of the merger agreement, but an exception allowing earlier notification is available when the parties demonstrate a “good faith intention to conclude an agreement.” Merger Regulation, art. 4, sec. 1.

¹⁴⁴ Merger Regulation, art. 2, sec. 3.

¹⁴⁵ Merger Regulation, art. 7, sec. 1.

¹⁴⁶ Merger Regulation, art. 10, sec. 1 and sec. 3. *See also* European Commission, “New Merger Regulation frequently asked questions,” press release dated Jan. 20, 2004, available at <http://europa.eu.int/comm/competition/mergers/legislation/regulation/>.

¹⁴⁷ Federal Trade Commission, “Protecting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws”—Preface, available at <http://www.ftc.gov/bc/compguide/index.htm> [hereinafter FTC, Protecting Competition].

stantially to lessen competition, or to tend to create a monopoly.”¹⁴⁸ In general, the Clayton Act requires that businesses planning a merger that exceeds a specified size threshold must notify the DOJ and the FTC of the proposed transaction and wait for a time period (usually thirty days) before completing the transaction.¹⁴⁹ If either agency decides further examination is necessary, that agency may make a “second request” for information and extend the waiting period.¹⁵⁰ If the DOJ or FTC finds the proposed transaction may violate antitrust laws, that agency may seek a court order barring the transaction.¹⁵¹

3. Competition Policy and Globalization

Globalization and a steep rise in the number of multinational mergers have made a purely domestic approach to merger regulation untenable. As stated in the final report of the U.S. International Competition Policy Advisory Committee (ICPAC) in November 1997, “a key challenge stems from the recognition that law is national but markets can extend beyond national boundaries.”¹⁵² These circumstances provide incentives for transatlantic cooperation on competition matters. The general problem is that “[i]nconsistent outcomes and conflicting or burdensome remedies imposed by multiple jurisdictions may significantly increase transaction costs.”¹⁵³

For example, a merger between two companies in state *A* may have anticompetitive effects in state *B*. Thus, both the E.U. and the U.S. apply their respective antitrust laws, including merger regulations, to transactions outside their respective borders that may have adverse effects

¹⁴⁸ FTC, Protecting Competition—An Antitrust Primer.

¹⁴⁹ Federal Trade Commission, “Introductory Guide I to the Premerger Notification Program,” at 1, at <http://www.ftc.gov/bc/hsr/introguides/guide1.pdf> [hereinafter FTC Premerger Guide]. In general, the parties to a merger must file a notification if all of the following conditions are met: (a) One person has sales or assets of at least \$100 million; (b) The other person has sales or assets of at least \$10 million; and (c) As a result of the transaction, the acquiring person will hold an aggregate amount of stock and assets of the acquired person valued at more than \$50 million; or (d) As a result of the transaction, the acquiring person will hold an aggregate amount of stock and assets of the acquired person valued at more than \$200 million, regardless of the sales or assets of the acquiring and acquired persons. *Id.* at 2-3.

¹⁵⁰ *Id.* at 1.

¹⁵¹ *Id.* at 2.

¹⁵² INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE (ICPAC) TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, FINAL REPORT 2 (2000), at <http://www.usdoj.gov/atr/icpac/finalreport.htm> [hereinafter ICPAC, FINAL REPORT].

¹⁵³ *Id.* at 4.

within their respective borders.¹⁵⁴ If E.U. and U.S. regulators both find that the merger would have anticompetitive effects within their respective markets, then E.U. and U.S. regulators would have an incentive to cooperate to pursue their mutual interest in crafting remedies to mitigate those effects. Since the merging parties would be incapable of satisfying conflicting sets of remedies, E.U. and U.S. regulators in such cases have a specific incentive to ensure that their remedies are consistent.

On the other hand, state *A* and state *B* may disagree about the effects of a proposed merger. One state may approve it, and the other may prohibit it. From the perspective of the companies seeking to merge, this makes the transaction impossible. Thus, state *A* and state *B* in essence have a veto power over mergers that the other may have approved.¹⁵⁵ “The ruling of the most restrictive jurisdiction with respect to a proposed merger ultimately will prevail.”¹⁵⁶ For example, even though U.S. regulators approved the 2001 proposed merger between General Electric and Honeywell, two U.S. companies, the E.U. prohibited it, finding that it would give the merged company a dominant position in relevant markets.¹⁵⁷ The risk of such outcomes provides another strong incentive for regulators to cooperate with the aim of avoiding contradictory decisions.

B. *Assessing Transgovernmentalism in E.U.-U.S. Merger Review Cooperation*

Now that this part of the article has provided some general background on E.U. and U.S. merger review policy and practices and the impact of globalization on merger regulation, it proceeds to evaluate the conjectures presented in Part III by applying them to the case of E.U.-U.S. merger review cooperation. This section focuses on the dependent varia-

¹⁵⁴ Merit E. Janow, *Transatlantic Cooperation on Competition Policy*, in ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 30-31 (Simon J. Evenett et al. eds. 2000); Youri Devuyt, *Transatlantic Competition Relations*, in TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 130 (Mark A. Pollack and Gregory C. Shaffer eds., 2001).

¹⁵⁵ Simon J. Evenett et al., *Antitrust Policy in an Evolving Global Marketplace*, in ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 22 (Simon J. Evenett et al. eds. 2000).

