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Competing for the Competition Rules: The EU-US Rivalry over
the World Trade Organisation's (WTO's) Agreement on
Competition Policy

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Abstract

This thesis examines the capacity of the WTO for fostering cooperation between the EU and the US for the Agreement on Competition Policy. Given the successful conclusion of two bilateral competition arrangements between the two states, as well as their cooperation on the same subject in other international institutions such as the International Competition Network, the thesis sets out to assess the WTO's impact – as the immediate underlying platform on which the interactions unfolded – over terms of cooperation between 1997-2004.

The thesis accommodates its main inquiry using the theory of Neoliberal Institutionalism to test the fundamental claim that international institutions, such as the WTO, facilitate cooperation between sovereign self-reliant states by addressing cheating risks. The project further draws on the counter-argument put forward by Neorealists to furnish its maintained hypothesis over the claim that it needs more than enforceability of a deal to ensure cooperation. The concept of nesting institutions – endorsed by Neoliberal Institutionalism and Neorealism alike – was slotted in to help visualise the WTO as the catalyst of cooperation for the negotiations on a Competition Policy Agreement (CPA). The theory of Rational Design of International Institutions operationalises the research question.

Using the WTO's internal documents of the negotiations as the main sources of data, the empirical findings of this thesis suggest that the WTO had a substantial impact on the quality of interactions between the two countries as they unfolded over time. The WTO, as expected from an international institution, provided a workable solution for cheating concerns as well. However, that solution in its own right failed to ensure cooperation between the EU and the US for the Competition Policy Agreement.

The findings indicate that to remain relevant to intentional economic cooperation, the WTO must compete with other fora by improvising a wider space for possible enforcement solutions. On the theory side, the thesis suggests that a future research agenda over the international arrangements for competition policy must be informed by a revised understanding of the two rational theories of interstate cooperation, i.e., Neoliberal Institutionalism and Neorealism, so much so that the two are not substitutes but the former is subordinated to the latter.

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Abbreviations

AD	Anti-Dumping
CP	Competition Policy
CPA	Competition Policy Agreement
DOJ	Department of Justice (US)
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EC	European Commission
EU	European Union
FTA	Free Trade Agreement
FTAA	Free Trade Area of the Americas
FTC	Federal Trade Commission (USA)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HSR	Hart-Scott-Rodino Improvements Act of 1976
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
IPE	International Political Economy
ITO	International Trade Organisation
MLATs	Mutual Legal Assistance Treaties
MFN	Most Favoured Nations
MNC	Multinational Corporation
NAFTA	North American Free Trade Agreement
NGO	Non-Government Organisations
NT	National Treatment
NTB	Non-Tariff Barriers
OECD	Organisation for Economic Cooperation and Development
RBP	Restrictive Business Practices
SCM	Subsidies and Countervailing Measures
SPS	Sanitary and Phytosanitary Measures
TPRB	Trade Policy Review Body
TPRD	Trade Policies Review Division
TPRM	Trade Policy Review Mechanism
TRIMs	Trade Related Investment Measures
TRIPs	Trade Related Intellectual Property Rights Agreement

UNCTAD	United Nations Conference on Trade and Development
USAID	US Agency for International Development
WGTCP	Working Group on the Interaction between Trade and Competition Policy
WTO	World Trade Organisation

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Chapter One: The Problematique, Clarifications and Definitions

In July 2004, the General Council of the World Trade Organisation (WTO) decided to drop negotiations for a multilateral framework agreement for a WTO Competition Policy Agreement (CPA). The ‘July decision’ literally put an end to eight years of activities that had started under the mandate of the Singapore Ministerial Conference in 1996, and was later reiterated by the Doha Ministerial Conference in 2001. Many commentators believe the unwillingness of the United States (US) to cooperate with the European Union (EU) was a major force behind the collapse of the talks (Bradford, 2010; Jackson, 2006: 130 and 221; Gerber, 2012:105).

While the EU’s WTO delegation strongly supported “a multilateral framework of rules on competition law and policy within WTO” (EC, 1999b:2), the US authorities played down chances of cooperation. The most concrete resistance came from the US’s International Competition Policy Advisory Committee (ICPAC) – a high-level committee formed by the US Attorney General, Janet Reno, and run by Assistant Attorney General, Joel Klein – that counselled the US authorities against entering negotiations about a WTO competition regime (ICPAC, 2000). This Advisory Committee openly dismissed the idea of a competition policy deal under the WTO’s umbrella, echoing a response previously made succinctly by Douglas Melamed – a high ranking authority in the Antitrust Division of the US Department of Justice – that “Our view... is that negotiating WTO competition rules ... is a bad idea” (Melamed, 1998).

Although signs of deep disagreement over the terms of a CPA were flagged up as early as 2003 in the course of the Cancun Ministerial Conference, experts and scholars of international political economy – including this researcher – did not expect a complete collapse of the talks. As will be explained in Chapter 2 – where the history of the initiations on international arrangements for competition policy in the multilateral trading system is addressed – competition policy’s history in the multilateral trading system has had many ebbs and flows. However, as Evenett (2005:37) puts it, “something of a paradox” emerged in the years leading to the 1997-2004 activities. The WTO talks failed while the burgeoning growth of bilateral and regional economic arrangements by the US and the EU, either dedicated to competition policy or just including competition-related provisions, signalled the demand for international arrangements for anticompetitive practices. For instance, the US and the EU signed two bilateral antitrust agreements in 1991 and 1998. These agreements incorporated strong cooperation provisions of negative and positive comity provisions, and were referred to as the solution to international competition issues by both sides (US, 1998a; EC; 1999c:10). Further evidence of the paradox entails the number of countries that enacted and enforced national competition laws

in the decade prior to the WTO initiation, hinting at an increasing urgency for disciplining inter-firm rivalry worldwide.

The present PhD project is built exactly on this observation; that the EU and the US did not reach a deal on competition policy in the General Agreement on Tariffs and Trade (GATT)/WTO, yet have successfully concluded two bilateral deals with each other outside the WTO during almost the same period in which the WTO initiations took place. Interestingly, both the EU and the US have actively cooperated in other competition related fora – such as the OECD and the International Competition Network (ICN) – and have further concluded a good number of agreements with other countries in *ad hoc* antitrust agreements or within the wider framework of bilateral and regional trade arrangements.

Why could the EU and the US not broker a deal within the WTO? What variables can explain the stark contradiction between the multilateral destiny of the CPA talks and the lively bilateral/unilateral activities? What factors have facilitated the bilateral routes? And what hindering elements have possibly made a multilateral route ineffective, costly and therefore unfeasible?

As will be explained in more detail in Chapter 3, there is a variety of possible theoretically informed explanations. A liberal approach suggests that the interplay of domestic forces within the EU and the US did not favour a comprehensive WTO deal. For one thing, it might be argued that a WTO deal subordinates competition concerns to trade considerations, and certain circles feel that such a change might disturb the current balance of power between domestic constituencies. A constructivist might hold the view that the world community of competition experts is still working towards a consensus for the properties of a global mechanism for regulation of antitrust, and the bilateral agreements are moments of cooperation in a longer problem-solving journey that will ultimately result in a multilateral antitrust arrangement. In their distinct way, orthodox Realists might argue that non-cooperation over CP in the WTO is no surprise in international relations and anything otherwise should in fact raise questions. It might also be argued that the sheer number of WTO members, added to the WTO's tradition of consensual decision-making, entangles not only the CPA but any other negotiations in the complex myriad of political rivalry, coalition making and cognitive difficulties.

Yet, for an observer of the world economy, these explanations might conflict with what is usually said and believed about the WTO. Given WTO's track record of success in previous rounds of negotiations – the Uruguay round in particular – in accommodating inter-State cooperation, it would have been reasonable to expect that the WTO could have done better in the competition talks. First, the WTO provides an established multilateral negotiation forum,

which reduces the transaction costs of bargaining between countries in comparison with many bilateral arrangements, and even a new multilateral setting (Martin, 1992). The WTO has put into place the procedures for diplomatic economic interactions in a participatory way so that members enter into economic bargaining with the least transaction costs compared to bilateral and regional arrangements. In fact, as one commentator has put it, the Uruguay round has furnished “the largest and most complex negotiation concerning international economics in history” (Jackson, 1997:1) and a competition deal is only a minor endeavour in comparison.

Second, the WTO enables fair competition between its members and is an important vehicle for disseminating best practice (Hurd, 2014:41-71). For instance, the WTO dispute settlement body legitimises countervailing actions by injured parties, but puts limits on these actions. Likewise, the WTO allows member states to know about the latest policies in other countries, and that helps them refine and redefine their own national policies for better economic performance. From this perspective, the WTO works like a norm-propagating apparatus at the international level that many countries – either norm setters or norm takers – find helpful, if not crucial.

The failure of the WTO to conclude a CP agreement must be a surprise even to those commentators that see international institutions as nothing more than ciphers for a power struggle between countries. For people like the late Susan Strange in *Cave! Hic Dragones* (Strange, 1991), it would be at least perplexing that the US decided to follow the CPA in other fora rather than the WTO given the US’s heavy investment – hence influence – in shaping the principles, norms and procedures of the WTO over the past five decades. In this interpretation of the WTO, the US had spent a significant amount of time and energy to sustain its hegemony over time by crafting the multilateral trading system so that it produces favourable outcomes, and the multilateral trading system has actually done so very successfully (see for instance, Wilkinson, 2011). Therefore, the question is thus why this embodiment of the US’s structural power was unutilised and abandoned by the US in favour of bilateral/regional competition arrangements.

Studies of CP initiations in the WTO are not without precedence. A world regime for competition policy, whether in the WTO or in a combination of bilateral/regional settings, is a multi-faceted, multi-tier subject involving a number of actors (states, organisations, interest groups, etc.), institutions, norms, principles and a myriad of relations amongst them at the domestic and international tiers. This makes the issue attractive to a wide range of competing scientific disciplines, theories and perspectives, each focusing on one or a combination of concepts, actors and relationships. For instance, Anu Bradford (2010) undertook a comparative study on the factors and circumstances that contributed to the formation of the Agreement on Trade Related Intellectual Property Rights (TRIPs), and the impact of the same variables on CP

talks. Having identified these factors, she extended her research to see whether these variables had any influence on the WTO's failure to conclude a CPA. Marsden (2003) concludes, based on pure economic considerations, that a WTO CPA would enable member states to achieve increased efficiency on their CP interactions. Chad Damro (2006a; 2006b; 2012) built on previous works by Putnam (1988) and Milner (1998) to argue that the rise of international capital movements on the one hand, and proliferation of the countries passing and rigorously enforcing their national competition policies on the other, are potential causes of friction among countries. Damro's (2006a) analysis suggested that out of the institutions compared, competition policy would be pursued through all venues except the WTO. UNCTAD, the OECD and ICN in particular promote non-binding regimes because of their ability in reducing the likelihood of competition-related disputes that could threaten international economic stability (Damro, 2006a:880).

For the reasons that will be explained in full in Chapter 2, from all the states involved in the WTO's CPA negotiations, this research focuses on the EU and the US. From all the possible theoretical perspectives, it draws on a framework that mainly builds on rational theories of cooperation, rational design of international institutions, and the theory of nesting institutions. There are many definitions for international cooperation (see for instance, Grieco, 1990:22; Keohane and Oye, 1986), as Keohane (1995:23) simply puts it (and we adopt for this research), "cooperation is coordinated mutual adjustment of states' policy yielding benefits to participants".

As such, the research question is:

Can the failure of the CPA talks of 1997-2004 be attributed to the WTO's inability in addressing cheating concerns of the EU and US?

To accommodate the question, the research tests three hypotheses; the answer to each is the answer to the main research question as they are mutually exclusive.

- a) the WTO was unable to address cheating concerns;
- b) the WTO was able to address cheating concerns but there were other factors that contributed to the failure;
- c) cheating was never a concern in the CPA talks.

As will be explained in detail in Chapter 3, the first hypothesis is built on the Neoliberal Institutionalism theory while the second hypothesis draws on neorealism. The answer to the third, however, negates the basic assumption of the main question, that the WTO had anything to do with cheating concerns. For the sake of clarity, failure is defined here in terms of an

endeavour that started but did not culminate in cooperation, hence no agreement was ultimately reached and signed. Otherwise, one might argue that no agreement is just a success – and not a failure – for the party who did not like a WTO CPA.

The question above is founded on the role of the WTO as the institution that hosted the CPA activities, and as such worked like an independent force in fostering/hindering cooperation between the EU and the US. In other words, the research depicts the EU's and the US's CPA proposals as interacting – in what Aggarwal (1983) calls 'nested' – in the wider WTO's trading regime. The idea of nesting can be understood from the perspective of a hierarchy of the systems, where an agreement on competition policy is implemented within the wider multilateral trading system. As a result, the proposals for the CP deal are constrained by the limits and frontiers set by the WTO as a context. As will be explained in the coming chapters in more detail, the relationship between the broader institution of the WTO and the new agreement on competition policy in the making can be diverse and at times massively complex. However, the main argument is that there are possible contextual parameters that may have restrained/facilitated formation of the CPA in the WTO, and this research is about studying their impact.

The multilateral trading system, for one thing, is an established institution that can affect states' behaviour in many different ways (for a thorough study see Jupille et al., 2013; Simmons and Martin, 2002; Davis, 2004; Keohane, 1984; Krasner, 1982a; Aggarwal, 1983). For example, it is argued that institutions such as the WTO affect the cooperation calculations of the states, making it possible for the interacting parties to enter into mutually beneficial agreements with one another (Keohane, 1984:13), even under anarchy (Kono, 2007). From this perspective, the WTO is an intermediary variable that acts like a catalyst for inter-state cooperation in new areas. It can help negotiating parties to reduce their areas of disagreement by putting in place mechanisms that facilitate exchange of information, by reducing chances of cheating, and by lending some basic principles in a very cost effective way. This effect is documented in the Tokyo Round discussions about the regulation of the world trade in textiles (Aggarwal, 1983). Because the GATT regime was broader than the more specific regime for textiles, contracting states avoided undermining the norms of GATT in creating and modifying the Long Term Arrangement on Cotton Textiles (LTA) and the multifiber arrangement (MFA) within the multilateral trading system. They imported as many norms as possible from GATT into the LTA and MFA, and in so doing, the nature of the textile regime was overhauled around GATT's principles.

The theory of rational design of international institutions helps in the operationalisation of the research. Chapter 4 elaborates on this theory and explains that the EU and the US, being goal-

seeking agents, make specific institutional design choices to solve their concerns for enforcement. According to Koremenos et al. (2004:XIII), international actors engage in institution building and, in doing so, try to address their enforcement concerns by engaging in design institutional arrangements in terms of scope, membership and degree of centralisation. Chapter 4 builds on the rational design literature and suggests that in the CP talks, the EU and the US have fought over their desired outcome in terms of the scope, membership and centralisation. More will be explained about the concepts and methodology of rational design of institutions and its application in the CP activities of the WTO wherever necessary in the next chapters including, but not limited to, Anu Bradford's (2007; 2010) work explained in Chapter 2, explaining enforcement issues, and the discussions on centralisation as well as scope which are all discussed in Chapter 4.

The contributions of this research are threefold. First, it sheds new light on developments in regulating competition policy at the international level. As mentioned earlier, and will be demonstrated more fully Chapter 2, there have been various studies about the WTO's CPA talks. In almost all of these, the WTO is taken as a neutral variable without any influence over the cooperation process regarding competition policy. For instance, Bradford's (2009) analysis of the existence of, or the lack of, key issues in WTO's TRIPs and CP negotiations, totally ignores the gravity of the WTO as an important force. Therefore, her study fails to explain why the regulation of antitrust was successful outside of the WTO but not inside. This project incorporates the WTO as an active player and considers its potential impact on EU-US interactions.

Second, the research tests various theories of international institutions against each other in terms of their predictive power. The concept of rational design of international institution, for instance, sketches a causal social system by which actors maximise their wants given others' preferences. The study of the EU's and the US's interactions in the WTO provides a fresh field to test strong and weak points of international institutions when rationally designed. In fact, the thesis will be a response to the request of authors of the theory of rational design of international institution inviting others to join them in their intellectual effort to develop the theory further (Koremenos et al., 2004).

The third contribution of the study concerns wider efforts in understanding the processes of global governance. International institutions have risen to promise a system capable of solving issues of importance to the global community in a more democratic way than institution of power/hegemony, and in a more sustainable way than momentary instances of cooperation in shaky international organisations, and perhaps independent from pervasive forces of global capitalism. The role that the WTO does and can play in the global institutions of production,

trade, competition, development, justice, etc., is of immense importance. Therefore, third, by looking into the inner mechanisms of interstate interactions in the WTO, the research provides some pointers as to the direction that the WTO needs to go in order to align itself as a more significant part of the institution of governance at a global level.

The reasons for this research are twofold. The researcher has always seen international institutions such as the WTO as signs of world intellectual maturity that contribute to a more civilised way of distribution of the world's wealth; an alternative to war, invasion, colonisation and sanctions. They are manifestations of a significant epoch of human history towards more global justice; an ethical development and a playing field in which less military capable nations are at least given a seat and room to talk. Of course, this student is not naïve, or at least he thinks he is not. The power relationships in international institutions are a daily exercise. It is also no secret, as the history of many international organisations demonstrates, that the delegates of the less mighty nations have actually been carriers of orders to their capitals than real decision makers. Yet, the alternatives are few and international institutions seem to be more readily available than other solutions in my time. Therefore, the case for their potentials in bringing prosperity and development into many nations is strong. In doing this research, this student hopes he has participated in this discourse by contributing a humble amount of insight.

Some Clarifications and Definitions

The first clarification concerns the use of the terms 'regimes' and 'institutions'. In this research, the two terms will be used interchangeably. This is because the focus of the research pays attention to arrangements that have an impact on the quality of interstate cooperation, and not how these arrangements come into being, develop and change. Regimes are defined by many scholars; "a set of explicit or implicit principles, norms, rules, and decision making procedures" (Krasner, 1982a:186), and "norms, principles, rules, and decision making procedures that shape, guide and constrain states policies" (Grieco, 1990:22). International institutions in their turn are defined in different ways. For instance, Koremenos et al. (2001:762) see "international institutions as explicit arrangements, ... proscribe, and/or authorise behaviour", or "practices composed of recognized roles coupled with sets of rules or conventions governing relations among occupants of these roles" (Young, 1986:108).

The definitions above indicate that international institutions and regimes share two main features. These comprise (a) a set of rules, norms, etc., that (b) have an impact on States' behaviour.

This is not, of course, a new approach. Hasenclever et al. (2004:10) suggest that institutions and regimes are identical, and that “international regimes are international institutions and should be studied as such”. Likewise, Krasner (1983:2) clearly defines regimes as subsets of international institutions when he defines them elsewhere “as institutions possessing norms, decision rules, and procedures”. Grieco (1990:22) similarly acknowledges the similarity between the two and that the two terms are increasingly used interchangeably. Keohane (1984:57) also sees them as very close concepts when he refers to regimes as social institutions.

This is not to deny that other interpretations do not exist or that they are flawed. For instance, Weiss and Wilkinson (2013:8) draw a fine line between the two terms by asserting that regimes are a set of activities created by “behaviour-shaping” effects of international institutions.

The second clarification is about the perspective of the ‘WTO’ to be used in this project. The WTO may be viewed as a forum, as an adjudication body, and/or as a legal construction (a regime or formal institution). The ‘WTO as a forum’ perspective concentrates on the WTO as being a member-driven institution that facilitates interstate talks (see for instance, Blackhurst, 1998). Emphasised in this definition is reduced transaction costs. In a network of now almost 160 countries, instead of entering into bilateral interactions members use the WTO that acts like a forum in which information is shared, proposals heard, delegations and contact points known; all this reduces the time and money required for an exchange of concessions. The definition also emphasises that the secretariat and other departments are just means geared towards reducing transaction costs with no otherwise significant authority to set mandates. The forum definition suggests that the WTO’s role in the periodic rounds of talks, inter-state dispute settlement and trade policy review is only providing guidelines and facilitation; it sees no hard mandate or role in modifying/shaping contents and strategy of the states or quality of proposals, except for reducing transaction costs. The forum definition sees the WTO as an influential platform, yet a platform that reduces transaction costs rather than an ombudsman that has a substantial impact on reducing gaps.

The ‘WTO as an adjudicating mechanism’ perspective refers to the organisation as an agent to the principles, sometimes with reference to the superpowers, particularly the US. The debate here often falls under the rubric of global governance and concerns delegation of sovereignty by the principals (most of the time sub-conscious), being member states, to the WTO as the recipient, hence the term ‘agent’. The main attention is on the question of why and under what conditions states delegate and how control mechanisms work – or not work – to keep the WTO as the depository in check. The tone and the assumption in this literature is negative towards the WTO as an agent that, because of information asymmetry, has stripped sovereignty from member states, and why member states as principals fail to agree amongst themselves on

checking mechanisms to put on the WTO. The debate addresses many directions of the principle-agent discourse. For instance, arguments point to the judiciary machinery of the WTO, particularly members of panels who have received some autonomy in terms of interpretation of agreements/settlement of disputes; however, the role of secretariat, as international civil servants, has diminished over time (see for instance, Elsig, 2010). Here the debate is that the WTO has an impact on the behaviour of member states but it is all too often negative, hidden and creeping.

This research adopts the third perspective on the WTO as a ‘legal construction’, consisting of a body of principles, rules, norms and decision-making procedures. In its relationship with new issues, such as the CPA, it is assumed that the WTO consists of a number of building blocks that, acting as an exogenous factor, forms and informs the interstate interactions by imposing its weight to the content and dimensions of the proposals. In doing so, it influences the whole negotiation process and shapes the outcomes. For the most part, this structure remains fixed and monolithic, at least in the short term. Such an approach implies that the system is seen as resistant to change. Any change requires huge energy because it involves a redistribution of gains and costs between members. Moreover, such a change is more likely to be incremental and slow, rather than substantial and abrupt, because any such work is affected by decisions made in the past. If it involves a new issue that is compatible with the extant structure, the chances are that it would be digested more swiftly in the system than when the issue is contrary to the extant rules and norms.

Final Comments

This chapter explained the dimensions of the research problem. It stated the research question and explained why the answer is important for understanding the many facets of the CPA initiations in the WTO.

The next chapter will investigate the demand for an international regime for competition policy. It will also review the present literature on the CPA initiations in the WTO. Clarifications are made with regard to unit of analysis, the actors and the academic discipline of the research towards the end of the chapter.

Chapter 3 depicts the research chain of argument that links the empirical data to the research questions. This chapter builds on the findings in Chapter 2 on research gaps to justify the research question and its approach to handle it. Chapter 3 furthermore depicts the theoretical framework of the research and identifies rational theories of cooperation as the most appropriate

theories given the question of the research. It then explains the measures used to address objectivity, reliability and validity concerns in the conduct of the research.

Based on the method of pattern matching introduced in Chapter 3, Chapter 4 builds a reference framework for the analysis of the research data. To this end, the chapter engages deeply with the theories of neoliberal institutionalism and neorealism, and imposes the rational theory of international institutions to identify the critical points for EU-US cooperation in the context of the WTO. The result is an expected model of the EU's and US's approach to CPA in the WTO talks that is used against the research data in Chapters 5 and 6.

Chapter 5 is the first of the two chapters that tackle the empirical data. It explores the centralisation factor in the formulation of the WTO's Competition Policy Agreement as advised by the EU and the US and affected by the WTO. The analysis is broken down into three workable areas of transparency and information, settlement of inter-state disputes, and cooperation over individual cases. The chapter ends by identifying in what ways the institution of the WTO affected the EU and the US cooperation.

Chapter 6 handles the scope factor in the CPA talks. It revisits the negotiation proposals of the US and the EU to see how far the WTO has fostered or hindered cooperation between the two countries insofar as the scope of a CPA is concerned. The analysis is broken into four areas, a) scope of actors, b) scope of actions, c) scope of outcomes, and d) scope of remedies.

Chapter 7 concludes the work by synthesising the research findings on the impact of the WTO as the immediate platform of the EU-US cooperation in terms of their cheating concerns. It will also tackle the theoretical implications and policy recommendations of the research for advancing the scholarship on the impact of international institutions in general, and the WTO in particular, in dealing with interstate cooperation. The chapter concludes by mentioning the limitations of the results as well as providing recommendations for future research.

Chapter Two: Bringing the WTO into the Spotlight

This chapter lays the foundation of the research. It will first investigate whether there has been a genuine demand for an international competition agreement by the EU and the US, in or out of the World Trade Organisation (WTO). This is necessary out of the concern that our research question assumes such a demand. To this end, in the immediate subsection below, some academic and statistical works arguing for an international competition regime will be reviewed. In the next step, both outside and inside of General Agreement on Tariffs and Trade (GATT) and the WTO will be revisited, looking for traces of competition policy related activities at the international level. This will help to establish the facts for the main inquiry of the research, that the US and the EU have been genuinely interested in international competition arrangements having found a favourable solution.

The second section will review the most relevant literature on the WTO's competition policy initiations. This will draw on Bradford, Marsden and Damro's contributions (as representative of typical works in three categories of research on the WTO's CPA), with the aim of justifying the research in terms of objectives and methodology. The last section will clarify the project's unit of analysis, justify the choice of the EU and the US for the present research, and position the project within the wider IPE scholarship. In this part, the commonalities, as well as the differences, of the research are highlighted against the context of major IPE contributions in terms of method, assumptions, etc.

The Demand for International Competition Policy Arrangements (CPA)

This subsection explains the arguments for a WTO CPA. As the three parts below explain, the growth of international trade has created an environment for the expansion of worldwide business activities that, in the absence of an international antitrust regime, has resulted in increased anticompetitive practices in many industries. International initiations within the multilateral trading system, bilateral agreements and other international institutions such as the ICN, UNCTAD and OECD, have all, individually and collectively, fallen short in addressing problems of international competition; the WTO must, therefore, take on this responsibility.

There has been a growing awareness among critics of the world economy that an international competition policy is a necessity for the ever interdependent markets of our era (among the many see, for example, Hufbauer and Kim, 2009; Koopman, 1995; Utton, 2006:4; EC, 1999c; Fox, 2010; Evenett, 2005:37-38; Marsden, 2003). Many commentators, including former WTO Director General, Renato Ruggiero, regard a world agreement on competition policy as an indispensable step towards greater global economic integration and safeguarding the outcomes

of the liberalisations of the multilateral trading system made in the past six decades (Gilpin, 2000:106; Horn and Levinsohn, 1997; Pitelis, 2007; Mitschke, 2008). The growth of business concentrations at a global level on the one hand, and increasing number of significant international antitrust disputes on the other, add weight to these claims. Moreover, it is believed that the transaction costs of addressing anticompetitive practices in a well-established institution like the WTO are significantly lower than establishing new international arrangements. This is especially true of the bilateral deals that seem inept in tackling global anti-competitive practices in their many façades (Laprevote et al., 2015; Bradford, 2010, 2009).

As the forces of globalisation unfold, new issues arise, issues that add to the complexity of trade liberalisation efforts and require fresh thoughts and remedies. For many world trade observers, anticompetitive business activities have endangered the outcomes of decades of multilateral trade liberalisation efforts by substituting tariffs and non-tariff barriers (NTBs) with barriers that such activities create to international trade: “Globalisation has spotlighted loopholes in the world trading system; notably, loopholes that shelter foreign market-blocking conduct” (Marsden, 2003:172). In this line of argument, an EC communication to the WTO highlights that, “Indeed, an effective competition law regime is essential to combat anticompetitive practices which deny to foreign producers effective equality of competitive opportunities, thereby undermining WTO market-opening commitments” (EC, 1999a).

As noticed by some commentators, trade policies and the promotion of free trade generally have as a prerequisite the existence of a good supranational competition policy; this is because of the emergence of the markets that are easily larger in geographic extent than jurisdictional borders (Budzinski, 2009). In fact, trade policy and competition policy in the WTO are “are two sides of one coin” (Fox, 1999:666), in the sense that while the former limits state protectionism, the latter makes sure that the vacuum is not re-filled with anticompetitive measures of the firms. In other words, as expressed on a number of occasions by WTO delegates (see for instance, EC, 2000b:2), in the absence of an effective competition policy, the gains of trade liberalisation may be compromised as a result of restraints put on trade by private or public undertakings. Conversely, in the absence of a sustained process of trade liberalisation, the objectives of competition policy in promoting the contestability of markets are hard to be realised.

The unilateral adoption of one or another form of competition policy by countries is a basic and positive step to this end. Yet to many analysts it is far from enough. For one thing, enforcement agencies might be tempted to apply a *de facto*, even *de jure*, double standard by being lenient towards local enterprises, while interpreting the same competition rules in their extremes for foreign enterprises. Furthermore, even if the process is unbiased, in the absence of international cooperation, foreign firms subject to review (as well as their respective governments) may

believe that an unfavourable ruling represents an attempt to unduly penalise foreign firms. As Guzman (2004) sees it, this perception might, by itself, become unnecessarily costly because it may affect firm behaviour or generate hostility among states. This point was repeatedly emphasised by Europe's WTO diplomats when they asserted that:

“... These [unilateral and bilateral arrangements] are all positive developments, but at the same time, real life cases show that these approaches are not sufficient to meet the challenges of globalization. A more comprehensive and coherent approach is therefore necessary” (EC, 1999c:8).

The US envoy echoes the same need by confessing that even the US's sophisticated competition policy falls short of curtailing anticompetitive practices without international cooperation:

“... our recent international cartel prosecutions have demonstrated that even a century of vigorous antitrust enforcement has not brought an end to cartel behaviour on a grand scale....The US enforcement experience of recent years ... has convinced the US antitrust agencies that they need to improve their ability to work with their foreign counterparts in international investigations.” (US, 1998a:10)

The case for a multilateral antitrust agreement is further strengthened noting that how inadequate existing bilateral/regional arrangements are in handling the many dimensions of inter-firm competition. Eleanor Fox (2010) believes that the argument that competition issues between nations does not need a sophisticated global top-down agreement in a grandiose organisation such as the WTO has proven ineffective in addressing the many types of competition problems between nations. The main problem, which remains unsolved through these lower level avenues, is the ‘outward-oriented harm’ existing in export cartels, world scale cartels, and in the restrictive state trade policies that support them. Much negative externalities result from the reality that nations do not worry very much about the effects that their policies have outside their own borders. In the same line of argument, Damro (1999) also highlights the inadequacy of even the most comprehensive bilateral antitrust deal between the EU and US:

“The prospect for a transatlantic trade war over the Boeing-McDonnell Douglas merger brings into the open an issue largely ignored by governments. While companies are increasingly selling and merging across borders, antitrust authorities are working with little more than a patchwork of national laws and loose cooperation accords. The Boing case makes plain that what few real collaboration agreements are in place- the US and the EU signed what is considered one of the world's most successful antitrust cooperation pacts in 1991- have weaknesses leaving even those who work together vulnerable to conflict” (Damro, 1999).

This argument holds that the governance of inter-firm competition is currently marked by a system of co-operation between individual nations through solutions of either bilateral or networking type arrangements; neither, or both even added together, is good enough. Many of the bilateral deals are constructed on the concept of comity. Comity, which was once heralded

as the solution to international competition issues (US, 1998a; EC, 1999c:10), has indeed lost relevance over time. Negative comity involves the idea that one country takes the interests of the other country in the enforcement of its national competition law. In the case of positive comity agreements, such as the 1998 EU-US deal, the complaining country trusts the case to the other party to solve (OECD, 1999a:31-40). In practice, comity sounds like a good idea, but experience has shown that its application is considerably limited.

The other alternative to the WTO's CPA, the ICN, which is a bottom up governance mechanism comprising a network of competition authorities, also falls short of addressing all international competition conflicts. The ICN works from the ground up to discuss and find solutions to practical problems, such as harmonising procedures, facilitation of exchange of information, enforcement cooperation, and rules where their divergence caused extra transaction costs, etc. It does not engage in substantial issues such as regulation of hard-core cartels. Likewise, the main problem of 'outward-oriented harm' still needs to be resolved by a top-down approach that comes from an organisation such as the WTO (Fox, 2010).

UNCTAD has also tackled competition policy at the international level. Demanded by less developed countries, the UN General Assembly adopted the 'UNCTAD Code on Restrictive Business Practices' in December 1980. As such, the 'Code' is the only multilateral agreement around addressing anticompetitive measures. Negotiated under the rubric of a New International Economic Order, developing countries wanted a binding arrangement to protect them from allegedly untoward consequences of the anticompetitive practices of multinational corporations (MNCs) (Bensen, 1981). At that time, it was believed that anticompetitive practices were restrictive mechanisms in the transfer of the benefits of open trade from developing to developed countries.

The impact of the UNCTAD code is very limited. Despite the wishes of the least developed countries (LDCs), the obligations of the code are non-binding to firms and governments, and the guidelines are just recommendatory. Most importantly, the code lacks a robust mechanism for settlement of disputes. It only asks the parties to enter into consultations in good faith once requested by others. The code does not address export cartels and limit itself to international cartels.

The UNCTAD antitrust initiation is a work in progress. The Inter-governmental Group of Experts developed the code on Competition Law and Policy. As said, the code aims to protect less developed countries from unfair practices of multinational enterprises (Thompson, 1980; Taylor, 2006:130), as such, it is not considered a tool to be used universally by all countries, especially the advanced economies.

In addition to providing an adequate answer to international anti-competitive behaviour, the WTO is arguably more cost effective than other international venues. It has been argued that the marginal costs of dealing with an additional issue, such as antitrust, will be lower within an existing regime; this explains the tendency of a regime, such as the WTO, to expand and bring more issues under its purview (Haggard and Simmons, 1987:508). More specifically, Aggarwal (1985:28) highlights that negotiating a multilateral agreement “is organizationally less expensive than is the development of many bilateral contracts”. He particularly mentions that a multilateral approach reduces transaction costs significantly compared with a chain of bilateral contracts, and is therefore economically recommended. An EC document stresses this point by asserting that:

“...Nor does it appear to be feasible to envisage a very large network of bilateral agreements, which would result in very high costs for competition authorities. The European Community and its member States therefore consider that it is essential to develop modalities of cooperation at the multilateral level and would welcome suggestions from other WTO Members on how such framework could be best developed” (EC, 1999c:9).

Such a call is particularly true when noting that WTO’s extant rules and principles support the basic tenets of an agreement on competition policy. A publication by the GATT secretary reads “... the GATT is clearly not the ‘free-trade organization’ it is sometimes described as. It is more concerned with open, fair and undistorted competition” (GATT, 1992). By limiting states’ protectionist interventions in international trade to a substantial degree, the system prides itself on opening a platform for competition among businesses, regardless of their nationality. The coming chapters engage deeply with the competition-oriented provisions in GATT and the WTO. At this stage, suffice it to mention that pro-competition provisions are scattered throughout the different agreements of the WTO. More precisely, competition provisions in GATT, GATS, TRIPs, Subsidies and Countervailing Measures (SCM), the Sanitary and Phytosanitary Measures (SPS), Trade Related Investment Measures (TRIMs), Public Procurement Agreement, and Antidumping Agreement have been identified. In fact, the WTO’s terms of competition has gone some way to establish themselves as a model arrangement for bilateral/regional deals worldwide. For example, as of 2015, 27% of all 232 free trade agreements (FTAs) notified to the WTO (including US-Oman, US-Bahrain, EU-Central America and EU-CARIFORUM Economic Partnership Agreement) contain provisions that largely replicate Article 1 of the WTO’s Basic Telecommunications Reference Paper for safeguarding competition in the telecommunications sector (Laprevote et al., 2015:4).

The Statistical Evidence

The argument in support of a multinational antitrust deal is better understood with a glance to hard data about anticompetitive practices. As will be presented in detail below, a closer look into the available figures shows that, in today's globalising world, only a small number of firms dominate certain industries; competition issues therefore need to be addressed multilaterally, on a global scale, and preferably in the WTO (Balasubramanyam and Elliot, 2002; Marsden, 2003; Brittan, 1998; Fox, 1999). The figures suggest that, at variance with the widely held idea on the impact of globalisation on markets, "competition among the few", as Fellner in his 1949 contribution has coined, marks the structures of production, distribution, marketing, etc., in many industries. As a result, what seems to be a structural transformation towards more competitive markets on the surface may, in fact, be a new form of dominance with the effect of shrunken market contestability in many industries (Scholte, 2005:182; UNCTAD, 1997:133-173).

The alliance capitalism (Gerlach, 1997) refers to the developments in the industrial structures in which the networks of mergers, agencies, subcontracting, franchises and other forms of collaboration, equity and non-equity modes, have facilitated the continued dominance of a few MNCs in major industries over a large number of smaller firms worldwide, increasing the demand for regulation of anticompetitive practices. In this vein, a report by UNCTAD (2011) reveals that non-equity modes of international production have generated over US\$2,000 billion of sales in 2010 alone. MNCs have built interdependent networks, known as global value chains, by which they increasingly control and coordinate the activities of their affiliates and partner companies worldwide. UNCTAD's report (2011:124) shows that contract manufacturing and services outsourcing accounted for US\$1.1-1.3 trillion, franchising US\$330-350 billion and licensing US\$340-360 billion in 2010.

The demand for an international antitrust agreement can be better understood knowing that markets for many industries (e.g., communications, pharmaceuticals, information technology (IT), and media industries in particular) are actively oligopolistically maintained, and market power is concentrated within a handful of large businesses at a global scale (see for instance, Dicken, 2015). In the world trade of commodities, as another example, the proportion of the commodities marketed by three to six of the largest firms is 85-90% for coffee, 85% for cocoa beans, 85-90% for jute and 75-80% for tin (Cowling and Tomlinson, 2005).

Moving from commodities to the world of technologically advanced pharmaceuticals shows a similar pattern. For instance, while the talks for a competition policy were taking place in the WTO, the pharmaceutical industry was also undergoing further consolidation in a handful of companies through, in some cases historically, significant mergers and acquisitions. In

November 1999, Pfizer acquired Warner-Lambert for almost US\$90 billion, and then in 2002 acquired Pharmacia for US\$59.5 billion. The company had a market capitalisation of US\$270 billion and sales of US\$39 billion in 2003 (8% of world sales), and Pfizer-Warner-Lambert was considered the third largest mergers of all times at the time. Similarly, two British pharmaceutical companies, Glaxo Wellcome and SmithKline Beecham, were merged in a deal amounting to US\$76 billion, and the new company, GlaxoSmithKlein was valued over US\$136 billion. The new company's sales reached US\$30 billion in 2003. To summarise, the first ten mergers and acquisitions of pharmaceutical companies during the 1995-2002 period amounted to US\$366 billion, with some mergers being historical records. It is worth noting that, by the end of December 2003, the sales of the first 15 largest pharmaceutical firms amounted to US\$255 billion, accounting for 54% of world sales.

The Competitiveness Index highlights just how fast the US companies have shifted from multinational firms to global enterprises when the WTO's CP negotiations were reaching their destiny. It is surprising to know that the total sale of US MNCs has become significantly more than total US exports. The US\$2,400 billion sales of US foreign subsidiaries at the end of WTO's activities for a CP agreement in 2003 dwarfed the US\$1,000 billion sale of their US-based parents, three times higher than US exports and even 50% higher than the trade deficit (Council on Competitiveness, 2007).