¹⁵⁶ Timothy J. Muris, *Merger Enforcement in a World of Multiple Arbiters*, remarks delivered to Brookings Institution, Dec. 21, 2001, at note 33, available at <http://www.ftc.gov/speeches/muris/brookings.pdf>. Muris continues, “Consequently, disagreements among regulators may lead businesses to restrict their merger activity to transactions that will be acceptable to all jurisdictions. As a result, merger activity may fall to sub-optimal levels, as businesses are dissuaded from negotiating transactions that most jurisdictions would view as competitively benign, out of concern that the most restrictive jurisdiction would block those transactions.” *Id.*

¹⁵⁷ Dimitri Giotakos et al., *General Electric/Honeywell - An Insight into the Commission's Investigation and Decision*, COMPETITION POL'Y NEWSL., Oct. 2001, at http://europa.eu.int/comm/competition/speeches/text/sp2001_037_en.pdf.

ble, transgovernmentalism. As the following discussion of interstate and transgovernmental elements demonstrates, the level of transgovernmentalism in E.U.-U.S. merger review cooperation is high.¹⁵⁸

1. Interstate Elements

There is no formal interstate institution governing E.U.-U.S. cooperation on merger review. There is, however, a series of interstate declarations urging more transgovernmental cooperation on competition matters in general. First, in 1990, U.S. President George Bush and European Commission President Jacques Delors signed the Transatlantic Declaration on E.C.-U.S. Relations (TAD).¹⁵⁹ The TAD declared that the E.U. and U.S. would continue to develop dialog on matters including competition policy.¹⁶⁰

In 1995, Jacques Santer, President of the European Commission, Felipe Gonzalez, President of the E.U. Council of Ministers and Prime Minister of Spain, and President Bill Clinton of the United States, endorsed the New Transatlantic Agenda (NTA).¹⁶¹ The NTA states that the E.U. and U.S. “will address in appropriate fora problems where trade intersects with [. . .] competition policy.”¹⁶² In the accompanying Joint E.U.-U.S. Action Plan, the parties stated they:

will pursue work on the scope for multilateral action in the fields of trade and competition policy. Our competition authorities will cooperate in working with other countries to develop effective antitrust regimes. [. . .] We will pursue, and build on, bilateral cooperation in the immediate term based on the E.C.-U.S. Agreement of 1991 [discussed below]. We will examine the options for deepening cooperation on competition matters, including the possibility of a further agreement.¹⁶³

At the London E.U.-U.S. Summit of May 18, 1998, President Bill Clinton, Prime Minister Tony Blair, and Commission president Santer issued a statement on the Transatlantic Economic Partnership (TEP).¹⁶⁴ In this statement, the E.U. and U.S. agreed to “exchange views *inter alia* on

¹⁵⁸ This characterization is consistent with prior studies of competition policy cooperation. *See, e.g.,* Slaughter, *Global Economy*, *supra* note 6, at 179 and 191; and Raustiala, *supra* note 8, at 35-44.

¹⁵⁹ Pollack & Shaffer, *supra* note 22, at 14.

¹⁶⁰ Transatlantic Declaration on E.C.-U.S. Relations, available at <http://europa.eu.int/en/agenda/eu-us/pub/decl.html>.

¹⁶¹ “A New Era For Transatlantic Relations,” European Union press release dated December 3, 1995, available at <http://europa.eu.int/en/agenda/tr02.html>.

¹⁶² New Transatlantic Agenda, available at <http://www.eurunion.org/partner/agenda.htm>.

¹⁶³ Joint E.U.-U.S. Action Plan, available at <http://www.eurunion.org/partner/actplan.htm>.

¹⁶⁴ White House Office of Press Secretary, Fact Sheet: The Transatlantic Economic Partnership, May 18, 1998, available at <http://www.useu.be/TransAtlantic/TEP/partn518.html>.

issues relating to the question of multilateral rules on competition law and its enforcement, and on means of enhancing international cooperation among competition authorities in relation to anticompetitive practices with a significant impact on international trade and investment,” at upcoming World Trade Organization (WTO) meetings. The E.U. and the U.S. also stated that they “will continue to explore possibilities for further cooperation in the implementation of [E.U. and U.S.] competition laws.”¹⁶⁵

In summary, the E.U. and U.S. have made statements at the interstate level that they will cooperate on competition matters, particularly as they relate to trade. The cooperation called for in these statements, however, is principally transgovernmental, and these E.U.-U.S. statements do not mention merger review. Nevertheless, this evidence suggests that E.U. and U.S. heads of state generally are supportive, at least in principle, of transgovernmental cooperation on competition matters.

2. Transgovernmental Elements

There is considerable transgovernmental cooperation between the E.U. and the U.S. on merger review matters, as evidenced by formal agreements, cooperation on specific merger review cases, and expert accounts. In September 1991, European Competition Commissioner Sir Leon Brittan, U.S. Attorney General William P. Barr and Federal Trade Commission Chairman Janet D. Steiger signed 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” (the 1991 Agreement).¹⁶⁶ The 1991 Agreement contains guidelines for notification by the parties to each other “whenever its competition authorities become aware that their enforcement activities may affect important interests of the other Party”; the exchange of information by “appropriate officials from the competition authorities of each party”; coordination by competition authorities in enforcement activities; and prompt consultation at the request of either party “at the appropriate

¹⁶⁵ Links to the full text of the TAD, NTA and TEP are available from the E.U. Commission’s website: for the TAD, http://europa.eu.int/comm/externalrelations/us/economic_partnership/declaration_1990.htm; for the NTA, http://europa.eu.int/comm/external_relations/us/new_transatlantic_agenda/index.htm; and for the TEP, http://europa.eu.int/comm/external_relations/us/economic_partnership/trans_econ_partner_11_98.htm.

¹⁶⁶ Europe Information Service, European Report, “EEC/U.S.: Competition Pact Aims for New Level of Cooperation,” Sept. 25, 1991. The text of the 1991 Agreement is available at http://europa.eu.int/comm/competition/international/bilateral/documents/us3_en.html.

level, which may include consultations between the heads of the competition authorities concerned.”¹⁶⁷

In 1999, E.U. and U.S. competition authorities adopted the “Administrative Arrangement on Attendance” (AAA), which provides guidelines for “reciprocal attendance at certain stages of the procedures in individual cases involving the application of their respective competition rules”.¹⁶⁸ In October 2001, FTC Chairman Timothy J. Muris and Assistant Attorney General Charles A. James, E.U. Competition Commissioner Mario Monti, and other antitrust authorities endorsed the creation of the International Competition Network (ICN) to provide a venue where senior antitrust officials from developed and developing countries will work to reach consensus on proposals for procedural and substantive convergence in antitrust enforcement.¹⁶⁹ The ICN has established a working group aimed at addressing “the challenges of merger review in a

¹⁶⁷ 1991 Agreement, art. II(1), art. III(2), art. IV(1) and art. VII(1). The 1991 Agreement is an executive agreement under U.S. law, meaning that it was not ratified by the Senate. As such, it is a formal, binding international agreement. Unlike a treaty, however, an executive agreement does not override any provisions of U.S. law with which it may be inconsistent. Moreover, unlike many other executive agreements, the 1991 Agreement was not entered into by the U.S. president. Rather, it was entered into by the FTC and DOJ on behalf of the U.S. government, after being approved by the Department of State. Similarly, on the European side it was signed by the Competition Commissioner. Only after the European Court of Justice held in 1994 that the European Commission was not competent to conclude the 1991 Agreement did the E.U. Council approve the agreement, effective as of its original signing. John J. Parisi, *Enforcement Cooperation among Antitrust Authorities*, May 19, 1999, at <http://www.ftc.gov/speeches/other/ibc99059911update.htm>; Devuyst, *supra* note 154, at 134-136.

¹⁶⁸ See “Background information-United States of America,” at http://europa.eu.int/comm/competition/international/bilateral/background/us1_en.html. On June 4, 1998, Attorney General Janet Reno and Federal Trade Commission Chairman Robert Pitofsky, on behalf of the United States and Karel Van Miert, European Commissioner for Competition Policy, and Margaret Beckett, the United Kingdom’s Secretary of State for Trade and Industry on behalf of the Council of the European Union, signed an “Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws” (the 1998 Agreement). The 1998 Agreement does not, however, apply to mergers. Federal Trade Commission press release, June 4, 1998, “United States and European Communities Sign Agreement on ‘Positive Comity’ in Antitrust Enforcement.” www.ftc.gov/opa/1998/06/positive.htm.

¹⁶⁹ See Federal Trade Commission press release dated October 25, 2001, “U.S. and Foreign Antitrust Officials Launch International Competition Network,” at <http://www.ftc.gov/opa/2001/10/icn.htm>. The ICN’s website, where the full text of the memorandum establishing the ICN can be found, is <http://www.internationalcompetitionnetwork.org>.

multi-jurisdictional context.”¹⁷⁰ In addition to providing a central source of information about participants’ merger review rules and procedures, the working group has produced a variety of guidelines and recommended practices to facilitate cooperation and regulatory convergence.¹⁷¹

In October 2002, FTC Chairman Muris, Assistant Attorney General James, and E.U. Competition Commissioner Monti, released a set of “best practices” containing detailed guidelines for coordinating merger reviews (Best Practices).¹⁷² The Best Practices include provisions for coordination on timing, collection and evaluation of evidence, communication between reviewing agencies, and crafting remedies and settlements.¹⁷³ The Best Practices were a product of the U.S.-E.U. Merger Working Group, which is a group of lawyers and economists from the FTC, the DOJ’s Antitrust Division, and the E.U.¹⁷⁴

In addition to these formal statements, there has been substantial interaction between E.U. and U.S. competition regulators in merger review activities. In 1997 alone, the E.U. notified the U.S. of thirty-one merger investigations that implicated U.S. interests, and the U.S. notified the E.U. of twenty merger investigations, which means that almost half of the merger matters before the FTC that year involved some level of interaction with foreign competition authorities.¹⁷⁵ Between 1991 and 1999, E.U. and U.S. antitrust agencies contacted each other in 689 antitrust cases, including 473 merger cases that had a transatlantic dimension.¹⁷⁶ According to FTC Chairman Muris, there were seventy-five merger cases during this time period where there was communication between E.U. and U.S. regulators that confirmed decisions to clear, clear with undertakings, or challenge proposed mergers.¹⁷⁷ E.U. and U.S. regulators also have cooperated on crafting consistent remedies in several merger cases,

¹⁷⁰ See International Competition Network, Merger Review Working Group at <http://www.internationalcompetitionnetwork.org/mergers.html>.

¹⁷¹ See International Competition Network, Merger Review Working Group, Merger Documents, at <http://www.internationalcompetitionnetwork.org/mergersdocuments.html>.

¹⁷² Federal Trade Commission, United States and European Union Antitrust Agencies Issue “Best Practices” for Coordinating Merger Reviews, Press Release dated Oct. 30, 2002, available at <http://www.ftc.gov/opa/2002/10/euguidelines.htm>. This press release has a link to the full text of the Best Practices.

¹⁷³ The full text of the Best Practices on Cooperation in Merger Investigations [hereinafter “Best Practices”] is at www.ftc.gov/opa/2002/10/mergerbestpractices.htm.