A number of countries make their case for a WTO CPA based on the claim that many of the activities mentioned above in essence entail different degrees of anticompetitive measures at the global level. For example, it is estimated that 25% of criminal antitrust cases pursued by the US Department of Justice in the 1990s were international in scope, and international cartel cases affected firms located in more than 20 countries (EC, 2000a:2). In this vein, and in the US only, an OECD report indicated that exposed cartels have affected over US\$10 billion in US commerce, which implies global overcharges by those cartels in the billions of dollars (OECD, 2000). The same report shows that in just one single case, a global cartel managed to raise the price of graphite electrodes by 50% in various markets, and extracted monopoly profits on an estimated US\$7 billion in world-wide sales in a matter of five years. For developing countries only, it is stated that they imported US\$81.1 billion of goods from industries that had suffered from a price-fixing conspiracy during the 1990s; those imports represented as much as 6.7% of imports and 1.2% of GDP of these countries. An analysis by the World Bank's Simon Evenett estimates that, in terms of overpayment, this would amount to 20-40% of US\$81.1 billion, i.e., between US\$16 and US\$32 billion (EC, 2002b:3-4).

Initiations in the Multilateral Trading System

The many attempts within the multilateral trading system to tackle anticompetitive practices is further evidence that suggests both the US and the European countries were truly concerned about competition matters, and therefore demanded international regulation of business practices.

In addition to the attempts made outside GATT and the WTO, there have been a number of attempts to tackle antitrust since 1947 and formation of GATT, although all failed. In fact, it has been a work in progress ever since the establishment of GATT, i.e., for almost half a century until the competition agenda was ultimately carried forward to the WTO, only to see another failure in 2004. During this period, the competition related initiations have waxed and waned in terms of cooperation/conflict in the GATT-WTO; however, all have resulted in non-agreement.

The first of these attempts is recorded in the talks leading to the draft of the Havana Charter, where it seems that the views of the Europeans and US negotiators were very close. In addition to laying down the basic rules of intergovernmental trade, the Charter addressed restrictive business practices (RBPs) of enterprises in its Chapter V, emphasising the obligation of the contracting parties to prevent those practises of private and state enterprises that result in the infringement of competition. More specifically, Article 46 of the Charter required signatories to oppose business practices, in the form of monopolies, export cartels, etc., that had untoward impact on international trade. According to the Havana Charter, after an initial investigation and exhausting reconciliatory venues, the International Trade Organisation (ITO) could refer complaints to International Court of Justice for an advisory opinion, or the executive board of the ITO for a final decision. The inclusion of antitrust provisions by, to a large degree, an American initiation was born out of a desire to dismantle both German and Japanese heavy industrial blocks, which then assumed the powerhouse behind their military might. The Havana Charter, however, was to a great degree satisfactory to both the American negotiators and delegates of the European countries as both sides agreed on the draft.

Although the Havana Charter and establishment of the ITO were fully endorsed by the Truman administration, it was not ratified by the Congress, which in 1948 was dominated by the Republicans. This decision was partly influenced by leading US firms who feared that the limitations on restrictive practices might be used as a club against their business interests (Hufbauer and Kim, 2009). The Havana Charter's RBPs draft touched on very sensitive issues. For example, preventing technology development and innovation, and the abusive use of patents and trademarks was also prohibited. These were never addressed on a world scale, and the uncertainty around them made major US businesses nervous, "a nervousness reflected in congressional unwillingness to grant that level of regulatory control over monopoly powers to

Geneva” (Braithwaite and Drahos, 2000:189). As a result, the Havana Charter was abandoned and with it the arrangements for a world scale anti-trust deal. The congress again rejected a second proposed draft prepared in the 1955 Review Session of the GATT for the establishment of an Organisation for Trade Cooperation, an epitome of the initial ITO, just to show the seriousness of its initial decision seven years earlier.

A few months after GATT’s Torquay Round, between 1951 and 1953, the UN Economic and Social Council made another anti-trust attempt by setting up an *ad hoc* committee to address the objectives of Article 46 of the Havana Charter. However, the proposals of this committee saw the same miserable destiny as their predecessors when the US delegate rejected them altogether. This was later followed when yet another attempt to inject anti-trust into the multilateral trading system in 1958-1960 faced the objection of the Americans. More particularly, the issue of anti-competitive practices was reflected in the decision of the contracting parties of 18 November 1960. The contracting parties recognised that:

“...business practices which restrict competition in international trade may hamper the expansion of world trade and the economic development in individual countries and thereby frustrate the benefits of tariff reductions and removal of quantitative restrictions or may otherwise interfere with the objectives of GATT. With the increased globalization of business activities and the substantial reduction of government barriers to trade, the pertinence of such recognition has, if anything, increased” (EC, 1997b:3).

It bears noting that the opposition took place at the same time that dumping practices (likewise seen in the initial Havana Charter and considered a business restrictive instrument in its own right) were addressed, and the Anti-Dumping Code of 1967 was formed (Braithwaite and Drahos, 2000:188).

In the Uruguay Round (1986-1992), competition policy as a comprehensive, across the board agreement was clearly off the US agenda (Braithwaite and Drahos, 2000:117). However, with the Europeans insistence, the Americans rather reluctantly agreed to approach the issue on an industry-by-industry basis, avoiding any cross-sectoral commitment out of the fear that such a commitment would adversely affect US interests. A senior USTR official quotes the Europeans as saying: “we’ll be there when you want to deal with post, telecoms, etc. one by one to increase competition. So I say okay” (Braithwaite and Drahos, 2000:189).

The demand for the CPA once again brought competition to the table in the course of the Doha Round in 2001. The member states decided to keep working on the Singapore Issues in the Working Group on the Interaction between Trade and Competition Policy (WGTCPP). However, because of the “July 2004 package” adopted on 1 August 2004, the Working Group is currently inactive. However, the WTO Secretariat continues to respond to national requests of WTO

member states and acceding countries for technical assistance. In this last round, as said earlier, the United States and the EU were not able to carve out a compromise over an agreement on competition policy, bringing the efforts for the CPA to a halt. While the EU, with the support of all its members, has vehemently tried to keep the subject on the GATT/WTO negotiating table (Monti, 2001), the US dampened down venues of cooperation (see for instance, Jackson, 2006: 130 and 221; Gerber, 2012:105). That was a policy generally buttressed by support from the business circles simultaneously in the USA (Hufbauer and Kim, 2009; Davidow, 1990; Bradford, 2009; Braithwaite and Drahos, 2000), and out of the USA (ICC, 2000; Buch-Hansen and Wigger, 2010).

The US and the EU were outspoken on their positions. The excerpts below are samples taken from deliberations of the EU and the US to the WTO between 1997 and 2004, indicating that two major trading blocks were serious about an international antitrust deal. For instance, in one deliberation the EU mentions the investigation on the so called lysine cartel to highlight the gravity of anticompetitive threats:

“The now infamous statement by one of the executives participating in one recently investigated cartel – “Our competitors are our friends, our customers are the enemy” shows that such cartels are in stark contradiction with the proper functioning of a competitive market-place, have an adverse impact on international trade and deserve unequivocal international condemnation” (EC, 2002b:1-2).

Moreover, by mentioning the inadequacy of bilateral deals, the EU is convinced that the WTO is the proper institution for a CPA:

“...we remain convinced that the WTO is the right and proper forum for multilateral action regarding rule making on competition policy. Bilateral cooperation arrangements have worked well in the past and offered substantial benefits for all parties involved. However, they suffer from a number of shortcomings, ... In a globalised economy, international anti-competitive practices affect a number of jurisdictions ... In light of the increasing number of jurisdictions with a domestic competition law regime, a network of bilateral agreements ...would be extremely costly to administer” (EC, 2001a:6).

A similar message for international competition arrangements is also heard from the US. Some years before the start of the CPA talks, both US antitrust related agencies, the Federal Trade Commission (FTC) and the Department of Justice (DOJ), in their ‘Antitrust Enforcement Guidelines for International Operations’ had made it a: “high priority . . . to cooperate wherever appropriate with foreign authorities regarding [antitrust] enforcement” (US, 1999b:1). The available data also justifies the US demand for international arrangements. As mentioned earlier, among all cases investigated by the US Department of Justice in the 1990s, as many as

25% of cases were international in scope affecting firms in more than 20 countries (EC, 2000a:2) affecting US\$10 billion worth of US commerce (OECD, 2000:5).

In all, in addition to the statistical evidence, written and oral deliberations of EU and US envoys to the WTO indicate the serious demand for international antitrust arrangements. The next subsection will provide yet more evidence for the demand of international antitrust regulation by introducing the activities of these countries outside the WTO.

Non-WTO Initiations

The quest for an international antitrust arrangement has not been confined to the WTO. Other venues have also been tried by the EU and the US, indicating the serious demand for international cooperation for tackling business anticompetitive practices.

The US and the EU have been parties to a good number of these initiations. Paradoxically, US and EU non-cooperation in the WTO takes place at a time when both had negotiated either *ad hoc* antitrust agreements or economic agreements with competition related provisions included with a host of other countries. Moreover, the US and the EU had signed two bilateral antitrust agreements in 1991 and 1998, demonstrating once more their desire for competition related cooperation. Heralded as the solution to international competition issues (US, 1998a; EC, 1999c:10) these agreements incorporate negative and positive comity provisions.

A recent survey shows that, out of 232 FTAs notified to the WTO as of early 2015, at least 190 addressed competition policy in various degrees (Laprevote et al., 2015:1), demonstrating both a sharp rise in number and a heavy demand for international antitrust arrangements. The same report suggests that while only 60% of FTAs included antitrust provisions prior to the 1990s, this figure had surpassed 90% for those FTA's signed between 1995 and 2005, the years that the piece of the initiations took place in the WTO.

The EU and, more vehemently, the US have actively used at least two other venues to tackle regulation of competition at the international level. First, both countries have either signed *ad hoc* antitrust deals or included competition policy provisions in their Free Trade Agreements (Laprevote et al., 2015; Bradford and Buthe, 2015, OECD, 2005). The US signed agreements with Vietnam (2001), Australia (2005), Chile (2004), Columbia, Peru, Singapore (2004), South Korea (2007), Bahrain, Oman, and NAFTA (1994). The EU also concluded treaties with a number of countries and regions, including Mexico, Jordan, South Korea, Egypt, Singapore, Costa Rica and Panama, Peru, Moldova, CARIFORUM, Colombia, Hong Kong, Palestinian Authority, Morocco, Serbia, Bosnia, Ukraine, Albania and Canada.

In addition to the bilateral deals, the competition related multilateral efforts have developed in three other venues, namely the ICN, OECD and UNCTAD. The US initiated the International Competition Network (ICN) as an alternative venue for competition centred cooperation. ICN was formed on the recommendation of the International Competition Policy Advisory Committee (ICPAC) to US authorities in order to initiate the Global Competition Initiative. This was where government officials and private firms, as well as related non-government organisations (NGOs), could cooperate on antitrust matters for a “greater convergence of competition law and analysis, common understanding, and common culture” (ICPAC, 2000).

ICPAC was a group formed in 1997 by then US Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel Klein, with the aim of addressing global issues such as multi-jurisdictional merger review, the interface between trade and competition, and the future direction for cooperation between antitrust agencies. Formation of the ICN was later supported by the EU’s then Commissioner for Competition, Mario Monti, and the institution was launched on 25 October 2001, initially with antitrust officials from the US, the EU and 12 other jurisdictions; Australia, Canada, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom and Zambia.

UNCTAD, OECD and other UN bodies are all other venues that the US and European countries have actively involved with their activities for tackling competition related issues at the international level. The activities are diverse. For instance, UNCTAD’s General Assembly, at its 35th session adopted the *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, approved by the United Nations Conference on Restrictive Business Practices*. The OECD, with massive support from the US and the EU, has likewise done extensive research and issued publications on different aspects of international antitrust, most notably perhaps some general guidelines for regulation of anti-trust, including *Recommendations of the OECD Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade*. The US and the Europeans were active in the UN agencies going back to The League of Nations Economic Conference that addressed restrictive business practices as early as 1927 on a global scale. However, the rift between the US, who wanted total eradication of cartels, and the European’s view, that then justified some forms of cartels, was so deep that the whole initiation was abandoned altogether. Later, the ILO initiated another attempt to curb restrictive business practices, which once again could not see the light of success (Marceau, 1994:59-60).

The subsections above provided three indications that the EU and the US have been serious about cooperation for the regulation of antitrust at a world level. Studies by academia and professional bodies, the statistics on the breadth of international anticompetitive behaviour, the

large number of bilateral regional competition arrangements by the EU and the US, EU-US efforts in non-WTO international institutions such UN agencies, the OECD and the ICN, as well as statements by the EU and the US envoys in and out of the WTO, indicate that the EU and the US have been actively seeking an international arrangement for competition policy – if they could overcome their differences and cooperate on terms of such agreement.

Having established the demand for international competition arrangements, the next subsection tackles the existing literature on the subject of a WTO's CPA. The result leads to a more sophisticated understanding of the research question and highlights the gaps in the existing works with regard to the impact of the WTO in terms of cooperation between the EU and the US for the CPA.

Locating the Study in the CPA Literature of the WTO

This section maps the literature most relevant to the interactions in the WTO for the CPA. The literature on international cooperation, international institutions and the WTO are reviewed in different parts of the research as the discussion demands. In this section, however, the purpose is to sketch a framework of the studies about the international antitrust endeavours, with a view to identifying research gaps that justify our approach in terms of the significance of the institution of the WTO in fostering cooperation/conflict amongst the EU and the US for a CPA. The assumption at this stage is that the WTO has not received due attention or any at all, in terms of a powerful variable with significant potential to affect the course of inter-state cooperation.

To approach the existing works, an appropriate 'literature framework' is required, one that is capable of accommodating categorisation and liaising as many as possible studies related to this project. Two sets of variables are needed: one involves forces affecting the EU and the US in terms of their approach to a CPA in the WTO. These forces can be domestic or international. The other concerns the research approach. This latter can be positive or normative and these are explained below.

To begin, Walker's (1993) framework of 'inside/outside distinction' and Putnam's concept behind the 1998 contribution 'Logic of Two-Level Games', are helpful as an integrative framework through which the literature/narratives on the evolution of competition policy initiatives can be united and linked together. These works accommodate an analysis of the related literature on the two sets of domestic and international forces in a coherent way. The logic behind Putnam's contribution suggests that there are always two sets of forces involved in the states' decisions over international issues (see Figure 2.1). As a result, neither purely domestic nor purely international studies can explain the act of cooperation by a given state over

an international agreement in its entirety. The negotiating bodies of the EU and the US, on the one hand, have to absorb the complexities of the forces at home created by a variety of domestic actors and institutions such as trades unions, lobbying groups, different government agencies, etc. (these are shown on the sides of Figure 2.1). On the other hand, they must handle and utilise international forces to define a winning proposal that fits into the possible solutions. Putnam calls these possible solutions the “win set” (Putnam, 1998:435-441).

To accommodate this, the present study extends the foreign side of Putnam’s model by slotting in international institutions, e.g., the WTO, so that a shelf is opened for the studies that focus on the role of international institutions on the quality of cooperation amongst states. Moreover, as the diagram below indicates, since any proposal for an international treaty has to deal with the enforcement issue (and that according to the theory of Rational Design of International Institutions, enforcement concerns show themselves in the three variables of scope, centralisation and membership), the subject matter of the CPA negotiations will be broken down into three areas. Such a break-down makes it possible to classify the literature on competition policy.

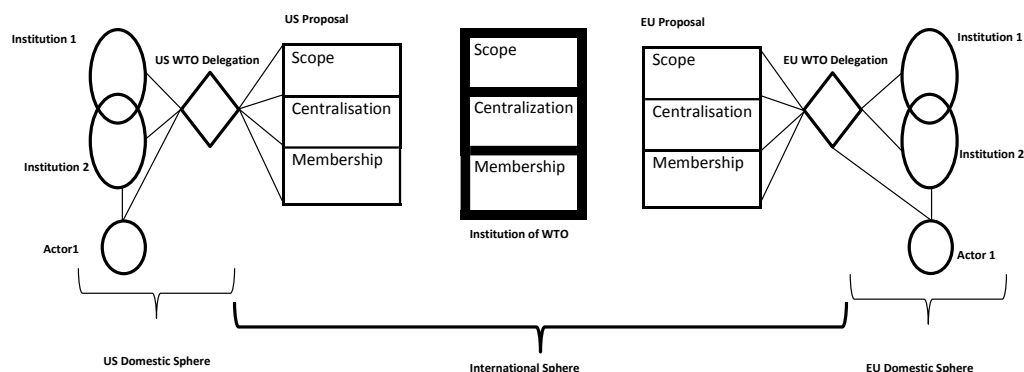


Figure 2.1: Overall Framework of Available Literature on the CPA

Source: Author

The final point before starting a substantial analysis of the literature is attention to the dichotomy of positive vs normative analysis in the literature. Most CPA related studies, including the present study, are positive in their analysis as they seek to analyse the relationship between a certain number of variables in the WTO on the cooperation between the US and the EU over the CPA. However, a fraction of studies take a normative view to the WTO’s CPA, where they evaluate proposals with a view to see whether they are right or wrong. For instance, Marsden (2003) sets out to approach the EU proposal with a view of establishing whether it is suitable as a basis for a world competition policy regime.

Having defined the general literature framework, the most relevant studies on the matter are discussed below. The contributions by Bradford, Marsden and Damro presented in this section each provide an explanation of the WTO's antitrust efforts, and each takes a different approach/methodology.

The main reason for choosing these studies in particular is that they all address the same issue as the present study, i.e., international competition policy, factoring, in one way or another, in the WTO into the analysis, paying particular attention to the US and EU as the main actors and taking the same period of time as this research.

However, what is common between these studies is the absence of due attention to the institution of the WTO as a force in its own right that is capable of facilitating cooperation, or fanning conflict, between the EU and the US. As explained in more detail below, Bradford's (2007, 2009, 2010) works compares the successful TRIPs negotiations of the Uruguay Round with the competition policy initiatives of 1997-2004. She first identifies a number of facilitating factors for TRIPs success, and then applies them to competition policy talks. Her aim is to assess the presence or lack of what factors, which are predominantly domestic, may have actually contributed to the failure of the antitrust talks. Marsden (2003), for his part, studies the EU's and the US's positions in antitrust activities of the WTO from the much talked about dichotomy of trade versus competition policies. Adopting a normative approach, he essentially downplays the EU proposal against that of the US, yet points out the possibility of a third way that may address the concerns of both trade and competition authorities. For him, like Bradford, the WTO is assumed to be an impartial territory for the CPA talks. Damro's (1999, 2006a, 2006b, 2012) works, in their turn, remain theoretic. Taking a political approach, his works combine international and domestic political forces to explain the EU-US interaction on competition matters in the WTO and elsewhere.

Anu Bradford: Why TRIPs and not the CPA?

A group of studies identify factors that in their presence – or absence – inter-state cooperation for competition policy is fostered or hindered within international institutions. Studies by Arup (2008), Fox and Ordovery (1997) Bartók and Miroudot (2008), Anderson (2008), Hufbauer and Kim (2009), Tay and Willmann (2005), and Akbar (2000) all draw on one or a handful of parameters whose presence or absence causes friction to, or facilitates cooperation for, the formation of a CPA in the WTO. For instance, Fox and Ordovery (1997) examine a wide set of previously identified factors that enhance interstate cooperation (in terms of coordination and harmonisation of competition law among countries) to offer sets of procedures and agreements, particularly on a process that could minimise conflicts over international competition policy regimes. These studies do not necessarily focus on the WTO the international institution as

such, but instead compare different factors for their impact on cooperation/conflict. As will be explained in detail below, Bradford's publications fall in this group and explore the factors that have fostered cooperation for TRIPs but were lacking in the WTO's CPA talks.

Bradford's two articles (2007, 2010) focus on the interplay of what she calls the great powers in WTO's competition policy challenge. Furthermore, she takes on the task of exploring the ways in which the coherent interest groups affect these states in the WTO's antitrust initiations. More important to this project, her articles tackle the question of why some of the great powers in the WTO insist on putting competition policy on the agenda in the absence of active support from coherent interest groups within their territories.

Her works on WTO's CP initiations build on two convictions. First is an optimistic view that antitrust interactions are likely to bear fruit given the experience of the TRIPs. Both deals seem to share a number of commonalities. For instance, the enforcement of antitrust laws and protection of intellectual property rights across jurisdictions have serious implications for business entities in the US and the EU, creating domestic pressure for international cooperation.

The second conviction suggests that the WTO is a suitable environment for CP cooperation when five conditions are present (Bradford, 2010:4-5):

1. when the interests of the EU and the US align;
2. the negotiations are supported by domestic interest groups;
3. when the contracting states need to rely on issue linkages to overcome the distributional conflicts;
4. the subject matter of a deal demands a formal and powerful enforcement mechanism capable of levying sanctions; and
5. the WTO is the preferred venue for cooperation when the benefits of cooperation exceed the higher costs of formal cooperation (Bradford, 2010:5).

Methodologically, her studies are comparative and start with identifying what factors and what circumstances assisted the WTO member states navigate the Agreement on Trade Related Intellectual Property Rights (TRIPs) in the presence of so many different perspectives and conflicting interests towards a concrete regime for regulation of intellectual property rights. Having identified these factors, she extends her research to see whether these variables bore weight on the WTO's failure for the CPA.

The following subsection explains Bradford's findings on the five factors that their presence accelerates cooperation for a competition deal in the WTO.

1- International cooperation is likely to succeed when the interests of powerful states align

Although decision-making in the WTO is consensus based, the powerful states must agree on the need for cooperation. The United States and the European Union are the most powerful states within the multilateral trading system. Together, they can resort to coercive tactics by economic sanctions, withdrawal of economic benefits, such as removal of the Generalised System of Preferences (GSP), and use of selective incentives and conditional benefits to persuade less powerful countries to adopt favourable trade policies (Bradford, 2010:10).

Great powers, the US and a number of European countries, were all “ardent advocates” of the TRIPs talks and pursued their goal as a unified front. They are the world’s leading producers of IP products, and stronger international IP protection would reinforce their position as IP exporters by enabling them to charge supra competitive prices for their products abroad (Bradford, 2010:19-20). Bradford (2010) documents some of these benefits. For example, based on the WIPO report 2000, she asserts that the US has been the primary beneficiary of IP trade, its income having increased from US\$1.1 billion in 1970 to US\$14.3 billion in 2001. The European countries had a similar stake at the time of negotiating the TRIPs.

The common interests of the US and Europe helped them form a united front for overcoming the difficulties of brokering a deal. For example, Bradford (2009) mentions Steinberg (2002) reporting that, in response to developing countries’ resistance to adopting the Final Act of the Uruguay Round in one single package (the single undertaking rule), the United States and the EU threatened to terminate their trade obligations under GATT 1947 against states that did not accept the Final Act in one package that included TRIPs.

Bradford (2007) argues that due to the conflictual relationship between the EU and the USA over terms of the competition deal in the Doha round, and before such a unified front did not take form and the disagreement brought the whole negotiations to a full halt:

“The circumstances under which the attempts to launch WTO negotiations on antitrust have taken place have been characterised primarily by a distributional conflict between the two major antitrust powers, the United States and the EU...” (Bradford, 2007:400).

The deadlock is therefore comprehensible since “International cooperation is more likely to fail when Great Powers are divided, so it is no surprise that the United States-EU divergence has obstructed state’s abilities to negotiate antitrust matters in the WTO” (Bradford, 2010:23).

2- Support of concentrated interest groups facilitates interstate cooperation in the WTO

Bradford (2010) further suggests that interest groups assumed a prominent role in the TRIPS talks because of the particularly high benefits that they expected to receive from their lobbying

efforts. In fact, comments Bradford, the benefits were so noticeable that competing companies were lured into joining their efforts to achieve the IP deal in the WTO; “The joint gains available to the industry from the TRIPS Agreement superseded any relative gains that the corporations were hoping to secure as each other’s competitors” (Bradford, 2010:27).

Powerful US corporations, especially in the pharmaceuticals, movie, and computer industries, assumed an unprecedented role in promoting the inclusion of TRIPs into the WTO agenda. Anticipating a significant gain, these producers became the primary advocates of the TRIPS Agreement. They formed a transnational coalition and engaged in an unprecedented lobbying effort to establish a global IP regime. American private interest groups, together with their European and Japanese counterparts, lobbied their respective governments to ensure that the IP agenda remained a negotiating priority for these three key WTO delegations. Their efforts ultimately bore fruit despite fierce opposition of the developing countries.

Bradford (2007) stipulates that the CPA talks suffered from the absence of a similar powerful lobby in the US and the EU. For one thing, attention is paid to the low transaction cost of a merger, amounting to 0.11% of the average merger value in 2003. This is not significant enough to stimulate support from the business community for a WTO competition agreement (Bradford, 2007:404). While the benefits from TRIPs were so substantial, this gave momentum for the negotiations to go even beyond what was first expected.

In contrast to the TRIPS negotiations, private interests have been largely absent from the quest for WTO antitrust rules as “few corporations, industry organizations, or consumer groups have endorsed the agreement” (Bradford, 2010:28). Her argument suggests that the power of big businesses has not been harnessed in support of the CPA talks. Many corporations with significant lobbying power remain ambivalent about the possible results of the negotiations, “distinguishing the TRIPs negotiations from any impending antitrust negotiations on very clear domestic political economy grounds” (Bradford, 2007:434).

She concludes, “the international antitrust regime does not seem to have a clear constituency that would unequivocally benefit from the WTO antitrust rules, and so there is no equivalent stakeholder to assume the role the IP industry played in the TRIPS negotiations” (Bradford, 2010:28).

3- Cross-issue linkages enhance the cooperation tempo by helping negotiating parties to overcome distributional conflicts

Called ‘Scope’ in the literature on rational design of international institutions, cross-issue linkages help balance distributional conflicts between states. In addition to facilitating balancing

distributional conflicts, cross-issue linkages are particularly helpful in overcoming resistance to an international agreement at domestic quarters. Incorporating new issues in the negotiations mobilises countervailing forces that help overcome domestic protectionist inclinations, “when negotiating additional issues, new coalitions emerge to counter the protectionist sentiments, offering governments political rents that can exceed the costs that the protectionist coalition incurs” (Bradford, 2010:12).

Bradford (2012) explicitly argues that the WTO is particularly the right place for cross issue deals. Its many dimensions are conducive to multi-issues interactions. This was the arrangement needed for breaking the intellectual property deal, as other organisations, such as the WIPO, fell short of including issues beyond their main subject matter.

The circumstances had been different for TRIPs. It was certain that the EU and the US were the winners of the deal and the developing countries the ones who lost. This understanding, according to Bradford (2009), made a transfer payment from developed countries to developing countries necessary; this was made possible or facilitated by the institution of the WTO. The developed countries agreed to cut their agricultural subsidies to compensate for the loss of developing countries from TRIPs.

According to Bradford (2010), because of uncertainty about the distributional consequences of the competition policy deal, the EU and the US could not decide about the transfers. In this situation, they therefore preferred to keep the *status quo* and abstain from adding other issues out of the risk of increased complexity and transaction costs (Bradford, 2010:36).

4- The need for a solid enforcement mechanism makes the WTO a better cooperation venue in comparison to bilateral and regional arrangements

States always have an incentive to defect on the package deals they have negotiated; the WTO can reduce this temptation by authorising trade retaliation measures and holding states accountable to their obligations. This is particularly so when the strategic relationship between the states is one resembling that of the Prisoner’s Dilemma, where cheating is difficult to detect and the chance of opportunism is relatively high (Bradford, 2010:13-14). In fact, argues Bradford, the enforceability of the WTO agreements sheds doubt on the widely held idea that international trade law is soft and states comply on a voluntary basis.

The fear of defection was an important aspect of the strategic situation characterising the TRIPS negotiations, leading the member states to pursue legally binding, enforceable commitments within the WTO, “from the outset, states’ ability to resort to the DSM to contain other states’ incentives to defect motivated the negotiation of the TRIPS agreement within the WTO” (Bradford, 2010:39). Bradford (2007, 2009, 2010) asserts that because of uncertainties that a

competition deal might bring about, states preferred to keep it unbinding; they therefore shunned serious talks in the WTO: “Consequently, states are likely to find it rational to continue to rely on informal antitrust cooperation. One of the advantages of voluntary cooperation is states’ willingness to enter into deeper substantive commitments if those commitments are kept non-binding.” (Bradford, 2007:439)

5- When the opportunity cost of non-cooperation is higher than the gains from cooperation in the WTO, the members work more enthusiastically for a solution

States’ choice of venue for negotiating international agreements is a function of associate costs. It reflects their perception of which institution allows them to obtain the best possible outcome at the lowest possible cost. Therefore, states’ inclination to pursue a deal in the WTO depends on the availability of alternatives that exist outside the WTO, such as RTAs. The higher the opportunity costs of non-agreement in the WTO, the more would be the states’ efforts to deal with the underlying issue in the WTO:

“In contrast, the more content states are with the status quo or the more alternatives they have outside of the WTO, the lower costs are to forgo WTO negotiations. Thus, the likelihood of a WTO agreement is often not only a function of costs and benefits of that agreement, but also a function of the opportunity costs of a non-WTO agreement” (Bradford, 2010:14).

All in all, Bradford’s account of the future of competition policy in the WTO is not very promising. She recaps her argument by asserting that the progress of the WTO’s competition deal indicates little guidance on the possible outcome of the talks and, more importantly, shows little guidance on the distributional consequences of the competition accord. The substantial ambiguity of the gain and loss of the deal does not produce enough incentives for the states, as well as their constituent interest groups, to support such an agreement. On the future of the talks she stipulates

“As long as the preference heterogeneity, distributional conflict, and underlying uncertainty prevail, negotiations in the WTO framework are unlikely to show any significant progress, especially if the benefits from formal cooperation remain debatable and the costs of non-cooperation acceptable. Under these conditions, any meaningful binding international antitrust agreement continues to be implausible” (Bradford, 2007:439).

Phillip Marsden: Trade Vs Competition policy and the concept of Finis Opus Coronat

Phillip Marsden’s detailed study (2003) approaches the EU-US’s competition interaction in the WTO with an eye to proving which of the two countries has offered a more economically sound proposal. In its distinct way, Marsden’s work sides with studies – but is not limited to – by Anderson and Holmes (2002), Neven and Seabright (1997), Devuyt (2002), Consumer

International (2003), Bilal and Olarreaga (1998), Hoekman and Holmes (1999), Hoekman and Saggi (2003), and Roessler (1999). These studies all approach the case for WTO's CPA in a normative way to evaluate what is right or wrong in the debate for an international institution for regulation of antitrust.

To begin, Marsden (2003) echoes those who see the WTO as being the right place for a world competition policy: "...the location of any agreement on competition rules will be the WTO, where commitments are binding and enforceable" (Marsden, 2003:39). Competition policy is linked to a number of social, industrial, technological and environmental policies. Among these, he focuses on the interaction between trade and competition policy, assuming that it is the dichotomy of trade vs competition that is at the centre of the WTO's CP stand-off. In this vein, he argues that damage to one's trade as a result of one of the four modes of business restrictive practices is not a sound test of injury; this is because chances are that some supposedly highly desirable economic efficiency is forgone.

Marsden initially gives a critique of several current proposals for the regulation of competition in the WTO. To him, the frameworks introduced in some of these proposals are skewed and loaded; therefore, any agreement that might result from them will neglect market principles and becomes a burden on successful enterprises. He further argues that many of these proposals are, in essence, irrelevant, if not detrimental to the basic principles of competition because they tend to add nothing to, and could even take much away from current commitments that already exist within the WTO system for restrictive business practices.

Some of the proposals put forward the idea that the regulators at the national level must ensure that restrictive business measures would not have substantial adverse effect on foreign competitors. The core of these proposals is an adherence to international trade and access to domestic markets of the WTO member states. This requires states abandoning inappropriately narrow and parochial concerns and adopting more cosmopolitan competition principles instead (for more information Marsden (2003) refers the readers to Fox, 1998). In its proposal for the WTO's competition policy for instance, the EU suggests that WTO member states forbid a substantial foreclosure of competitors, especially if they are foreigners, because such policy curbs market access of foreigners and therefore restricts trade. This position requires that members of the WTO not only monitor their markets for business arrangements that substantially impede foreign entry, which is already the case in many countries, but also measure how far the reduced foreign presence dilutes competition in their markets. Within the framework of this proposal, countries are required to demonstrate special attention to the presence of foreign firms as a means of ensuring their markets remain competitive. "Just as with its own approach under various provisions of the EU law, the EU wants members to introduce a

separate offence of substantial foreclosure of the domestic market” notes Marsden (2003; 208). He quotes former EU commissioner Sir Leon Brittan once saying that as a market would be assessed to be more closed, greater weight needs to be given to the importance of foreign competition to balance entry barriers (Marsden, 2003:206).

In response to those proposals that favour priority of open trade over regulation of competition (Marsden puts the EU’s position into this category) Marsden puts forward three major points. First, he argues that the EU model is developed for the EU and is not necessarily appropriate for other countries, “...the EU paradigm may make sense in the context of creating an economic and political union, but the rest of the world has other, lesser ambition” (Marsden, 2005:98-99).

Second, these proposals are not realistic and would skew competition-based tests by introducing a form of “foreign favoritism” (Marsden, 2003:207) into domestic competition policies whereas they must remain neutral and objective in analysing business made restrictions. Foreign favouritism hidden in these proposals requires a test of market foreclosure to foreigners, according to Marsden, goes beyond the current regime in the WTO, which limits countries’ liability to observe national treatment (NT). He concludes that these proposals, “therefore, appears to clash with existing trade and competition practice, and are unlikely to be accepted by most WTO Members” (Marsden, 2003:207).

Third, a market foreclosure test opens national competition policies to WTO scrutiny and surveillance. Panels then would be missioned to analyse compatibility of national competition policies with commitment of countries. In doing so, they may have to analyse not only national policies but also individual cases. Since WTO members are very unlikely to tolerate such an action, the future of any cooperation remains murky (Marsden, 2003:217).

Before introducing his solution, Marsden concludes that trade sympathetic proposals suggest that WTO members either change their competition policy so that more attention is paid to the impact of exclusionary arrangements on trade, or simply introduce new regulations to improve the position of foreign companies in their markets (Marsden, 2003:91-123).

To Marsden this is wrong. Both trade and competition policies are pro-competition and share the ultimate goal of increasing efficiency in the markets: “...the shared aim of trade and competition policy is efficiency” (Marsden, 2003:257), so seeing a rivalry between the two is a misperception. He further elaborates that once an exclusive arrangement creates efficiency in a given market and in doing so one or a number of competitors are excluded from that market, the question of a competitor’s nationality is irrelevant.

Therefore, he takes a firm stance on proponents of market access proposals and sees their approach ‘myopic’ as they take the means of trade policy – i.e., market access – for its end, which according to Marsden is increased efficiency (Marsden, 2003:257).

“The main proposals for further WTO ‘competition’ rules all start from the same premise: a belief that competition policy analyses can itself be a barrier to increased trade. In particular, the proposals attack competition policy’s insistence on prohibiting only those practices which are harmful to the competitive process itself, rather than what may appear to be harmful to specific competitors, particularly foreign competitors. The proposals seek to remove this barrier either directly or indirectly. The direct approach would alter competition policy analysis itself to make it display a greater concern for foreign competitors or for world welfare as a whole. The indirect (though arguably more forceful) approach would ignore competition policy and simply create new ‘rights’ for foreign competitors to access new markets, with corresponding duties on competitors and their governments... the folly of the proposals lies in the fact that they would distort both competition and the efficient operation of markets, without offering any lasting benefit for market access.”

Marsden (2003) believes there is a third way forward without compromising trade and competition policies suggested by other proposals. The ‘Marsden way’ is a framework of legal and economic reasoning for the review of exclusionary arrangements, and of their toleration by competition authorities, which accords with the aims of both trade and competition policies. As a substitute to the available proposals, in his PhD research Marsden (2003) proposes that the concept of *Finis Opus Coronat* – to the victor belongs the crown – should lead the negotiations where the most efficient enterprises, regardless of their origin and nationality, are ensured not to be negatively disciplined as a result of market access concerns. This will help the two often conflicting aspects of trade and competition policy to finally work together to address harmful business conduct, without unnecessarily disciplining successful companies.

Marsden’s solution is made up of two consecutive but mutually independent tests. The first satisfies trade concerns (i.e., market access), and the second addresses competition concerns while having an international flavour. He argues that once market disclosure effect of an action is proven, to satisfy a test of substantial impediment to trade, a further test of ‘substantial lessening of competition’ is needed. He emphasises that this second test should be “rational, reasonable and capable of being implemented in practice, and should be acceptable to all WTO members” (Marsden, 2003:277).

Moreover, by no means should the competition rules be subordinated to other priorities except competition policy itself (Marsden, 2003:40). Based on a number of competition related disputes,¹ Marsden traces the different views taken by the European and US authorities and

¹ Most particularly the US vs Japan Kodak-Fuji, as well as the merger initiations of General Electric with Honeywell, and Boeing with McDonnell Douglas.

rejects the perspectives that suggest competition authorities need to tolerate exclusive business arrangements that appear to exclude competitors, and foreign competitors in particular.

Chad Damro: Arguing the Orthodoxy

Damro's work is typical of studies that see domestic forces as the main factors in shaping states' behaviour for international competition arrangements. Ostry (1997), Sokol (2008), Sydorak (2009), Campbell and Trebilcock (1997), all – in their different ways – address matters of international interactions for competition policy in conjunction with national level factors.

Damro has also studied and written about international initiatives for the regulation of competition (see, for example, Damro, 2006a, 2006b, 2007, 2012). His works study the main actors, forces and dynamics that shape international CP interactions. Drawing on these factors, and contrary to Bradford and Marsden who take the desirability of the WTO for the CPA for granted, Damro (2006a) concludes that the WTO cannot host the CPA. For Damro, the EU, the US, and developing countries as a whole, are the actors who each pursue their interests in a world CP arrangement, and their behaviour for an international competition regime is formed and informed by domestic institutions and international forces. As for the model, he builds on different variations of principle-agency theory and two-level game as introduced by Putnam (1988) and utilised by Milner (1998).

Damro clearly identifies the EU and the US as two actors that seek international arrangements for competition policy (Damro, 2006a):

“The European Union (EU) is an active participant in international discussions of competition policy as part of its ‘deep trade agenda’ ... It is ...a leading advocate of international competition policy co-ordination”.

As for the US, Damro's works (2006a, 2006b) suggest that the US has actively influenced competition related issues on a world scale. International organisations, such as WTO, OECD, ICN and UNCTAD, are amongst the many venues with whom the US has engaged with the EU over antitrust. Moreover, Damro brings into his studies the many bilateral pacts that the two have signed to show the interests involved (see, for example, Damro and Guay, 2016).

To Damro (2006a), there are two major forces that shape actors CP behaviour: international forces and domestic forces. In terms of international forces, the twin rise of the international capital movement, and proliferation of countries passing and rigorously enforcing their national competition policies, are potential causes of friction among countries. On the one hand, countries try to furnish a thriving environment for both their inward and outward capital. At the same time, they also attempt to minimise the adverse effects of such movements on their

national economy. So, competition authorities struggle to find ways of expanding their national jurisdiction, or lose their ability to control variables that affect the quality of investment across or outside their national borders. To make things more complicated, these somewhat contradictory objectives sometimes lead to politicisation of international CP cases; this usually leads to decisions that harm economic interdependence between countries, the EU and the US in particular, and reduce global economic competitiveness (Damro, 2012:643). Competition policy regulators therefore have an incentive to try to mitigate divergent decisions (Damro, 2012:646) and de-politicise competition disputes (such as the EU-US confrontation in the Boeing McDonnell Douglass merger) by either avoiding such disputes or establishing an international arrangement that helps mitigate competition conflicts (Damro, 2012:653-658). According to Damro, these factors are international forces that make the case for international cooperation for a world CP deal (Damro, 2006a:868).

The domestic forces are fundamentally different but are relatively even more important in shaping the type of international arrangements that different actors seek to establish. Damro (2007) argues that the relationship between politicians and competition regulators, mostly theorised by the Principle-Agent scholarship, is the key to understanding the domestic forces that shape interaction cooperation.