¹⁷⁴ Federal Trade Commission press release dated October 30, 2002, “United States and European Union Antitrust Agencies Issue ‘Best Practices’ for Coordinating Merger Review.” www.ftc.gov/opa/2002/10/euguidelines.htm.

¹⁷⁵ Janow, *supra* note 154, at 42.

¹⁷⁶ Devuyt, *supra* note 154, at 138.

¹⁷⁷ Muris, *supra* note 156, at note 15.

such as WorldCom/MCI, Guinness/GrandMetropolitan and Dresser/Halliburton.¹⁷⁸

Cooperation can not only enhance coordination on remedies, but also help avoid unnecessary duplication of work and costs, “both for the competition authorities involved and for the businesses whose conduct is subject to review.”¹⁷⁹ For example, in the Dresser/Halliburton merger in 1998, involving two U.S. companies, the Commission was kept informed about remedy negotiations but deferred to U.S. regulators in negotiating an acceptable divestiture. “Although it had to formally approve the merger, the Commission could do so without much additional action, explicitly taking into account the remedies obtained by the U.S. authorities.”¹⁸⁰

This evidence of transgovernmental cooperation is consistent with the findings of practitioners and other experts. On the E.U. side, Alexander Schaub, formerly the European Commission’s Director General for competition, commented that “staff level contacts have become a daily routine in our work” and noted that merger control is “the area where daily U.S.-E.U. cooperation has reached the most advanced stage.”¹⁸¹ On the U.S. side, former FTC Chairman Robert Pitofsky noted in 2000 that “virtually all knowledgeable observers agree that there has been substantial convergence in the method and content of merger enforcement in the E.C. and U.S., and a remarkable improvement in coordination and cooperation between the two enforcement authorities” and that this was a result of “thoughtful and intensive efforts” of antitrust regulators on both sides of the Atlantic.¹⁸²

John Parisi, Counsel for European Union Affairs in the International Antitrust Division of the FTC, described E.U.-U.S. antitrust cooperation as follows:

The process [. . .] is conducted and overseen by professional staff in the international departments of the agencies. These public servants are

¹⁷⁸ Devuyst, *supra* note 154, at 139 and 141. Devuyst distinguishes between two types of cases that are dealt with in transatlantic merger cooperation. First, there are mergers involving a “truly transatlantic (or global) market.” Second, there are transatlantic mergers that involve separate national markets. Devuyst explains that cooperation on both types of mergers focuses on coordinating the remedies with which the merging companies must comply in order for the merger to be approved by regulators. *Id.* at 139.

¹⁷⁹ *Id.* at 131-132.

¹⁸⁰ *Id.* at 141.

¹⁸¹ See Alexander Schaub, “Co-operation in Competition Policy Enforcement between the E.U. and the U.S. and New Concepts Evolving at the World Trade Organisation and the International Competition Network,” Apr. 4, 2002, at 9-10, available at http://europa.eu.int/comm/competition/speeches/text/sp2002_013_en.pdf.

¹⁸² Robert Pitofsky, “E.U. and U.S. Approaches to International Mergers—Views from the U.S. Federal Trade Commission” (pt. III(B)(1)), Sept. 14-15, 2000, available at www.ftc.gov/speeches/pitofsky/pitintermergers.htm.

grounded in their own agency's law and practices and have acquired expertise about other systems. They have gotten to know and trust their counterparts and they serve as the diplomats who bring together the investigative staffs and help to bridge language, knowledge, and analytical gaps between the investigators.¹⁸³

Similarly, Columbia University professor and antitrust attorney Merit Janow summarizes E.U.-U.S. cooperation as follows:

[C]ooperation between U.S. and European competition authorities appears to have deepened and broadened and become regularized. Such cooperation has not, however, become formulaic. Interaction between officials at all levels is now commonplace. Discussion can include a review of product markets, timing of respective procedures, and consideration of relevant geographic markets. In a number of cases, [DGC] and FTC staffs share their views on the appropriate definition of product and geographic markets, possible competitive effects, and potential remedies.¹⁸⁴

In summary, formal agreements, cooperation on specific merger review cases, and expert accounts indicate that levels of transgovernmentalism are high in E.U.-U.S. merger cooperation.

3. Assessment

The foregoing evidence suggests that E.U.-U.S. merger review cooperation is primarily transgovernmental. More specifically, the evidence suggests that this transgovernmental cooperation is what Slaughter would refer to as "spontaneous" transgovernmentalism in that it arises above all from agreements among domestic regulatory agencies (such as the 1991 Agreement, the AAA, and the Best Practices) and with relatively little interstate involvement.¹⁸⁵ Alternatively, although the TAD, NTA and TEP do not expressly refer to merger review cooperation, they might be understood as providing the basis for Slaughter's second type of transgovernmentalism, that which arises within a framework agreed upon by heads of state.¹⁸⁶

¹⁸³ See John J. Parisi, Enforcement Cooperation among Antitrust Authorities, May 19, 1999, available at <http://www.ftc.gov/speeches/other/ibc99059911update.htm>.

¹⁸⁴ Janow, *supra* note 154, at 42; see also Merit E. Janow, *Transatlantic Regulatory Cooperation in Competition Policy: The Case for 'Soft Harmonization' and Multilateralism over New Bilateral U.S.-E.U. Institutions*, in *TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 256 (George A. Bermann et al. eds., 2000).

¹⁸⁵ See *supra* Part II.B.