Politicians – as principles – often delegate authority to competition regulators – acting as agents – on a contractual basis. The politicians cannot monitor and direct all competition activities because of associated costs. Competition regulators in their own right expand their decision-making autonomy to produce outputs that conform to their own preferences. As explained in the dynamics in more detail below, Damro (2006b) argues that the conflictual relationship between the principle and agent is a force that shapes international CP activities of the EU and the US.

In his contributions, Damro (see for instance 2006a:200; 1999; 2012) identifies two major interaction models among and within each international player for a CP deal. First, the principle-agent relationship is the dominant model, and the interplay between national centres of power significantly shape states' overall behaviour at the international level. Second, he argues that the US and the EU follow the strategy of a two level game in their CP interactions.

Damro's (see for instance, Damro, 2012) depiction of the international CP interplay between the US and the EU holds that the behaviour of these states is highly influenced by Principle-Agent (PA) model. Very briefly, the model holds that politicians (the principals) delegate authority – on a contractual basis – to competition regulators that act as agents in the PA model. This entails delegating authority to engage in certain activities at the agent's discretion. Due to limited resources, principals cannot legislate and observe all the actions of their agents. However, when

discretionary authority is broad, CP authorities pursue objectives that serve their own purpose and often go beyond the politicians' initial intentions. In this relationship, the CP regulators apparently enjoy a strong bargaining position because of their technical and institutional expertise. As a result, competition related departments in both the EU and the US are increasingly able to pursue greater autonomy that, in turn, increases their ability to enact outcomes different from the policies preferred by the principle, i.e., those who originally delegated power to them.

Damro (2006b) argues that domestic conflicts between politicians and CP agencies is the main force, among other forces whether domestic or international, that informs the substance, process and quality of interactions demanded by main actors for a world level competition arrangement.

The two level game argument, which builds on Putnam's (1988) and Milner's (1998) studies mentioned earlier, holds that the game that either of the EU and the US has played for international antitrust arrangement is constrained at Level 1 (international level) by the need for agreement with foreign counterparts. At Level 2 (the domestic level), the game follows the policy preferences of domestic actors (being politicians and CP agencies), and the institutions for power-sharing among them. Damro (2006a; 2006b) explains the dynamics as that the domestic conflict leads CP regulators to free themselves from limitations imposed on them by politicians, by attempting to pursue non-treaty agreements that fully fall under regulators' own discretionary authority. This would strip the politicians of their ratifying power, and places the regulators in the position of the executives in the traditional two-level game, making them a domestic-international interface. As a result, each of the US and EU CP regulators "are constrained at Level 1 by the need for agreement by foreign regulators and at Level II by the domestic institutions of power-sharing that guarantee a role for domestic political actors" (Damro, 2006b:174). The interplay of the two games leads the regulators "to pursue non-treaty agreements instead of treaties".

Damro concludes that:

"I find that EU-US cooperation in competition relations is best explained as driven by competition regulators reacting — within the constraints of domestic political institutions — to the external challenge of economic internationalization" (Damro, 2006b:173).

Damro (2006a) reaches a different conclusion from Bradford and Marsden's with regard to a required institution being needed to foster competition. Building on the assumption that the two-level game is the dominant model, and the domestic principle-agent consideration is the main force in framing the actors' behaviour, he further sets out to investigate the way different international institutions may play roles in the world competition game. In particular, his study

makes queries about the kind of international institution that is likely to entertain international antitrust cooperation. Damro (2006a) explains that the desired institutions are those that can mitigate the likelihood of different decisions in individual competition cases by concerned actors. National CP representatives seek to develop an international competition regime that promotes dispute prevention over a reliance on political dispute resolution. In other words, the regulators prefer that their “foreign counterparts reach the same decision in multi-jurisdictional competition cases because conflicting decisions can lead to political intervention and undesirable trade linkages and tensions” (2006a:880). To apply his theory on real cases, Damro identifies five legal characteristics and then compares some different international competition related institutions, including the WTO. The characteristics are international coverage, being a binding, primary target of activity, issue mandate and representation. Damro’s 2006a) analysis suggests that, out of the five institutions compared, competition policy will be pursued through all venues except the WTO. UNCTAD, the OECD and ICN, in particular, promote non-binding regimes because of their ability to reduce the likelihood of competition-related disputes that could “threaten international economic stability” (Damro, 2006a:880).

The Way Forward

The contributions mentioned in this chapter each have shed light on one or more aspects of EU-US CPA interactions. In doing so, they go some way towards explaining the WTO’s failure in the CPA talks, and pave the road for additional works. The insights highlight the areas that need to be further explored.

Bradford’s (2010) work suggests that in the presence of certain variables, the initiation in the WTO for the CPA could bear fruit. The existence of five conditions expedites the process, and their absence hinders cooperation for an antitrust deal. For example, she suggests that the cooperation of great powers, i.e., the US and the EU, is instrumental for the success of the WTO’s CP talks. In a similar way, Damro (2006a) hints at certain characteristics that subordinate the WTO to other international venues for antitrust cooperation. More precisely, he believes the WTO is not the chosen venue for cooperation because a CP agreement in the WTO limits the sought after discretion of competition regulators at the domestic tier. Marsden (2003) takes a normative approach to suggest that the WTO’s CPA must not seek to subordinate competition requirements to trade concerns, indicating that cooperation will be expedited just when the EU modifies its proposal to realise the concept of *Finis Opus Coronat*.

Missing in these works is a systematic attention to the WTO as a significant force in its own right. Neither Bradford nor Damro take on themselves to see, for instance, in what ways the substance of the competition’s regulatory regime (e.g., the regulation of mergers, abuse of

dominant position, etc.) as demanded by either the US and the EU, talks to the WTO as a regime with stablished principles, rules and decision-making process that can affect cooperation in many ways. Bradford (see for instance 2010) somehow gets close to this point when she mentions the WTO's dispute settlement system as a mechanism that ensures compliance. However, yet again, she approaches the point as though current DSM is equally demanded by the parties for the CPA without any empirical inquiry as to the proposals made by the US and the EU. In other words, it seems as though Damro and Bradford's works are a general cooperation analysis in the WTO and can be readily applied to any new issue raised in the WTO, regardless of being antitrust or any other subjects being government procurement, trade facilitation, etc.

Marsden (2003) actually engages with the substance of the CPA in the WTO, but does it in a very narrow way. He draws on actual proposals to build a trade-off argument between the trade policy instituted by the WTO and competition policy requirements as demanded by the EU and the US. Yet from the many actors, actions, possible consequences and remedies he studies, the injury test is the only one of the interfaces that the proposals from the two sides of Atlantic may have according to the 'literature framework' mentioned above.

These contributions accentuate a gap for the studies that take the institution of the WTO as the centre of gravity in the analysis of the CPA developments in the WTO in 1997-2004. Each of the three studies mentioned above takes a number of actors, and a few relationships between them. Bradford, Marsden and Damro touch on the WTO here and there, but each give disproportional weight to the WTO as the platform institution with significant force in fostering/breaking cooperation. As such, they fail to really engage with the WTO in a fundamental way so as to see in what ways it has affected the quality of cooperation between the EU and the US over important variables, such as scope, centralisation and membership of the CPA in the period under study. They have all, to different degrees, ignored the fact that the WTO is a robust institution with certain principles, rules, norms and procedures that can exert a heavy impact on different aspects of the EU's and US's proposals.

For one thing, to mention one of the many, the WTO's effect is more than likely to be unequal, not only on each of the EU's and the US's proposals in general, but on every bit of each proposal. As a result, positions expressed by the US and the EU are likely to become heavier and lighter on the other party, depending on where the WTO's weight falls. In Bradford's works (2007, 2009, 2010), for example, such an unequal impact of the institution of the WTO is ignored altogether. For instance, her contribution (2009) has clearly assumed that the WTO's rules are all equally demanded by the EU and the US. Therefore, she takes such a demand for granted, without paying due attention to the fact that it might actually be the case that the

WTO's rules load each party's CP proposal in different directions and magnitudes, giving either the EU or the US an advantage or disadvantage in the negotiations. A case in point is Bradford's (2010) view of the dispute settlement mechanism in the WTO. She assumes that the EU and the US both view the settlement mechanism of the WTO favourably and equally, whereas, there are strong arguments that the WTO's powerful settlement mechanism is very likely to dampen the appetite for cooperation from either party because of a country's fear that its manoeuvring space for interpretation of the CPA will be substantially reduced (see, for instance, Fearon, 1998).

Neither does Marsden's (2003) contribution see the WTO in many ways. From all possible interface points that the proposals of the EU and the US could have with the WTO's current rules, procedures and norms, Marsden concentrates on the injury test only, overlooking other features of the WTO that might have affected transatlantic cooperation over the CPA. Moreover, even in the only case that Marsden actually factors in the WTO as a variable, a very restricted economic perspective is adopted. *Finis Opus Coronat*, where Marsden argues that trade interests should not supersede competition concerns, hides a significant distributional implication between the EU and the US that needs to be addressed simply because, as Robert Pitofsky (1979) once mentioned, competition policy is no less a political matter as it is economic.

As such, Marsden's (2003) work remains very limited in terms of the many dimensions that the WTO could possibly affect cooperation between the EU and the US by just focusing on scope of the interactions (see Figure 2.2). Moreover, even in doing so, his interpretation of some of the concepts does not engage with the WTO deep enough. For instance, the term market access used by Marsden must be interpreted in conjunction with the concept of reciprocity and GATT's Article 23 on nullification and impairment. By definition, nullification and impairment may result from an action– or in the case of obligations, inaction– of a member; this compromises a reciprocal exchange of rights and obligations and imposes negative consequences on the international market access of other members. Countries were – and always are – very cautious about the distribution of gains between negotiating parties as new issues or rounds of trade liberalisation unfold. Studies show that some countries may even discontinue cooperating on a deal with considerable domestic benefits, primarily out of concern for an asymmetrical distribution of gains internationally (for example, see Grieco, 1990). Therefore, participants of the WTO's CPA will also make sure that in following Marsden's *Finis Opus Coronat*, close attention is paid to striking a favourable balance between the market access exchanged with others. Simply put, in the barter of market access, each country tries to get the greater access for opening up to foreigners.

Likewise, Marsden's study does not engage with the WTO as the nesting institution of the interaction deep enough to suggest in what ways the WTO can actually accommodate *Finis Opus Coronat*. In addition to the misinterpretation of the term 'market access', and similar to Bradford's (see for instance 2009) study, his analysis suffers a lack of attention to the way that the WTO, as a context in which the CP talks unfold, can accommodate his solution. It would be very hard for a country to pursue the new trade affecting provision of *Finis Opus Coronat* because there are just so many interests woven into the WTO's system that such a proposal would be doomed. Marsden claims that his solution is not incompatible with the current WTO regime. However, his work falls short of telling us how far *Finis Opus Coronat* is from the proposals of the EU and the US, and how the WTO – as the headstock of interactions – can readily lubricate convergence of the two proposals.

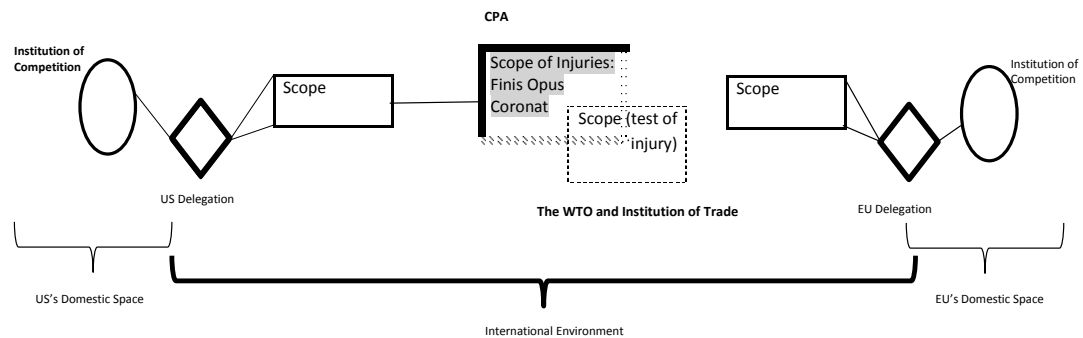


Figure 2.2: Factors handled by Marsden's Study

Source: Author

This is not a minor setback. Since Marsden's solution is highly 'de-politicised' it shows little clue as to how WTO members can push forward the competition debate from the current standoff towards *Finis Opus Coronat*. For instance, a few years before Marsden's contribution, under the influence of Joel Klein, the ICPAC report warned the US authorities against a WTO competition pact. One would expect Marsden to demonstrate in what ways *Finis Opus Coronat* can address the concerns of the ICPAC. It seems that Marsden's basic assumption is that the competition related talks in the WTO were aground primarily because the member countries could *not* find the right direction or solution to their differences: "the differences of approach undoubtedly affect the feasibility of forging multilateral agreement" (Marsden, 2003:95); therefore, a solution such as *Finis Opus Coronat* could help to overcome the problem. As will be discussed here, the problem might well be that one party feels negotiating CPA in the WTO

is swimming against the river flow because the WTO, as a regime with much force in shaping proposals, just lacks sympathy with their proposal.

Insufficient attention to the institution of the WTO is also palpable in Damro's works. For one thing, his narration is an oversimplification of the EU-US CPA interactions. The international forces that shaped the CPA talks are much more complicated than Damro's studies suggest, with the WTO alone inserting a number of key variables into the cooperation equations. The two international forces proposed by Damro (2006b) (i.e., increasing internationalisation of the world economy and looming threat of politicisation of competition issues), although important in their own right, fall short of bringing the impact of the WTO – for instance – in determining the substance and enforcement mechanism into analysis, hence the need for the CPA. Damro's account of the over politicisation of competition policy, for instance, shuns embracing the point that the antitrust developments in the world economy open new areas of rivalry on both sides of the Atlantic. For one thing, the impact of existing WTO rules concerning information sharing obligations, compliance surveillance, as well as a sophisticated dispute settlement mechanism, may in itself contribute to the degree of politicisation of antitrust in the EU and, particularly, the US. This fact becomes even more important once the non-discrimination principle of the WTO is added to the debate. Does the MFN, a basic pillar of the WTO, increase or decrease politicisation? What about the National Treatment rule? These factors have political repercussions in the EU-US relationship. By keeping them out of the analysis, Damro's analysis takes a significant variable out of the picture. Overlooking the WTO is an incorrect methodological oversimplification that has significant impact on the results and the policy recommendations that might follow.

Table 2.1 shows the main features of Bradford's, Marsden's and Damro's studies.

Table 2.1: Variables Covered by studies of Bradford, Marsden and Damro

Issue Analyst	Force forming the deadlock	Approach	Unit of analysis	Remedy	Engagement with the institution of WTO
Bradford	Eclectic	Comparative-Eclectic	US-EU Cooperation in the WTO	-	Very limited in depth
Marsden	Subordination of competition concerns to trade interests	Economic Efficiency	Injury test	Finis Opus Coronat	Very limited in scope
Damro	Domestic Actors + international investment trends	Principle-Agent	Complication of interests	Harmonization of National competition laws -No WTO	Extremely general - none

Source: Author

These studies suggest that this project is not the first to offer an explanation for the failure of WTO's CPA initiatives. Indeed, over the past decade or so, a number of explanations have been offered, of which the studies reviewed here are just typical. Some of these explanations advance our understanding of the mechanism of non-cooperation and are, in this sense, complementary to the present PhD project, while others are, in the author's view, weak and at times flawed.

It should be noted that, by way of contrast with these studies, there is a research gap for analysis of the fate of competition policy activities in the WTO. In these studies, the WTO is either considered a barren context, like Damro's (2006a) work, or if any role is seen for it, concerns solely one aspect, such as the enforcement capacity of the organisation in Bradford's (see for instance, 2010) work, of the many ways that the WTO could form and inform cooperation between the EU and the US in the period under study.

This research fills this gap by giving the WTO an identity that, in its own right, has an impact on cooperation between the EU and the US over terms of a multilateral competition regime. More particularly, the research investigates how the WTO, as an international institution and as an intervening variable, had an impact on the process of competition negotiations and which areas were more affected by such an impact.

Towards the Research Design: Some Clarifications

This section explains some necessary items that are needed for the research design that follows in the next chapter. These include focus/unit of analysis, the reason for the choice of actors, and the scientific discipline applied to the research.

Focus of the Study and the Unit of Analysis

It is normally the "formation" of a deal that has attracted academicians. However, non-formation of the CPA within the multilateral trading system for over six decades is a 'result' and 'outcome' that can be analysed and studied in its own right. It is true that neither now nor at any time in the past has the world had a competition regime in the GATT/WTO; however, a fine distinction must be made. There could not be a CPA because the member states of the WTO considered the CPA irrelevant to the world's economic system. Mergers, monopolisation of markets and other business restrictive practices had little or no impact on the ways international business was conducted. Neither did the CPA have the potential to affect the power relationship amongst nations at the international level. The formation of mega mergers and cartels were seen as simply economic decisions with little or no consequence on inter-state rivalry.

Yet we know that this is not the case. The anticompetitive arrangements do have a heavy impact on the global economy and potentially the power relationships amongst the concerned parties. In fact, these are the benefits of regulating competition that have given rise to the initiations within the multilateral trading system and the regional/bilateral agreements, the FTA's or others, alike for the terms of such accord. However, the course of interaction between interested parties has ended in a non-agreement stalemate in the WTO and some progress elsewhere, as mentioned earlier.

As said, this is an 'outcome' and 'product' in its own right. The present research seeks to explore the role played by the WTO as a platform with supposedly significant impact on cooperation between the member states. As such, the unit of analysis of the research is the WTO's impact over cooperation between the EU and the US for the CPA. The actors are obviously the EU and the US, as sovereign states represented by their delegation, and the WTO as a legal structure, not a forum and not an agent – in the sense of a principle-agent relationship – but a solid structure of existing rules that are hard to change beyond the flexibility fixed in them initially.

This research, however, starts from a simple observation; that the EU and the US have not been able to reach a deal on Competition Policy in the GATT/WTO for over 60 years, yet have successfully concluded some agreements outside the WTO with each other. Interestingly, both the EU and the US, furthermore, have actively cooperated in other CP related fora, such as the OECD and the ICN, and have also concluded a number of agreements with other countries in *ad hoc* competition agreements or within the framework of trade arrangements. So, why could not they do it in the WTO?

This observation leads to the possible role of the WTO, as the institution that, being the platform of the interactions, acted as an independent variable in the EU-US CPA cooperation. Put differently, this research depicts the EU-US interactions over a competition policy arrangement as being conducted in what Aggarwal (1983) calls 'nested' in the wider WTO's trading regime. As will be explained later in the chapter, the relationship between the broader contextual institution regime and a new issue can be diverse and at times even complex. However, the main point is that there are possible mutual impacts that restrain or facilitate formation of the new regime. In other words, and from the perspective of the hierarchy of systems, the initiations for the competition policy agreement are "nested" within the wider trading system. Therefore, the actions that countries take for the CP deal are influenced by the limits and frontiers set by the WTO as the nesting institution.

In general, as Haas (1989) has once mentioned, international regimes are not simply static summaries of rules and norms. They may also serve as “important vehicles for international learning that produce convergent state policies” (Haas, 1989:377); for the sake of clarity, it is not the learning variable that this research seeks; the stress is on the impact in defining the extent of acceptable proposals. The multilateral trading system, for one thing, is an established institution that can affect states’ behaviour in a whole host of different ways (for a thorough study see Jupille et al., 2013; Kono, 2007; Keohane, 1984; Krasner, 1982a; Aggarwal, 1983). For example, it is argued that institutions such as the WTO affect the cooperation calculations of the states, making it possible for the interacting parties to enter into mutually beneficial agreements with one another (Keohane, 1984:13). According to this perspective, the WTO is an intermediary variable that acts like a catalyst for inter-state cooperation in new areas. It can help negotiating parties to decrease their gaps by putting mechanisms into place that facilitate an exchange of information, reduces the chances of cheating, and lends some basic principles to the new subject in a very cost effective way.

With respect to the concept of nested regimes, the study by Aggarwal (1983) on the formation of the agreement in the textile trade, demonstrates that in the Tokyo Round contracting states avoided undermining the norms of GATT. Aggarwal suggests that the reason must be sought in the relationship between the two regimes. GATT was broader than the textile regime in creating and modifying the Long Term Arrangement on Cotton Textiles (LTA) and the Multifiber Arrangement (MFA), thus, they imported as many norms from GATT into the LTA and MFA as possible, and in doing so the nature of the textile regime was overhauled around GATT’s principles.

Such an approach to the CPA in the WTO sets the stage for a very neat research arrangement similar to that enjoyed in natural sciences. Since the EU-US cooperation has taken place outside of the WTO at the same that the initiations unfolded inside the organisation, this research’s formulation allows assuming that all variables are constant, except the environment of the interactions. Therefore, the *ceteris paribus* condition includes the actors, their motives, the time (the late 1990s), and the subject of negotiations – competition policy. The analysis based on this arrangement follows the logic of Method of Difference as laid by John Stewart Mill (1882). Since the actors and their motives are assumed to be unchanged, and only the context, being the WTO and elsewhere, in which the interactions take place is different, it can be concluded that the context, i.e., the WTO, has determined the fate of the CPA talks. The general reasoning is best read in Mill’s own words:

“If an instance in which the phenomenon under investigation occurs, and an instance in which it does not occur, have every circumstance save one in common, that one occurring only in the former; the circumstance in which alone the two instances differ,

is the effect, or cause, or a necessary part of the cause, of the phenomenon”(Mill, 1882:455-6).

Why only the US and the EU?

A possible question might arise as to the focus of the study being on the US and the EU as the main actors in the WTO’s CP fate: this is a legitimate question. It is clear that, in the course of Cancun Ministerial and elsewhere, developing countries had a genuine impact over the CPA’s fate and a massive role in its course of life. Yet, US-EU cooperation is even more relevant. The fact of the matter is that, as the history of the GATT/WTO has proven, a deal has little chance to break in the WTO without the explicit consent of these two countries. For instance, the Tokyo rounds agreements could not be finalised without close cooperation between the US and Europe (see for instance, Bradford, 2010; Grieco, 1990). If these two GATT partners agreed on “their respective rights and obligations” then “the code in question had a good chance of success; if they clashed – as in the technical barriers or government procurement agreement and specially the subsidy code – its prospects were markedly less favorable” (Grieco, 1990:142). A similar and more relevant observation is made by Bradford (2010:10), where she argues that the cooperation of the superpowers is critical for the CP talks. The United States and the European Union are the most powerful states within the multilateral trading system, and together can resort to coercive tactics by economic sanctions, withdrawal of economic benefits, and use of selective incentives and conditional benefits to persuade less powerful countries to adopt favourable trade policies.

The Discipline

Discipline wise, the project broadly falls within *International Political Economy (IPE)* scholarship. This choice is made out of the conviction that, given the actors, context and available facts, IPE provides an insightful framework for the analysis of the interactions for the CPA in its making. For one thing, the WTO is an interstate institution. Therefore, the choice of theory for the problematique of this project is strictly limited to addressing cooperation amongst sovereign states. As any interest group, political party, etc., can only hope to be presented or influence an agenda, processes or outcomes in the WTO only through the medium of a sovereign state, an analysis framework that builds on other actors is deemed less relevant if not completely wrong.

The theoretical framework of the study has four main sides: two theories of cooperation of neoliberal institutionalism, as the base theory, and neorealism as the critique, the theory of nested institutions, and finally the rational design of international institutionalism as the operationalising perspective. The nested institution theory has already been explained. It sees

the WTO as a platform with a true impact that is not neutral on the US-EU cooperation for the CPA.

The research builds its enquiry from neoliberal institutionalism to answer the research question: a theory optimistic about cooperation between states and one that sees much room for institutions such as the WTO for fostering cooperation. However, neorealism will be used to critically examine the maintained hypothesis of the research that, in addition to cheating concerns, other factors have complicated cooperation for a CPA in the WTO.

Both theories maintain that the international space is anarchical with the sovereign states being the main actors. However, neoliberal institutionalists invest much trust in international agencies. They assert the WTO as an international institution substantially decreases the chances of cheating in international deals. However, neoliberal institutionalism and neorealism disagree on the impact of gains on the decision of states for cooperation. While neorealists suggest that states pay much attention to the distribution of the gains that results from cooperation among the contracting parties, neoliberal institutionalists stress that it is the absolute gain that counts in cooperation among sovereign states. Therefore, as long as cheating risk is eliminated, countries will cooperate. As said, neoliberal institutionalism is the point of departure in the research and neorealism will be used to build a counterargument on the expected behaviour model of neoliberal institutionalism.

Lastly, rational design of international institutions suggest that the enforcement problem, the main issue in inter-state cooperation, plays itself out in three aspects of scope, degree of centralisation, and membership of the CPA. This theory will build the second layer of the research framework by lending itself as the operationalisation tool.

It must be noted that cognitive theory provides a third explanation for interstate cooperation. The theory recognises knowledge and perception as forces that affect decisions of diplomats/policymakers for international cooperation and conflict. We will return to these theories in the next chapter for a detailed discussion to choose the best mix of theories

Conclusions

This chapter exhausted the last steps before the main work. We revisited the assumptions beneath the research questions in terms of the real demand for international competition arrangements by either the EU or the US. We also reviewed the available literature on the US's and the EU's CPA relationships as they unfolded during 1997-2004 to see what others have left out and whether the gap is significant. The review justifies our approach in terms of bringing the WTO to the fore as the hotbed institution that hosted the initiatives and, as a result, could have

an impact on the quality of cooperation between the two countries. Moreover, the chapter set the stage for the research design in the next chapter by addressing the discipline, unit of analysis and importance of attention to the US-EU interaction in isolation from other countries for the CPA.

Chapter Three: Research Design and Methodology

The previous chapter examined some of the basic assumptions underlying the research question. The present chapter advances the work a step further by planning the research chain of argument that identifies the data needed for the research, and then links the empirical data on the ground to the research question. It further introduces the framework by which conclusions are drawn. Sequence wise, the theoretical framework of the research is defined. This includes identifying the basic propositions, choosing the most appropriate theories of cooperation given the core question of the research, and setting out the criteria for interpretation of the data. The next stage addresses the method, validity and reliability issues: the end of the chapter identifies sources and uses of data.

Theoretical Framework and Basic Research Propositions

This section sketches the theoretical framework of the project. It starts with a discussion of the cooperation between sovereign states where definitions, presumptions, facilitators and possible outcomes of cooperation are discussed. Following this is a discussion on the research's basic propositions and theories, and the chapter continues with a comparative analysis of cooperation related theories. These will pave the road for a discussion of the most appropriate set of theories given the research question, based on four criteria of stability versus change, proximity of cause and effect, ability of providing policy recommendation, and, finally, viability.

Cooperation and International Institutions

As suggested by the research questions, this project is about the ways the World Trade Organisation (WTO), as an institution that constitutes the external environment of the negotiations, can facilitate or hamper EU-US cooperation for a competition policy (CP) agreement. There are two relationships involved. On the one hand, the WTO can help interacting parties increase collective gains. In Chapter 2 we discussed the fact that both the EU and the US claim to have something to gain from an international cooperation arrangement. In addition, they both acclaim, in their different ways, that the WTO can lubricate interactions for these gains to materialise (there are many quotes on this matter: see for instance, EC, 1999b:2; US, 1997b:2; USWTOSUPPORT, EUWTOSUPPORT). On the other hand, the WTO, being an established international institution, can affect the distribution of gains and costs between parties (e.g., Krasner, 1982a). Such an impact becomes even more important once it is noted that the WTO is resistant to change (for example, see Powell, 1994:341) and the arrangements coming under it tend to last for long periods (Knight, 1992). This emphasises the significance of

its shadow on cooperation and conflict for the CPA because of the length of distributional impact in terms of gain and loss.

The WTO can facilitate cooperation in a number of ways. Seeing it as a regime, it is essentially an institution based on a set of principles, rules, norms and decision-making procedures around which governments' expectations converge over an issue (Keohane, 1993:23-45; Krasner, 1982a:186). For instance, the WTO can boost cooperation by acting as an enforcement agent of the competition policy agreement (CPA). As a result, cheating opportunities are significantly reduced and parties more willingly enter into cooperation. The world trading regime can also overcome temptations of free-riding by member countries through putting mechanisms for monitoring into place, and by sanctioning unaccepted behaviour. The WTO, moreover, can promote cooperation through prompt and precise dissemination of information amongst countries.

As discussed later in the research, the many Working Groups on Trade and Competition Policy documents over the CPA initiations demonstrate that the WTO has been very helpful for gathering and disseminating EU and US CP preferences (and, of course, all other participating countries), by setting appropriate meeting agendas that address points of convergence. This information management function, for one thing, helps member states to eliminate acute information asymmetry over competition policy that hinders cooperation between members. It is also worth noting that, as Haas (1982) points out, in our highly complex world in which *ad hoc*, individualistic calculations of interest could not possibly provide the necessary level of coordination for the CPA, the WTO as a forum for delegations, experts and negotiators can play a decisive role in bridging the differences between the EU and the US.

Having said that, the WTO can also constrain CPA cooperation between the EU and the US. This anti-cooperation attribute is rooted in the WTO's robust structure that can substantially curtail the ambitions for power through structural means. The WTO is based on a number of principles and rules that show a strong capacity to resist change over time (Krasner, 1982b:502; Stein, 1982:322). The multilateral trading system, as Powell puts it, is typical of robust regimes in which "institutional history matters", so that the prior institutional choices constrain collective decisions and behaviour in later periods (Powell, 1994:341). Now, for a new issue such as the CPA, if these principles/rules, etc., furnish the wants of one party to the detriment of the other party, since the latter can *not* be hopeful of altering the extant system to serve its interests in the new area, it becomes demotivated to cooperate, and possibly looks for another international platform.

Such an effect can best be understood under the concept of structural power. For various reasons, nation states seek to empower themselves by producing effects that increase their capacities to determine their circumstances and fate (Barnett and Duvall, 2005). A main form of this power is what international political economy (IPE) scholars call ‘structural power’, identified as the capability to shape and determine the structures of the global political economy within which other states work and live. This is the power to decide how things are to be done: the power to shape frameworks within which states relate to each other (Strange, 1994:24-25; Cohen, 2000). Essentially, therefore, structural power allows its holders to mould the options of other states without exercising force. As far as the WTO’s antitrust is concerned, structural power of this nature means more than the power to set the agenda of discussion in Working Group on the Interaction between Trade and Competition Policy (WGTCPP) or even WTO’s Ministerials. It is primarily about designing an international competition agreement that, as Susan Strange suggests (1994:25), is aimed at setting the rules and customs that are supposed to structure not only inter-state terms of economic rivalry, but also the way that other states’ internal political institutions, their economic enterprises, and their professional people have to operate.

As a result, a party would be immensely demotivated to cooperate if the WTO’s extant rules, procedures, etc., work to serve the positions of the other interacting party. It is difficult for the quest for structural power in antitrust matters to succeed if its terms are at odds with principles/norms of the WTO. For example, the General Agreement on Tariffs and Trade’s (GATT) principle of non-discrimination and consensus-based decision-making has remained intact since 1947, and reverberated itself into new agreements despite GATT’s and later WTO’s expansion in terms of coverage and new membership.

Cooperation Theories; a Snapshot

The WTO, as one among different venues with its own distinct regime, therefore has an impact on antitrust interactions. This impact can be positive or negative, with the potential of facilitating cooperation or increasing the gap between the EU and the US over an issue area. Various theories to shed light on the relationship between regimes and international cooperation have been proposed. These theories are classified under three main headings of neorealism, neoliberal institutionalism and cognitive theories as explained below. The next section gives a summary of the main features of these theories, and provides the basis for the analysis of the most relevant theory to this project that comes later in the chapter.

There are three core explanations for the impact of regimes on interstate cooperation (see, for example, Haas, 1995:177-178; Young and Osherenko, 1995:224-226; Hasenclever et al., 2004). First are interest-based theories among which neoliberal institutionalism stands out as the major

contribution. Second, power-based theories that are primarily represented by neorealism, and a third category, known as knowledge-based theories, which emphasises knowledge dynamics, communication and identities. A short summary of each and the way they relate to the research question of this project is provided below. This will be followed by an analysis for choosing the most appropriate theories for the research.

Neoliberal Institutionalism, Inter-state Cooperation and International Institutions

Neoliberal institutionalism is optimistic about inter-state cooperation. It also sees a positive role for international institutions in fostering cooperation. In this account of international relations, institutions such as the world trading system facilitate cooperation by curbing the effects of anarchy, reducing transaction costs of cooperation through the exchange of information, and setting into motion a system of enforcement. Neoliberal institutionalism shares many assumptions of neorealists, such as the concept of anarchy and primacy of states in international space, and that in anarchy, states are equal in statehood. Neoliberal institutionalism, however, posits that states behave as rational-egoists and their choices are constrained by factors such as bounded rationality (e.g., Keohane, 1984:110-133) and imperfect knowledge/information (Shepsle, 1989:138-139).

International institutions/regimes are helpful in mitigating the effects of anarchy on cooperation by increasing predictability of the behaviour of parties. Institutionalists suggest that the Prisoner's Dilemma type of structure (that neorealists assume to preside over inter-state relations) is a disfigured depiction of the realities of the world. In neoliberal institutionalism's account of inter-state interactions, the relationship between states builds over a long period of time and a repetition of interactions makes cooperation a rational behaviour (for example, see Keohane, 1984:67-70). In this relationship, the sum of relatively small cooperative payoffs over a longer period of time can be greater than the gain from a single-shot exploitation of the other party (Axelrod, 1984). The increased predictability power for rational parties in the long run, on the one hand, reduces states' fears of defect of the of their counterparts, and on the other hand, discourages their own propensity to do so (Milner, 1992:475). Likewise, by facilitating an exchange of information between member-states, international regimes contribute to predictability, therefore curbing the effects of anarchy.

Neoliberal institutionalism further adds to the significance of its cooperation theory by incorporating the concept of 'transaction cost' in international regimes. Keohane (1984) maintains that an already established regime, such as the world trading system under GATT and the WTO, are helpful in facilitating further cooperation in new areas by reducing transaction costs through the exchange of information and facilitation of side payments. Side payments

allow for a balanced exchange of concessions that are likely to lead to a more acceptable distribution of gains between parties. In *After Hegemony* (1984:99), Keohane writes:

“clustering of issues under a regime facilitates side-payments among those issues: more potential quids are available for the quo. Without international regimes linking clusters of issues to one another, side payments and linkages would be difficult to arrange in world politics.”

The key to understanding neoliberal institutionalism’s explanation of cooperation is iteration, information and rationality. Neoliberal institutionalists’ argument for an inter-state relationship is informed by the game of prisoner’s dilemma (Keohane, 1984). Under this game, each party has the option of cooperating or cheating but cannot, as discussed under the concept of interdependence, eliminate the other player or avoid the game altogether (Axelrod, 1984:10-12). In terms of the payoffs, a participant’s gain is maximised when it cheats at the same time as the other state plays cooperatively. In cases where both states follow a cooperative strategy, each would end up gaining less than when it cheats; however, this saves the worst scenario that entails both parties ending up with the least possible gain or end up in loss. This happens when the involved states mutually seek to follow a strategy of cheating. Aware of the fact that more interactions are unavoidable, each state, which is egoistic in nature, is then compelled to overcome the temptation to cheat and enter into cooperation while still aware that the payoff for cheating is higher.

The cooperation/cheating dilemma is solved, according to neoliberal institutionalists, when the parties, being rational entities, realise that the game, and more similar games, are played over and over again; in the long run their benefit lies in following a cooperation strategy. Essentially, parties substitute the short-run chance of immediate and higher gains that result from successful cheating with safe mutual gains that long-run cooperation brings. By doing so, they also avoid the worst scenario in which the loss of both parties is maximised. In Hardin’s (1982) account of strategic cooperation, when a game is iterated parties to the game become strategic partners of each other; this is because their decisions would now affect the kind of game played by their counterpart. That in turn feeds back into the next decision of the first state and so on. Keohane (1984:75) in general accepts Hardin’s account where the latter writes:

“It is generally agreed that players may rationally cooperate in iterated Prisoner’s Dilemma. When there is even tacit opportunity for making one’s choices contingent on those of one’s adversary-partner, that is, of threatening the partner with defection in return for defection, rationality can become strategic” (Hardin, 1982:145).

To recap, according to the neoliberal institutionalism, international institutions like the WTO reduce the costs of negotiations to a significant degree in a host of ways, most notably in addressing cheating and ensuring enforcement.

Neorealism, Inter-state Cooperation and International Institutions

Neorealism criticises neoliberal institutionalism on a number of grounds. Neorealists argue that international cooperation among states, on security as well as economic issues (Snidel, 1991:703), is hard to realise. Although some neorealists confirm that cooperation exists in international space, they see it more as a puzzle and exception rather than the norm (Hasenclever et al., 2004:3). Neorealist theory recognises states as the only international actors, and further insists that anarchy imposes a “security dilemma” on states that drives them towards power rivalry with other states that, in turn, make cooperation unlikely (Waltz, 2010).

The anarchical nature of the international relationship, and the need for self-help, makes states less willing to cooperate, even with the existence of common interests (Mearsheimer, 1994:12; Gilpin, 1984). Without a central authority in the international system, the theory maintains, security is a tenacious concern for states because they have to rely solely on their own capabilities in terms of military power and economic might (Waltz, 2010:). Political scientists mention that power is hard to define (see, for example, Gilpin, 1981:31), however, it can be accepted that power is “the capacity to direct the decisions and actions of others” (Marcella, 2004).

More precisely, from a neorealist point of view, there are three obstacles to international cooperation, and international institutions cannot, contrary to neoliberal institutionalism’s argument, overcome these obstacles. These are probability of cheating (Mearsheimer, 1994), the need for self-reliance, hence the need for policy space, and finally concern for distribution of gains upon an act of cooperation (Snidal, 1990; Grieco, 1990).

Cheating is considered a main obstacle to cooperation; and international institutions are only considered epiphenomenal in overcoming this problem (Mearsheimer, 1994). In the absence of a world governing mechanism, and given states’ powerful incentives to take advantage of other states, there is no guarantee that they will respect their obligations under an agreement leaving the ever looming chance of defection.

International institutions/regimes are potentially a hindrance to cooperation because they, being rigid and ‘path dependent’ (Pierson, 2000), can limit the policy space that states need. With an assumption of anarchy in international relations, neorealists conclude that states live within a self-help system and need to keep their action space open. They need to be flexible in adopting whatever measures are needed so that they can ensure balance of power with other states. International institutions limit this freedom (for a detailed discussion, see Keohane, 1984:85-109).

In addition to the risk of cheating and concern for policy space, what matters most for any single state contemplating cooperation is the way that benefits of the mutual cooperative behaviour are split amongst the interacting parties. Neorealists maintain that states are positional (Grieco, 1990), therefore they may decide not to cooperate in cases where a partner gains more than they do (Waltz, 2010:105-106). Each side not only considers its individual gain, but also pays attention to the gains of its counterpart. Obviously, cooperation is more difficult to achieve when states are attuned to a relative-gains framework rather than absolute-gains logic. This is because if states are concerned only for absolute gains, they just need to make sure that, “the pie is expanding and that they are getting at least some portion of the increase, while states that worry about relative gains must care also about how the pie is divided, which complicates cooperative efforts” (Mearsheimer, 1994:12-13).

In the neorealists’ account, an international establishment such as the WTO does not necessarily solve cooperation issues. In fact, international institutions by themselves are primarily displays of power rivalry between powerful states (Mearsheimer, 1994:13). As such, international institutions in themselves are subject to distribution of power among states. In other words, regimes are “merely arenas for acting out power relationships, rather than themselves shaping outcomes” (Menon, 2010:86), therefore, “States themselves must choose to obey the rules they created” (Mearsheimer, 1994:9) rather than being constrained by international institutions. They do so only if calculations show them that it is beneficial to do so: “In short, the balance of power is the independent variable ...; institutions are merely an intervening variable in the process” (Mearsheimer, 1994:13).

Neorealists are not all despaired for international cooperation (see Mearsheimer, 1994:13). For instance, based on his detailed analysis of the GATT negotiations of the Tokyo round, Grieco (1990) builds on the earlier idea of Morgenthau to argue that a balanced agreement increases the chance of cooperation, despite neorealists’ general pessimism for cooperation:

“Faced with both potential problems – cheating and gaps in gains – states seek to ensure that partners comply with their promises and that their collaborative arrangements produce “balanced” or “equitable” achievement of gains. According to realists, states define balance and equity as a distribution of gains that roughly maintains pre-cooperation balances of capabilities” (Grieco, 1990:47).

In all, in neorealism’s account of international relations, cooperation may happen (Mearsheimer, 1994:13) but, contrary to neoliberal institutionalism’s argument, it is an unlikely event. International organisations such as the WTO have an impact on cooperation, but for that to happen certain conditions, beyond enforcement concerns that are the main argument of neoliberal institutionalism, must be present.

Constructivism, Inter-state Cooperation and International Institutions

Constructivism, also known as cognitive theory, recognises that the role of knowledge and ideas are the main variables in shaping states' behaviour (see for example, Haas, 1995; Park, 2006). Proponents of this school study the processes by which identities of states (i.e., their fundamental self-understanding in relation to others) as well as their international objectives are formed and informed by the evolution of underlying ideas. More precisely, the main argument is that these processes are functions of both normative and causal beliefs of the decision-makers and, as such, they are the main, or one of the most significant, forces that affect decisions for international cooperation and conflict. The WTO as an international institution, as one commentator puts it, is seen to be a norm diffuser, transmitter and norm maker, spreading international norms throughout the international system via teaching member states their interests (Park, 2006:359).

In this regard, the mechanism of knowledge dissemination is an important variable. The constructivists essentially build on the role of experts, scientists and scholars (referred to as epistemic communities) who not only generate new insights but also actively engage in establishing networks with likeminded individuals and circles within an international institution (Chwieroth, 2008, 2007). They do this to disseminate their findings among users of knowledge of which policy-makers are the main targets (Park, 2005). Consequently, consensus among experts and the interplay of experts with politicians for inter-state cooperation systematically affects state behaviour by reducing the cognitive gaps between policymakers and diplomats through agenda setting and regime formation (see for example, Haas, 1992:3).

As such, the dependence of policymakers on sophisticated scientific advice from experts is an essential assumption in cognitivists' analysis. They share the concept of complex interdependence with neoliberal institutionalists and conclude that complex interdependence intensifies the need for technically informed advice. Complex interdependence brings with it many uncertainties, and to face these uncertainties, national objectives and strategies need to be modified and, in fact, constantly redefined. Haas (1992:4) elaborates that in this situation, statesmen, in addition to being "power and wealth pursuers", become "uncertainty reducers". This opens the gates for suppliers of knowledge who find themselves in a position to exert considerable influence over policy choices at the national and international level. An initial study by Haas (1980), for instance, indicates that by providing benefits to all participatory countries through linking various issues and creating new issue packages, the diplomats facilitated formation of new international regimes over environmental disasters of the 1960s and 1970s.

Constructivism is insightful on cooperation as it sketches a new picture of the creation and change processes of regimes, as well as their role in promoting cooperation among countries. Constructivists claim that their approach to regimes is fundamentally different from neoliberal institutionalism and neorealism:

“The study of regimes is a way of mapping the ontogeny and the phylogeny of consensual thought about interactions between man, culture, and nature; it is a way of conceptualizing a shared notion of what really exists - a reality that includes more than the familiar political conflicts among states” (Haas, 1982:209).

International institutions have a two-way causal relationship with identity and knowledge (see for instance, Park, 2006). On the one hand, they are the end result of inter-state cooperation; the sort of cooperation that stems from the evolution of knowledge and exchange of information among experts and policy makers about an issue area over time. As Haas puts it, international regimes are instances of “cooperation in which nation states accumulate as assimilate rapidly evolving information in an effort to manage collectively a shared problem marked by disagreements over preferences” (Haas, 1995:174). In this relationship, international institutions are products of cooperation. On the other hand, constructivists argue that the norms and rules embodied in the regimes facilitate further cooperation by enhancing shared beliefs amongst member countries (Goldstein and Keohane, 1993:8-24). Ideas once embodied in an institution, such as the WTO, give it an “authority” (see for instance, Broome and Seabrooke, 2012) that affects the policy choice of member countries. Insofar as they are not challenged by a change in underlying science or embodied norms and principles of the institution in question, this will keep happening. In the words of Goldstein and Keohane (1993:20):

“...once ideas have influenced organizational design, their influence will be reflected in the incentives of those in the organization and those whose interests are served by it. In general, when institutions intervene, the impact of ideas may be prolonged for decades or even generations”

More technically, widely shared ideas as embodied in a regime help cooperation in the absence of a unique equilibrium that would serve as focal points around which acceptable solutions to collective problems emerge. In this relationship, cooperation is the product of international regimes.

Therefore, there is a circular process at work over time. Cooperation forms international institutions; and international institutions help more cooperation. The currency of this long run process is knowledge and ideas, which, by their constant evolution, turn international organisations into centres of learning. In Haas’s words:

“But what about the long run? ... organizations are created in response to converging actor perceptions of interests, these institutions are not therefore assumed to be merely fleeting manifestations of a short-lived consensus. Organizations, the cognitive evolutionist supposes, are capable of learning. They reflect more than the initial convergence of actor demands because actor interests themselves may change in response to new knowledge; organizations may autonomously feed the process of change by the information and ideas they are able to mobilize” (Haas, 1982:241).

The concept of “perception” plays a major role in cognitive theories’ formulation of regimes. It is argued that the demand for regimes depends on actors’ perception of inter-state relations, international issues, and significance of regimes (see for example, Haas, 1995; Denemark and Hoffmann, 2008). According to Haas’s argument, and contrary to neorealism and neoliberal institutionalism’s basic tenets, these perceptions are relatively independent from an actor’s power and interest ambitions, as neorealism and neoliberal institutionalism suppose, so can be studied in their own right for their impact on international regimes. Constructivists highlight that between international structures and human volition lays interpretation. In other words, while neorealism and neoliberal institutionalism take the search for power and interest as exogenous variables upon which states’ international endeavours unfold, knowledge based theories argue that it is:

“the prevailing forms of reason [i.e., ideas] by which actors identify their preferences and the available choices facing them...cognitivists treat actors [basically states] as reflective organisms, rather than as inert matter which obeys universally applicable and unchanging mechanical laws” (Haas, 1995:170).

In all, cognitive theories are based on the assumption of the evolution of ideas and how they affect states’ behaviour in terms of cooperation and conflict. Ideas, identities and knowledge are the building blocks of constructivism. These will be examined again later.

The Way Forward: Which Theory?

In the choice of theory there are initially two basic criteria; one concerns the structure of the theory in terms of internal consistency and degree of being broad/parsimonious for the number of concepts/constructs/ideas, etc.; this usually incorporates the more parsimonious the better. The other criterion for the choice of theory concerns the quality of its relationship with the subject matter of the study. The three cooperation theories explained above pass the first test, as they are established, well built and numerously used by academia in a wide range of inter-state cooperation/conflict studies. Therefore, the task in this section is to reason the choice of theory in terms of the second criterion, how well they serve in answering the research question at hand.

It is worthwhile mentioning that it is not intended to open an in depth three-dimensional analysis of the three sets of theories mentioned above. The reason for this is that the goal at this

stage is having a general blueprint for the way ahead by eliminating the theories that provide only remote general explanations. The detailed analysis of the chosen theories, however, is important and will appear in the next chapter. Likewise, this task will be fulfilled to some extent in the last chapter of the research, when the results of the study are tested against the theories used.

These three cooperation theories are analysed with two objectives. First, they will be studied to choose those that best help to extract data from the EU and US proposals. Second, they provide the tools needed for analysing the data and drawing conclusions from that analysis. Each of the three cooperation theories explained above has its own distinct features that give it an edge over certain cooperation issues and in certain periods of time. Neorealists build on concepts of international systems, anarchy and states to conclude that the search for power is the force behind states' behaviour for cooperation and conflict. Neoliberal institutionalists share many of these assumptions, but suggest that as long the threat of cheating is eliminated or substantially reduced, states are willing to cooperate. Constructivism, in its own right, focuses on the impact of ideas and knowledge on the processes of international cooperation. States' interactions, international regimes, cooperation and conflicts are all informed by the underlying ideas/knowledge prevailing at any given time. As a result, neorealism and neoliberal institutionalism focus on the outcomes. They maintain a number of assumptions about international relations, actors and the cause-effect relationships, and analyse interstate interactions based on these assumptions. Cognitive theories study processes: their main preoccupation is change. The fundamental underlying beliefs change, with them actors and the relationship between them. Neorealism and neoliberal institutionalism focus on the results. They maintain certain assumptions about international relations and try to explain inter-state behaviour by them. Constructivism studies the process. For them 'change' is the assumption; international actors and the relationship between them are all subject to change and evolution.

For simplicity, both neorealism and neoliberal institutionalism are put into one category and cognitive theories in another. This is not a random categorisation. Neorealism and neoliberalism are both approached as rational theories of cooperation by numerous scholars (see for example, Hasenclever et al., 2004; Milner, 1992). Being rational actors, states seek to maximise their utility and act to balance costs against benefits in arriving at the policy choice that maximises power/security or wealth and welfare, as neorealists and neoliberal institutionalists claim. Subsequently, foreign policies, as well as international institutions, are both outcomes of calculations of rational entities seeking security or wealth.

Four criteria will be used to compare the three cooperation theories. These are ‘stability vs change’, ‘proximity of cause and effect’, ‘ability to provide policy recommendation’, and ‘viability’ within the wherewithal of a PhD study.

Stability and change

The first criterion for choosing the right theory from among cooperation theories for this research concerns the way in which the theory approaches stability and change. From an epistemological point of view, some theories are designed for the analysis of evolution while others are better equipped to study cases where the relationships and entities under study are assumed stable and static. The initiations for the CPA in the WTO took place between 1997 and 2004, with the bulk concentrated in the 1998-2001 period. It is reasonable to assume that, as by hindsight it is indeed the case, in this period both the EU and the US maintained a consistent negotiation proposal without a significant change over time. One can see some ebb and flow in the deliberations of the parties; however, as the content of documents indicates, both the EU and the US remained reasonably consistent in their demands. Similarly, not only did the US and the EU remain consistent, neither did the WTO, as the context of the negotiations, undergo a fundamental change in this period. Although there were a number of initiatives on the table, including the Singapore issues, by the big Uruguay Round just recently finished, the WTO did not experience a major overhaul or change in the underlying principles, rules and procedures in the period between 1997 and 2004.

With respect to the three cooperation theories, rational theories assume a relative stability in states’ preferences across time and across borders. Both neoliberal institutionalism and neorealism assume that states, regardless of their material capabilities, are always geared towards achieving utmost welfare and security. This is essentially an epistemological assumption in these theories, the purpose of which is to “discourage all too easy and therefore empty (pseudo-) explanations of social behaviour” (Hasenclever et al., 2004:24). Obviously, this is distinct from freedom of choosing the right policy for these goals. States are, of course, flexible about policy preferences, i.e., policies that are used to work as the means to security and welfare as ends. Yet, regardless of what these instrumental policies are, the outcomes that states wish to achieve remain unchanged; welfare and security (Powell, 1994:317-318). Snidal is very clear on this point;

“if preferences change too quickly, the model [i.e. the payoff system as depicted by rationalists] degenerates to a generalized post hoc revealed-preference exercise, where actions are assumed to reflect prevailing fluctuations in preferences... such systematic treatment of changing preferences or evolving institutions allows for a properly dynamic treatment of international issues” (Snidal, 1986:43)

This concept of stable preferences integrates well with rational theories' explanation of international regimes. Some neorealists have argued for the role of international institutions in entertaining the ongoing quest of the hegemons in setting the rules of the game in different issue areas. Likewise, neoliberal institutionalism argues that institutions such as the WTO do not change the states' ultimate goal of increasing welfare, although they *can* affect the policy choice of states for pursuing this goal. In neoliberal institutionalism theory, game theory, for example, is a theory of choice where the chosen policy for maximisation of interest is influenced by the international regimes. Knowing the other parties' moves, states would probably follow a more cooperative policy in comparison with the times they do not have this information. Whatever the policy choice, a state's ultimate goal remains the same, maximisation of welfare.

Knowledge based theories take a different view. They believe that rational theories' approach to states' preferences of security and welfare are reductionist and far too mechanistic. They argue that states are social entities that change their behaviour as underlying ideas change. Therefore, their outcome preferences are not exogenously given and fixed because preferences follow changes in the underlying ideas. Hence, neither neorealism nor neoliberal institutionalism capture the dynamics of state behaviour as a social entity. For their part, however, by emphasising the role of ideas in state behaviour, cognitive theories suggest that states' preferences are, in fact, subject to change. As mentioned earlier, Haas (1993), for example, proposed that states' preferences follow their perception of the world's political economy. In the same line of argument, Goldstein and Keohane (1993) argue that behaviour change at the international scene takes place under the influence of "normative ideas that specify criteria for distinguishing right from wrong and just from unjust", as well as causal beliefs that are, "beliefs about cause-effect relationships... provide[ing] guides for individuals on how to achieve their objectives" (Haas, 1993:9-10).

The significance of ideas in changing state behaviour is also echoed in a number of recent research programmes. For instance, Campbell (2002) asserts that 'frames' (i.e., normative ideas that are located in the foreground of policy debates) have been strategically used by political leaders to persuade others to accept policy change. In their empirical work, Cerna and Chou (2013) also see the impact of framing and reframing under the implementation of the Lisbon Strategy on the process of Europe's cooperation for attracting top foreign talents.

It is quite reasonable to assume that there has been no fundamental change of idea taking place about the merits/advantages/disadvantages, etc., of international antitrust in this period. Neither the US nor the EU representatives came up with any revolutionary ideas about the characteristics of international antitrust, nor were politicians likely to change their CP view dramatically. Similarly, the WTO, as the vessel in which CP talks took place, did not add any

additional agreements or change existing structures, norms, procedures, etc. The bulk of the CP talks took place between 1997 and 2004, with 1998 to 2001 being the most active period. For one thing, with the WTO coming into life as early as 1995 after the long Uruguay Round of talks and the Marrakesh Agreement, there seemed to be less appetite for major change in the WTO. Singapore issues were newly introduced, but they would only be moderate additions that were not meant to overhaul the whole trading system – even if they were successful.

So the theory to be used for the analysis of the WTO's CPA talks is best to take the positions of the EU and the US somewhat fixed in this period. Rational theories are more appropriate because they take the world order as is with states un-altered behaviour in searching for security and wealth. As far as states' objectives are concerned, therefore, time is frozen and not a significant variable. Cox (1981:128), for instance, sees neorealism ahistorical in nature; a theory that always lives in the 'now' because it takes "the present as given and reason about how to deal with particular problems within the existing order of things" (Cox, 1992:3).

Such an approach has yet another advantage that matches the underlying methodology of this research. The research tries to analyse the impact of the WTO as the environment in which CPA talks took place during the 1997-2004 period, a rather short period in the longer GATT-WTO life. It would be helpful to assume that both the WTO and the proposals of the EU and the US have remained relatively unchanged. This assumption is not unrealistic; in fact, there were no substantial changes in the WTO, yet it allows concentration on the impact of the WTO over cooperation in a static way.

Contrary to rational theories, constructivism is a theory of dynamism and change. In fact, cognitivists denounce rational regime theories for assuming stability and immutable regularities in international relations (for example, see Cox, 1981). Simply put, constructivists see states' behaviour as a function of their perception of the international system, and that those perceptions are constantly built and rebuilt as the underlying knowledge evolves. Given that knowledge formation and change are inherently time-consuming processes, the scope of cognitive theories fit those studies that cover longer periods of time than that assumed for the present research that covers only 1997-2004.

The length of time consideration makes rational theories (i.e., neorealism and neoliberal institutionalism) a better choice for this project because the research's time scope is short and we can assume that neither the proposals nor the WTO dramatically changed.

Proximity of cause and effect

In addition to the discussion of stability versus dynamic evolution in explaining state behaviour, proximity of cause and effect is yet another relevant point in the choice of the correct theory. In

the analysis of a certain issue, the applied theory can be broad in scope so that it only provides a general explanation for the issue under study. For instance, a hand-held magnifying glass is not particularly helpful in studying the phenomenon of bacteria growth and reproduction: it simply fails to show the details needed for these types of research. Similarly, but in the opposite direction, a too narrow theory tends to overlook the many parallel and underlying variables that are relevant to the subject of study. For one thing, a broad perspective tends to include a long chain of variables between cause and effect with possible routes connecting them. The long distance between cause and effect makes it necessary for the researcher to broaden the investigation to include all the possibilities, without even being certain that the ultimate result explains the issue under study by reliably establishing a connection between cause and effect. Using the previous example, the hand-held magnifier is also not helpful in studying the solar system. It just fails to include all the relevant forces that are needed for such studies.

The unit of analysis in the present research is the interaction between the EU and the US, as influenced by the WTO as the possible catalyst of cooperation. It is not meant to analyse the processes through which either the US and the EU has come to reach their position in the WGTCP talks. In fact, the research assumes these positions as given and starts from that point to see whether the WTO, as an intervening variable, has contributed to cooperation between the proposals of the two sides.

Rational theories are well equipped to tackle this task. Neoliberal institutionalism, for instance, highlights the cheating/enforcement issue in international regimes and provides a detailed set of tools, including use of game theory, for an analysis of interstate cooperation within the context of a regime. Neorealism, likewise, reflects on the interplay of power and international institutions. It sketches a direct causal relationship between states' preferences and, *inter alia*, expansion of the scope of international institutions into new areas. Neorealists, similar to their neoliberal institutionalists counterparts, have developed sophisticated methods for the analysis of states' behaviour, whether inside or outside international regimes or before/after their formation.

This precision seems to be lacking in cognitive theories. The distance between cause and effect and the quality of the relationships are murky and long. As far as state behaviour is concerned, these theories can only provide a general explanation of state behaviour and international arrangements. The cognitivist's account of international relations includes a number of variables and a chain of – rather loose – domino-like links between cause and effect for international cooperation. They are suitable for what Milner (1992) calls instances of 'tacit' and 'implicit' cooperation. The theory starts with the creation of knowledge, yet it continues with the role of epistemic communities in constructing states' interest, spreading the related knowledge and

interpretation, interaction with like-minded communities, interaction with politicians and diplomats. This forms national identities/perceptions and ultimately reaches a broad consensus on the merits and demerits of cooperation (and conflict) through the formation of a regime for a certain international issues.

Investigating this number of variables and establishing a relationship between them are challenging and possibly infeasible. Haas, identifying this attribute of his theory, asserts that his theory is based on a construction of reality, one "... 'constructed' in the sense that the theorist considers them as heuristic approximations rather than networks of determinative 'laws' constraining choice" (Haas, 1975:839).

Consequently, the theories chosen for this purpose must be commensurate with the research scope. As mentioned, cognitive theories usually tend to address cooperation holistically. They would argue that CP cooperation is a function of interactions of antitrust experts in America and Europe over time. That these experts, through interaction and consultation (like Goldstein and Keohane (1993:8-24) have suggested), push their respective politicians towards a set of ideas that are necessary for a CP agreement if they believe international cooperation over CP is needed. These shared ideas in turn provide a negotiation roadmap, serve as focal points for reaching an equilibrium, i.e., a bilaterally (and in the case of the WTO a multilaterally) accepted and sustainable distribution of gains, and that the shared ideas embed the CP agreement in the underlying wider mutual relationship of the involved parties. Testing and establishing a causal relationship between so many variables is only likely to produce a shaky result.

Rational theories, i.e., neorealism and neoliberal institutionalism in their own right can take a closer look. These theories are well equipped to tackle the EU-US CP interaction from a closer distance. They have certain assumptions about state behaviour, and have identified the major force that organises the rules of the game. They also are very clear about the role of institutions like the WTO in fostering cooperation. With these theoretical relevances, rational theories provide a better focus for the question of this research.

The ability to provide policy recommendations

Another criterion in choosing the right theory concerns the ability of the theory in providing policy recommendations. This is not just out of love for a WTO CPA: it is necessary because the focus of this research is on the possible WTO's factors that, in one way or another, have played a role in the current standoff. The research question is built on the assumption that the WTO has been a successful institution in fostering international cooperation for seven decades. Therefore, it needs to be approached with the higher order objective of taking the lessons of

failure in the CPA talks, and coming up with recommendations for helping the institution to foster international cooperation in newer areas.

The predictive power of constructivism is problematic in working out generalisable explanations on the impact of institutions in comparison with rational choice theories. The latter by taking the states' objectives constant, and then by drawing on a wealth of empirical studies, works out different conditions that are replicable in the future if a similar scenario repeats itself. This capability gives these theories a future orientation and a prediction power. Constructivism, however, has an epistemologically different understanding of the world. For them, states' choices for cooperation and the conditions in which they operate are subject to perception, ideology, the values of the actors and their beliefs as constructed by epistemic circles. These qualities, in turn, are dynamic and subject to change with the evolution in the underlying knowledge available to states. Therefore, cognitivists are unlikely to predict when and in the presence of what conditions cooperation takes place because they are somewhat path-dependent and their analysis is contingent. Their toolbox cannot clearly predict at what point consensual values or knowledge will produce cooperation. Haas was clearly aware of this shortcoming when he wrote, "ends, or purposes, of action are not self-evidently derivable from the scientific understanding of relationships among variables. Instead, these ends are more often deduced from the means found to be available" (Haas, 1975:848). Likewise, the generation of new knowledge can change rules of the interaction by introducing ideas that are in opposite direction of the ones previous knowledge indicated. As one commentator indicates, "Cognitive theory needs to specify more clearly the types of issues and conditions under which consensual knowledge is likely to drive cooperation. Are they many or few? No one would disagree that purposes, values, and knowledge matter, but when?" (Haggard and Simmons, 1987; 199).

Viability

The last, but not least, point in choosing the right set of theories for the present research concerns availability of data. Running a cognitive based research requires extensive data as to what ideas, concepts and factors have shaped the perception of negotiators in both the EU and the US camps in the CP talks. Such research, likewise, requires identification of decision centres, their relationship with expert circles, and the network through which the underlying ideas for the CPA talks were created, developed and exchanged with politicians and related government/business entities. This will basically be a study of the entire processes that have contributed to developing positions of the US and the EU in the WGTCP talks. Such a task is huge and beyond the wherewithal of a single PhD student with limited time and budget. For one thing, it requires detailed interviews with related people on both sides of the Atlantic as many of the underlying variables are not studied or understudied. Likewise, the research design requires

insights from a number of disciplines to capture the many aspects of the research. That would be a project much larger than a PhD project.

Which theory ultimately?

The analysis above indicates that rational theories, i.e., neoliberal institutionalism and neorealism, provide a more appropriate foundation for the study than constructivism.

All in all, rational theories of cooperation, i.e., neorealism and neoliberal institutionalism, provide a more appropriate framework to address the questions of this research. By their assumption of stability in state preferences, these theories provide a better analytical framework for the research questions than constructivism. Moreover, the assumptions and the type of relationship between states and regimes as seen by neoliberal institutionalism and neorealism promise a clearer investigation from a closer distance than their cognitive rival. Rational theories are also capable of indicating some policy advice to the way out of CPA deadlock in the WTO. Lastly, and as far as this student is concerned, a research using cognitive theories falls beyond the wherewithal of a PhD project.

Using rational theories, an argument and a counterargument is made by taking neoliberal institutionalism as the starting point of inquiry (for the reasons that follow) and using neorealism as a critique to challenge the former on its assumptions, dynamism and conclusions. The dialogue between the two makes the impact of the WTO on the cooperation between the US and the EU clearer.

The reasons for basing the inquiry on neoliberal institutionalism rather than neorealism are as follows. First, neoliberal institutionalism is clear about the impact of enforceability on inter-state cooperation. As such, it provides a detailed framework for understanding the requirement of cooperation and conflict as far as cheating is concerned. Second, neoliberal institutionalism places much emphasis on the positive role of international institutions such as the WTO in facilitating cooperation, whereas neorealism is just sceptical of such a function. For instance, whether or not the WTO has failed to provide an anti-cheating mechanism for the CPA as neoliberal institutionalists predict can be tested. Or, for instance, whether or not the WTO has come short in helping the circulation of information that is needed from neoliberal institutionalists for a sustainable cooperation. Third, neoliberal institutionalism is the common denominator of the two theories. As mentioned earlier, neorealism, just like neoliberal institutionalism, highlights the importance of enforcement concerns in international deals. However, they add that enforcement is just one of the requirements of inter-state cooperation, and other factors, such as distribution of gains/costs, need to be present for an act of cooperation. Therefore, for any analysis, the cheating analysis is necessary and must come first.

Objectivity, Reliability and Validity

This section tackles the remaining parts of the research design. The research questions are already worded and unit of analysis defined. The following sections explain the method of pattern matching for collecting and interpreting the findings, and other measures to increase the validity and reliability of the research.

Method of Pattern Matching

The major instrument in ensuring a reliable approach to tackle the research question draws on the use of a pattern matching technique in political sciences, which is based on Donald Campbell's 'Degree of Freedom' concept (1975). The pattern matching technique is endorsed and recommended by Odell for IPE case studies (Odell, 2001). In its general form, the method builds on the research theory framework and involves predicting a pattern of outcomes from analysing the research data. It allows one to test the causal implications of a theory, thus providing corroborating evidence for a causal argument (Campbell, 1975). In more practical terms, the researcher constructs a very detailed expected model of outcome in which more and more theory informed aspects of the case under study are included.

As far as the present research is concerned, the benefits of the pattern matching technique are twofold. First, it helps to assess whether the available data is sufficient and adequate for the analysis, and look for alternatives if necessary. Second, the method leads to more and more points of reference, which (as Yin (2014:127-165) suggests) would ultimately increase the validity, and reliability of the research. The important point is that the expected behaviour framework builds on as many theory-informed propositions as possible, rather than just one. For the present research, and as far as the centralisation factor, for instance, is concerned, the process involves asking what variables and what sort of causal relationship should be expected in the EU and the US interaction over the CPA negotiations in the WTO. Should we expect concerns on the decision-making process on the side of the EU or US delegates as neorealists expect? What do these countries have to say about enforcement mechanisms? What roles and responsibilities are invested in the member countries, and what are invested in the WTO? Who or what agencies are picked up to tackle the information sharing function between member states in the EU and the US approaches to in individual cases? Are exceptions/exemptions put forward by either party to be included in the WTO's CP designed in such a way as to leave them with much policy space while limiting the choices of other parties? Data analysis using the pattern matching method includes keeping tally of the theory's hits and misses. According to Campbell (1975:181-182), a theory is rejected if it does not pass most of these tests. If it does not, the researcher has to find a better theory in the same way on the same case.

Wilson and Woodside (1999:16) use a very simple example that serves a better understanding of the degree of freedom concept. In a doctor-patient interaction, upon examining a sick child, the doctor, after a series of questions, determines symptoms of fever, irritability, loss of appetite, nausea, and a dull pain in the lower right quadrant of the abdomen. The pattern of observed symptoms (in this project various instances of convergence and divergence between the EU and US under the influence of the WTO) leads the doctor to diagnose her patient as suffering from appendicitis. In the same fashion, case data collected in social science contexts can be examined to note the degree of match to a pattern that is set forth by theory.

This research will make use of the degree of freedom technique in Chapter 4. As explained above, this involves building a theory-informed expectancy framework. This serves as a stepping stone that, as much as possible, maps the points in coding and categorising data. The next two chapters map out the expected behaviour of the US and the EU in the WTO under the basic theories of the research, i.e., neoliberal institutionalism and neorealism and the related assumptions underlying them. In turn, the results help identify the critical points in the WGTCP documents for the related points in EU-US WTO's CP interactions. The more sophisticated and detailed the 'expected-behaviour' map, the more reliable the analysis process.

Validity

The aim of increasing validity is increasing the degree by which the research explains the case in hand so that inferences about real life practice can be made. In qualitative research, validity refers to "whether the findings of a study are true and certain—"true" in the sense that research findings accurately reflect the situation under study, and "certain" in the sense that research findings are supported by the evidence" (Guion et al., 2013:1). A research design is considered valid when the theoretical constructs of cause and effect accurately represent the real-world situations that they are intended to explain. As far as this project is concerned, the issue is whether the study actually explains the EU-US interactions for a WTO antitrust agreement in a way that a person closely engaged with the issue feels the research design and findings make sense.

One major step to ensure validity of this research entails a thorough comparison of the available cooperation theories for those that best simulate the underlying realities of the EU and the US interaction for the CPA. Theories of cooperation each have a history, a set of assumptions and a context that first identifies the relevant variables and then shows the direction of causality amongst those variables. Testing the validity of research therefore requires challenging the relationship between the variables in one theory against competing interpretations offered by alternative theories. A study that fitted a theory to a case, and thereby helped explain that case,

could not successfully pass the validity test if the results were not compared with alternative interpretations and proved that they are inferior.

The validity concern as expressed above was discussed in a previous section where the three competing cooperation theories were compared; the two most relevant theories of neorealism and neoliberal institutionalism were then chosen.

Reliability and Triangulation Technique

The present research, similar to all research projects, is subject to certain biases rooted in its data and research design. For a qualitative case study, such as the present one, reliability is primarily defined in terms of consistency (for example, see Yin, 2014:240), where it ensures that the same or similar results are obtained or produced under similar conditions by other researchers, or the same researcher if repeated. By definition, a research, measurement or method would not be reliable if each attempt produces different results under the same conditions. There are a number of measures that a researcher can adopt to increase reliability; however, in fact it is more often the case that concerns for total reliability cannot be readily eliminated, no matter what correction measures are adopted (Scott, 1990:28).

For the present research, there are three main sources of bias. The first is rooted in the nature of the main source of data, i.e., the WTO's published documents of written/oral communications of the EU and the US. Authenticity refers to the documents' genuineness; it includes not only considerations of fraud, but also of the errors that may creep into copies (Scott, 1990:19). The question is also whether the research documents have been sampled/sifted without any bias. The second reliability concern regards whether the documents used are credible (Scott, 1990:25) and truly reflect the underlying issues over cooperation for the WTO's CP negotiations. In other words, have the EU and the US honestly spoken their positions in WGTCP? The third concerns the methodology and methods used to analyse the data, and if they make the research prone to subjectivity. The research is conducted by only *one* person, and as such is predisposed to subjectivity risk with regard to the ways in which the data are analysed.

As will be explained in more detail below, a triangulation of data sources can be helpful in reducing the first two reliability concerns. In brief, triangulation (sometimes called 'multiple operationalisation') (Campbell and Fiske, 1959), is a procedure where researchers look for convergence among multiple and different sources of information (Golafshani, 2003:126). It often comes in different categories including data triangulations and investigator triangulations (Denzin, 1978), each enhancing the reliability of different phases of research. There seems to be no such measures for the third, as in PhD research there is only one person involved; therefore the research carries the risk of subjectivity.

Reliability of sources of data

Concerning authenticity of documents and reliable method for data collection, a serious issue is not foreseen as the main source will be the WTO's website. The website provides access to authentic documents that cover submitted communications of US and EU delegations to the WGTCP, written records of oral deliberations of the parties, minutes of the meetings prepared by the WTO's secretariat, communications from non-member parties (including the OECD), as well as reports of the chairman of the WGTCP. Use of the WTO website virtually eliminates any biases that might arise from other methods of data collection such as interviews and questionnaires, etc. In collecting data by interview, as an example, the researcher's attitude, and the context in which the interview takes place, such as time, place, etc., may have an impact on the quality of the data obtained. A slight change of tone on the side of the interviewer, for instance, may have an impact on the interviewee's quality of participation, and therefore the quality of data collected. These are all eliminated to the greatest degree for most of the data used in this research project. The WTO's website is a global reference for governments, university scholars, individual researchers, businesses, NGOs, etc. The risk of a user's impact on the quality of data is almost nil. More importantly, however, each WTO member makes sure the website publishes the original deliberations. All members of the WTO are likewise in a position to advise the WTO secretariat to take appropriate measures if there is inconsistency between actual distributed communications and the documents published by www.wto.org. All in all, the risk of inconsistency in the collection of data is insignificant.

To avoid reliability concerns that might arise from sampling methods, the so-called representativeness criterion of the documents (Scott, 1990:24), *all* the WGTCP's documents for EU and US deliberations will be examined. A research can be ranked low in reliability because the data used do not represent the data available. Similar to sampling errors in statistical research, the use of selected WTO documents on the CP initiations is likely to overemphasise, underemphasise or even ignore the significance of some facts. In whatever good way sample documents are chosen, the research would be at the mercy of ignoring a critical fact/discussion/standpoint inherent in the chosen sample. A prescribed approach to overcome such bias in statistical studies is the use of one or more random sets of samples. Randomly chosen data help reduce purposive sampling and the biases it might create. The risks of sampling in their different guises will be overcome by including *all* the WTO documents, rather than one or more samples. The reason is not hard to see: this research is less interested in asking about statistical measures such as central tendency or distribution of data, and much more interested in the particular ways the WTO as an institution had facilitated or hindered cooperation over CP. The WTO CP documents cover both written and oral communications of the EU and the US, as well as the chairman's and other countries' remarks. Using all these

resources not only eliminates the risk of missing a piece of important data but also, as explained elsewhere in this section, alleviates any misinterpretation of data through triangulating perspectives.

Reliability of the Data

The first source of bias comes from the fact that the research relies on EU and US produced documents and the chances that these two countries hide their true positions for the WTO's CP agreement as a result of their negotiation strategy. Countries may weigh down/up their demands to achieve a higher bargaining position against other WTO members. A party eager for a particular provision in the CPA may be willing to give up more concessions to others if the latter adamantly stood its grounds and rejected that particular demand. For example, it is said that US emphasis on the inclusion of state-owned enterprises in the WTO's CPA talks was more a negotiation manoeuvre than a true position.

For data biases of this nature, triangulation entails a cross validation of data over the declared positions of the EU and the US through deliberations of other WTO members, reports of the secretariat and the chairperson. National envoys to the WTO generally have access to various sources of information about the issues on the table. For one thing, they have the opportunity to discuss matters with other WTO delegations informally and find out additional information over the issue in question. Some countries are also well connected to analysts in their capitals who, with multiple sources of data, are in a position to pass refined analysis to the envoy in Geneva. These documents will be drawn upon because all the extra information echoed in WGTCP documents help to reduce data bias.

Reliability in Interpretation: Subjectivity and Consistency

Unlike the method of data collection, reliability issues in terms of consistency and objectivity in interpretation and analysis of the data cannot be totally eliminated. Technically called inter-rater reliability, the test of this reliability measure is that, by using the methodology of this project, a second analyst reaches more or less to the same conclusion. In other words, this study is considered reliable if others get the same or similar results using the same methodology.

In fact, these are biases to which this research – similar to other qualitative research conducted by single individuals – is prone, and there is less hope in eliminating all of them. However, some measures that are scientifically proven to be helpful in increasing reliability will be adopted in this study.

Before going into details of the reliability increasing measures, it is important to note that this project is a case study and qualitative in terms of the data. This implies that this project is not identical to any other. The concepts, constructs and variables are *ad hoc* tools addressing the

interactions between the US and the EU in the period and place of study for a CPA. As such, the methodology used cannot be readily applied to other cases without modification in one way or another; this is because it is highly unlikely that another situation will arise where its context, players and the relationship between the players will be the same. It would then require caution to apply the tools used in this research to other similar-looking cases expecting the same results; therefore a test of reliability is fulfilled. In other words, as long as reliability is concerned, the model in this thesis cannot be applied readily to other cases of economic cooperation for a test of reliability.

It might be argued that reliability is also about the repeated application of the research methodology over the WTO's CP case by the researcher, expecting the same or similar results. Here again, reliability as a concept used for quantitative data might be controversial because it is expected that our understanding of the case changes and improves over time, making it necessary to modify the concepts, constructs and variables. As one research methodologist mentions:

“qualitative researchers believe that the subject matter and a researcher's relationship to it should be a growing, evolving process. The metaphor for the relationship between the researcher and the data is one of an evolving relationship or living organism (e.g., a plant) that naturally matures” (Neuman, 2000:171).

Therefore a measure of reliability in this sense is hard to define, as the relationship to the research ontology is likely to change.

Keeping this possible change in mind, some measures will be taken that address concerns for interpretation objectivity. A probable reliability concern (technically called inter-rater reliability) is that, using the same methodology, a second analyst reaches different conclusions. In other words, this study is considered reliable if others get the same or similar results using the same methods and methodology. In fact, a complicated analysis of CP negotiations in which very technical jargon is used can fall into a subjectivity trap, decreasing inter-rater reliability.

A basic measure to decrease the chance of bias of this nature is constructing well-defined parameters so that the interpretation space is kept minimal. This includes articulating the cause-effect direction, stating clearly the expected results and identifying the forces that, in one way or another, are likely to have an impact on the results. For example, in breaking down 'anti-cheating' as a concept used by both neoliberal institutionalism and neorealism into workable parameters that measures the US and EU positions on CP agreement, the utmost care will be taken to define the boundaries, acceptable and non-acceptable areas of the parameters such as notification requirements, authorities involved, methods of communication, etc. The clarity

reduces the chance of subjective judgements in an analysis of the negotiations data, therefore increasing the reliability of findings.

Nonetheless, subjectivity in the interpretation of the data remains a major issue and cannot be totally eliminated. Maybe the best assurance is having a second or third researcher/researching teams to conduct the research independently. They could run their own investigation of the US-EU CP cooperation in the WTO and use and interpret the related data accordingly. Added to this research, their results could then be compared in an effort to find divergence and then take correcting measures. However, as this study is a PhD thesis conducted by one person, the luxury of a parallel researching buddy is not possible.

Source and Use of Data

The first step of the research involves an evaluation of the US's and the EU's proposals for the WTO competition negotiations. For this purpose, the primary sources obtained from the WTO and the documents mentioned below will be used. At least 1,500 pages of WTO documents are used to depict the negotiation process and the position of the parties involved. The proceedings of the competition policy disputes further elaborate the desired qualities and interpretation of the parties involved in the dispute. The competition related bilateral agreements, likewise, demonstrate the content, form and scope of a competition deal in the WTO.

The sources used are as follows:

- a) for the EU, 366 pages of first-hand self-declared deliberations in 23 original WTO documents, submitted directly to the WGTCP under the title 'Communication from the European Community and its member States' between 1998 and 2003;
- b) for the United States: 203 pages of first-hand deliberations in 21 WTO documents under the title "Communication from the United States", submitted to the WTO by the US delegation between 1997 and 2003;
- c) the proposals of the EU and the US are also partly reflected in "the Minutes of the Meeting" prepared by the secretariat. A total of 22 documents covered the meetings from early 1997 to 2003 in 564 pages. These documents are particularly important because they, *inter alia*, include oral statements of the representatives of the EU and the US expressing and explaining their views;
- d) 108 pages of "Background Notes" in 7 detailed documents. These are studies done by the WTO's Secretariat at the request of member countries for clarification, explanation and background of some of the issues of importance;
- e) reports to the General Council, prepared by the WGTCP. These seven documents report the developments on the CP talks to the WTO's general council. The documents contain

the highlights of the deliberations, as well as extra explanations on proposals by all members including the US and the EU; a total of 249 pages. Being watched and ratified by all WTO members, these documents are impartial and a reflection of the realities of the negotiations on the ground.