¹⁸⁶ See *supra* Part II.B. However, at least one expert doubts the importance of these interstate elements, arguing that competition cooperation emerged independently from the NTA the TEP. Devuyt, *supra* note 154, at 127. Devuyt suggests that "the frequent gatherings of FTC, Department of Justice, and European

C. *Explaining Transgovernmentalism in E.U.-U.S. Merger Cooperation*

1. Distribution Problems

Even if the E.U. and the U.S. generally agree on the overarching goals of merger review policy and recognize that they both can gain from merger review cooperation, they do not necessarily agree completely on what the best policies are for accomplishing those goals. There are some differences between the preferences of the E.U. and the U.S. regarding the exact policies around which they should coordinate their merger review activities. These differences introduce a moderate level of distribution problems into E.U.-U.S. merger review cooperation.

These differences relate to both substantive and procedural preferences. Substantively, there are, for example, different views regarding the treatment of government subsidies, analysis of mergers involving vertical integration, and the scope of business activity that is subject to review.¹⁸⁷ Moreover, “the E.U. has displayed considerably less appreciation [than the U.S.] for merger defenses based on efficiency arguments.”¹⁸⁸ Procedurally, there are differences regarding the treatment of confidential information, the timing of merger review, the involvement in the review process of competitors of the parties proposing to merge, and the role of the judiciary in merger review enforcement.¹⁸⁹ In the view of one U.S. regulator, “the similarities among competition laws and their enforcement are greater than their differences.”¹⁹⁰ Similarly, in the words of former FTC Chairman Muris, “[w]e should [. . .] keep the impact of those differences in perspective. They are too great to ignore, but not so great as to jeopardize either most transatlantic business activity or transatlantic antitrust enforcement cooperation.”¹⁹¹

Commission officials” has been more important than the interstate legal framework for fostering cooperation.” *Id.* at 134.

¹⁸⁷ Devuyt, *supra* note 154, at 143-146; *see also* Bevin MB Newman and Marta Delgado Echevarria, *Gaps and Bridges: Transatlantic Cooperation*, EUR. ANTITRUST REV. 26, 27 (2005) (quoting commissioner Mario Monti), available at http://www.globalcompetitionreview.com/ear/eu_us.cfm; *see, e.g.*, Debra A. Valentine & Raj De, *Transatlantic Similarities and Differences in Merger Policy: How the United States and the European Union Evaluate Transactions* 4-5, BUS. ECON., Oct. 2002, available at http://www.findarticles.com/cf_dls/m1094/4_37/94774173/print.jhtml; Philip Mardsen, *The Divide on Verticals*, in ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? Chap. 6 (Simon J. Evenett et al. eds. 2000). An example regarding the scope of business activity covered by E.U. and U.S. antitrust law is given by Muris: some exclusive agreements such as exclusive territorial rights agreements may be unlawful in the E.U. but permitted in the U.S. Muris, *supra* note 156.

¹⁸⁸ Evenett et al., *supra* note 155, at 20.

¹⁸⁹ Devuyt, *supra* note 154, at 147-148; Newman & Echevarria, *supra* note 187, at 28; Valentine & De, *supra* note 187.

¹⁹⁰ Parisi, *supra* note 167, at section I.

¹⁹¹ Muris, *supra* note 156, at 1.

These examples and expert observations suggest that E.U.-U.S. merger review cooperation is not a Simple Coordination game such as the one depicted in Figure 1: even though the E.U. and the U.S. have a common interest in avoiding the Pareto suboptimal 0 payoffs associated with non-cooperation and generally have the same goals regarding merger review, they are not indifferent as to the choice of policy used to pursue those goals. Thus, E.U.-U.S. merger review cooperation is probably more like the Battle of the Sexes game depicted in Figure 2. The upper-left cell might represent the E.U.'s preferred policy option, and the lower-right cell the U.S.'s preferred policy option. The payoffs illustrate the distributional consequences of the choice between the two policies: whereas the E.U. gets a payoff of 3 if the agreement is on its preferred policy, it only gets a payoff of 2 if the agreement is on the U.S.'s preferred policy. This analysis suggests that E.U.-U.S. merger review cooperation does involve moderate distribution problems.

2. Preference Heterogeneity

E.U.-U.S. merger review cooperation involves a low level of preference heterogeneity. The E.U. and the U.S. generally agree on the overarching policy goal of merger review: to prevent business combinations that have anticompetitive effects. The preamble of the Merger Regulation expresses the E.U.'s goal of ensuring that mergers "[do] not result in lasting damage to competition." Similarly, the U.S. Clayton Act's merger provisions are aimed at preventing transactions the effect of which "may be substantially to lessen competition, or to tend to create a monopoly."¹⁹²

The similarity of the merger review policy goals of the E.U. and the U.S. are also evident in less formal agency statements. According to the FTC:

Most mergers actually benefit competition and consumers by allowing firms to operate more efficiently. In a competitive market, firms pass on these lower costs to consumers. But some mergers, by reducing competition, can cost consumers many millions of dollars every year in the form of higher prices and reduced product quality, consumer choice and innovation. The Bureau of Competition reviews mergers to determine which ones have the potential to harm consumers; thoroughly investigates those that may be troublesome; and recommends enforcement action to the Commission when necessary to protect competition and consumers.¹⁹³

Likewise, according to the DGC:

¹⁹² 15 U.S.C. 18 (sec. 7 of the Clayton Antitrust Act (1914)).

¹⁹³ "Guide to the Federal Trade Commission." <http://www.ftc.gov/bcp/online/pubs/general/guidetofc.htm>.