Conclusions

Chapter 3 completed the discussions in Chapter 2 by tackling three issues. First, we defined the theoretical framework of the research. By comparing two sets of international cooperation theories of rational theories and constructivism, we reasoned that the former is a better match to the question in hand. To finalise the theoretical framework of the research, we introduced and incorporated the theory of Rational Design of International Institutions and the concept of Nested Institutions to operationalise the research question and the hypotheses introduced in Chapter 1.

Second, the chapter tackled the remaining points of the research design. Questions of reliability, validity and objectivity were furthermore addressed to increase the quality of the research. It was mentioned that the pattern matching method must be utilised to ensure reliability of the findings. The chapter further acknowledged the pitfalls of the project given the limited resources available.

Chapter Four: a Theory Informed Reference Framework

This chapter juxtaposes the theories explained in the previous chapter in order to build a reference framework for the analysis of the data. This follows the logic of the pattern matching technique introduced in Chapter 3. Drawing on Koremenos et al.'s (2004) theory of the rational design of international institutions, a very detailed pairwise pattern of outcomes will be constructed in which the many facets of the World Trade Organisation's (WTO) impact on competition policy agreement (CPA) cooperation are identified according to the theories of neoliberal institutionalism and neorealism. The results will be used in Chapter 5 (for the centralisation factor of the rational theory of international institutions), and Chapter 6 (for the scope factor) against the research data to assess the WTO's impact on the cooperation in the CPA talks. The aim is to sketch a theoretically informed framework against which the proposals made by the EU and the US could be analysed for the WTO's role, as the nesting institution, in fostering cooperation or fanning conflict.

Chapter 1 mentioned that a possible answer to the research question entails the WTO's inability to address cheating concerns. To accommodate this postulate, we will draw on neoliberal institutionalism to identify those variables whose impact determines the WTO's effect on cheating; hence, the EU-US terms of cooperation. Alternatively, the research question could be answered if the research shows that factors other than concerns for cheating had been at play. Neorealism best entertains this proposition as its interpretation of the WTO not only entails a different perspective on cheating/enforcement debate but also goes beyond to incorporate concerns for relative gains.

In practical terms, the issue of enforcement of the CPA will be opened up (i.e., the main argument of neoliberal institutionalists) by the prism of Koremenos et al.'s (2004) theory of rational design of international institutions into two vectors of scope and centralisation. Consequently, in the light of each of these vectors, neoliberal institutionalism will be applied to the EU-US's CPA interplay in the WTO. The same will be done for the neorealism narration of cooperation to present a triangulated look to the one provided by neoliberal institutionalism. In this analysis, the third dependent variable, that of membership, will be dropped, as suggested by Koremenos and her colleagues for the analysis of the enforcement problem. The reasons are presented below.

Using this approach, the chapter is formed around two broad variables of the theory of rational design of international institutions; centralisation and scope. The first subsection builds the expected model of centralisation for a CPA as nested in the WTO. The second does the same but for the scope. The two put together will provide the framework of analysis for the next two

chapters, where the data taken from deliberations of the US and the EU delegations to the WGTCP are used to evaluate the terms of cooperation and conflict as affected by the WTO.

As just mentioned, of the three variables of scope, centralisation and membership identified by the rational theory of international institutions in the enforcement discourse, the last will be removed from this research. Given the circumstances around the CPA talks in the WTO, the membership variable is a silent (spurious) variable in the sense that both the EU and the US (for reasons explained below) went for full membership of all the WTO member countries in the CPA. In general, a higher enforcement problem affects the desired size of memberships in an institution, which in turn affects cooperation because "... the prospects for cooperation diminish as the number of players increases..." (Oye, 1986:18). As Keohane (1984:77) sees it, with a smaller number of partners, the range of behaviour that must be monitored by each goes down, reducing verification costs. With a smaller number of partners, the collective action costs of organising retaliation against defectors will be lower, and, as a result, the implicit credibility of a small group's threats to punish cheaters will be higher and more effective. Akin to this point, as Snidal (1979) has argued, different membership rules, *inter alia*, affect the diversity of the members of an institution. Knowing that each member has its own distinct incentive (Walt, 1987) and capacity (Fearon, 1998) to comply or defect, more members are likely to increase the defection risk, taking all members together.

The argument for dropping the membership variable from Koremenos et al.'s (2004) basic framework is that membership hardly turned out to an issue between the EU and US in the CPA talks. For the reasons that follow, both the EU and the US actually encouraged the WTO's custom of full membership for granted and insisted on it. First, since under the rubric of multilateralism membership in the WTO's agreements is a given factor to the negotiating parties, no efforts were made to put conditions on membership. Being a consensus driven institution, any condition put on the membership is simply doomed to fail; this is because the left-out party would break the consensus necessary for adaptation of the new agreement if it wishes to join. In the case of competition talks more specifically, the mandate was given by the Singapore Ministerial by consensus, meaning that no WTO member objected to the work on the competition agreement. It had been obvious for the US and the EU delegations that they could not play the cards that deprived or forced a WTO member from/to joining the CPA. As the study of the WGTCP documents show, in fact there had been very little talk about conditions of membership in the CPA in the deliberations of both countries.

Second, both countries actually wanted all members to join. One reason repeatedly put forward by both countries in bringing competition policy into the WTO was that the CPA needed to be as inclusive as possible in terms of coverage of the countries; the WTO with more than 140

member countries served this objective well. On numerous occasions, the EU and the US both emphasised that the spread of anticompetitive practices – notably cartelisation – is so wide that the negative effects of anticompetitive measures cannot be contained without participation of all countries (see for example, EC, 1998b:6; 1999b:4; US, 2002c:2). For instance, one EU deliberation holds that business anticompetitive practices have been broken into different jurisdictions, so detection and persecution of the culprits requires the cooperation of many countries; a situation that has been worsened by the fact that some countries have even exploited anticompetitive practices as a “beggar thy neighbour” policy (EC, 1997b:5). Obviously, such an approach avoids demanding conditions that restrict membership.

A third reason is that both the EU and the US had been advocating full membership in the CPA out of concern for free-riding. The WTO’s antitrust would provide common benefits to all regardless of their membership. For instance, the notification obligation makes information an institutional public good available to all. In the existence of the most favoured nations (MFN) that requires unconditional and immediate extension of any advantage, favour, privilege or immunity granted by a party to all other members, exclusion is actually a ticket for free-riding; this is because the non-signatories could use the benefits without necessarily making a significant contribution to the pool of information. Likewise, non-members without any contributions could be privileged by the fruits of anti-trust efforts of the CPA signatories in combatting international practices with negative impact on all countries. Moreover, when both the EU and the US, and all other signatories to the CPA, complied with the CPA, they would like to be reciprocated by as many as possible countries. In doing so they are, in essence, selling a commitment to more and more countries who otherwise would receive the benefits for nothing. The point would be clearer once attention is paid to the fact that it would be costly, at times even impossible, to maintain a parallel competition policy for non-members of the CPA.

There are two key assumptions underlying the discussion in this chapter. First is the impact of international institutions such as the WTO on states’ decisions for cooperation. Both neoliberal institutionalism and neorealism share the basic assumption that international institutions do have an impact on states’ behaviour in terms of cooperation. The second assumption, which is an off-shoot of the first, suggests that a proposal that falls far from WTO’s extant rules, norms and procedures has less chance of success as it has to overcome the inertia of the other party’s proposal and that of the WTO put together. These assumptions will be explained in more detail below.

Both neoliberal institutionalism and neorealism perspectives accept that international institutions such as the WTO, when being contexts of new issues – say antitrust, can potentially insert great influence over cooperation decisions of the parties (Keohane, 1984; Grieco,

1990:234; Krasner, 1982a; Axelrod, 1984; Snidal, 1991, 1985). They would argue that, in its basic form, the world trading regime is an intervening variable that stands between a basic causal variable, i.e., a state's interests in the CPA, and their actual behaviour in terms of degree of cooperation and conflict (Krasner, 1982a:189-190). Keohane's (1984) main argument holds that the WTO, being an established regime in trade matters, can facilitate the negotiations for cooperation over the CPA by reducing transaction costs and making arrangements for the clustering of issues that ensures "more quids are available for the quo" (Keohane, 1984:91). Likewise, some neorealists go that far to argue that neoliberal institutionalism is myopic in seeing the significance of international institutions in affecting cooperation decisions by states:

"Realists would agree [vis-a-vis neoliberal institutionalism] that international institutions are important because they reduce cheating; yet, realists would also argue, they must do much more than that if cooperation is to be achieved" (Grieco, 1990:234).

Inspired by Krasner's (1983) analysis of regimes, the diagram below depicts the interpretation of the WTO's impact on the negotiations for the competition policy:

US/EU's interests ➡ The WTO ➡ Cooperation for the CPA

In turn, neorealists acknowledge the existence of a hierarchically arranged system of principles and norms in international institutions (Krasner, 1982a, 187-188). In the WTO, the interaction of states takes place within a wider context, one that has developed around international trade. Consequently, the emergence of a system for the regulation of competition policy, instead of a largely unexplained inter-state absolute anarchy, starts from a more principled, to some extent predetermined, structure. Therefore, the cooperation for the foundations of the competition regime are largely informed by existing structure of the WTO (this point has been raised by the US's WTO envoy, see US, 1998d:5). Such an impact, i.e., the potential power of a contextual regime/institution on further cooperative behaviour of the engaging states, is by no means baseless and is empirically well documented. More specific than the theory of nested institutions of Aggarwal (1983) explained earlier, Tarullo (2000) acknowledges the influence of the WTO's principles as the intervening variables on the outcome of negotiations for the competition agreement when he writes:

"A competition arrangement in the WTO will be substantively shaped by the norms and procedures of the trading system. Elaboration of the rules will be heavily influenced by the market-access norms of trade policy, and the consumer-welfare norm informing antitrust laws probably de-emphasized" (Tarullo, 2000:479).

The second assumption holds that the proposals that are not in conformity with the WTO's extant rules have to overcome the added inertia created by the institution; the extra cost of compliance that results in demotivating the concerned party from cooperation. Looking from the

perspective of the engaging parties, either of the dependent variables for the enforcement of the CPA (i.e., degree of centralisation and width of scope) can potentially fall somewhere on a spectrum; ranging from – so to speak – high to low. The bargaining power of a party whose interests fall off the WTO's existing rules will be weakened; this is because this party has to overcome the costs of dealing with the well-established rules of the WTO and the gravity induced by the proposal of the other party put together. Taking the dependent variable of centralisation, for instance, Party 2's bargaining power is under pressure just because its proposal falls out of the WTO's incumbent rules relative to Party 1's (see Figure 4.1).

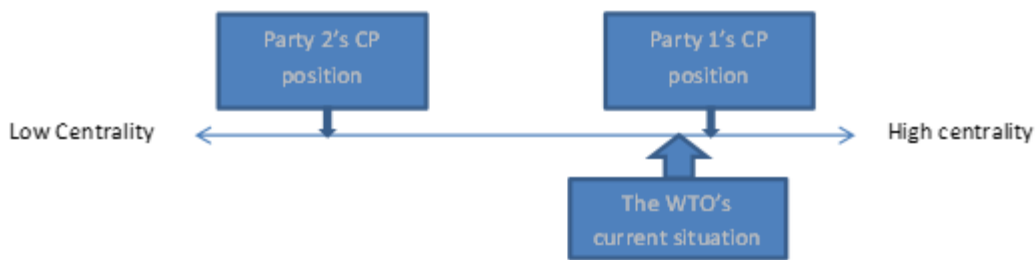


Figure 4.1: The WTO's Impact over Cooperation given States' Position

Source: Author

Before starting the main discussions, however, the key concepts of enforcement, centralisation and scope as defined in the Rational Design of International Institutions will be discussed. This is important because they operate as the building blocks of the discussions that follow. The mechanisms by which each of these variables have a bearing on cheating and enforcement, and as such can enable or hamper cooperation between the US and the EU, will also be discussed.

The concepts of enforcement and compliance sit at the heart of this research. Neorealism and neoliberal institutionalism underline the important implications of cheating and enforcement in international arrangements. Neoliberal institutionalists believe that, as long as the cheating issue is addressed, cooperation between countries is possible. Neorealists reason that solving the enforcement issue is necessary, but it takes more than that for countries to start and maintain cooperation. Other issues such as distribution of gains also need to be solved. Moreover, the advocates of Rational Design of International Institutions underline that enforcement is a central issue in the attributes of an international institution, and a crucial factor in cooperation calculation of the interacting parties. In its turn, the concept of nested institutions suggests that the enforcement mechanism for an international institution such as CPA is determined partly by the interacting parties and partly by the wider institution that hosts the deal.

An enforcement problem refers to the strength of an interacting state's desire to breach an agreement or set of rules (Koremenos et al., 2004:16). There are often situations where, despite the long run benefits of co-operation to all contracting parties of a deal, one party feels it pays to cheat others on pre-agreed terms of cooperation. If the future value of co-operation is considered less than the imminent benefits of a defect, there are higher incentives for cheating and greater the enforcement problem. In a rationally built institution, the enforcement problem is addressed by the right mix of facades of cooperation: scope and centralisation. These will be explained below.

First, different approaches to the enforcement issue play out in the desired combination of rules and actors that form the scope of an agreement. Some rules are easier to enforce, while some other rules may fail to comfort cheating concerns as they cannot be properly enforced. Assuming that an interacting party favours strict enforcement of the agreed deal, it might choose a particular rule partly because it is easy to be enforced, or less costly to monitor compliance of the other parties. Likewise, if this party feels retaliation against a breach is easier for certain rules/actors, it might choose to conclude a deal that includes such a rule/actor.

Second, the degree of centralisation corresponds to the capacity of an institution to increase compliance. In instances when unilateral defection has a high immediate payoff, or the costs of monitoring compliance of others are significantly high, members often find it helpful to empower the whole institution – centralisation – to adjudicate and enforce the terms of the agreement upon breach of the participants of the deal (Koremenos, 2001:790). Centralisation is therefore a way of dealing with costs of enforcement and cost of gathering and analysing the necessary information for enforcement. Delegation, however, comes at the cost of loss of sovereignty. It is argued that under anarchy, and except for the cases where cooperation does not disturb the pre-existing balance of capabilities that parties enjoyed before a deal, states avoid stripping themselves from sovereignty and relying on international institutions (Grieco, 1990:47). For instance, a state might find it particularly imprudent to let an international organisation start a fact-finding investigation for clues of non-compliance or defect on its own soil. As Schwartz and Tomz (1997) demonstrate, the authority invested in an international institution becomes extremely annoying for a party, particularly when the institution in question has the right and power of expelling that country from the whole arrangement for breach of a requirement.

The General Approach to the WTO Impact

Neoliberal institutionalism expects a positive role for the WTO in facilitating cooperation between the US and the EU for a CPA by increasing the chance of enforceability of the CPA.

Neorealism does not agree with arguing that more needs to be done for cooperation to take place. The WTO, being an international institution, is central to neoliberal institutionalists' explanation of the dynamics of cooperation, believing that it would act as a catalyst of cooperation. For a neorealist, on the other hand, the WTO, as Jervis (1999) points out, is not an autonomous entity and is nothing more than an instrument of 'statecraft' without an independent impact. Neoliberal institutionalists accept that neorealists are correct in identifying international anarchy as an impediment to cooperation among states, but, all the same, they maintain that neorealists overemphasise the role of conflict in addressing international issues while simultaneously underestimating the impact of international institutions such as the WTO in fostering cooperation.

Keohane (1984:Ch. 5) asserts that cheating within the game of Prisoners' Dilemma is an example of political market failure; however, contrary to neorealists' conclusions, cooperation can be promoted even in the absence of a hegemon by reducing the transaction costs of cooperation through the use of international arrangements, such as the WTO. Keohane makes this point clear by saying:

“My argument is that cooperation among independent governments in the absence of hegemony, to achieve joint gains, is possible, and that regimes can facilitate such cooperation by reducing transaction costs, [and] providing information...” (Keohane, 1984:221).

The neorealists' account of cooperation criticises neoliberal institutionalists on several grounds and is much less rosy. Without certain conditions in place, neorealists are pessimistic about cooperation between the EU and the US for the CPA, and believe that the WTO is unable to solve cooperation problems in a sustainable way. This is unless and until, next to addressing the enforcement issue, it takes account of the issues surrounding the distribution of gains. For them, the world is anarchic, and lack of a governing entity is the major force shaping action, reaction, interaction and behaviour (Waltz, 2001; Lipson, 1984; Mearsheimer, 2001:21; Grieco, 1990, Chapter 1). Neorealists acknowledge that international institutions have the potential to affect states' behaviour (see for instance, Krasner, 1982a), however, they fall short of constituting a form of world government to impose order (Charrette and Sterling-Folker, 2014). Therefore, it is left entirely to states to choose whether they form and obey the norms, principles and rules of international institutions/regimes (Mearsheimer, 1994:9).

The decision to cooperate – or not – partly depends on the enforceability of the CPA. However, it takes more than that to convince the EU and the US to cooperate: other factors such as distribution of gains are no less important (Grieco, 1990:216-235). In neorealism's interpretation of anarchy in international systems, states have to rely solely on their own means

in pursuit of survival, power and interests. In the absence of an effective authority to prevent other states from use of force at the international level, rivalry is the general rule of the game where only one's capabilities ensure survival, and the WTO is not necessarily helpful. Under anarchy, cooperation and conflict among states are both reflections of a state's will for survival. Of course, "the bottom line, however, is that" writes Mearsheimer in his sketch of international system "cooperation takes place in a world that is competitive at its core- one where states have powerful incentives to take advantage of other states" (Mearsheimer, 1982:13). As such, they also need to make sure that a deal does not reduce their capabilities against partners.

Insofar as the formation of a WTO antitrust is concerned, the logical interpretation of neorealists' self-reliance doctrine suggests that neoliberal institutionalists' emphasis on enforceability, as the only condition for cooperation, is faulty. The reason is that either the EU or the US, if deciding to enter into cooperation mode, would struggle to form the CPA in a way that serves its best interest, even if it were sure that the deal – whatever its terms might be – is enforceable.

Neorealists' conception of an enforcement problem in an institutional setting follows their general interpretation of anarchy and the need for self-help in the international sphere. For an agreement on antitrust, as Mearsheimer suggests, the parties need to make sure that "they will receive early warning of cheating to avoid serious injury" (Mearsheimer, 1994:17). Therefore, in a neorealist account of the CPA, institutional centralisation can be helpful for an early warning of a defection, because enforcement problems may persist even in the presence of good information and knowledge about the parties if the payoff from unilateral defection is significantly greater than the payoff from mutual cooperation at the dispute-resolution stage.

Therefore, according to neorealists, and despite neoliberal institutionalists' interpretation, an international institution may or may *not* be part of the big powers' solution to the regulation of international competition, depending on how well its attributes match their policy mix. As such, neorealists conclude that the WTO has an impact on the EU's and the US's behaviour; this is contrary to neoliberal institutionalists interpretation that sees such an effect to be pro-cooperation, the effect of the WTO might work well against cooperation by states seeing the WTO itself an arena of rivalry because as Mearsheimer (1994:13) asserts:

"The most powerful states in the system create and shape institutions so that they can maintain their share of world power, or even increase it. In this view, institutions are essentially arenas for acting out power relationships. For realists... institutions largely mirror the distribution of power in the system. In short, the balance of power is the independent variable ...; institutions are merely an intervening variable in the process".

Contrary to neoliberal institutionalists, who assume states to be “rationally egoistic” (meaning that they are agents that are primarily interested in themselves), neorealism’s conception of states is that they are positionalists (e.g., see Grieco, 1990:45). This approach to states’ behaviour suggests that in an anarchical international system, rational states are concerned with their position relative to others in the course of the antitrust interactions in the WTO. As such, the interacting states concentrate on the risk that relative gains from joint action may advantage their partners, and subsequently may result in the emergence of what might be a potentially more dominant rival who is capable of exerting influence for progressively more concessions and its desired terms of interaction (Grieco, 1990:48).

The concept of ‘positionalism’ when combined with the concept of symmetrical, or asymmetrical as suggested by Mitchell and Keilbach (2001), has some practical implications that need particular attention when delineating the neorealist criticism of neoliberal institutionalism with the two institutional variables of centralisation and scope, as suggested by the rational design of international institutions.

First, neorealists pay attention to the variable of symmetry in the relationship between the US and the EU over competition matters. A symmetric relationship means that both the US and EU are prone to the risk of non-cooperation by the other party at any time: a party can be both a perpetrator and a victim simultaneously, and a defect has negative externality over the interests of the other party. According to Mitchell and Keilbach (2001), the institutional designs for addressing enforcement problems differ when the externalities are symmetrical with the situation of asymmetric externalities. In general, an institution limited to the single issue of an asymmetric externality would provide benefits only to victims and imposes costs primarily on the perpetrator. In this situation, the possible victim of a defection will go for a limited scope as such a relationship deprives the perpetrator of the opportunity of non-cooperation in other areas of interest to the victim when they adopt countervailing measures on a defection by the former. On the other hand, a possible perpetrator in an asymmetric relationship would tend to go for a wider scope, and any limitation demanded by the other party or imposed by the nesting institution – in this case the WTO – would be rejected.

Secondly, it is important to take note of the opportunity of using coercive force in EU-US CP interactions. In general, there are three mechanisms by which the defection problem is addressed: reciprocity, exchange and coercion (Mitchell and Keilbach, 2001:891). This study assumes that use of coercive force an unlikely variable in the CP interactions. First, because the two sides enjoy enormous military power, second, because it seems far-fetched to think that the US and the EU enter into military conflict over competition issues. Therefore, reciprocity and exchange remain the only possibilities for addressing reneging.

All in all, neoliberal institutionalists expect that cooperation between the EU and the US in the WTO is a likely event, and, if it has not taken place, the reason should be sought in the WTO's inability to address the enforcement of the CPA. Neorealists, in their turn, accept this point. However, they say neoliberal institution's account of inter-state relationships is not complete because non-cooperation is more complicated than simply an issue of enforcement; other factors are involved. As such, they expect two factors to be involved. First, the WTO's inability to ensure enforceability; a point shared with neoliberal institutionalists. Second, the WTO's impact on the distribution of the CPA gains so that at least one party feels uneasy with the results. Based on these insights, the coming two chapters will analyse the US and EU proposals according to neoliberal institutionalism's account of enforcement requirements. The objective is to see in what ways the WTO had any effect on cooperation (whether positive or negative) by ensuring enforceability of the CPA. For a more comprehensive analysis, neorealism's critique of neoliberal institutionalism will be used to see whether the WTO has affected US-EU non-cooperation through factors other than enforcement concerns.

In the subsection below, the discussion into the two variables of centralisation and scope for the CPA will be channelled. Neoliberal institutionalism and neorealism, as introduced above, have their distinct approach to the WTO's impact over cooperation in these two areas. The aim is to take our expectation model one more step to see how the WTO influences cooperation between the EU and the US over antitrust.

The Centralisation Factor

In neoliberal institutionalists' account of WTO's CPA initiations, settlement of disputes, and information and its distribution among interacting parties, play an important role in solving the enforcement problem. Solving the compliance issue for the CPA would be greatly facilitated by the right degree of centralisation in information generation and information distribution. Keohane suggests that a state becomes disinclined to engage in an agreement in realisation of the fact that other states are equipped with greater information and are consequently able to engage in "deception" (Keohane, 1982:345). Likewise, neorealists recognise the importance of information for competition matters, although from a different perspective than that provided by neoliberal institutionalism. Under condition of anarchy, either the EU or the US considers information as an asset that can be used as leverage, as the terms of its exchange will affect distribution of costs and gains.

In other words, availability of information when centrally provided, as suggested by neoliberal institutionalists, is an institutional public good "... that is made available, more or less equally to all members" (Keohane, 1984:93), regardless of their contribution to its supply. On the other

hand, neorealists emphasise that issues related to competition policy are deeply information intensive, and the party who owns the information has the upper hand in identifying policy change, breach and compliance. Therefore, when a party who agrees to supply it will ensure that other parties would pay the price by reciprocating at least equally. On a more practical level, either the US or the EU needs to have a great deal of information to be able to appraise competition performance in general and, in the case of a deal, commitment of the other party to the CPA. Moreover, neorealists would acknowledge that sharing information involves the risk of partners being able to detect defection, taking it as evidence to trigger countervailing measures or start a formal dispute (Grieco, 1990:177). The situation where a country needs to receive information about the competition policy of the other country in exchange for similar information, and yet being apprehensive of the same information being used against it, puts either the EU or the US between rock and a hard place. This is because the more information/notification is released by a party, the greater the risk of becoming a victim of its own competition policies. Conversely, the less a partner is obliged to release notification about its competition policies, the more unlikely a harmful action or breach from the terms of the CPA to be detected in time.

Neorealists' information sharing dilemma is not ignored by neoliberal institutionalists. The response, in fact, constitutes one major pillar of their explanation of inter-states' relationship under anarchy. Keohane (1984) borrows the concept of market failure from economics, juxtaposes it to Olson's (1971) theory of collective action, and applies them to relationships amongst states, which he assumes to be egoistic in nature. He uses this to assemble his argument that cooperation amongst sovereign states becomes possible once international institutions overcome what he calls political market failure in international relations (Keohane, 1984:65-110). Neoliberal institutionalists further elaborate that information asymmetry between the EU and the US would be likely to reduce incentives for cooperation because "[A]wareness that others have greater knowledge than oneself, and are therefore capable of manipulating a relationship or even engaging successful deception and double-cross, is a barrier to making agreements" (Keohane, 1984:93).

Applied to the case of competition policy, neoliberal institutionalists would argue that because of anarchy, interpreted as lack of common government in world politics (Axelrod and Keohane, 1985:226), no agency is available to enforce the CPA or force the EU and the US to work together on competition matters. As such, "...the absence of reliable guarantees is an essential feature of international relations and a major obstacle to concluding treaties, contracts, and agreements..." (Lipson, 1984:4). Availability of information would reduce the uncertainty that plagues cooperation. Being an international institution, the WTO can help alleviate the cheating

problem by providing information, and reducing transaction costs of the exchange of information (Keohane, 1995:23-45).

Clearly, such an approach advocates some degree of centralisation, not only with regard to information, but also in the settlement of disputes, which are inherently information intensive. In addressing the fear of deception and encouraging cooperation over antitrust, neoliberal institutionalists would argue that delegation of some powers to the WTO for information gathering and distribution of competition related policies of the parties is critical. It is critical because when information is available by the WTO about other states' resources and formal negotiation positions, the EU and the US are assured, to some degree, that the other party refrains from cheating out of the fear that its reputation would be damaged in the "shadow of future" (Axelrod, 1984:126; Oye, 1986:12; Kono, 2007). Moreover, when information is readily available, governments are favourably equipped to assess and measure others' reputation by linking these standards to specific issues (Keohane, 1984:93).

In the neoliberal institutionalists' way of addressing enforcement problems for a CP deal, nowhere can centralisation of information be more helpful than addressing a breach. Neoliberal institutionalism observes that the lack of a monitoring mechanism for compliance and non-existence of a judiciary to enforce an agreement, are two major obstacles to cooperation between the EU and the US (Woo, 2010:425). Centralisation of activities in the WTO is an institutional arrangement that address both concerns. It not only coordinates interaction of the parties for the exchange of information and notifications, but also serves as the final arbitrator; as such, it is very useful for resolving enforcement concerns. The settlement of a competition dispute, such as cartelisation, is highly information intensive. The identification of a defect in the first place requires huge policing activities. Likewise, the fact-finding process, both before and during adjudication, needs constant access to fresh information that might be beyond the reach of either the US and the EU in terms of both access and costs of access. In Keohane's words:

"A government may require precise information about its prospective partners' internal evaluations of a particular situation, their intentions... and their willingness to adhere to an agreement even in adverse future circumstances. Governments also need to know whether other participants will follow the spirit as well as the letter of agreements, whether they will share the burden of adjustment to unexpected adverse change..." (Keohane, 1984:94).

In his study on the relationship between centralisation and enforcement problems in the settlement of disputes, Mattli (2001) finds a strong correlation between enforcement problems, i.e., when firms are no longer going to interact with each other (called a situation where "there is no shadow of future") and the degree of centralisation. His findings suggest that a centralised

institution such as the WTO provides procedural safeguards and monitoring to overcome defection: “enforcement problems may remain severe if the payoff from unilateral defection is significantly greater than that from mutual cooperation at the dispute-resolution stage. In this case, strong centralized procedural safeguards will be necessary to foil defection” (Mattli, 2001:922).

Neorealists believe that neoliberal institutionalism’s narration of centralisation is no guarantee of cooperation. In a neorealist account of desired institutional features, high centralisation connotes transfer of control from sovereign states to the WTO, and given that neorealists prefer maintaining sovereignty in the anarchy of the international sphere, being controlled by an institution such as the WTO is a highly undesired situation. Therefore, a centralised WTO arrangement could be tolerated only to the extent that it resolves competition related conflicts, and only as far as the arrangement imposes no untoward limitations on the policy menu of the participating states. In this line of argument, Mearsheimer (1995:9) echoes Charles Lipson (1994) by writing:

“Institutions are not a form of world government. States themselves must choose to obey the rules they created. Institutions, in short, call for the decentralized cooperation of individual sovereign states, without any effective mechanism of command”

Consequently, this neorealist view disagrees with that of the neoliberal institutionalists because it would have an uneasy relationship with current WTO rules; these rules subject all agreements to the formal dispute settlement mechanism of the institution. The dispute settlement system of the WTO has achieved some degree of independence over time in the sense that, in resolving disputes, it has revolved to rely progressively on the rulings of the Dispute Settlement Body (DSB) rather than bilateral negotiations between concerned states. The so-called ‘rule based’ method involves reference to an established body of rules. The concerned parties start negotiating over these rules for a settlement. Otherwise, they are referred to DSB for a ruling if they fail to resolve the issue bilaterally.

Neorealists, moreover, would tend to say that centralisation in terms of WTO’s settlement of disputes could also be undesirable. A neorealist would pay close attention to the important fact about the interpreting role of already agreed deals by WTO’s panels. The panels do not hesitate to exercise authority over the interpretation of WTO agreements whenever they find them vague or less than clear. The exercise sets the dispute settlement panellists in the position of negotiators, and, by nature, the areas left to panellists are most likely to be the sensitive areas that were left unresolved by negotiators in the first place as a result of complications or converging perspectives. Given the complexities of the competition policy, a neorealist’s

approach to the CPA sees the interpretive powers of WTO's centrally administered adjudication panels an inhibitive factor for cooperation over the CPA.

The discussion above shows that both neoliberal institutionalists and neorealists, in very different ways, see the impact of the degree of centralisation of dispute settlement and information exchange mechanism on cooperation between the US and the EU for the CPA. Neoliberal institutionalists suggest that to overcome cheating incentives, as the underlying institution that hosts the antitrust interaction, the WTO must approach information as an institutional public good and play an important role in the generation and dissemination of information in a centralised way for the CPA. Neorealists, on the other hand, would suggest that central administration of information under the CPA is detrimental for cooperation. It makes the US and the EU apprehensive that a release of information – in an asymmetric setting – can be used against the perpetrator and, in the cases of a symmetric relationship, may change the distribution of gains to the benefit of the other party, unless the centrally managed mechanism ensures that information is received from either party equally well.

The Scope Factor

The scope of the CPA is a determining factor for cooperation by both theories. Business anticompetitive practices fall under one of four categories: cartelisation, monopolisation, vertical restraints, and mergers/acquisitions. The decision to include one or any combination of these measures has substantial repercussions on the enforcement mechanism of the CPA, as well as the distribution of gains and costs between the EU and the US. For instance, as will be discussed in Chapter 6, both the EU and the US had a similar approach towards the inclusion of international cartels in the WTO's CPA. However, their positions were substantially different on export cartels. Whereas the EU wanted the CPA to include export cartels, the US firmly objected as the cost of changing the US internal competition regime on these measures were very high.

More importantly, an agreement for competition policy within the WTO will inevitably be pinned to the wider subject of trade, automatically expanding the scope of a competition deal. Such a linkage has considerable bearing on the anti-cheating mechanism of the CPA; this would show itself in the information sharing obligation of the members and dispute settlement, as well as the internal organisation of the CPA such as a peer review arrangement.

The history of many agreements in the GATT/WTO reminds us that it seems as though there is no way that this connection can be avoided. The formation of a number of agreements, such as intellectual property rights and investment (TRIPs and TRIMs respectively), whose subject

matter were not inherently related to trade, became possible only when a relationship was established with international trade. TRIMs, as an example, could qualify for the WTO because it could be claimed that by banning local content requirements, dismissing trade-balancing requirements, etc., GATT would be further strengthened.

The impact of the WTO's current framework on the scope of the CPA becomes an important subject in terms of cooperation, knowing that the relationship between trade and competition policy is one of simultaneous complementarity and divergence Marsden, 2003; Tarullo, 2000, US, 1998d:3-6; EC, 1998e:10; Fox, 2003; 1997). This makes the impact of the WTO critically significant in structure as well as functions of a CPA.

Complementarities between the two policies rest in their economic goal of the efficient use of the world's limited resources. By trade, states seek to harness the benefits of increased efficiency that arise from economies of scale and scope through better allocation of resources. The reduction of tariffs and removal of state imposed Non-Tariff Barriers (NTB) all facilitate the achievement of this goal. Competition policy, likewise, aims to reduce the effects of inefficiencies that arise from business restrictive practices. The abuse of a dominant position in markets, for example, allows the dominant firms to manipulate otherwise competitive prices, restricting the best allocation of resources that would otherwise be enjoyed by market participants. Inclusion of a competition policy in the WTO thus should not cause friction with the existing provisions as it complements the objectives of trade liberalisation by ensuring that removal of tariff barriers is not substituted by the anti-competitive behaviour of the private sector. This understanding is echoed in deliberations of different countries in the WTO. For example, a US communication to WGTCPC holds "the ultimate objectives and outcomes of a successful policy of trade liberalisation will in many instances closely resemble or complement those achieved through the instruments of competition policy" (WTO, 1997a). The US envoy makes its point on complementarity of the two policies clearer when they say:

"what seems clear is that the trade policy objectives of trade liberalization ... can generally go a long way toward facilitating robust competition in markets, whereas the establishment and vigorous enforcement of sound antitrust laws and competition policies can generally go a long way toward assuring the conditions which are conducive to expanding and sustaining free and open trade among nations." (US, 1998a:2)

This notion resonates in the EU's interventions as well; "It can be seen ... that the WTO/GATT system ... has made an important contribution to enhancing competition and ensuring the contestability of markets" (EC, 1998e:11).

The scope of a CP deal would also be informed by the WTO rules on exceptions and limitations on trade. Safeguard measures are usually adopted by trade authorities, regardless of the positive impact that such imports might have on better allocation of national and world resources through increased competition. According to the WTO's safeguarding mechanism and the test of serious injury, in international trade loss of market share is the main criterion of re-raising tariffs without any reference to the benefits of better allocative efficiencies that such imports possibly created. The existing WTO safeguarding rules do not question whether the harmful imports are actually dumped or exported from a firm with a monopoly advantage or is a member of a cartel. Loss of market share is the only criterion. This means that as long as the losing party is domiciled in the importing country, the efficiency considerations that are the centrepiece of competition policy are simply ignored. Real world examples are numerous. In the US-Japan dispute over auto parts, for instance, the US authorities preferred to put forward their complaint under GATT Article 23 – nullification and impairment – without mentioning possible efficiencies in the Japanese markets. They claimed that market access for US auto part manufacturers was virtually foreclosed because of the vertical relationship that existed between Japanese car manufacturers and their part suppliers under the Keiretsu system. There was no mention of the possible efficiency gains/losses to American firms from US authorities. Nor did the Japanese bother to put their defence on competition and efficiency grounds as obviously efficiency and competition were clearly out of question. Trade concerns and interest group objectives clearly overshadowed competition considerations.

Neoliberal institutionalism predicts that the more severe the enforcement concerns, the wider the scope of the CPA (see for example, Keohane, 1984). A wider scope, one that, for example, incorporates all four major anticompetitive business practices or covers an extensive injury area, entangles different interests of the interacting parties together. In such situations, a cheating party will put itself at risk of retaliation by other parties, not only in the defection area but also in all other areas that the CPA covers. Metaphorically, it is similar to a tournament that plays out in several small matches. Fair play in any of the matches will enhance a states' reputation that makes others assured of their future compliance, consequently leading to prolonged cooperation over time. Gluing a number of issues together is synonymous to transposing the shadow of future (i.e., iteration of the same game over time) across a number of issues but played simultaneously. Busch and Koremenos (2001) show formally that the more severe the enforcement problem is for a party, the greater the probability of that party to propose a wider scope because, in the presence of certain conditions, a series of shorter agreements still embodies the shadow of the future required for the parties to ensure enforceability of the CPA.

Axelrod (1984) suggests that a strategy of tit-for-tat is a stable form of cooperation in the iterated games such as Prisoners' Dilemma where a player initially cooperates with other players, and continues to cooperate as long as the other does so because it is "robust and collectively stable" (Keohane, 1984:76). Neoliberal institutionalism believes that a strategy of tit-for-tat makes a CP deal stable as more games are played in aggregate. According to Axelrod, the key to overcoming cheating concerns among self-interested states is use of what he refers to as lengthening "the shadow of future". The contention holds that by making mutual interactions "more durable" and "more frequent" (Axelrod, 2009:130-132) within the framework of an institution, states are enabled to find conditional cooperation on anticompetitive business practices being a low risk strategy.

A neoliberal institutionalist perspective would suggest that, similar to the impact of iterated games on international cooperation, a wider scope in the CPA permits the players to become involved in more games, but games that fall into different niches. This is an extension to the concept of iterated games, with the difference that they are played over time and in different areas. Neoliberal institutionalism holds that under a wider scope, governments may still have incentives to comply with the rules of the CPA because they are concerned about precedent or believe that their reputations are at stake. For one thing, the EU or the US worry about establishing bad precedents by defecting their responsibilities under the CPA out of the fear that rule-violations spread to the other party, starting a cascade of breach and cheat that is likely to result in what Keohane once called a "collective bad" (Keohane, 1984:105). An egoist state avoids such a situation as it negatively affects the utility of being a member of the CPA and the WTO by outweighing the benefits of cheating. Keohane (1984:103-104) refers to the pre-WTO GATT system, for instance, to suggest that a narrow scope for retaliation is ineffective. He particularly mentions a countervailing system of GATT, and the IMF, and blames their unhelpful narrow scope in maintaining the conditions necessary for effective tit-for-tat strategies. As a result, retaliation for specific violations is not a reliable way of maintaining international regimes; this is because the GATT provisions for retaliation have been invoked only once, and then ineffectively.

Neorealists' perception of the CPA's scope – similar to their case for centralisation – is informed by relative gains concerns and by the nature of externalities between the EU and the US over competition matters. Accordingly, in the US-EU relationship where symmetric externalities exist, both states prefer cooperation to the *status quo*, and are therefore happy with a narrow institution that relies on issue-specific reciprocity. A wide scope in a symmetric relationship allows the other party to be able to retaliate to a defection in other areas rather than

the same area. Therefore, wider and wider scopes run the risk of unravelling retaliation and counter-retaliation in cascades, letting issues get out of hand.

A limited scope allows countries in symmetrical relationships to define a balanced or equitable deal. In such deals, states can better assess their concessions to each other in exchange of what they receive as compensation.

In an asymmetrical context, an institution limited to the single issue of an asymmetric externality would provide benefits only to the victims and impose costs only on perpetrators. To create incentive compatible institutions in the face of such distributional problems, states dissatisfied with the *status quo* must broaden institutional scope, using the linkage of incentives to convince perpetrators to join the institution and keep to it in the years to come (Mitchell and Keilbach, 2001:892).

Here is one of the major differences between neoliberal institutionalists and neorealists. Whereas the former argues in favour of issue linkage (i.e., lengthening the shadow of future) as a facilitator of cooperation, the latter reasons that such a relationship does not necessarily exist. In an asymmetric relationship, the potential perpetrator would be unwilling to tie its interests in other areas to the issue at hand. Given that the WTO automatically broadens the scope of the CPA to incorporate trade, rather than intellectual property rights and even investment indirectly, a neorealist perspective would not see the institutional impact of the WTO as a positive impact; this is because the concern for distribution of gains becomes more severe, which is unlikely to whet the appetite for cooperation. In fact, the analysis by Snidal (1985) and Fearon (1998) supports this claim. Their argument maintains that the more an international institution creates “durable expectations of future interactions”, the greater the incentive for an interacting state “to bargain hard for favourable terms, possibly making cooperation harder to reach”. Fearon then concludes, “... the shadow of the future thus ... may encourage states to delay in bargaining over the terms” (Fearon, 1998:270-271).

The scope-related impact of the WTO on cooperation is likewise important when a party wishes to broaden the issue linkage from trade and competition to other areas of bilateral concern. In the EU-US’s CPA relationship, for instance, if one side feels the need to broaden the scope from competition and trade to other areas, it again has to overcome the inertia created by the WTO. The fact that this broader scope, if entailing an advantage, is automatically granted to other countries under the MFN rules adds to the complexity of cooperation.

Therefore, a neorealist would posit that it is the WTO’s general rigidity rather than necessarily the span that is likely to hinder cooperation. If one of the parties, say for instance the EU, wishes to insert issues of security, technology or labour, etc., into the injury test in an

asymmetric relationship in which the EU is the victim, it would struggle on two fronts: one against the US position, the other against the WTO's extant rules that are less tuned towards new areas.

Conclusions

Neoliberal institutionalism suggests that once the WTO addresses the enforcement issue, the EU and the US would agree on terms of the CPA. In other words, given the failure of talks, they would argue that the WTO's inability to ensure enforcement through the effective definition of scope and right degree of centralisation has contributed to the non-cooperation between the EU and the US over CPA. Neorealists, in their turn, would reason that neoliberal institutionalists' account of the case is only one part of the story. The WTO's inability to address enforcement could be only one of the reasons. There are more reasons that could have made cooperation between the US and the EU untenable. The neorealists' critique holds that the WTO furthermore needed to ensure that the gains and costs of the CPA were divided in a way that maintained pre-CPA capabilities of the two sides relatively as had been beforehand. More precisely, the argument would be that in defining the scope and degree of centralisation for the CPA, the WTO had to ensure that not only enforcement was addressed, but also that both parties were happy with the distribution of gains as reflected in the right degree of centralisation and right size of the scope.

The differences between the theories exhibit themselves in both the centralisation and the scope variables. Whereas neoliberal institutionalists believe that the enforcement concern is addressed by a centralised WTO dispute settlement mechanism and a system of information generation/dissemination (similar to the current practice in the WTO), neorealists argue that centralisation might or might *not* address cooperation calculations. The reason is that a centralised enforcement mechanism is one of the concerns of the EU and the US, because these countries need to make sure that such an arrangement would not undermine their capabilities relative to the other party by, for instance, exposing them to extra threats of retaliation.

As for the scope, yet again, the theories differ in their predictions. Neoliberal institutionalists expect that a wide scope would increase enforceability of the CPA, therefore giving incentive to the EU and the US to cooperate in the WTO. They also see a positive role for the WTO in the CPA initiations as it increases the scope of the agreement by liaising trade issues with antitrust. The decrease in cheating incentives that follows would enhance enforceability, hence cooperation. Neorealists argue against the neoliberal institutionalists' interpretation. They do not expect such a cause-effect chain would necessarily result in cooperation. The criticism holds that different scopes carry different sets of benefits/costs for both the EU and the US. The WTO

could only be helpful in boosting cooperation in the exceptional case that the proposals of both parties fell in the current territory of the extant arrangements. Otherwise, the WTO's rigidity to change would, in fact, hinder cooperation as it would limit the flexibility needed for the EU and the US to cooperate.

In the process of tackling the research question, this chapter built on the previous chapter by presenting an expectation model of behaviour based on neoliberal institutionalism's interpretation of cooperation: neorealism's account was also added for a better understanding of the cooperation dynamism. As such, Chapter 4 laid the ground for the next two chapters to tackle the empirical data over centralisation and scope in the CPA interactions in the WTO. The results of these chapters will then be put together in Chapter 7 for the final analysis of the WTO's impact on the quality of the US-EU interactions over an international agreement on competition policy.

Chapter Five: The Centralisation Factor

This chapter explores the centralisation factor in the formulation of the World Trade Organisation's (WTO) Competition Policy Agreement (CPA) as advised by the EU and the US and affected by the WTO.

Previous chapters discussed that, according to neoliberal institutionalism, in cooperation between sovereign states, enforcement concerns (i.e., the cheating dilemma) were the main variable informing the behaviour of the interacting parties. Furthermore, we drew on the theory of rational design of international institution to borrow those features affected by the enforcement concerns in the process of constructing the WTO's CPA. These are centralisation, membership and scope. Finally, the theory of embedded institutionalism was incorporated in our discussion to remind us that the WTO, as an intermediating factor, conditions the terms of interactions between the EU and the US; it therefore has significant influence on the outcomes.

This chapter addresses the centralisation variable. By definition, centralisation concerns the distribution by which important tasks are allocated to the entities (states, institutions, experts, etc.) within or outside the boundaries of the institution in question. The chapter has two tasks. First, it identifies the important activities that are subject matter of the centralisation debate in the CPA for the countries in question. This is a necessary initial step in demonstrating the sensitive areas for the EU and the US as far as the question of centrality is concerned. The second task is the study of the proposed frameworks for the distribution of tasks between the WTO and the member states for performing the activities identified in the first step; this is the question of who does what, and in what capacity, authority and order.

Based on the WTO documents in the period under study, this chapter shows that the two important areas highlighted and negotiated by the countries in question for the CPA, in a broad categorisation, are, first, transparency requirements and the mechanisms for exchange of information between signatories of the CPA and, second, the settlement of disputes. More technically, therefore, the study of the centralisation factor for the CPA entails analysing the degree by which important institutional tasks of dissemination/exchange of information and settlement of disputes are distributed between the WTO and the member states of the WTO in their own right. In other words, the centralisation debate, on the one hand, concerns the point at which members of the WTO compromise as to how much responsibility and regulatory power to delegate to the WTO. On the other hand, they must also choose how much power to be trusted to the WTO members themselves, or perhaps other international institutions, to perform certain tasks in their own capacity.

We need to be reminded that attention to the centralisation factor is important in the analysis of the CPA. This is because we expect that bigger enforcement concerns lead the interacting parties to trust more responsibility, and therefore authority, to the institution of the WTO than member states. It is argued that the degree of centralisation can be a point of divergence with negative impact over cooperation.

Based on the discussion above, the EU and the US proposals over centrality factor in two main areas are compared: transparency/exchange of information, and monitoring/settlement of disputes. What the EU and the US have to say about the objectives, scope, participants, and the end products of each area for a competition policy agreement will be investigated and discussed. The task in this regard will be ultimately used to assess the degree by which the proposals are close to the current review mechanisms of the WTO for an assessment of the WTO's impact over cooperation.

The same format shapes the sections of the chapter: first, the activities related to increased transparency and information generation/transmission/analysis and, second, the activities related to settlement of disputes form sections A, B and C. Then each section is divided into three parts, the EU model, the US model, and a comparison with the extant related WTO legal framework.

At this point, and before starting the main section, it is timely to talk about the case for a peer review mechanism. It is often referred to in this chapter, and is a key concept in the CPA's centralisation debate.

Peer Review and its Role in the Organisation of International Institutions

Peer review is a process by which the quality and effectiveness of policies, laws, regulations, legislation, policy environments, processes and key institutions of member countries on a range of topics are assessed (OECD, 2003:1). The assessment is mainly done by the countries' member to the same institution, but third parties, being persons or other organisations, can also be called upon when their expertise is needed (see, for example, WTO's DSU (Dispute Settlement Understanding), Article 13:2). Many competition policy fora maintain peer reviews, for instance, the OECD and the ICN both have a peer review mechanism with a number of tasks and responsibilities (see for instance, Hollman and Kovacic, 2011). In the WTO system, review bodies such as Trade Policy Review Mechanism (TPRM) are formed to contribute to:

“...improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements ... and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual

Members' trade policies and practices and their impact on the functioning of the multilateral trading system" (Annex 3 of the Marrakesh Agreement).

The degree of centralisation is critical in the design of a peer review mechanism; therefore there are certain features on which members have to decide. The list is not exhaustive, but it mainly consists of the objectives, scope and definition of peers, i.e., who should compose the peer group (e.g., national delegates, legal experts, WTO secretariat, etc.). As for the objective, the range is diverse. However, it is mostly about increasing the exchange of information, monitoring behaviour of members under the subject matter of a treaty, agreement, etc., and cooperation for technical assistance to help members achieve higher performance and efficiency.

Scope of the activities is the second feature that needs to be integrated into the design of a peer review body. The question is what activities, subjects or behaviour is covered by the peer review. Membership criteria are the third feature and involve decisions about the party or parties that carry out the tasks. Membership in the WTO's peer review bodies is often voluntary, but participation is highly encouraged.

A committee of experts is often formed to carry out the tasks. As one observer in the Working Group on the Interaction between Trade and Competition Policy (WGTCPP) suggests, a generic framework for the peer review mechanism for the WTO's CPA must involve the administering secretariat, the country being reviewed, the peer group and a set of examiners that are normally drawn from the peer group (WTO, 2003c). The review process involves a number of stages, beginning with an investigation carried out in accordance with specific agreed review criteria. The end product of the peer review process is often only a report. That report includes policy recommendations and guidelines, specific indicators, benchmarks and legal norms. The peer review process ends with the dissemination of a report prepared by the WTO secretariat.

An important characteristic of peer review vis-à-vis other institutional activities, such as formal dispute settlement, is that it is conducted in a non-adversarial collegial context (OECD, 2002:4), therefore reducing concerns for national sovereignty. As mentioned earlier, one possible objective of the peer review system is monitoring compliance and guiding progress among signatories of an agreement. This is controversial because parties with different objectives and political/legal systems demand different degrees of peer review involvement. The non-adversarial characteristic motivates tolerance and sets the ground for cooperation, as the findings of the review do not form a basis for bringing discipline to the reviewed country; unless, of course, a party, whether they are a member of the peer group or not, starts a dispute based on the findings.

Having introduced the significance of the peer review mechanism for the CPA's degree of centralisation debate, the main discussion of the chapter begins in the three sections below. These concern transparency/exchange of information, settlement of interstate disputes, and the debate over individual competition cases respectively.

Transparency and Information: The Uncompromising Issue

In the following section, using the deliberations made by the EU and the US delegations, we depict what each party proposes for the concept of transparency as one of the critical factors in defining the degree of centralisation for the CPA. The modalities proposed by the EU and the US for increased transparency in the context of the CPA talks are also discussed.

The study of WGTCP documents shows that the overall atmosphere in the working group has been positive on transparency cooperation over competition related issues. In particular, reports by the secretariat indicate that most countries have endorsed, albeit in their different ways, that application of transparency as an accepted norm in the WTO is critical to ensuring compliance to the obligations of the CP agreement (see for instance, WTO, 2002b). Exchange of information between member states not only demonstrates that a country has respected its commitments, but also helps others to see whether or not the performance has been uniform, impartial and reasonable.

The following section draws on the WGTCP documents to show, first, how far the US and the EU have supported the transparency requirements in the CPA, and second, what degree of centralisation, in terms of activities, should be trusted to the WTO, and for what roles they have proposed that the member countries are kept accountable. The section will also show conditions, limitations and other terms that both the EU and the US have attached to transparency responsibility of members and the WTO.

The EU Argument for Transparency

In numerous instances and in many guises, the EU has asserted that transparency in conduct of competition policy should be an important, and perhaps the most important, feature of the WTO's antitrust agreement (see for example, EC, 1999a, 2000a:6-7, EC, 2002a:6, EC, 2001a:3). The EU mentions that members must be dedicated to ensuring transparency in their competition law and practice. The EU explains that, in the absence of transparency, other countries and the private sector are adversely affected. For instance an EU deliberation circulated among members on 19 November 2002 reads:

“Transparency is a fundamental principle both for the multilateral trading system and for competition authorities seeking to develop and establish a “competition culture”. In

addition to this important objective, transparency of competition law regimes is of great importance for firms engaged in international trade as well as for consumers...” (EC, 2002a:6).

The EU’s stance for transparency has several features upon which its argument for the degree of centralisation of different tasks in the WTO rests. The study of the WGTCP during 1997-2003 indicates that the EU emphasises the need for the WTO’s CPA to address transparency in national competition laws, as well as the practice of competition policy. For one thing, the EU discussion holds that, without exception, and quite naturally, all national competition laws prescribe and proscribe certain types of business conducts with regard to competition between businesses; however, the provisions are often defined in such a general way that leaves room for a wide range of interpretation. In this vein, the EU further mentions that although publication of the basic legal and regulatory framework is essential, additional steps have to be introduced to ensure the necessary transparency needed for the conduct of international business. The EU particularly draws on the practice of competition policy in EU states countries and says:

“... Similar steps have been taken by the European Community member States as regards national competition law. While different approaches can be followed to ensure transparency, it is a matter of considerable importance that under any such approach there is sufficient information not only about the basic legal regime, but also on how the law is applied in practice.” (EC, 1999a:4-5).

As far as the distribution of tasks for the generation, analysis and distribution of information on members’ competition regime is concerned, the EU assigns a number of tasks to member countries and some other responsibilities to the WTO.

According to the EU model, member countries are invested with one main task: publicising details of their competition regimes and changes to it as early as they can, and notifying the WTO of such changes. The EU envoy addresses the issue by asserting that:

“In the competition field, a transparency commitment would obviously apply to laws, regulations, and guidelines of general application. The obligation would be for WTO members to ensure public availability in a comprehensive and timely manner – be it in print or on a publicly accessible web site – of all laws, regulations and guidelines of general application... the second part of a transparency obligation would be a notification requirement for WTO members concerning their laws, regulations and guidelines of general application” (EC, 2002a:6).

When country level duties are exhausted, the WTO’s part starts. Within the WTO, it would not be the WTO’s secretariat, however, but a peer review group who fulfils the WTO’s share of work in most instances (EC, 2000a:9; EC, 2002c; EC, 2003). Therefore the weight given to the WTO in carrying out some tasks can be assessed in terms of the capacity delegated to the peer

review body. In the EU model, the CP peer review group has certain characteristics and duties. These will be approached in two sections below.

In the EU model of centralisation, all WTO signatories are members of the CPA's peer review, making participation universal. The EU, moreover, envisages that a Competition Policy Committee be established as part of the peer review mechanism to handle the peer review's tasks (EC, 2002a:6). According to the EU formulation, this committee acts as a forum for both providers and recipients of national level information to better co-ordinate and develop programmes for each WTO member. The EU argues that by assigning this role to the committee, the available resources will be used in an efficient, resource effective way (EC, 2003:7).

The EU's sketch of the WTO's peer review includes details about the combination and quality of participants, frequency of reviews and even the minimum number of participants needed for the meetings. In terms of participants, the members of the WTO are the "peers"; however, they are not required to participate in all activities. As for the substantive works, the EU is not specific, leaving the doors open to a combination of all member states, secretariat and even an independent expert group from outside. The EU explains the reason for inclusion of competition experts in the monitoring mechanism to be, "... a safeguard against slippage in that competition experts had the best appreciation of the delicacy of enforcement procedures, as well as the fact-intensity involved in decisions on individual cases" (WTO, 2003a:38).

In the EU arrangement, the competition peer review works independently from TPRM. The reason, as the EU explains, is that TPRM covers a wide range of trade-related issues in addition to competition and:

"...would not allow the necessary time and degree of detail which an effective competition-specific peer review warrants. ..., we see a need for a separate peer review mechanism within the WTO for competition, the design of which should avoid duplication with other fora and should draw upon relevant work from such fora, including the OECD Global Forum on Competition, the ICN and UNCTAD where relevant" (EC, 2003:7).

According to the EU, peer review should apply to all provisions of the WTO competition agreement, whether binding or not (EC, 2003:2). The peer review would have an overall transparency monitoring task (a "service-check" function using EU terminology) of a WTO member's competition law and policy. It should also help identify areas where improvements could be made to increase transparency. The EU adds that peer review will be an instrument in the disposal of the members under review, used to verify the effectiveness and efficiency of the laws, regulations and practices through which it implements its CP commitments.

The EU further explains that the scope of activities of the peer review can include the modality of cooperation between developing and developed countries for the provision of technical assistance and capacity building when a developing country needs to address inefficiency in its competition regime. More specifically, the terms of cooperation could include “how well a culture of competition was being established and whether knowledge of the competition law and regime had been successfully propagated in the public and private sectors [of the developing country]” (WTO, 2003a:22).

The EU tilts towards more centralisation in this area by not rejecting the possibility of the suggestion made by the representative of UNCTAD about UNCTAD, and possibly OECD involvement in capacity building for increased transparency in developing member countries due to the advantage of the synergies available in these organisations.

In sum, the EU sketches a process for ensuring transparency in members’ competition regime under the CPA. As far as the degree of centralisation is concerned, the process starts with member countries commitment to publish their competition system and make sure any development is transmitted to other members. This information will then be passed to the WTO for analysis. As the EU sees it, in the WTO a combination of peer review, competition policy committee, WTO’s secretariat and third parties will carry the responsibility of exchange of information and transparency. Table 5.1 below shows the activities and the bodies responsible in the EU proposal.

Table 5.1-Summary of the EU’s Position on Centralisation and Transparency

	Informing others on developments in competition laws	Annual Country Reports	Analysis of the Reports	Recommendations	Capacity Building and technical Assistance	Implementation	Enforcement
WTO Member States	✓	✓			✓	✓	
Peer review			✓	✓			
The CP Committee			✓				
External Experts including UNCTAD, OECD			✓	✓	✓		
WTO Secretariat							

Source: Author

The US Argument for Transparency

Similar to the EU, the US puts massive emphasis on transparency in the practice of national competition policy and law to be one main objective the CP deal. In fact, transparency in regulation, enforcement and antitrust investigation was numerously emphasised in many written and oral communications of the US throughout the working years of the WGTCP (see for

example, US, 2002a:5; US, 1999a:4). Very similar to the EU, the US sees transparency as a key principle in the formulation of the CPA, and that it must cover a wide range of activities/ issues. In a deliberation the US makes its position clear by saying:

“...the United States advocates the transparency of rules, laws, and enforcement procedures. Transparency is important to the sound application of antitrust law and maintaining the effectiveness, impartiality and credibility of such law...” (US, 2002a:5)

To make its point, the US stresses its adherence to the exchange of information between countries and that it endorses a peer review mechanism for the WTO's antitrust deal. To highlight the importance of transparency through the exchange of information, the US, furthermore, refers to the commitment of America's competition agencies to cooperate with their counterparts worldwide for an exchange of information within bilateral and regional competition arrangements (US, 1997c; US, 1999b). In this vein, the American diplomats highlight that some of their international competition endeavours have been unilateral, without necessarily an expectation of similar return from their contracting parties. For example, it reports to the WGTC that the United States' Department of Justice (DOJ), the Federal Trade Commission (FTC) and USAID cooperate to release to all “...thousands of published judicial and administrative decisions in antitrust cases” about “... what the agencies are doing, including pleadings, decisions, press releases, speeches by government officials, and the like...” (US, 1999a:3). These publications explain the structure and administration of the DOJ and the FTC, US investigative techniques, and legal and economic analyses of a wide spectrum of antitrust issues.

To highlight the importance of transparency and exchange of information in international antitrust cooperation, the US furthermore affirmingly mentions the developments in the OECD (US, 1999a:4). Given that the US has been the main force behind the OECD's competition work, it would be fair to assume that the OECD recommendations have the backing of the US, and as such is advised by the US to other WTO members for the WTO's CPA.

This chapter has shown that transparency and an increased exchange of information has been top of the US's agenda for the WTO's antitrust deal. The following section will tackle the issue of centralisation in the US deliberations; the question of who does what and what responsibilities the US believes must be carried out by member countries and what responsibilities should be invested into the WTO.

The US echoes the EU's approach by asserting that peer review can contribute significantly to the objective of transparency. The last deliberation of the US to the WGTC in 2003 was totally dedicated to the peer review and its importance for the WTO's antitrust agreement in assuring

transparency in the law and practice of competition in member countries. The paragraph below summarises the US position on the matter:

“...Peer review can contribute to transparency of competition laws and policies and their implementation. The report that typically provides the basis for peer review can describe the reviewed country’s competition laws as well as the policies and enforcement practices used in implementing the law. The interchange facilitated by the peer review process, in which the reviewed country is asked to explain aspects of its competition regime, increases the transparency of competition regimes to all WTO Members” (US, 2003:3).

The US further highlights the attributes of the peer review mechanism for the CPA. Drawing on the US deliberations, written and oral, the following section will describe the particularities of US model for the peer review as it relates to the transparency requirements.

As far as membership is concerned, the US advocates participation of all WTO members in the peer review mechanism. It argues that because of the need for the creation of a common competition culture, all members of the WTO should take part and cooperate in the activities of peer review because it is with participation that such culture will be created. One US deliberation explains that:

“...Through participation in peer reviews, competition policy officials from different countries not only learnt more about one another’s policies, they also made increased personal contacts, which could facilitate increased international cooperation in implementing competition laws and policies...” (WTO, 2003a:29)

Moreover, and similar to the EU, the US sees some merit in the formation of a Competition Policy Committee (US, 2003; WTO, 2003a). In this regard, the WTO’s Secretariat records hold that:

“The representative of the United States expressed his agreement with ... the submission of the European Community and its member States, ... Merit was seen in the suggestion that peer review be organized under a WTO Competition Policy Committee, as was also set out in the US delegation’s paper.” (WTO, 2003a).

In addition to the suggestion for a Competition Policy Committee, the American’s view on the peer review mechanism includes a number of key functions. First, the CPA’s peer review must seek to increase transparency in members’ national competition laws and their implementation. The US position maintains that the interchange facilitated by the peer review process, in which the reviewed country is asked to explain aspects of its competition regime, increases the transparency of competition regimes to all WTO Members (US, 2003:3).

Second, the peer review mechanism must pursue the objective of the enhancement of national laws, capacity building and ultimately convergence of competition policies between WTO

members. The US believes that reviews and an exchange of information will facilitate the convergence of competition practices among member countries over time, as all participants in the peer group know what the competition policy and law is like in other countries and adjust their own practices for better regulation, implementation or increased efficiency. Agencies dealing with the implementation and enforcement of the law could benefit from drawing on the experiences of those in other jurisdictions. The US describes peer review as a means aimed to:

“...facilitating learning through sharing experiences and expertise, contributing to capacity building, promoting transparency, promoting convergence, encouraging problem-solving, and promoting international cooperation...peer review could be an effective tool in enhancing national competition regimes, and by helping disseminate the culture of competition to all Members, could benefit the world trading system as well” (US, 2003:30).

All in all, in the US model for transparency in the CPA, the WTO is in charge of a great many activities in terms of facilitating the exchange of information between members, and ensuring transparency in their competition regimes. Within the WTO, however, the US believes that the peer review arrangement must carry the lion’s share of tasks. It reviews country reports and passes recommendations to them to enhance transparency. The US also sees some merits in having a competition policy committee to work within the purview of peer review.

As we shall see later in this chapter, the US view differs from that of the EU as it sees it more appropriate for a country’s annual reports to be prepared by the WTO’s secretariat and not member states themselves. On this last point only, one sees that the US seeks more centralisation of activities in the WTO than the EU. Table 5.2 below summarises the US model for the distribution of tasks between the WTO and member states for transparency in the CPA.

Table 5.2-Summary of the US’s Position on Centralisation and Transparency

	Informing others on developments in competition laws	Annual Country Reports	Analysis of the Reports	Recommendations	Capacity Building and technical Assistance	Implementation	Enforcement
WTO Member States	✱				✱	✱	
Peer review			✱	✱	✱		
The CP Committee			✱				
External Experts including UNCTAD, OECD							
WTO Secretariat		✱					

Source: Author

The WTO’s Impact on Cooperation over Transparency

If there is something that both the Europeans and Americans emphatically stress for the WTO’s CPA, it is a commitment to transparency and availability of information in all aspects of practice of competition policy and law in member countries. This includes a commitment by all

parties for cooperation on the exchange of information over the general application of competition related national policy and practice.

The views expressed by the EU and the US share much, not only on the importance of transparency and exchange of information but also, as will be explained below, with the extant WTO's current laws: the expressed views are even identical at times. This point is acknowledged by the parties. For instance, a note by the WGTCP secretariat from the US delegation holds:

“The representative of the United States expressed his agreement with key aspects of Section 2, of the submission of the European Community and its member States, pertaining to peer review [This is WTO's document WT/WGTCP/W/229 dated 14 May 2003]. In particular, the US concurred with the paper's endorsement of the application of peer review to the competition-related work of the WTO and, in particular, as a vehicle to assist Members in developing and implementing their competition laws and policies” (WTO, 2003a:35).

The EU and the US likewise underscore the importance of exchange of information between members of the CPA. According to their deliberations, as mentioned earlier in this chapter, such information sharing ensures transparency in national competition regimes. However, as depicted in Table 5.3 below, there are some differences between the two over the modality. For one thing, while the EU sees it appropriate for member countries to prepare the annual country reports, the US invests in the WTO's secretariat to do this, indicating the US's tendency for more centralisation over transparency matters.

Table 5.3- Integrated Summary of the EU's and US's Position on Centralisation and Transparency

	Informing others on developments in competition laws	Annual Country Reports	Analysis of the Reports	Recommendations	Capacity Building and technical Assistance	Implementation	Enforcement
WTO Member States	✓✱	✓			✓✱	✓✱	
Peer review			✓✱	✓✱	✱		
The CP Committee			✓✱				
External Experts including UNCTAD, OECD			✓	✓	✓		
WTO Secretariat		✱					

US - ✱

EU - ✓

WTO - W

Source: Author

The following section explores the WTO's legal framework for an assessment of how far, or close, its current rules and regulations fall to the EU and US formulation of the CPA. Knowing this, we are then equipped to understand the possible impact of the WTO as the nesting institution for the CPA.

The transparency related rules are all scattered in the many WTO agreements, as well as the General Agreement on Trade in Services (GATS), TRIPs and GATT 1994. According to these provisions, member countries are required to notify other member states of new developments in their trade policy. The notification method is also well articulated and procedures are set in detail. Moreover, the responsibility of members to respond to a consultation request is determined. GATT Article 10 is typical of these provisions and is totally dedicated to ensuring transparency and exchange of information in a wide range of subjects. The text of the article is given below to show that the WTO's extant rules are clear and strong on transparency requirements:

“Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them....” (GATT, Article 10)

In a similar manner, but in relation to the trade in services, GATS Article 3 emphasises the necessity of transparency through the notification of a change in national policy to other parties. Furthermore, GATS Article 3 highlights that member states would respond as swiftly as possible to the request of other members seeking information and clarification in policies related to the trade in services. Article 3 reads as below on this matter:

“... Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph...” (GATS, Article 3).

Notification for transparency requirements also resonates in the TRIPs. Article 63 highlights the contractual requirements that members of the WTO will explore virtually all possibilities to inform all related stakeholders about all developments in their jurisdictions, as long as trade of intellectual property rights are concerned:

Likewise, Annex 3 of the Marrakesh Agreement for Trade Policy Review mechanism holds:

“Members recognize the inherent value of domestic transparency of government decision-making on trade policy matters for both Members' economies and the multilateral trading system, and agree to encourage and promote greater transparency within their own systems...”

These points highlight that current WTO rules concerning trade in goods, trade in services, intellectual property rights (i.e., the main pillars of the WTO) and many other Uruguay Round

agreements, all support the principle of transparency to the degree demanded by the EU and the US for the CPA.

Nevertheless, for a full compatibility analysis, the organisation needed for ensuring transparency must also be taken into consideration. In sum, the bodies mentioned by the EU and the US that undertake the needed activities modalities of transparency in the CP agreements includes:

- A- The Peer Review
- B- Competition Policy Committee
- C- National contact points

The WTO's framework was examined in search of antecedents for these bodies. Again, the aim is to see which of these suggestions have precedence in current the WTO framework and which do not. The findings help us see in what areas the extant WTO rules support or reject the proposals of the US and the EU.

The establishment of a peer Review mechanism for the CP agreement is perhaps the main modality (operational) arrangement for the CP deal. Policy review of a member by other members for enhancement recommendations has a tradition in the Uruguay Round of negotiations and its main agreements. The most prominent one is Annex 3 of the WTO's Final Act, which concerns the Trade Policy Review Mechanism (TPRM). TPRM requires more exchange of information among parties for increased transparency:

“...the review mechanism [TPRM] enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system.”

And TPRM's paragraph D reads

“In order to achieve the fullest possible degree of transparency, each Member shall report regularly to the TPRB [Trade Policy Review Body]. Full reports shall describe the trade policies and practices pursued by the Member or Members concerned...”

The members of the TPRM, called the Trade Policy Review Body (TPRB), are the same as members of the WTO General Council wearing a new chapeau to undertake the review of the member states' trade policies. This is similar to the EU proposal for the CP agreement. As mentioned above, the EU would like to see a Competition Policy Committee put into place for the management of the operation of the peer review.

In addition to the TPRB, the WTO has invested in another body in itself. Called the Trade Policies Review Division (TPRD), it has several areas of responsibility. One such area, related to our discussion, is supporting the work of the Director-General and WTO members under the TPRM (Annex 3 of the WTO Agreement). This includes preparing periodic reports on members' trade policies, and preparing regular reports by the Director-General on trade policy developments including a report on Annual Overview Developments.

The US envoy suggested that a Competition Policy Committee must be put into place to administer a number of tasks within the peer review mechanism of the CPA. Again, such arrangement has antecedence in the WTO and a number of Uruguay Round agreements. The Council for Trade in Goods (Goods Council), the Council for Trade in Services (Services Council), the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPs Council) are the three main overarching WTO bodies with similar tasks suggested for the Competition Agreement, but on a larger scale. There are, moreover, six smaller specialised bodies called "committees". The committees cover issues such as trade and development, the environment, regional trading arrangements, and administrative issues. Each of the higher order councils also has subsidiary bodies. The Goods Council has 11 committees dealing with specific subjects (such as agriculture, market access, subsidies, anti-dumping measures and so on). More specifically, for instance, the Agreement on Technical Barriers to Trade envisages a 'Committee' in its Article 13. This committee, composed of representatives from all the WTO members, – is meant to serve the purpose of "...affording Members the opportunity of consulting on any matters relating to the operation of this Agreement [TBT] or the furtherance of its objectives..." (TBT, Article 13). Likewise, the Committee on Trade and Development serves as a focal point for the consideration and coordination of work on development in the WTO. In total, the WTO's activities are centralised in three councils and a number of committees, taskforces and *ad hoc* working groups.

The EU's suggestion for the establishment of a national contact point for the facilitation of responding to information requests has precedence in GATS, Article 3;

"Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters [being its measures of general application in governing rules of trade in services] as well as those subject to the notification requirement..."

In sum, the analysis presented so far proves two significant points. First, the EU and the US have a lot in common in terms of the importance of transparency requirements and the need for a smooth exchange of information between members within the CPA. There are some differences between the two in the proposed modalities, as well as in the degree of centralisation

of activities in the WTO; however, these differences are minor and do not constitute a hurdle to cooperation. Our findings are very similar to the observation made by the OECD in the WGTCP:

“...Discussions of the WGTCP have revealed a general consensus among WTO members that peer review in the trade and competition context is an effective means to carry out evaluation of policies and laws, stimulating discussion and co-operation, knowledge and experience sharing and thus generally advancing the goals of an MFC. In the same vein, it has been noted that because one of the functions of peer review is to identify capacity constraints, it can serve as a useful step in the process of capacity building and facilitating understanding of complex technical issues that arise in this area.” (OECD, 2003:7)

Second, our analysis shows that the legal structure of the WTO as it stood during the CPA initiations were close to the proposals of the US and the EU in terms of transparency and the required modalities.

We can therefore conclude that the WTO was not a hindrance to cooperation in the transparency/exchange of information area in the CPA, as it supported proposals of both countries equally, not favouring one against the other.

The next section tackles the second variable. The issue of centralisation in settlement of disputes is extremely sensitive for countries because it is directly related to questions of sovereignty. Again, the aim is to see whether or not the WTO has facilitated cooperation in that area, or has caused hindrance through its extant rules. Substantive matters such as necessity of having a national level competition policy, issues related to hard core cartels, etc., will be addressed under the rubrics of scope in the next chapter.

Settlement of Inter-state Disputes

The previous section tackled the first of the two issues in centralisation debate for the CPA. The ways of ensuring transparency and the modalities necessary for the generation and analysis of information over members' national competition laws/policies, and then allocation of responsibilities for recommendation, technical assistance and implementation of the recommendations were discussed. We then elaborated the ways that the WTO's extant legal framework could affect, whether to facilitate or hinder, cooperation between the US and the EU for transparency in the CP agreement.

The second part of the debate, in its turn, addresses the settlement of disputes. In general, the EU and the US emphasise cooperation, albeit in different degrees, based on negative comity and positive comity as part of the agreement on Competition Policy (see for instance, EC, 1999c:9). The EU and US proposals for settlement of disputes will be discussed; in particular, suggestions

for the degree of centralisation through ways by which related activities are divided between the members, the WTO, and possibly third parties are the subjects of this section. Following the routine of the previous section, the EU position will be addressed first, followed by the US position, and finally, what the WTO's extant rules have to say on these matters, and whether or not the WTO helped cooperation between the two countries.

However, before studying the proposals, it bears reminding that different dispute settlement arrangements, in terms of degree of centralisation of the adjudication process, should be understood as the products of parties' assessment of enforcement problems of the CPA. As lies at the heart of the Prisoners' Dilemma game, on which neoliberal institutionalism draws, and Koremenos et al. (2001:776) further endorse, even if a settlement arrangement makes everyone better off, one or all actors may prefer not to be bound by it because they believe they could do better in finding a resolution if they were left to themselves.

The EU Argument for Settlement of Interstate Disputes

As the theories of neoliberal institutionalism and neorealism both expect, the EU puts massive emphasis on the formal settlement of disputes between member countries as an anti-cheating measure that ensures enforcement of the CPA. According to the EU model, the parties to a dispute have certain responsibilities; however, it is mainly the WTO's dispute settlement and the peer review, as two intra-organisational complementary mechanisms, that carry the main weight of settling disputes (EC, 2003:1). The EU points out that settlement is essentially the instrument that upholds the integrity of the system because, in a system of corresponding rights and obligations such as the WTO's, close attention to the settlement of disputes is necessary for the enforcement of obligations (see for example, secretariat notes of the 20-21 February 2003 WGTCP meeting, WTO, 2003b:27). As such, the EU proposal accumulates much responsibility to the WTO and the role of member countries; in comparison, the weight of activities in the WTO is much lighter.

Similar to our discussion above on peer review's role in ensuring transparency, the arguments for the design of a dispute settlement mechanism of the CPA has to answer two key questions:

- a) participants; who carries the responsibility and hence is invested with power; and
- b) the range of responsibilities, what the scope of the responsibilities must be and what the exemptions must be.

The following section discusses each in turn, based on the EU's deliberation in WGTCP between 1997 and 2003.

As far as participation of members is concerned, the EU favours a well-centralised dispute settlement mechanism for the CPA. More specifically, the EU proposes that competition disputes should be handled by the same general framework that all other disputes in the WTO are tackled (see for instance, EC, 2003:1). The EU, however, points out that by referring the competition disputes to the WTO's Dispute Settlement Body (DSB), members are not relieved from their duties for entering into consultations at the request of other members. As such therefore, and according to EU model, WTO members are invested with some responsibility to handle disputes. This responsibility, although important in its own right, is just one part of a longer, more formal process. In this vein, an EU deliberation reads:

“...we envisage that a consultation and co-operation mechanism would be a key component of any WTO competition agreement. A range of issues could be raised under the consultation provisions of such an agreement, including one WTO Member's assessment – rightly or wrongly - that the domestic legislation of another WTO does not meet the standards contained in the WTO agreement... What is to be noted in this context is that consultations under this mechanism would be distinct from the consultations under DSU Article 4It is important to stress that... this consultation mechanism would afford WTO Members a venue to discuss matters they either cannot or do not wish to bring under the WTO dispute settlement provisions. Such consultations would also provide an essential complement to the more public processes of discussion in the Competition Policy Committee and of peer review.” (EC, 2003:7-8.)

According to the EU proposal, when the initial consultations are exhausted and an issue is not yet solved, the WTO takes charge, with peer review and Dispute Settlement Mechanism (DSM) being the bodies to be trusted to tackle the issue. However, in its construction for the CPA, the EU emphasises that it sees peer review more as a supplementary tool to the formal hard law dispute settlement mechanism, with the difference being that the peer review is helpful for the enforcement of the issues that cannot be handled by the dispute settlement:

“...dispute settlement and peer review should be seen as complementary mechanisms and peer review addresses a number of issues which would not be subject to WTO dispute settlement. However, unlike dispute settlement which would apply to the obligations contained in the WTO competition agreement, peer review would aim at a wider range of competition law and policy matters” (EC, 2003:6).

The EU further makes its point clearer on several occasions. In the EU's depiction of the settlement of disputes, it envisages a monitoring and consultation mechanism to be a key component of the WTO's competition agreement. A range of issues could be raised under this mechanism, including one WTO member's assessment that the domestic legislation/policy of another member does not meet the standards contained in the CPA (EC, 2003:7-8).

A few weeks later in the WGTCP meeting on 26-27 May 2003, in an oral deliberation, the EU delegation further explained its desired boundaries for the peer review in fulfilling the invested responsibility for ensuring enforcement of the CP deal:

“...peer review could cover a wider range of issues than those which would be subject to dispute settlement; that is, it would even cover matters where no commitments were made. In particular, it could look at the successes and difficulties which a country experienced in enforcing its competition regime, with a view to identifying good practices which could be disseminated and aspects where further improvement would be welcome. However, peer review, like dispute settlement, should avoid looking at decisions in individual competition cases, which involved judgements on legal and economic questions, and at questions which concerned prosecutorial discretion...” (WTO, 2003a:27).

To recap, as far as responsible bodies are concerned, the EU model for the settlement of disputes has three main bodies: a) member states, b) peer review, c) WTO’s dispute settlement unit. However, the role of members is mostly voluntary: it primarily entails bilateral consultations. The WTO’s peer review has an overall guidance/monitoring role, but the dispute settlement unit carries the gravity of the settlement process and is in charge of formal adjudication between member states.

As for the scope of the activities that come under auspices of the WTO, the EU sees no difference between competition and non-competition disputes. It proposes that if the complaining party wishes, the disputes falling under the binding rules of the CPA similar to non-competition cases must be covered by the DSB. The EU’s message is direct and specific:

“...On the basis of what the EC and its member States have proposed ... dispute settlement would apply to the three core principles of non-discrimination, transparency and procedural fairness, as well as to the ban on hard-core cartels. It would not apply to co-operation under the agreement, which would be voluntary and non-binding” (EC, 2003:3).

The EU argues that its model for settling interstate rows seeks to strike the right balance between two forces that act in different directions; the need for the enforcement of the CPA, and the force for respecting national sensitivities of the member countries. The EU says, “...peer review and dispute settlement may be used so as to provide optimal results in the trade and competition area, while at the same time duly respecting national sensitivities and prerogatives” (EC, 2003:1).