The control of mergers and acquisitions is one of the pillars of European Union competition policy. When companies combine via a merger, an acquisition or the creation of a joint venture, this generally has a positive impact on markets: firms usually become more efficient, competition intensifies and the final consumer will benefit from higher-quality goods at fairer prices. However, mergers which create or strengthen a dominant market position are prohibited in order to prevent ensuing abuses. A firm is in a dominant position when it is able to act on the market without having to take account of the reaction of its competitors, suppliers or customers. In a dominant position a firm can, for example, increase its prices above those of its competitors without fearing any loss of profit.¹⁹⁴

It would be difficult to place the merger review policy goals of the E.U. and the U.S. precisely in an abstract one-dimensional policy space such as the one depicted in Figure 3. The similarities between the legal and informal statements of policy goals discussed above indicate, however, that the preferences of the E.U. and the U.S. would be better represented by points *a* and *b*, which are relatively close to each other, than points *a'* and *b'*. In summary, in the words of one E.U. competition official, E.U. and U.S. merger review rules “are—in most respects—pursuing the same objectives.”¹⁹⁵ “Put simply, the E.U. and U.S. agree on what competition policy should be all about.”¹⁹⁶

3. Enforcement Problems

E.U.-U.S. merger review cooperation involves a low level of enforcement problems. Even if there might be payoff structures associated with the review of certain mergers that may create a Prisoners' Dilemma situation in which defection is the dominant strategy, E.U.-U.S. merger review cooperation is not a single-play game. To the contrary, there is iteration—year after year, the E.U. and the U.S. are presented with opportunities to cooperate on the review of various mergers—and, as noted above, enforcement problems generally are less severe when there is iteration.

In addition, the depth of cooperation in E.U.-U.S. merger review cooperation appears to be relatively low because none of the arrangements discussed above require the parties to make fundamental changes to how they regulate competition.¹⁹⁷ For example, the TAD, NTA and TEP are

¹⁹⁴ See “Citizen’s Guide to Competition Policy - Control of major cross-border mergers,” available at http://europa.eu.int/comm/competition/citizen/citizen_mergers_en.html. This is not to say that there cannot be problems of preference heterogeneity in specific cases. See discussion of high politics below.

¹⁹⁵ Valentine & De, *supra* note 187, at 2.

¹⁹⁶ Newman and Echevarria, *supra* note 187, at 26.

¹⁹⁷ Recall the definition of “depth” given above, which is based on Downs et al., *supra* note 110. The author does not use this term to imply that the cooperation

nonbinding declarations of intent. The 1991 Agreement states that it shall not 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.” The 1991 Agreement also allows the parties to take their “own national interests into account in determining whether and to what extent to provide cooperation in any given matter.”¹⁹⁸ Similarly, the Best Practices state that they are “intended to set forth an advisory framework for interagency cooperation” and “the agencies reserve their full discretion in the implementation of these best practices and nothing in this document is intended to create any enforceable rights.”¹⁹⁹ For these reasons, it does not appear that E.U.-U.S. merger review cooperation entails serious enforcement problems.

4. High Politics

Using traditional concepts of “high” and “low” politics, E.U.-U.S. anti-trust cooperation involves low politics since it is in the realm of economic regulation and business, not national security or military affairs. This would seem to be an accurate characterization, but only with the qualification that, in specific merger cases, issues of high politics may emerge. For example, both E.U. and U.S. antitrust authorities asserted jurisdiction over the proposed Boeing-McDonnell Douglas merger, even though neither Boeing nor McDonnell Douglas had any production assets in the E.U. “It provoked nationalistic responses in both the United States and Europe, with politicians accusing each other of supporting their own national champion. [. . .] [T]he case demonstrates that when important interests are involved (and nationalistic sentiments invoked) interagency cooperation may not be sufficient to avoid conflict and surmount differences.”²⁰⁰ U.S. government officials were concerned that prohibiting the proposed merger would harm U.S. defense interests.²⁰¹ The U.S. House of Representatives even got involved, voting 416-2 in favor of a resolution warning the E.U. against “an unwarranted and unprecedented inter-

between E.U. and U.S. regulators is unimportant or minor; to the contrary, the evidence shows that it is important and extensive. The case of E.U.-U.S. merger review shows that regulatory cooperation does not have to require great changes in state behavior or high levels of obligation in order to yield substantial benefits to both parties and sustained patterns of interaction.

¹⁹⁸ Janow, *supra* note 154, at 35.

¹⁹⁹ *Id.*

²⁰⁰ Janow, *supra* note 154, at 44-45. The United States House of Representatives, in its Resolution No. 191 (1997), available at <http://thomas.loc.gov>, stated that “the European Commission is apparently determined to disapprove the [Boeing/McDonnell Douglas] merger to gain an unfair competitive advantage for Airbus Industries, a government-owned aircraft manufacturer.”

²⁰¹ Devuyt, *supra* note 154, at 143.

ference in a U.S. business transaction.”²⁰² Although this is an exceptional case and an arrangement was finally made whereby both the E.U. and U.S. ultimately approved the merger,²⁰³ it is important to note that even a quintessentially “low politics” issue like competition policy can at times take on a high politics dimension that can limit the potential of trans-governmental cooperation.

5. Issue Complexity

E.U.-U.S. merger review cooperation involves a high level of complexity—both legal²⁰⁴ and economic.²⁰⁵ In both Europe and the U.S., competition policy is the domain of highly specialized economists and lawyers who represent businesses in the private sector and the government in regulatory agencies. This complexity is magnified in the transatlantic context because the E.U. and U.S. each have their own competition laws, policies and procedures and use different types of economic analysis to evaluate mergers that need to be taken into account when designing consistent remedies or developing work sharing arrangements.²⁰⁶

In addition to the legal expertise required by regulators to apply complex laws and regulations, economic expertise is required to perform tasks including definition of the geographic scope of relevant markets; modeling anticipated economic effects of business transactions; determining implications for market power; assessing efficiency gains and losses, and competitive restraints; and formulating remedies that will mitigate adverse economic effects. Depending on the types of businesses propos-

²⁰² House Resolution 191, adopted July 22, 1997, available at <http://thomas.loc.gov>; “Case Study: The Boeing-McDonnell Merger,” Economic Perspectives, USIA Electronic Journal, Vol. 4, No. 1, February 1999, at <http://usinfo.state.gov/journals/ites/0299/ijee/boeing.htm>.