Against this general area of duties, the EU trims certain areas from the jurisdiction of the DSM (see Table 5.4). One such exception is private cases. The EU believes that the WTO should be contained to address interstate disputes only. Therefore, the DSU can *not* be appealed to by the private sector, and it does not have jurisdiction over individual cases addressed by national

courts. Moreover, the WTO's DSM will be charged with investigating disputes that are based on *de jure* commitments; therefore, *de facto* claims again stay out of DSU's purview. The Europeans assert that the inclusion of *de facto* measures in a formal dispute settlement mechanism, in essence authorises panellists to expand the scope of the CP agreement to individuals. A report prepared by the WGTCP's chairman summarises the exceptions proposed by the EU:

“On qualification, the WTO had at its disposal a well-known and well-functioning dispute settlement mechanism. Only governments had access to it. The proposal on competition would not depart from this model. In other words, private companies would not have access to dispute settlement mechanism. Secondly, on the question of the scope of jurisdiction of dispute settlement, the actual negotiated commitments and binding obligations of an agreement would dictate the scope of jurisdiction, and only *de jure*, and not *de facto* discrimination would be covered by the dispute settlement. In other words, the task of any WTO dispute settlement mechanism would be one of assessing merely whether a domestic competition law regime was in conformity with the obligations relating to the core principles and the prohibition of hard core cartels. On the other hand, individual decisions by domestic competition authorities and pattern of individual decisions would not be covered. This guarantee could be expressly included in the agreement, which would also include the usual provisions on consultations helping to minimise recourse to formal settlement proceedings.” (WTO, 2003a:27)

The EU model for settlement of disputes entails provisions for a WTO competition authority with articulated substantive and procedural norms. A note by Frédéric Jenny, the chairman of WGTCP, suggests that the EU model is comparable to the 1993 Munich Code, which had been proposed by the International Antitrust Code Working Group (WTO, 1999c). Furthermore, the proposal has some similarities with the TRIPS, which is a more flexible arrangement. With the EU proposal, signatories are required to commit themselves to incorporate certain substantive norms of competition into their domestic law, establish independent administrative and judicial bodies to oversee implementation, and guarantee greater uniformity in interpretation of the CPA. The WTO's dispute settlement procedures are added on top of all these, to oversee implementation and tackle violations of those substantive measures that countries have put into their competition regimes.

In sum, the EU model invests heavily in the WTO's DSM. The DSB is in charge of all CP cases that:

- 1- have exhausted inter-state bilateral consultations and are also passed through consultations in peer review;
- 2- their related laws are binding;
- 3- are between states;
- 4- are based on *de jure* commitments of a member; and
- 5- do not concern individual cases.

Table 5.4 below sums up the EU model in terms of the centralisation of dispute settlements.

Table 5.4- The EU's Proposal for Centralisation of Dispute settlement

	Bilateral consultations	Multilateral consultations	De jure	De facto	Formal settlement	Implementation
Member countries	✓	✓				
Peer Review		✓				
Third party		✓				
DSB			✓		✓	✓

Source: Author

The US's Argument for Settlement of Interstate Disputes

The US delegation openly opposed investing any authority in the WTO's formal dispute settlement mechanism for the resolution of the competition disputes between member states. Addressing the EC's proposal, the Americans openly dismissed the EU proposal of investing heavily in the WTO's dispute settlement body on almost all grounds. The Americans made it clear that they will not endorse anything above the minimum tools at the disposal of member states and the peer review mechanism for monitoring compliance to the CP deal.

The US only partly accepted the EU proposal, by asserting that, rather than passing inter-state disputes to WTO's DSB as proposed by the Europeans, it would be more appropriate to rely on the peer review mechanism only. The US argued that, first and foremost, the appropriateness of applying the dispute settlement to competition policy should be assessed on its own merits in an open-minded way, "without pre-conceptions drawn from other fields..." (WTO, 2003a:36). They mention that the wide disparity of members' experiences with competition law and policy, and the gaps in their institutional capacities, calls the usefulness and feasibility of dispute settlement in this area into question.

As to the EC's emphasis on the idea that dispute settlement would be limited to *de jure* violations, the US draws on the technical difficulties of formulating a working definition and questions the ability of members to build sufficient safeguards steps into the terms of reference.

Moreover, the US envoy mentioned that the EC's paper had been silent about the consequences that would ensue once a WTO panel had found that a member had not complied with its obligations. In this regard, the Americans expressed their view and emphasised that it would be important that any sanctions applied in a multilateral framework on competition policy would have pro-competitive effects and not simply be a retaliatory move (WTO, 2003a).

The records of the WTO secretariat also highlight the US's view on the appropriate mechanism for settling disputes:

“The representative of the United States returned to the question of whether it could be conceivable to have a WTO competition framework without it inherently having a binding dispute settlement provision. He noted that the representative of the European Community and its member States had said that the reason for presuming that it should have a dispute settlement provision was not just because it was in the WTO but because a competition framework without dispute settlement would be useless. In response to that argument, he pointed out that the United States was party to about ten bilateral competition agreements, none of which contained dispute settlement, and – contrary to finding them of no use – the United States had found those competition agreements without dispute settlement provisions to be extremely useful” (WTO, 2003b:29).

As noted by the WTO’s secretariat (WTO, 1999c), there are substantial grounds for believing that the US’s resistance to the EU’s efforts for subjecting the CPA to the WTO’s formal dispute settlement mechanism reflects the US’s historical incapability of winning competition-related disputes through WTO’s dispute settlement system. For instance, just a couple of months before the WTO started working on the CPA, on 13 June 1996, the United States started a dispute about Japan’s treatment of consumer photographic film and paper imported to Japan from America. In its complaint, mostly known as Kodak-Fuji case, the US alleged that the Japanese Government had violated GATT Articles 3 and 10 by treating imported American film and papers less favourably than Japanese products, and by doing so had nullified or impaired benefits accruing to the US. After some difficulties in having a panel formed on this matter, the US ultimately lost the case altogether. The WTO’s ruling held that the US failed to show that the Japanese ‘measures’ had actually nullified or impaired benefits accruing to the US within the meaning of GATT Article 23:1(b). It was not also demonstrated that the Japanese distribution ‘measures’ accorded less favourable treatment to imported photographic film and paper within the meaning of GATT Article 3:4. Moreover, the panel found that the US failed to demonstrate that Japan had not published administrative rulings of general application in violation of GATT Article 10:1. As a result, the petition failed to bring about a favourable outcome for the US and, consequently, the Panel report was adopted by the DSB on 22 April 1998, right in the middle of the CPA initiations in the other rooms of the WTO.

So far, we have demonstrated that the WTO’s dispute settlement mechanism has very limited responsibility in the US model, close to none. However, the US approach relies heavily on the peer review mechanism as the ultimate source for reducing the gaps between WTO members in settling their competition related problems. Similar to the analysis done on the EU proposal, the following section will tackle the US’s view on participants, participation modality, administration and scope of activities of the WTO in settlement of disputes.

The US favours a voluntary, open to all, peer review with a mild compliance-monitoring role (US, 2003). The US does not approve of the WTO’s formal DSM for competition problems. However, it believes instead that by facilitating the exchange of information between member

countries, the peer review allows member countries to follow the trends, ask for explanations, and possibly offer corrections in the competition regime of other countries before things escalate to a serious dispute; a mechanism that one US delegation calls “constructive problem solving” (WTO, 2003d:24-25). With an exchange of information encouraged, members who have concerns about the reviewed member’s laws or practices have a chance to raise their concerns. In the US’s account of the process, peer review is conducive not only to identifying problems but also to finding solutions, in that participants might include countries that had confronted similar problems in the past and could recommend practical solutions from their own experience. In this setting, members are likely to be responsive to constructive suggestions of the peer review to address problems that had been identified in their competition regime (US, 2003:4; WTO, 2003a:28-29).

As one US deliberation holds, the findings of the WTO’s peer review imposes peer pressure on the reviewed country to revisit its competition regime. At the end of a review of each member’s competition regime, the peer review produces a report that incorporates information from the examination and makes policy recommendations. These recommendations would more likely catalyse reforms in the country in question. The international support provided by the peer review process is “often a welcome stimulus to making needed and desired changes to domestic competition regimes” (US, 2003:4).

The US model deposits some mild responsibility on the shoulders of the peer review for monitoring CP regimes of member countries and no role to the WTO’s DSB. As such, among all possible settings for a peer review arrangement (US, 2003:1; OECD, 2002), the CPA’s peer review, in addition to its main role in facilitating exchange of information between countries, will be the entity responsible for the task of reviewing the law and practice of member countries’ competition policy for possible inconsistencies. Nonetheless, this is a mild task and is conducted with the help of the WTO’s secretariat who, according to the US model, will be charged with preparation of national competition regimes of member countries in terms of law and performance (WTO, 2003a:21-22).

As such, it will be the peer review’s role to facilitate the information sharing between parties needed for checking on the practice and application of competition policy of the member countries.

A WGTCP’s report by the secretariat shows differences between the EU and the US proposal on the dispute settlement mechanism of the CPA:

“ ... On the issue of dispute settlement which was addressed in part 1 of the EC paper, the most appropriate course for the WTO to follow at this point was to focus on a peer

review mechanism. Establishing a dispute settlement mechanism for competition raised a number of questions. ...As to the EC's emphasis on idea that dispute settlement would be limited to de jure violations, the US questioned the ability to build into the terms of reference sufficient safeguards on this point. ... Overall, he felt that there was broad support for implementing a peer-review based mechanism as the next stage of work in the trade and competition area in the WTO, whereas significant questions remained about the role, if any, of dispute settlement in this area."

To recap, the US proposal differs significantly from that of the EU by envisaging a relatively decentralised mechanism for the settlement of disputes. It sees virtually no role for the WTO's DSB, and maintains responsibility within member states to combat anti-competitive practices. Nonetheless, the US believes that peer review can mitigate interstate differences by monitoring competition regime/practices of member states and acting as a medium of exchange of information. In the US model, a member country relies on other states through bilateral – mostly voluntary – cooperation, as well as the WTO's peer review in addressing anticompetitive measures. As such, the US proposes a substantially less formal approach to the settlement of disputes. Table 5.5 summarises these findings.

Table 5.5- The US's Proposal for Centralisation of Dispute Settlement

	Bilateral consultations	Multilateral consultations	De jure	De facto	Formal settlement	Implementation
Member countries	✱	✱				
Peer Review		✱	✱	✱		
Third party						
DSB						

Source: Author

The WTO and the Settlement of Competition Disputes

Which of these proposals is closer to the WTO's current practice and legal framework as the institution in which the CP agreement will be embedded? The main difference between the EU and US models lies in the weights they each allocate to the WTO's formal dispute settlement mechanism as the centre of gravity for solving disputes. While enforceability of the CP agreement through WTO's formal dispute settlement mechanism was the cornerstone of the EU model, the US simply tended for a flexible consultation based mechanism limited to the peer review body.

The EU proposal for the centralising enforcement of the CP agreement had three prongs. First, some responsibilities to be invested in the member countries in terms of an obligation to enter into initial consultation when approached by another government. Second, the peer review to carry its share by monitoring competition regimes of the member countries. In doing so, it helps preventing disputes before they happen. Third, and most important, the EU emphasises that a dispute settlement mechanism is the main and last reference for settlement of disputes.

The US, on the other hand, did not reject the informal first two steps, but clearly dismissed the EU's proposal for the formal hard enforcement mechanism of DSM. The US's proposal is more of a non-judicial means of settling disputes and is primarily based on diplomacy and reconciliation. It is the sort of arrangement that gives the parties, and to the more powerful even more, manoeuvring space to choose the methods and the timing of the settlement. Unlike the EU proposal by which the dispute settlement panel must follow and apply the fixed rules of the DSM procedures, the US proposal proposes that the parties can dispense with WTO's legal formalities and, relieved from formalities of the DSB administration, apply whatever procedural rules they see as appropriate for the case in question.

How do these proposals fit into the current WTO system? The consultation part of both proposals is fully backed by the extant WTO rules. The member countries of the WTO are required to enter into consultation when asked by other parties who believe their interests have been compromised. Literally, consultation requirements are repeated in many Uruguay Round agreements. For example, GATT (Article 22), SPS (Article 11), TBT (Article 14), GATS (Article 22), TRIPS (Article 62), Antidumping (Article 17) *inter alia* hold member states responsible for cooperating by consultations in solving disputes. Most important of all though, the Dispute Settlement Agreement holds that the formal settlement process will start only after consultation between members:

“Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former” (ANNEX 2: Understanding on Rules and Procedures Governing the Settlement of Disputes: Article 4).

In fact, a WTO report indicates that only about 136 of the nearly 369 dispute cases in the 1995-2008 period had reached the full panel process. Most of the rest were taken care of by bilateral consultations between concerned parties (WTO, 2015).

According to the EU's and US's formulation, the enforcement responsibility of the CPA is eventually shifted from members to the WTO once the states' role in the consultation phase is exhausted and the differences remained unsettled. The CP's peer review has some responsibilities in this regard, mostly through the study of periodic country reports; however, as demanded by the EU, the main responsibility of enforcement is vested in the WTO's Dispute Settlement Mechanism. Technically speaking, this is the main disagreement between the EU and the US, as the latter does not believe in a serious role for the DSU as far as competition related disputes are concerned.

Here lies the WTO's major impact as the institution that hosts the developments of the CP agreement. Drawing on the concept of nested regimes introduced in previous chapters, the party whose position is closest to the extant rules of the WTO would be in a better bargaining position because the context of interactions is just supportive of its proposal.

However, before going into detail and because of its importance, we need to have a deeper look into two settlement concepts in the world trading system. Settlement of disputes in the multilateral trading system can roughly follow either, but mostly, part of both of two routes; one based on consultation/conciliation/bargaining/diplomacy, or one based on discipline and rules. There are exceptions, but these two are the dominant approaches. In the diplomacy route, and following precedents developed in GATT, members see the WTO more as a platform in which negotiators reach compromises. As such, parties to a dispute are called on to seek resolution of the dispute through the progression of diplomacy and negotiations in which bilateral consultations and conciliation interactions are the main modalities. The interaction of the sides of the dispute in this approach hinges on the organisational rules, norms and procedures; however, it would probably be fair to say that these are only one among the many factors that determine the outcomes. Negotiations between parties remain the main tools for finding a resolution. This route is flexible in terms of the range of remedies available to the sides and, as such, is usually favoured by the parties under pressure for loss of sovereignty to the WTO over a case.

In the second approach, on the other hand, interaction of the parties is based on predetermined rules as set in the WTO agreements, among which the DS agreement is the main one. DSU plays a decisive role in the settlement process by establishing panels that are invested with the power to pass rulings with reference to the WTO's agreements, rules and established procedures. More importantly, the settlement process cannot be blocked because each step is clearly predefined, terms of reference are iterated, deadlines are set and, for any possible hurdle, pre-determined solutions are envisaged. In this approach, after the initial consultations the member states are discharged from authority and the responsibility of settling the dispute are shifted to third parties in the form of panels and appellate bodies.

The first route was a typical GATT way of handling disputes; however, the organisation tilted clearly towards the second route as a result of the Uruguay Round, and is now deeply rooted in the many agreements of the WTO and the whole system. It is not wrong to say that traces of the diplomacy route are still present and clearly observable in the system. As mentioned earlier, almost two thirds of the nearly 369 dispute cases in the 1995-2008 period were solved by consultations, reconciliation and diplomacy. However, it is the second route that now bears the main weight of judicial litigation of the organisation. Annex 2 of the Final Act expressly put

dispute settlement in the place of being the final reference in all interstate matters for all the agreements of the WTO. Article 1 of the DSU reads:

“The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the “covered agreements”). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the “WTO Agreement”) and of this Understanding taken in isolation or in combination with any other covered agreement.”

The EU’s proposal for the use of experts from outside the WTO also has precedence in the WTO, especially in cases that involve heavy fact-finding activities. For instance, the Agreement on Subsidies and Countervailing Measures (Articles 4.5 and 24.3), the Agreement on Technical Barriers to Trade (Article 14.2), and the Agreement on Sanitary and Phyto-Sanitary Measures (SPS) (Article 11), all provide for the possibility of using external expert groups. More important, however, Article 13 and Annex 4 of the DSU envisages the possibility of panels consulting experts for opinions on any specific matter and, if necessary, may request an advisory report from an expert review group

“Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate...Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group.”

The discussion above (and summarised in Table 5.6 below) points out that the current WTO legal system supports the EU model, giving the EU the upper hand in CPA negotiations. This condition, therefore, increases the gap between the US and the EU. In fact, in the latest stages of WGTCP work in May 2003, the EU built on the WTO’s favourable laws to overpower its position against the US’s to reject the former’s proposal for the CPA enforcement mechanism. The EU even went as far as suggesting that the US proposal essentially calls for anomaly in the WTO’s working:

“...although certain special rules and/or procedures apply with regard to some existing WTO Agreements (cf. Appendix 2 of the DSU), a factor common to all agreements is the application of dispute settlement for all of these “covered agreements”... In other words, non-application of WTO dispute settlement to a WTO Agreement could be seen as creating an anomaly from an overall systemic and institutional point of view...” (EC, 2003).

An OECD contribution to the WGTCP supports the use of peer review in solving disparities, especially for *de jure* issues. However, it firmly backs the EU’s argument about the

inappropriateness of shedding DSM from the CPA altogether on the grounds that it would entail a theoretical inconsistency:

“Peer review, consultation and conciliation could be good complements to DSU *de jure* compliance because, unlike *de jure* compliance, these methods allow for one Member to raise directly with another problems related to the administration of a Member’s competition law regime. Use of these methods, being less adversarial and less formal than the DSU, can also serve the objectives of co-operation between national authorities...Indeed, there would be a theoretical inconsistency with the WTO system in concluding a multilateral WTO agreement that is excluded from the operation of the DSU...This could also weaken the complementary functions of trade and competition rules for protecting non-discriminatory conditions of competition” (OECD, 2003:9-13).

In a similar vein, former Chairman of the Appellate Body, Ehlermann, and his colleague, Ehrling (Ehlermann and Ehrling, 2002), point out that it would be wrong to negotiate a CPA to which the DSU does not apply. They further argue that non-application of DSU to the WTO’s competition agreement would be a “step back” in the system in a substantive sense.

As Table 5.6 shows, the analysis above is very relevant to our discussion, being reminded that the WTO’s extant rules are hard to change. Therefore, it would be extra costly in terms of time and side payments for the US to counter-argue against the EU’s proposal. This is because the latter is extremely well situated within the current balance of rights and obligations among members.

Table 5.6- Integrated Summary of the US, EU and the WTO on Centralisation of Dispute Settlement

	Bilateral consultations	Multilateral consultations	De jure	De facto	Formal settlement	Implementation
Member countries	✓ * W	✓ * W				✓ W
Peer Review		✓ * W	✓ *	*		
Third party		✓ W				
DSB			✓ W		✓ W	

US - *

EU - ✓

WTO - W

Source: Author

Cooperation over Individual Cases

It is quite conceivable that some competition disputes implicate beyond the policies of a government to relate to actions taken by private entities. Should these cases be handled by the WTO? Or is this the responsibility of each member of the WTO to address concerns of this nature? Referred to as “hybrid practices”, the issue of the inability of WTO’s extant laws in bringing discipline to those anticompetitive practices, which are rooted in the combined undertakings of a government and private entities, have been raised in the WGTCP on several

occasions (see for example, WTO, 1999c:16; WTO, 1999a:6; WTO, 1999b:5; WTO, 2002b). These are usually cases, such as Kodak-Fuji, that involve situations where neither a governments' policy or business activities infringe a commitment, but together may constitute enough basis for anticompetitive concerns. These include, *inter alia*, collective boycotts and abuses of dominant position that prevent the entry of new competitors, or results in market-sharing arrangements.

The point was raised by some participants in the WGTCP that, to be complete, a proposal for the CP agreement must also tackle hybrid cases (see for example, the Background Note by the Secretariat: WTO, 2002b and WTO, 1999c:16). The questions involved whether the CP agreement should ever be extended to cover individual cases and, if yes, where do the related activities need to be handled, and who should be in charge? Would it be the member countries and their domestic laws and policies, or the WTO? If the WTO, then which institution/department? The peer review for instance? Or the DSB?

Following the routine adopted in previous sections above, the EU and US proposals for individual cases will now be discussed, and then compared with the WTO's extant situation to see how far the WTO has been a force in fostering cooperation between the two over this matter.

The EU Argument

The parts of the EU view on how to treat individual cases in the WTO's antitrust regime have been expressed over the years; however, several distinct features are discernible. First, an exchange of information between interested parties in a case is hugely important and should be addressed in the CPA in detail (see for example, EC, 2002b). In this regard, the European's discussion holds that however important unilateral and bilateral arrangements are in their own right, an international antitrust agreement must be multilateral to tackle the many dimensions that an anticompetitive act may have (EC, 1999c). Second, and from an operational perspective closely related to the exchange of information, negative and positive comity arrangements are important variables capable of enhancing the benefits of cooperation. The inclusion of concepts of positive and negative comity in the CP deal will enrich and strengthen the WTO's competition agreement (see for example, EC, 2002b; EC, 2002c; EC, 1999c). Third, the individual decisions by domestic competition authorities must stay out of the WTO's formal dispute settlement mechanism (WTO, 2003a:27). Each of these points will be discussed in the following section, followed by a discussion of the case for centralisation of the related activities in the WTO from Europe's standpoint.

The EU asserts that the following elements must be included under the heading of case-specific cooperation; exchanges of case-related information, and consultations and exchanges of views/evidence in cases affecting the important interests of other WTO members (EC, 2002c). Expanding on these elements, the EU suggests that members should inform the countries whose important interests are likely to be affected by an investigation. Likewise, a member can bring evidence of a business anti-competitive practice that has an impact on its interests to the attention of another WTO member. This would then be used to seek additional information about any possible competition investigation relating to such practices. In the context of consultations, the investigating authorities can also seek assistance from their counterparts in the home country of a foreign company in relation to an ongoing competition investigation, by seeking information that may help the investigation under question. Cooperation of this nature can even go further and be conducted in the form of consultations aimed at providing a fresh view to the whole investigation.

As the following excerpt shows, despite this emphasis on information cooperation, the EU expressly and emphatically excludes any exchange of confidential business information:

“...meaningful information exchange is the core element of cooperation between competition authorities. However, one should be mindful of the fact that certain business information is subject to strict legal protection in all jurisdictions and it would therefore be difficult to imagine confidential documents being exchanged between competition authorities as a routine matter...Consequently, a WTO agreement should, at least, provide for the exchange of non-confidential business information between countries affected by a given cartel” (EC, 2002b:7).

In addition to excluding business sensitive information, the EU excludes cooperation over all cases across the board and limits cooperation to:

- a) practices such as international cartels that affect international markets;
- b) practices that affect market access of WTO member states, such as import cartels or exclusionary abuses of a dominant position; and
- c) practices with an impact on a different market to that in which they have been conceived (EC, 2000a:2).

These issues will be discussed in more detail in the next chapter where the scope factor is addressed.

The second important feature of the EU proposal involves the concept of comity. The EU’s formulation of cooperation on individual cases goes beyond merely an exchange of information and consultations between states, and has yet another feature. This additional part envisages the inclusion of the principles of “negative comity” (EC, 2002c:1; EC, 1999c:10) and “positive

comity” (see for example, EC, 2002b:7). Negative comity is a mechanism by which potential for jurisdictional conflicts is minimised. This is because the WTO members commit themselves to take into account the important and clearly stated interest of other members before any disciplinary action is taken in a competition case. On the other hand, under the positive comity concept, cases involving anti-competitive practices originating in one territory but affecting the interests of another country can be referred to the competition agency of the country where such practices have originated for appropriate action (WTO, 2002a:4). The EU believes that in an EU-US type of positive comity, provisions can be inserted into the CPA because positive comity is beneficial for companies. This is because of the reduction of the total number of cases against them, dropping compliance costs and decreasing the possibility of conflicting decisions made by different countries. The EU further adds that existence of positive comity also helps to reduce market access problems, and provides an alternative to the extra-territorial application of jurisdiction (EC, 1999c:10).

Third, and as the last piece of construction of the case-specific cooperation framework, the EU makes it clear that decisions of national courts over individual cases must remain out of the domain of the WTO. The quotations below summarise the EU’s position on this matter:

“...individual decisions by domestic competition authorities and pattern of individual decisions would not be covered. This guarantee could be expressly included in the agreement, which would also include the usual provisions on consultations helping to minimise recourse to formal settlement proceedings.” (WTO, 2003a:27).

This echoes an earlier contribution of the EU emphasising that settlement of disputes under DSU is limited to interstate cases:

“...as regards the application of the DSU, we believe this should be limited to the obligation of WTO Members to have a domestic competition law...in other words, application of the DSU to individual decisions of competition authorities would be excluded” (EC, 2001a:3).

With regard to the degree of centralisation, therefore, the analysis of the EU model indicates that in contrast to its position over interstates disputes, the EU does not allocate any role to be played by the WTO for cases involving private entities. Exchange of information, positive and negative comity mechanisms all require member states – and not the WTO – to commit to addressing concerns of other parties in individual cases. The EU further argues that having these commitments engraved in national laws would boost confidence among members (WTO, 2003a:42); again, however, the WTO has no role to play. That said however, the EU also believes that interactions on the exchange of general information in the peer review for best practices regarding investigative techniques, fact-finding, etc., and cooperation between

countries over individual cases, would eventually help countries to adopt similar techniques in handling individual cases, whatever this impact may take:

“...individual decisions (involving the legal or economic interpretation of facts), or questions relating to the strategy or prioritisation of a competition enforcement body, would be excluded from peer review, just as it would be excluded from dispute settlement” (EC, 2003:5).

The US Approach

The study of the US documents does not suggest a razor sharp stance over individual cases. However, two arguments are discernible. First, a belief in a relatively mild positive impact from peer review operations on individual cases. Second, a massive support for the protection of business secrets in both transparency related activities and exchange of information between authorities.

The US considers a relatively mild positive role for the peer review in lowering the potential for conflict over cases that involve the private sector. For instance, one US deliberation holds that, as a result of an exchange of experience and in wider operations of the peer review body, the people and the internal processes of the countries in addressing anticompetitive behaviour of business entities is likely to converge to a shared vision that, in turn, is likely to reduce the prospect of conflict:

“...Through participation in peer reviews, competition policy and enforcement officials from different countries learn more about one another’s policies and also make increased personal contacts. In addition, as discussed above, peer review is likely to lead to greater commonality of approaches to competition issues. The combination of greater familiarity with other jurisdictions’ competition systems, getting to know the personnel responsible for implementing them, and greater convergence of approaches will likely lead to increased cooperation among jurisdictions in implementing competition laws and policies” (US, 2003:3).

On a number of occasions, the US has brought the issue of confidential information to the attention of the WGTCP. The US is obviously in favour of securing confidentiality when it comes to the information related to the private entities. The US presents its argument in the excerpt brought below:

“In the United States and many other countries, much of the information obtained in the course of antitrust enforcement proceedings is required by statute or regulation to be kept strictly confidential. All antitrust law enforcement proceedings are likely to involve some commercially sensitive information, informants and witnesses who must be protected, and/or other communications and deliberations of a non-public nature. This is especially true for the investigation stage, though confidentiality obligations continue after that. In the United States, special secrecy rules apply to criminal investigations...” (US, 1999a:4).

The US further explains that even the important transparency requirements of the WTO's CPA should not jeopardise, in any way be it publication, notification, court reports, etc., the confidentiality of the business secrets or people involved in a competition investigation (US, 2002a:5-6).

All in all, individual cases are not subject to WTO's competition jurisdiction in the US proposal. Sensitive business information must be treated in a very confidential way, and peer review has an overall, somehow remote, positive impact on lowering the potential for conflict over individual cases through a convergence of competition regimes of the signatory countries.

The WTO and EU-US Cooperation over Individual Competition Cases

Many competition cases involve business entities as distinct from issues between states. The EU's and the US's stance on these cases are relatively similar. In the EU model, members are required to cooperate on individual cases by consultation and exchange of information between investigating authorities of the related parties, and through negative and positive comity commitments. However, they emphasise that the decisions made by domestic competition authorities on cases involving private parties must not come under WTO's formal dispute settlement mechanism. The US did not reject the EU proposal, and further adds that cooperation and consultation in the peer review will eventually lead members to understand rules, jurisdictions and authorities in other countries. These interactions would eventually accommodate understanding and cooperation over individual cases. The WGTCP documents are silent on the US position for the possible role of the DSU in individual cases. However, with the US rejecting DSU jurisdiction over inter-state conflicts, it is fair to assume that it would veto any proposal that entails centralised decision-making in the WTO.

There are three main arguments that indicate that the WTO inherently is ill-equipped to handle individual cases. First, the WTO is an institution designed for handling the relationships between sovereign states; meaning that tackling issues related to the private sector was never meant to be part of its structure. The fact that a dispute arises, by definition, when one WTO member adopts a policy or undertakes an action that other members consider a breach of a WTO commitment, or a failure to live up to one's obligations, show WTO's inability in these matters. Second, there is no instrument envisaged in the WTO by which private entities find direct access to the WTO's dispute settlement mechanism. Third, it is also important to be reminded that competition litigation is generally a heavy fact-finding endeavour. The courts follow a rule-of-reason route rather than the enforcement of predefined rules, as is the case in the majority of WTO agreements (OECD, 2003.11). Therefore, the whole settlement machinery of the WTO lacks the wherewithal and the guidelines/procedures to address individual cases involving the private sector.

Despite this general picture, there is an argument that the WTO's current laws can, in essence, tackle some cases of private sector anticompetitive practices (WTO, 1999a:16; WTO, 1999c:5). For instance, drawing on GATS Articles 8 and 9 (that address monopolies and restrictive business practices in the services sector), one would see that GATS also addresses distribution services. Moreover, according to official explanations, the distribution services falling under GATS include agency agreements, distribution agreements and franchising agreements. It is clear that the definition of distribution includes distribution of goods; this is because in all distribution services it is impossible to separate the goods from the services and they usually form a package. Therefore, GATS Articles 8 and 9 might be referred to as examples that showcase the WTO's ability in tackling individual cases of business anticompetitive practices.

All in all, WTO is a state-state organisation with little, if any, access to private entities. This is true about GATT and all the goods agreements, and is true about TRIPs and GATS. However, as far as business entities are concerned, most of these agreements are written in a way where every member is required to commit itself to incorporate substantive norms into its domestic law, and to establish independent administrative and judicial bodies to oversee implementation and guarantee greater uniformity in the interpretation of the agreement. The WTO dispute settlement procedures could then be used as the mechanism that addresses violations of these substantive norms, but not individual cases involving the private sector.

Based on this analysis, the WTO's state of laws is close to the EU and US proposals for the CPA, where they envisage no good reason to stretch the jurisdiction of the WTO's dispute settlement mechanism to intervene in members' activities with regard to the application of national laws in individual cases. Comparison of the two proposals for the settlement of individual cases that involve businesses within the framework of the CPA against the WTO's extant rules, reveals that the proposed models both fall in the vicinity of the WTO's legal framework. Therefore, the WTO had a positive impact on cooperation between the two sides by furnishing their proposals for the rules governing states' treatment of anti-competitive practices of businesses.

Conclusions

As far as the centralisation factor in the CP initiations is concerned, the EU and the US have identified three areas of concern. These are the need for transparency, settlement of disputes between concerned states, and settlement of cases that involve business entities. The EU's proposed arrangement for centrality of activities in the WTO endorses the utmost transparency (with contributions from both member states and the peer review mechanism), assigns mild

responsibility to members and heavy tasks to the WTO over interstate disputes, and, finally, mild commitment from members but almost no involvement of the WTO over individual cases.

The US formulation with regard to the concentration of activities in the WTO over the transparency issue is almost identical with that of the EU. Moreover, the US proposal does not have any major difference with the European's for cases that involve individual cases, yet is totally against involvement of the WTO's dispute settlement mechanism whatsoever, which is the EU's proposal.

The comparison of the EU and the US models with the WTO's current legal framework reveals close consistency in the two areas of transparency and private dispute settlement. In these two areas, the EU, the US and the WTO have trivial differences and, as such, the WTO did not weigh the position of either party against the other; the WTO therefore facilitated cooperation by offering similar backing to both proposals.

The WTO was particularly unhelpful in accommodating cooperation over proposals for the settlement of disputes. In this regard, one important general point is that the US model posits less centrality to the WTO, so leaving more discretion to the member countries in terms of the ways they fulfil their competition commitments. The EU, on the other hand, commands a more disciplined model that leaves less manoeuvring room for national competition authorities in the administration and the judiciary.

The degree of centrality in the settlement of disputes is important because it affects a member's commitment regarding compliance or violation of the agreement. A CPA trusted with WTO's formal DSM is more likely to be highly disciplined and detailed. This may turn out to be too much of a burden, in that it requires an overly strict limitation over members' policy choice in responding to a dispute (Raustiala, 2005:613-14). Moreover, centralisation of the dispute settlement becomes more loaded if the WTO's settlement mechanism, as has been the case in a number of cases, decides to interpret expansively the CP deal, resulting in what Helfer (2002) defines as an "overlegalised" treaty. It is argued that being the case, when the costs of compliance outweigh the benefits, violations are more likely to result, whereas if the CP agreement grant member countries more space or contains flexible provisions, the WTO members may choose to adjust their commitments within the purview of the CPA rather than violating it.

The other side of the centralised dispute settlement, however, involves too much flexibility in the provisions of any dispute settlement. This entails the risk of stimulating opportunistic behaviour whenever circumstances make compliance a costly decision. Moreover, as Swaine (2003) suggests, such opportunism may also have wider consequences. Fearing that other

members may later invoke the flexibility mechanism to avoid compliance, the members that initially preferred to cooperate become demotivated and possibly invest much less in terms of employees or the infrastructure needed to comply with the CPA, or monitor business practices that might negatively impact the interests of other countries.

Therefore, the US and the EU faced the challenge of compromising on centralisation thresholds in the three areas of transparency, interstate disputes, and handling cases of business anticompetitive practices that, from their perspective, although facilitated cooperation among members did not encourage violation/cheating. In this endeavour, the WTO helped cooperation in two areas, however, as the institution that hosted the negotiations, it had a negative effect on eliminating the gap between the US and the EU models for the settlement of disputes.

This chapter covered the analysis of the centralisation factor; the first of our two empirical chapters. The next chapter tackles the scope factor. The aim and method is the same. First, the concept of scope is broken into the more workable dimensions of actors, actions, outcomes and remedies. Then, second, the data is extracted for each from the EU and US proposals to be analysed in the final stage against the WTO's impact for cooperation between the two states.

Chapter Six: The Scope Factor

The scope factor concerns the anticompetitive practices covered and remedied under a competition policy agreement (CPA). It can be defined broadly to incorporate a considerably large number of issues, or narrowly to tackle issues of prominence to the members. It can be defined even more narrowly simply to insinuate the common denominator of the proposals on the table.

As far as a CPA in the World Trade Organisation (WTO) is concerned, the study of the scope factor has four main ingredients. These are the actors, the actions, the concerned outcomes – or the injuries – and the remedies. In the process of negotiating the scope of the CPA, these are the points that the WTO member states must decide upon in addressing untoward results that may result from anti-competitive actions committed. Each of these will be explained briefly below before starting the empirical analysis.

Regarding the actors, these are primarily the business entities; but does the US and EU approach to a CPA in the WTO cover businesses from all industries and services across the board? For example, are state-owned enterprises included in the competition agreement? The parties to the CPA must also decide about the mechanism for exemptions; i.e., whether or not signatory countries must be granted the freedom to exempt certain industries from their national competition regimes, or whether the coverage ought to be universal and applied to all industries alike. What about firms whose market value is under a certain threshold? Or firms from developing countries; should they be treated more favourably vis-à-vis their counterparts in developed countries? If yes, for how long and in what manner and which industries? What about agricultural products? Or services?

Likewise, states themselves can directly or indirectly be party to an anti-competitive arrangement. As one European delegation once mentioned (EC, 1998c:1), any state's stance on competition law or its enforcement, including the decision not to have a competition law at all, or not to enforce the existing law, is a policy choice in its own right with repercussions over terms of inter-business competition. Government involvement implies that it is often difficult to disentangle private restraints from government policy, because the private actions might be attributable in one way or another to the government's choice of policy. As an example, in the WTO's Kodak-Fuji case, the US constructed its complaint on the claim that Fuji practices on the one hand, and the policies of Japan's government on the other, had together set out an allegedly unfair situation against Kodak. As such, the parties to the CP talks must decide the scope and span of government policies that they feel need to be covered by the WTO's antitrust arrangement.

Second, the study of scope also involves the identification of actions that must become subject matters of the CP deal. In principle, and as far as businesses are concerned, four behaviours come under a typical antitrust regime. These are cartelisation, monopolisation/abuse of dominant position, vertical restraints, and mergers. Do the EU and the US proposals envisage all four to be covered by the WTO's CPA? Likewise, and similar to the discussion above about governments' impact on the regulation of competition, the parties must address which government policies are to be included in and which excluded from the competition deal. As we shall see later in this chapter, industrial policies were subject of much debate in the Working Group on the Interaction between Trade and Competition Policy (WGTCPP), as some participatory countries felt the CPA must be clear on the kind of activities that government can adopt.

Third, in defining the boundaries of the CPA's scope, attention must be paid to the way that actions are connected to the consequences. This is essentially about the injuries; the parties must identify the interests that, once violated, the victim party can legitimately demand compensation for, or start retaliation. For instance, can a party take action if its domestic market share has dropped because of an acquisition? What about a decrease in export and market access? If trade, in both goods and services, for instance, decline or when an investment – either inbound or outbound – is negatively hit? For another, a question that any interacting country should answer is making decisions about the magnitude of an outcome by which it becomes significant enough to trigger countervailing action under the agreement. Under the EU's antitrust law, for example, mergers amounting to less than a certain amount are exempted from competition law. Given that the WTO's CPA addresses anticompetitive practices at the international level where firms are significantly larger, the countries must agree on the trigger points under the CPA.

Lastly, yet the most important decision concerns the remedies. Here the question is what remedies must be available to the victims of anticompetitive business actions once an interest is hit. Decisions in this area should also cover the repercussions of a breach; what countervailing actions are available to the injured party? There are more questions to be answered: what other arrangement might be introduced for more accountability of the signatories and increased efficiency of the whole system? Would it be enough for parties to exchange information in the WTO? Are such exchanges obligatory or are they just recommended on a voluntary basis? What about transparency requirements? Should parties commit themselves to publishing their policies, laws and court decisions? What are the boundaries for disclosure of private information? As this chapter shows, the questions around how remedies need to be applied took the bulk of talks in the working group.

Attention to scope is important because it is a factor that indicates a country's perception and approach towards the enforcement risk of the CPA. As discussed in the methodology chapter, on the one hand, neoliberal institutionalists would ascribe a party's reluctance to cooperate over the CPA to its concern for enforcement. An institution such as the WTO is helpful in addressing enforcement concerns by accommodating the parties to reach the right dimension and size of scope, where the interests and performance of one party in one area can be linked to the performance and interests of other parties in the same area or other areas of interest. In a similar vein, and in addition to neoliberal institutionalists' contribution, the theory of rational design of international institutions predicts that states would tend to incorporate more issues into the CPA, thus expanding its scope, as the risk of cheating increases. The logic here is that the linkage between wider issues helps parties overcome cheating concerns by connecting a breach to the wider interests of the defecting party. By gauging the parties desired scope for the CPA, we will be equipped to see how enforcement concerns have played out in the course of the CPA talks. Within our methodology, our mission will go one step further in answering our research question, once we have analysed the WTO's impact on the scope-setting process in the course of CPA talks. More precisely, we need to see whether or not the WTO has helped the EU and the US overcome their concern for enforceability of the antitrust deal by helping them to strike a balance over the scope of the CPA.