²⁰³ See Thomas L. Boeder, *The Boeing-McDonnell Douglas Merger*, in ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 139 (Simon J. Evenett et al. eds., 2000).

²⁰⁴ For an overview of the legal complexities of merger review, see, e.g., James S. Venit & William J. Kolasky, *Substantive Convergence and Procedural Dissonance in Merger Review*, in *Antitrust Goes Global: What Future for Transatlantic Cooperation?* 79-97 (Simon J. Evenett et al. eds., 2000).

²⁰⁵ For an overview of the economics of merger review, see, e.g., Edward M. Graham, *Economic Considerations in Merger Review*, in ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 57-78 (Simon J. Evenett et al. eds., 2000) Links to E.U. merger review laws, regulations and procedures may be found at http://europa.eu.int/comm/competition/citizen/citizen_mergers_en.html. An overview of U.S. antitrust law is available at http://www.usdoj.gov/atr/foia/division_manual/ch2.htm, and links to U.S. merger review laws, regulations and procedures may be found at <http://www.ftc.gov/bc/hsr/hsr.htm>. For an overview of the complexities of merger review on both sides of the Atlantic, see, e.g., Valentine and De, *supra* note 187, and ICPAC, *supra* note 129.

²⁰⁶ See, e.g., Evenett et al., *supra* note 155.

ing to merge, expertise in the economics of different business sectors also is required. This expertise must be applied to reach merger decisions within limited timeframes imposed by E.U. and U.S. procedural requirements.

This complexity appears to be increasing. As noted in recent FTC testimony, new technologies and the rise of the knowledge-based economy are causing mergers to grow in size, scope and complexity, making it necessary for regulators to undertake even more extensive review of proposed mergers.²⁰⁷

6. Agency Autonomy

The DOJ, FTC and DGC are moderately autonomous. On the one hand, they are under a legal duty to act independently on the basis of applicable law when reviewing proposed mergers.²⁰⁸ On the other hand, “[t]his does not mean that traditional state structures have simply and completely abdicated all powers in this area.”²⁰⁹ In high profile cases high-level state leaders may attempt to put pressure on regulators to reach certain outcomes.²¹⁰ Moreover, “[t]he U.S. Congress frequently summons FTC and [DOJ] officials to give testimony in formal hearings on antitrust problems. Similarly, the European commissioner in charge of competition policy is regularly grilled in the European Parliament.”²¹¹ The European Court of Justice can also limit the European Commission’s freedom of action, as it did when it ruled that it was for the European Council, not the Commission, to conclude the 1991 Agreement with the U.S.²¹² Thus, while E.U. and U.S. regulators are technically independent, their autonomy is not unlimited.

7. Antecedent Interaction in International Organizations

There has been a moderate level of interaction among European and U.S. competition regulators in international organizations that predates the currently high levels of bilateral regulatory cooperation.²¹³ For example, European and U.S. regulators have been interacting with each other

²⁰⁷ Federal Trade Commission, “An Overview of Federal Trade Commission Antitrust Activities,” Testimony before Committee on the Judiciary, Subcommittee on Antitrust, Competition, and Business and Consumer Rights, United States Senate, Sept. 19, 2002, available at http://www.ftc.gov/os/2002/09/020919overviewtestimony.htm#N_1_.

²⁰⁸ Devuyt, *supra* note 154, at 150-151.

²⁰⁹ *Id.* at 150.

²¹⁰ *Id.*

²¹¹ *Id.* at 130.

²¹² *Id.* at 135. The Council and the Commission jointly ratified the 1991 Agreement in 1995, declaring it effective as of its original conclusion in 1991. *Id.*

²¹³ As noted above, such interactions actually constitute, and therefore cannot be considered a cause, of Slaughter’s first type of transgovernmentalism (government

in the context of the Organization for Economic Development and Cooperation (OECD) for some time. The OECD has been a multilateral forum for discussing cooperation on anticompetitive practices affecting international trade since as early as 1967, and in 1999 the OECD's Directorate for Financial, Fiscal and Enterprise Affairs issued recommended guidelines for transnational merger notifications.²¹⁴ In addition, since 1999 the OECD has issued a variety of best practices addressing various aspects of the merger review process. The E.U. has been eager to establish the WTO as a forum for cooperation on antitrust matters and negotiation of core principles of competition law to be enforced by the WTO, but the U.S. has resisted these efforts.²¹⁵ As a result, discussion of anti-trust policy in the WTO context has been significant, but limited.²¹⁶

D. *Evaluating the Conjectures*

In summary, based on the foregoing evidence, Part IV has estimated that the level of transgovernmentalism, the dependent variable, is high in the case of E.U.-U.S. merger review cooperation. Regarding the explanatory variables, this part has estimated that distribution problems are moderate; preference heterogeneity is low; enforcement problems are low; the extent of "high politics" is generally low, but with notable exceptions; issue complexity is high; agency autonomy is moderate; and the level of antecedent interaction in international organizations is moderate. These results are presented in Table 1 below, and compared to the values expected by each of my conjectures when transgovernmentalism is high.

As the table illustrates, the results are generally consistent with the conjectures about the determinants of the structure of legal and regulatory cooperation. The findings regarding preference heterogeneity, enforcement problems and issue complexity are as expected, while the case is less clear-cut regarding distribution problems, high politics, agency autonomy, and antecedent interactions in international organizations. The implication of these findings is that this article's rational design theory of transgovernmentalism may be a plausible one. However, additional cases must be examined before reaching more definitive conclusions; in the meantime, these results should be considered preliminary.

networks within international organizations). It may be, however, an independent cause of the other types of transgovernmentalism.

²¹⁴ Parisi, *supra* note 167, at section II; Devuyt, *supra* note 154, at 133. Access to these documents is available from the OECD's website, www.oecd.org.

²¹⁵ Devuyt, *supra* note 154, at 133; Evenett et al., *supra* note 155, at 18.

²¹⁶ See www.wto.org/english/tratop_e/comp_e/comp_e.htm.

TABLE 1
EVALUATING CONJECTURES ABOUT LEVELS OF
TRANSGOVERNMENTALISM

	<i>Conjecture</i>	<i>Case Study</i>
<i>Distribution Problems</i>	Low	Moderate
<i>Preference Heterogeneity</i>	Low	Low
<i>Enforcement Problems</i>	Low	Low
<i>High Politics</i>	Low	Low/Moderate
<i>Issue Complexity</i>	High	High
<i>Agency Autonomy</i>	High	Moderate
<i>Antecedent Interactions</i>	High	Moderate

V. CONCLUSION

Legal and regulatory cooperation can be transgovernmental or interstate. These are fundamentally different forms of cooperation. The former involves cross-border interactions among different states' regulatory agencies and the lawyers and regulators that staff them, whereas the latter consists of interactions among states represented by heads of state and behaving as unitary actors. These two forms of cooperation are not, however, mutually exclusive. To the contrary, international cooperation between states in a given issue area is likely to have both transgovernmental and interstate dimensions. Scholars including Anne-Marie Slaughter have documented and explained the rise of transgovernmentalism in general. The goal of this article, however, has been to help explain how and why levels of transgovernmentalism vary across different groups of states and different issue areas.

To pursue that goal, this article has proposed a rational design theory of transgovernmentalism. The theory posits that transgovernmental versus interstate cooperation is a rational design choice made by heads of state and regulators taking into account the costs and benefits of the two forms of cooperation under a given set of circumstances. This article then used the theory to derive a series of conjectures regarding what types of circumstances matter for the design choice and how. More precisely, the conjectures were that relative levels of transgovernmentalism are likely to be lower when there are more serious distribution, preference heterogeneity and enforcement problems because interstate forms of cooperation offer solutions to these problems that transgovernmental forms generally are less capable of providing; lower in issue areas involving high politics; and higher when issue complexity, agency autonomy and the extent of prior regulatory interactions in international organizations are high. The case of E.U.-U.S. merger review cooperation is generally consistent with these conjectures, although more so with the conjectures regarding preference heterogeneity, enforcement problems and issue complexity.

This article, however, represents only the first step in the development of the rational design theory of transgovernmentalism. Further progress will require both additional theoretical and empirical work. Theoretically, one of the principal questions is the extent to which the role of domestic political actors should be taken into account. This article has consistently treated heads of state and regulators as the exclusive designers of international cooperation. In the delegation context the theory has treated heads of state as the sole principals and it has treated regulators as the agents. As noted above, this is a substantial simplification of reality. Other domestic political actors, particularly legislatures and interest groups, may also play an important role in influencing the structure of international cooperation. In addition, in terms of delegation, legislatures rather than heads of state may be the real principals in some cases of international cooperation. The challenge is to determine whether the reduced theoretical parsimony that would result from incorporating these additional domestic political actors would be outweighed by deeper insights about the determinants of levels of transgovernmentalism.²¹⁷

Connecting the realms of theory and empirics is the question of operationalization: how can the conceptual variables in the theory and in the conjectures derived from the theory be empirically measured? Concepts like issue complexity and enforcement problems are of considerable theoretical importance, but to what extent can they be measured in a consistent manner from case to case? Developing improved techniques for reliably and consistently operationalizing the variables used in this article is an important objective.

Empirically, to move beyond a preliminary plausibility test of the rational design theory of transgovernmentalism, additional case studies will be necessary. The case studies would ideally be selected to ensure a sampling across different issue areas and different groups of states, and to ensure variation in the values of the explanatory variables without regard to levels of transgovernmentalism.²¹⁸ Interesting case studies might range from cooperation on the regulation of corporate securities, environmental regulation and trade regulation to peace keeping and collective security.

It is important to seek a better understanding of international legal and regulatory cooperation. Such understanding can enhance the ability to

²¹⁷ In addition, alternative theories of transgovernmentalism should also be explored. See, e.g., Kal Raustiala's theory in his 2002 article on transgovernmental networks and international law. Raustiala, *supra* note 9.

²¹⁸ KING, KEOHANE & VERBA, *supra* note 138, at 140 ("the best 'intentional' [research] design selects observations to ensure variation in the explanatory variable . . . without regard to the values of the dependent variables. Only during the research do we discover the values of the dependent variable and then make our initial causal inference by examining the differences in the distribution of outcomes on the dependent variable for given values of the explanatory variables").

design effective frameworks for cooperation. It can improve the ability to manage and, when deemed appropriate, to facilitate the activities of transgovernmental networks. Moreover, because transgovernmentalism has serious implications not only for cooperation across borders but also for governance within borders, the structure of legal and regulatory cooperation has both international and domestic importance. In this new world order, this research agenda is well worth pursuing.