Operationally, the first mission of the present chapter is evaluating how wide or narrow the US and the EU wanted the scope of the antitrust deal to be. As mentioned earlier, this helps to understand how scope has been defined by either side to address risks of enforcement and cheating. The second task then involves investigating the WTO's role. This chapter aims to show, as the institution that hosted the interactions, what role the WTO has played over the definition of scope in addressing enforcement concerns; has it facilitated cooperation, remained impartial, or in one way or another hindered the cooperation process towards the CPA.

Following the format of the previous chapters, each of the four subsections in the EU proposal will first be discussed, then the US perspective for the CPA's scope will be studied, and finally the WTO to find out its impact over cooperation will be approached. Based on the explanations above, the study of either proposal entails the identification of actors, actions, outcomes and remedies, including the permitted countervailing measures, as suggested by the EU and the US. The findings of this chapter will then be matched against the results obtained in the study of centralisation factors to depict the many features of the WTO's impact in fostering cooperation through enhanced enforceability of the deal.

Scope of Actors

One important feature of defining the scope of the competition agreement involves deciding which entities may be involved in anticompetitive actions, and which one of the interacting parties wish to discipline. In so far as the CPA is concerned, these are primarily the business enterprises. However, governments can also be actors in their own right as their policies (for example, industrial or trade policies) can have an impact over the terms of inter-firm competition.

The decision for the exclusion or inclusion of different economic actors in the CPA is an important issue. A report published in 1996 indicates that all members of the OECD maintain competition regimes that in one way exempt certain sectors/firms from certain rules (OECD, 1996a:19-20). Likewise, the WTO secretariat provides a framework for the analysis of exemptions, and demonstrates that both the EU and the US have granted exemptions to some economic sectors (WTO, 2001:4). For instance, among other sectors, the EU's exemptions include coal and steel and insurance, while the US treats some agricultural/fishery activities as well as all transportation sectors differently.

According to the WTO secretariat's analysis, the exemptions to competition rules fall into either or all four categories. They are given to an industrial sector either partially or completely, or are granted on the basis of ownership or impact on competition, i.e., having *de minimis* impact or not. Each of them can also be either explicit or implicit. The study of WGTCP documents highlights three criteria used by the EU and the US for differentiating business entities for the purpose of antitrust. These are size, ownership and nationality, corresponding to Small and Medium-Sized Enterprises (SMEs), State Owned Enterprises, SOEs), and foreign entities respectively. The kind of businesses that a country wishes to include or exclude from a deal, however, follows the interests of the country in question in the international economy, because inclusion or exclusion of different businesses/industries has different impacts over the gain or costs of participation in the international economy.

In a general view, the EU has contributed more to the 'actors' discussion than the US. The EU deliberations include not only a definitional approach to the question of inclusion/exceptions, but also specific deliberations about the SMEs, SOEs and foreign entities. The US contribution is less detailed, and there might be a good reason for it. It prefers a more homogeneous treatment of firms across the board.

According to the proposals of both countries, in principle, the competition rules should apply to all sectors of the economy across the board, and exclusions kept to a minimum. The reason,

according to Europe (EC, 1999a:5), lies in the outcome of the exceptions in that the absence of effective competition disciplines results in anti-competitive practices by domestic firms, which deny foreign competitors' access to national markets. Also, the US does not favour exclusions because unwarranted exemptions can have "...the effect of allowing anti-competitive conduct that shields markets from competition" from foreign and domestic producers (US, 1997a:7). Later in the negotiations, however, the EU showed some leniency on full coverage to lubricate the negotiations process; these will be mentioned below.

The EU furthermore conditions its proposal to progressivity by acknowledging that, in its view, inclusion of all actors in the CPA's scope must be a gradual progress on the grounds that full coverage is not possibly achievable at the commencement of the agreement. Therefore, for the sake of keeping the momentum of talks, the EU is flexible on full coverage (EC, 1999a:5; EC, 2000b:8). It may go as far as accepting "...a flexible and progressive approach to the issue of sectoral exclusions from the application of competition law" that leaves "the domestic legal framework free to define the scope and the modalities of such exclusions and exemptions..." (EC, 2002:3). However, there are conditions for inclusion and exclusion that must be considered by all countries (EC, 2002a:6-7), for example, SMEs can be excluded once they meet certain criteria. However, the EU believes that the CPA should be progressive over time in terms of eliminating exceptions and trying to bring more and more businesses/sectors under coverage (EC, 2000a:7).

In spite of this flexibility, the EU vehemently matches the US proposal over state owned enterprises. Both countries, in their somewhat different ways, emphasise that these entities must be included in the antitrust regime of the member countries. Likewise, both proposals suggest that SOEs and the private entities that enjoy legal monopolies are sources of market foreclosure and negatively affect national and international competition (see for instance, US, 1997a; US, 1998d; US, 1998b; EC, 1998e).

The EU holds the view that state monopolies and state permitted private monopolies are most likely to have a negative impact on the interests of both national and international economic agents as they are likely to have a market foreclosure impact on foreign exports. The EU further argues that many of these negative impacts can be addressed by bringing these firms under the already in operation rules of the WTO and a "multinational CP" (EC, 1998e:5). Informed of possible resistance, however, the EU mentions that inclusion of the SOEs might not be feasible at the beginning; this is, therefore, enough for members to make their activities and privileges transparent and clear (EC, 1998e:17).

The US places much emphasis on the anticompetitive measures that involve state-owned companies (see for example, US, 1997a; US, 1998d). In the US account, state-controlled firms can substantially distort free movement of goods and services. The US approach makes the case that operation of an SOE has a direct impact over trading/investment activities of foreign enterprises. The argument claims that there is some degree of a direct cause-effect relationship between the existence of SOEs and damage to foreign trade and investment. For one thing, the US delegation asserts that members should prevent official monopolies and monosomies, public or private, from adopting measures that are effectively discriminatory against foreign suppliers, and “prevent such monopolies from abusing their monopoly rights to engage in anti-competitive practices in other sectors to the harm of *foreign investments* operating in those sectors” (US, 1998d:6, emphasis added). The US additionally explains that a number of countries have opposed the inclusion of state permitted monopolies in the CPA, fearing that it intrudes on competition policy. Others, however, including the United States, are on the side that it is a necessary safeguard against governments using official monopoly/monopsony franchises to “...discriminate against or otherwise harm foreign investors whose enterprises rely on the official monopoly for essential inputs or outlets...” (US, 1998d:6).

The second type of businesses discussed for exemption from antitrust discipline involves SMEs. In a general view, the US does not believe in excluding SMEs from antitrust because size does not justify exclusion (see for instance, US, 1997d). However, the EU presumes that SMEs can be excluded for two reasons. First, countries have legitimate industrial and developmental objectives in which SMEs play a major role (EC, 2000b:8). Second, because of their size and insignificant magnitude of activities, SMEs are unlikely to affect the flow of trade or investment in a substantial way (EC, 2000b:8; EC, 1999a:5; EC, 1998b:4).

Although the US shows some sympathy towards the EU’s argument, its approach suggests that size is not as relevant as the impact of an act. Drawing on the US antitrust, the US explains that its competition policy in the past had been concerned with the very size of enterprises and the need to preserve small businesses for their own sake. Over time, however, efforts to analyse competition problems more rigorously had resulted in the increasing incorporation of new economic thoughts in the formulation of national competition policy/law that does not justify granting discriminatory treatment to SMEs (see for instance, US, 1997d:3).

To bridge the gap, the EU, makes some efforts to bring its approach on exclusion of SMEs from the CP discipline closer to the US position. They assert that non-application of the CPA to SMEs should be conditional. For instance, by refereeing the thresholds put in place in Europe, the EU implies that the exclusion of SMEs should *not* be across the board and needs to meet the criteria for the size and magnitude of activities (EC, 1998b:4).

The third type of exclusion addressed in the WGTCP concerns the nationality of the firms and treatment of foreign companies vis-a-vis their domestic counterparts. These firms will be discussed in detail in the subsections below on outcomes and remedies. However, to make a more comprehensive picture at this stage, let us review some highlights in the US and EU proposals.

In principle, the EU goes for total impartiality in treating foreign entities, and therefore the elimination of discrimination against firms because of their nationality in national competition law of WTO member countries (EC, 1999a:3). In support of its position, the EU holds that discrimination in the competition field is against the very reason for having anticompetitive laws in the first place. It argues that the objective of having competition laws is to benefit consumers and uphold the competitive process of a nation's economy; this must be fulfilled, irrespective of the origin of a producer or service provider (EC, 1998f:13).

The same ideas are suggested by the US delegation. A US deliberation in the latest stages of the talks in 2002 reads:

“...discrimination on the basis of nationality, in favor of an individual competitor or group of competitors, is inconsistent with the purpose of antitrust rules. This is clearly the case in the United States, where the Department of Justice (DOJ) and Federal Trade Commission (FTC) Antitrust Enforcement Guidelines for International Operations explicitly state that “[t]he Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties.” Moreover, this is supported more generally by the consumer welfare goal of US antitrust law, pursuant to which the nationality of a firm is irrelevant because foreign firms provide healthy rivalry, stimulating lower prices and innovation” (US, 2002a:2).

To finalise our discussion of actors' scope in the CPA, so far as the scope of actors is concerned, the EU has shown relatively more flexibility than the US. Although the expressed ideal for both countries is the fully-fledged coverage of all businesses, under the EU proposal SMEs can be exempted from competition law once such exemptions are authorised in a transparent way and comply with certain criteria. The EU, however, takes a hard stance on SOEs and private entities that are bestowed with monopolistic powers, openly declaring that these firms must not be excluded from the application of the CPA. However, the EU accepts the introduction of exceptions on developmental and industrial policy grounds:

“The question of a possible interface with industrial policies has been primarily discussed in connection with the issue of exclusions from the application of domestic competition law...The EC envisages, in this connection, that a WTO horizontal framework agreement on competition would not go beyond ensuring transparency as regards such exclusions. WTO Members would therefore be free to decide which exclusions they wish to maintain, whether these relate to the protection of small and medium enterprises, certain sectors or other policy matters” (EC, 2001b:4)

The US, however, stands its no-exception ground rather firmly. It has argued that neither size nor nationality justifies exemption from the CPA. The US has its strongest opposition over the exclusion of SOEs, a proposal that received the EU's full support.

So far we have covered the EU and US proposals over actors, but how does the WTO fit into all this? For the reasons explained above, the exclusion/inclusion question has always been a contentious issue in GATT and the WTO, a fact that can be seen in the life of the multilateral trading system. Yet, by and large, the multilateral trading system has shown that it can oscillate between extremes as far as inclusion or exclusion of certain types of businesses/industries is concerned.

For one thing, GATT was started to focus on trade in goods only, excluding trade in services from the system. Even in the goods trade, only specific industrial goods were included. For instance, trade in textiles was treated under a much less ambitious regime. Likewise, trade in agricultural products was left out until decades later.

Despite this modest start, the system stretched itself to accommodate more interactions for the inclusion of not only agricultural and textile products but also, when it came to the Uruguay Round of negotiations, for trade in services and intellectual property rights. This is not to suggest that progress has been easy; it has been at times quite cumbersome and troublesome for some members. However, the multilateral trading system has shown a capacity for expansion and contraction whatever the case had been to include or exclude certain type of businesses.

Such flexibility can also be seen at the micro level. Whereas inclusion of agricultural products and trade in services are substantial developments, the case for inclusion and exclusion can also be traced down to agreement specific cases. Depending on the subject matter of the agreement, many Uruguay Round agreements have provisions that address specific industries or firms, or certain activities of firms. For instance, the Agreement on Subsidies and Countervailing Measures (SCM) expressly excludes the subsidies paid for research and development activities by "... firms or ... higher education or research establishments" from countervailing actions of the agreement for a certain period of time. Likewise, the subsidies paid to firms in receipt of "assistance to promote adaptation of existing facilities to new environmental requirements" (SCM Article 8).

From the three types of businesses mentioned in the EU and the US proposals (i.e., SMEs, SOEs and foreign firms), the last two have antecedents in the extant WTO rules with the first, SMEs, being without specific backgrounds. As a result, in an overall view, the WTO is flexible on SMEs, supports the inclusion of SOEs and, by having non-discrimination laws, treats foreign firms no less favourably than local ones. These will be explained in more detail below.

In contrast to SMEs, which have been overly overlooked, SOEs have received a lot of attention in the multilateral trading system. The GATT provisions tackle SOEs in industrial products. A similar approach to the SOEs also resonates in GATS. Under GATS, the basic principles are the same, although the terminology might sound different. GATT's Article 17, with the extra "Understanding on the Interpretation of Article 17 of the General Agreement on Tariffs and Trade 1994" added later during the Uruguay Round, are both dedicated to SOEs. As far competition policy is concerned, the WTO provisions do not prevent members from maintaining such firms. However, GATT rules recognise that the operation of these enterprises may create serious obstacles to the interests of other countries. The most important competition related principles behind the GATT's rules for the operation of SOEs is that such enterprises are to operate solely in accordance with commercial considerations and that their operations are transparent. As such, Article 17 requests that governments list their enterprises, to show the reason and purpose for introducing and maintaining each of them, and provide relevant statistical information over the width and breadth of their operation.

The case for foreign firms will be discussed in more detail in the subsection about remedies and outcome where the issue of non-discrimination is covered. However, to conclude the discussion at this stage, suffice to mention that the WTO has strong principles banning discrimination against foreign firms. National treatment, giving others the same treatment as one's own nationals, is one of the key principles of the multilateral trading system that ensures non-discrimination between local and foreign entities. GATT Article 3, GATS Article 17, and TRIPs Article 3 all, albeit in their common and different ways, prohibit discrimination based on nationality. Accordingly, the goods produced by foreign firms and locally-produced goods should be treated equally, at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents.

The table below summarises the empirical findings for the actors' scope. The WTO's extant laws are a great facilitator over the issue of SOEs and foreign firms. These are areas in which the EU and the US proposals show considerable convergence, and the WTO's extant body of laws as well its history are very sympathetic to the proposals. Over the SMEs, however, the US and EU proposals are different. While the EU sees some justification for the exclusion of SMEs, the US believes size is not an appropriate criterion in competition matters, and sees no point in offering exemptions to SMEs from the CPA. However, given that the EU has shown some flexibility later in its proposal, it does not seem that the WTO has been a serious hindrance to cooperation between the two states. Table 6.1 below depicts this assessment.

Table 6.1- Scope of Actors in the EU and US proposals and the WTO

	Desirability of Non-exception	Progressive inclusion	Inclusion of SOE	Inclusion of SMEs	Inclusion of foreign entities
EU	Yes	Yes	Yes	No	Yes
US	Yes	Not addressed	Definitely Yes	Yes	Yes
WTO	Flexible	Yes	Moderately Yes	Flexible	Yes

Source: Author

Scope of Actions

After identifying the actors proposed by the EU and the US to be included in the scope of the CPA, we now turn to the actions that the two states have proposed to be included – or excluded – from the CPA. In a broad categorisation, four sets of actions are generally recognised to run the risk of involving anticompetitive measures. First is cartelisation. Also known as horizontal restraints, this action involves price fixing arrangements among otherwise competing enterprises. Consumers, being either other businesses or final consumers, are often severely hit by cartelisation. The second action running the risk of being anticompetitive concerns monopolisation efforts (sometimes referred to as an abuse of a dominant position) and is believed to have market foreclosure impact. The third action is mergers and acquisitions. These arrangements can have a market foreclosure impact on foreign enterprises. The last action concerns vertical restraints. These are arrangements between producers and distributors, often involving maintaining a price that may have the effect of foreclosing a market to other producers of the same product. These are addressed below.

Similar to the case for actors, the EU's and the US's approach to the actions that comprise an anticompetitive measure have a number of distinct features. For one thing, drawing on its national law, the US indicates that all four modes of anticompetitive measures can potentially be included in the CPA. The excerpt below demonstrates the US's general approach:

“... Actionable behaviour includes, among other things, efforts to cartelize a market and fix prices, bid rigging and market allocation, certain kinds of vertical price and non-price restraints, including restraints on distribution, tying arrangements and unwarranted

restraints on the dissemination of technology, and mergers that substantially lessen competition” (US, 1997d:3).

The EU likewise “...proposes that the cooperation modalities of a WTO competition agreement would apply to all anti-competitive practices having an impact on international trade” (EC, 2002c, 2). However, since enforcement of competition law is resource intensive, the EU further argues that countries should be given the opportunity to prioritise, addressing the practices that have more serious impact on the health of their economies:

“...The adoption of a comprehensive competition law regime does not exclude the setting up of enforcement priorities, which allow a competition authority to focus limited resources on those practices which have a greater impact on the structure of competition in a market. Indeed, the setting up of priorities is often necessary to boost the enforcement operations of a competition authority” (EC, 1999a:9).

The following section analyses the US and EU proposals for the four modes of anticompetitive measures.

Cartelisation

Cartels are hard hit by the EU and the US alike. The proposals have differences and similarities, yet share the feature to be stringent and uncompromising on cartels. Both sides are somehow equivocal in that hard core cartels, in their different shades being price fixing, output restrictions, bid rigging, or market division, are costly to the national and international economy, resulting in harm to trade flows (EC, 2000b:8), and investment (see for instance, EC, 2000a:7; US, 1998a:7). Moreover, hard-core cartels are practices that always, or almost always, tend to restrict competition by reducing output or raising prices (US, 1997a). The EU even goes as far as suggesting that export cartels are conspicuous means designed for political ends that often follow beggar-thy-neighbour objectives (EC, 1999a:6). All these necessitate a hard stance on “the most pernicious practices” to economies and trade (Monti, 2001; WTO, 2002c:3). A US deliberation reads:

“The United States’ position on the importance of an effective anti-cartel enforcement program has long been clear. Detection and prosecution of hard core cartels has always been, and remains, a primary antitrust law enforcement priority. There is broad consensus that hard core cartels ...are the most egregious of violations of antitrust law” (US, 2002c:1).

The proposals have some highlights. To begin with, both countries stress that each signatory of the CPA must maintain a competition law with punitive teeth (see for instance, EC, 1997a:2; EC, 1999b:4). This is because they believe that anti-cartel laws would not be effective if they do not carry sanctions of a sufficient magnitude to deter and punish offenders (US, 2002c:2). In this regard, the US strongly supports a proposed OECD scheme that encourages countries to

maintain competition laws that effectively prohibit and deter hard-core cartels, with effective sanctions, enforcement procedures, and institutions (for more information consult OECD, 1995).

In its own right, the US (2002c:3) proposes a minimum framework for the signatories of the CPA to follow against cartels. These are:

1. publicly condemn hard-core cartels and state an intention to investigate and prosecute this conduct;
2. adopt and maintain an anti-cartel law with sanctions of at least equal deterrent and punitive effect as those imposed for other economic crimes, such as corruption, fraud and embezzlement;
3. establish domestic enforcement procedures and institutions that are sufficient to permit effective investigation, adjudication and remedy of cartel activities.

The US and EU proposals also underline the need for international action against cartels. They posit that cartels are arrangements that have taken advantage of the globalisation of markets to expand their activities internationally. For this reason, and many more, including their multijurisdictional location (EC, 1998b:6; EC, 1999b:4) and exemptions in some countries (EC, 1998b:6), it is not always practical to address cartels by national-level competition laws only (see for instance, EC, 1997b:5). Hence, national laws need to be boosted by a higher tier arrangement with all interested countries on board; this is because, as one US deliberation holds:

“...cartels continue to be a way of life in many parts of the world ...we realize that effective cartel enforcement requires other countries to have appropriate anti-cartel laws and to enforce those laws against both local and international cartels” (US, 2002c:2).

Cooperation between competition agencies over cartels is necessary. Both proposals further hold that, in addition to having an obligation to bring discipline to their hard-core cartels, members need to cooperate with their counterparts in other countries on a voluntary basis to combat cartels. In order to be fully effective, such cooperation should provide for appropriate procedures in the field of voluntary cooperation and exchange; these types of cooperation can be on a general exchange of information and on case specific instances. The peer review mechanism has an important role in this matter.

In addition to national level discipline, the EU believes that the WTO is the right international place to remedy cartels (see for instance, EC, 2002b:6; EC, 1999b:4). In part because there already exists a consensus between countries over untoward consequences of cartels (EC,

2000b:8), and partly because the liberalisation of trade in the WTO in its own right has contributed to the spread of cartels globally (EC, 1997a:2).

Among the many shades of cartels, the EU adopts a particularly hard stance on export cartels and international cartels (EC, 1998b:6) by positing that they constitute the “highest priority for international antitrust enforcement” (EC, 2000a:7). One reason is that unilateral measures often fall short of addressing international cartels. Likewise, the EU goes as far as claiming that policies that permit certain export cartels can be a form of “beggar-thy-neighbour” policy (EC, 1999a:6) that results in discriminatory conditions between the domestic and export markets. The EU sees it important that these cartels are treated as a priority because “...In some jurisdictions, export cartels are exempted from the application of competition law. In others, they may not be covered under general jurisdiction rules...” (EC, 1997b:5). The EU specifically mentions the exemption from CPA disciplines enjoyed by US export cartels:

“... Such cartels [Export Cartels] have a clear impact on international trade, but in the exporting country may be subject to exemptions from the application of competition law or fall outside the scope of competition law under general rules of jurisdiction... A United States court entered judgement of acquittal after observing that much of the missing evidence presumably was located abroad...”

Table 6.2 compares the proposals of the two countries as discussed above. It can be seen that both proposals share a hard stance on cartels. Also, they do not have significant differences on addressing international cartels and the importance of national level remedies, as well as international cooperation.

Table 6.2- The Case for Inclusion of Cartels in the CPA

	Cartels in General	Export Cartels	International Cartels	National Level Remedies	International Cooperation
EU	Yes	Yes	Yes	Yes	Yes
US	Yes	Not Necessarily	Yes	Yes	Yes

Source: Author

Abuse of Dominant Position (Monopolisation) and Vertical Restraints

Similar to cartels, the US and the EU both categorise vertical integrations and the abuse of a dominant position as potentially anticompetitive arrangements that can fall within the scope of a CPA. For instance, a US deliberation explains that some vertical arrangements, such as exclusive purchasing or buying agreements, may have anticompetitive effects by excluding foreign firms from the market. The US concludes that states:

“...should prohibit vertical restraints that substantially lessen competition (including distribution arrangements), monopolistic and other predatory practices ... that alter market structure so as to substantially lessen competition” (US, 1997a:7).

One of the reasons put forward for the inclusion of these types of anticompetitive actions concerns their discriminatory potential to treat market actors unfavourably, especially the foreign companies who wish to enter into the markets of another country. Likewise, in support of its proposal for inclusion of the abuse of a dominant position in the CPA's scope of the actions, the EU draws on the non-discrimination principle in the WTO and the market foreclosure that abuse of dominance might inflict. One EU deliberation says:

“...from the WTO perspective, a particular concern relates to anti-competitive practices which significantly raise barriers to entry into a market (i.e. foreclosure effect) or are primarily aimed at export trade. Such practices deny foreign producers effective equality of competitive opportunities or otherwise entail discrimination in international trade.” (EC, 1999a:9)

Nonetheless, contrary to the case for the cartels and in their different ways, both the EU and the US have come to the conclusion that flexibility is needed with regard to applying discipline to these measures. The reason is that the relationship between the abuse of a dominant position and other legally acceptable practices is fine and complicated. As a result, a general prohibition rule may infringe the freedom that the enterprises need to conduct business. In tackling cases of vertical agreements and dominant position, the US explains that any prohibition must be seen in connection with the impact over trade and market access. However, such exclusion needs attention as the cause-effect relationship is not always held.

The argument holds that as firms with market power may be able to prevent others' entry or expansion in their domestic market, foreign entities benefit from this prohibition against the abuse of dominance and market power. The US exemplifies the point by claiming that in foreign telecommunications and government procurement markets, US exporters have frequently faced monopolistic discrimination and market foreclosure (US, 1997a:8). The monopolisation can be often attributed to a specific firm. These situations are more likely to lead to market access issues because the monopolist has control over some essential facility needed by competitors to run their business, e.g., needed interconnection or an existing distribution grid. The US asserts that such situations frequently occur with state-owned enterprises that are in a “dominant position with the power to discriminate” (US, 1997a:8).

On the other hand, the abuse of a dominant position does not always result in anticompetitive measures or the hindrance of trade. A US communication to the WGTCP asserts that some vertical arrangements, practices by dominant firms, and mergers with an international scope can, but do not necessarily or always, have anticompetitive consequences. By the same token,

these same actions and practices may or may not have international trade effects. In some instances, they may affect both competition and trade, but in other instances, neither may be affected (US, 1998a). Drawing on United States vs Grinnell Corp. case of 1996, the communication further asserts:

“[the]Market power that is solely “a consequence of a superior product, business acumen, or historic accident” does not violate the US antitrust laws...[moreover] licensing is generally procompetitive. Licensing, cross-licensing or otherwise transferring intellectual property facilitates its integration with complementary factors of production. This integration can lead to more efficient exploitation of the intellectual property” (US, 1998a:5).

To address the issue of monopolisation in a clearer way, the EC (1998b:15-16) has come up with the idea of an illustrative list, mentioning that countries may wish to explore “the scope for identifying an illustrative list of factors” when assessing whether vertical restraints or dominant position have a foreclosure effect. Such a list “could facilitate international cooperation among competition authorities and reduce the scope for disagreements about the trade impact of vertical restraints...”.

The main points from the above discussion are tabulated below in Table 6.3. The findings show that the EU and the US both proposed inclusion of monopolisation practices in the scope of the CPA. However, for different reasons, they tended to be flexible and, unlike the case for cartelisation, showed signs of leniency for inclusion

Table 6.3- The EU and the US Proposals on Monopolisation + Vertical Restraints

	To be Included in the CPA	Direct Definite Injury	Injury area	Illustrative list
EU	Yes	Mild Yes	Market foreclosure, discrimination, investment	Yes
US	Somehow strong Yes	No	discrimination, investment	No-left to national authorities

Source: Author

Mergers and acquisitions

It was also proposed that mergers and acquisitions are included into the scope of the CPA by Europe (see for instance, EC, 1999a:4) and the USA (see for instance, US, 1997a; 1998a:7-8).

Referring to the results of some of the prominent merger cases, the US (1998a:7-8) suggests that some mergers can be anticompetitive and potentially affect trade through what the US authorities call unilateral effects. This means that mergers can have some of the same trade effects as other anti-competitive practices. A merger policy that takes competition requirements into consideration will keep domestic markets operating efficiently and open to entry by foreign firms. However, the US warns, if merger controls are used as an instrument of industrial policy to strengthen the competitive position of domestic firms at the expense of trading partners, or to undermine the position of foreign firms for non-competition reasons, “trade interests can be negatively impacted” (US, 1997a:8). According to the US, since the outcomes of the mergers and acquisitions are mixed, the CPA, therefore, must be designed in such a way as to differentiate “pro-competitive, efficiency-enhancing mergers from those mergers that pose a threat to competition” (US, 1997a:3).

The EU likewise believes that mergers are not off the agenda. The excerpt below succinctly displays the EU’s position for having anticompetitive mergers as a significant part of the CPA’s scope:

“An issue which has been the subject of much discussion in the Working Group is the extent to which provisions on merger control are a necessary component of a comprehensive competition law regime. From a pure competition law perspective, there is a strong argument in favour of developing procedures through which mergers which establish or reinforce an anti-competitive market structure can be subject to control before they come into force” (EC, 1999a:4).

However, the EU adopts a softer stance on mergers than it does over cartels. Notwithstanding the benefits of bringing mergers under discipline, EU diplomats believe that it must be left to each country to decide whether or not to commit itself to combatting anticompetitive impacts of mergers. For instance, in a deliberation made in July 1999, and repeated a couple of years later in 2001, the EC (2001a:7; 1999b:7) asserts that when defining the coverage of national competition laws, it may not be necessary for member countries to envisage the adoption of a regime for merger control because “... obviously it will be for each country for itself to assess the extent to which they are affected by merger activity and whether they wish to adopt merger control rules in this regard...” (EC, 2001a:7).

The EU explains that mergers resulting in market foreclosure could normally be addressed, albeit less effectively, under the law relating to the abuse of dominance or monopolisation, so countries who have the right measures in place can forgo addressing mergers independently (EC, 1999a:4).

The position of the two countries is summarised in Table 6.4 below.

Table 6.4- The EU and the US Proposals on Mergers and Acquisitions

	Inclusion in Scope	No-test proven Injury	Inclusion in Domestic law
EU	Mild Yes	Possibly	Not necessary
US	Yes	Possibly	Mild Yes

Source: Author

The Government Policies

The two proposals diverge on government policies with a bearing on competition. While the EU clearly does not insist on the inclusion of industrial policies in the scope of the CPA, the US does. The EU proposal sees no reason why a commitment through WTO's competition policy agreement would conflict with industrial or other developmental policies of the signatory countries. The EU mentions that, by the discussions in the working group, it is convinced that there is basic complementarity between competition, industrial and other development policies (EC, 2001b:4). The EU's negotiators assert that many countries – developing and developed – maintain industrial policies for a host of policy reasons. Therefore the EC envisages, in this connection, that a WTO horizontal framework agreement on competition would not go beyond ensuring transparency as regards such exclusions: “WTO Members would therefore be free to decide which exclusions they wish to maintain, whether these relate to the protection of small and medium enterprises, certain sectors or other policy matters” (EC, 2001b:4).

The US, by contrast, believe that government policies should be a key tenet of the CPA's scope (US, 1997a:9; 1998a:3; 1998a:2) (See table 6.5). The US states that government policies, when seen together with private business actions, might contribute to an anticompetitive measure. Likewise, government complacency and tolerance of some private sector actions may, at times, damage competition. Such government action – and inaction – can manifest itself in the sanctioning of government sponsored cartels, in the improper delegation of government functions to private groups, or in a failure to safeguard competition when industries are privatised or deregulated (see for instance, US, 1998a:10).

Therefore the US suggests that it is not solely private practices that should be covered by the CPA. State policies must also be included because they can be anticompetitive or result in such effect:

“we have not always restricted our discussion to “private” anticompetitive practices, per se, but have included such topics as regulation and other means by which government action (or inaction) may interrelate with private conduct to restrict competition and/or market access” (US, 1998a:3).

Explaining its approach in more detail, in March 1998's communication, the US (1998a:13) refers to governments as actors in their own right, and asserts that government sponsored measures can often restrict domestic competition and impede market access by foreign competitors. Based on this analysis, state-owned monopolies and state trading enterprises are potentially a risk to competition and foreign interests. Counter arguing the EU proposal, the US concludes that government industrial policies can also be used to restrain market access by foreign competitors. Calling their effectiveness into question, the argument maintains that some domestic regulatory schemes can create unnecessary burdens on competition once they indirectly promote monopolies and oligopolies, favour some domestic competitors over foreign or even other domestic competitors. These schemes are more than likely to result in entry and market access barriers, and are often concerned more with the well-being of the incumbent firms than with the industry in question.

Table 6.5- The EU and the US Proposals on Government Policies

	Inclusion in Scope	Definite injury
EU	No	Not addressed
US	Yes	Possibly

Source: Author

The WTO's Impact Through Extant Rules

The multilateral trading system has a mixed approach to anticompetitive measures, disapproving some while tolerating others. GATT and the WTO have generally been aware of the untoward consequences of anticompetitive practices. The attention, however, has not been homogenous for all types of anticompetitive actions. Depending on the issues under negotiation, some restrictive measures have received more attention than others in certain periods. For instance, hard core cartels and monopolisation have always been on and off the negotiation tables since 1947. The reason is not hard to see. Since the inception of GATT, there has been a gradual evolution in the regulation of a multilateral trading system towards a broader conceptualisation of market access and liberalisation. While the initial GATT primarily targeted the so-called border measures to trade (i.e., tariffs, quotas, etc.), the system steadily progressed to address measures within national territories having a similar ill effect on international trade. As a result, in all its guises, the evolution entailed turning attention to a range of non-border barriers, and this included those that affected terms of inter-firm competition.

Conceptually, the starting point had been the adoption of a broader definition of market access. Such an approach builds on the degree of openness of a given market to competition from

foreign firms. Thus, the more recent efforts from the Kennedy Round, and especially the Uruguay Round, tackled not only traditional barriers to trade, e.g., tariffs and quotas, but also addressed conditions of competition faced by foreign goods, services, service providers and investors in international markets.

As a result of these efforts, anticompetitive measures were tackled, although mildly, by the GATT-WTO, with monopolisation arrangements receiving the lion's share of attention. GATT 1947 requires countries to confirm that business entities with exclusive rights, particularly SOEs, enter into business transactions on the basis of market considerations only, and avoid using their power against their foreign counterparts. Under GATT Article 17, each country undertakes that if it establishes or maintains a state-owned company or grants exclusive or special privileges to any enterprise, such enterprise is supposed to "...afford the enterprises of the other contracting party's adequate opportunity...to compete for participation ...".

Similar to GATT, GATS also pays particular attention to competition aspects of international business. Echoing the same concept of GATT on monopolisation, GATS re-iterates competition concerns in Articles 8 and 9. Accordingly, member countries are asked to monitor their companies with or without monopolistic powers to refrain from abusing their "monopoly position" in a manner that "...may restrain competition and thereby restrict trade in services" (GATS, Article 8). Furthermore, the GATS' Understanding on Commitments on Financial Services encourages curtailing a range of *de facto* non-discriminatory measures affecting, for example, the range of services a given entity may provide, territorial limits on the establishment/expansion of operations, and other measures that ... affect adversely the ability of financial service suppliers of any other Member to operate, compete or enter the Member's market..

In addition to GATT and GATS, the WTO's Agreement on Basic Telecommunications Services, a deal made during the time that the CPA was being discussed, is also indicative of the WTO's attention to monopolisation. Under this agreement, the Competition Framework (the "Reference Paper") was negotiated to avoid the market access problems that can arise from a former monopolist's ability and incentive to restrict new entrants' access to essential facilities in the telecommunications sector. In fact, this work was referred to by the US team in WGTCF (1997a:8) to show the WTO's support of antitrust.

Despite its critical and disapproving approach to any abuse of market power, some of the current WTO rules tolerate certain types of monopolies; at least for a certain period of time. For one thing, and in a general view, the relationship between intellectual property rights, coming primarily under the TRIPs Agreement in the WTO, and competition policy proposals of the US

and the EU is somewhat complex. On the one hand, it is said that the protection of intellectual property rights (IPR) contributes to dynamic efficiency and is therefore pro-competitive. On the other hand, the exercise of such rights may at times interfere with the basic competition principle relating to the control of anticompetitive practices in, for instance, cases of contractual licenses, vertical integration, and possible abuses of a dominant position. As such, the ownership of IPR can create market power. Such powers may lead to opportunities for abuse and be exercised in a host of ways, including licensing, distribution or arrangement with other producers.

Therefore, there is an inherent conflict between the two, meaning that the already established IPR rules show resistance to yield to proposals that adhere to competition, such as the EU proposal that believes exercise of IPR should necessarily be subject to competition considerations (EC, 1998f:14-15). TRIPs recognises that the anti-competitive practice of intellectual property rights “may have adverse effect on trade”, and its Article 40 reaffirms the right of WTO members to prohibit licensing practices that may constitute an abuse of intellectual properties. Yet, it also furnishes at least ten years of protection for industrial designs and twenty years for patents, virtually offering the owners of the intellectual property right a kind of exclusivity through which a reasonably long opportunity to make a monopoly is granted. Obviously, such an opportunity has the potential to be anti-competition.

This impact has not been unnoticed in the WTO’s CPA talks. By differentiating between the existence of rights and the exercise of intellectual property rights, the EU draws on its experience in managing the relationship between IPR and the abuse of dominance in Europe, and proposes that there should be no doubt against the existence of IPR. However, it immediately makes the point that the exercise of such rights might, at times, prejudice the competition concerns so adds that “...the exercise of intellectual property rights should be fully subject to the respect of competition laws” (EC, 1998f:1). The CPA therefore needs to address these concerns. Perhaps a starting point is building on TRIPs itself that has shown attention to competition requirements several times in its texts, including Article 8 where it states that:

“...in formulating or amending their laws and regulations ...appropriate measures, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade”

and Article 40 where it states:

“Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade...”

Table 6.6 summarises the findings of this section. All in all, the WTO helps cooperation between the EU and the US by supporting both proposals to an almost equal degree. True, some provisions in the TRIPs might be a source of friction; however, their impact is not as strong as the provisions that support the ultimate objectives of the CPA in a multilateral trading system.

Table 6.6- Summary of the EU and US Proposals and the WTO on Scope of Actions

	Overall support for competition	Cartels	Vertical Restrains	Monopolization	Mergers
EU	Yes	Strong Yes	Yes	Yes	Mild Yes
US	Yes	Strong Yes	Yes	Somehow strong Yes	Yes
WTO	Yes	Flexible	Flexible	Mixed depending on the case	Flexible

Source: Author

Scope of Outcomes

So far, this chapter has studied the actors and actions that, according to the EU and the US, need to be included/excluded from the scope of the WTO's CPA. It now turns to the injury debate and the remedies. More specifically, it identifies the anticompetitive actions that the EU and the US suggested be included into the CPA's scope from all the possible outcomes, as well as the remedies to be devised and inserted into the agreement. Obviously, the envisaged remedies mirror the identified outcomes because they are supposed to address the injuries caused by them. Nevertheless, since any remedy has repercussions beyond the interests of the implanting parties only, other factors, including the interests of third parties, come into play. These interests are, without a doubt, part of the deal and must be taken into consideration when defining the remedies and the way they are enforced.

As this section unfolds, the two concerns for trade and investment stand out in the EU and the US deliberations. Trade obviously includes both import and export interests. Both sides have distinct views as to the outcomes and remedies in these two areas that sometimes intersect and sometimes diverge. In addition, there are views about the causality direction between injuries and the remedies and the role of 'efficiencies'.

Test of Injury: Trade, Investment and the WTO

The analysis of the WGTCP documents suggest that, for the EU, the disruption in market access was the main injurious outcome of anticompetitive practices, hence the reason for the inclusion of trade injuries in the CPA's scope (see for example, EC, 1997a; EC, 1998a; EC, 1998b).

Investment is also important in the EU's eye, but trade concerns stand out as the EU's top priority. In the US proposal, in its own right, the two trade and investment concerns are discernible with the weight tilting towards investment injuries (see for instance, US, 1997a; US, 1997d:3; US, 1998d:7; US, 1998a). As will be discussed later in this section, these two areas also form the main gravity of the interactions for the remedies. Interactions that are accompanied by issues relating to cooperation between competition authorities, considerations for non-discriminatory behaviour, concerns for transparency, and enforceability of remedies: these will all be discussed in the following text.

In spite of their shared views about the injurious impact of anticompetitive practices over trade and investment interests, the EU and the US have their own differences, even within these areas. One such difference concerns the priority given to trade and investment as the main injury area.

For the EU, trade and investment are the two injury areas that need to be included in the scope of the CPA. This is clear in several written and oral deliberations throughout the WGTCP activities: "...WTO disciplines should be clearly geared towards the objective of better addressing those anticompetitive practices which have a significant impact on international trade and investment ..." (EC, 1999a:11). The EU further clarifies its proposal by asserting that it does not seek the CPA just for the good of competition in general. Rather the aim is to ensure that injuries that results from anticompetitive measures are remedied. It is completely left to each country to decide for itself how it would like to handle anticompetitive actions whose origin and effect fall on its own constituencies, being firms or consumers. However, the WTO's CPA is to focus on those measures that their origins are outside of national jurisdictions:

"...In all cases, the focus of the work should be on practices with a significant impact on international trade and investment...WTO disciplines would only focus on those cases in which an anti-competitive practice has an international dimension and need not be concerned with anti-competitive practices of a purely domestic nature...." (EC, 1999b:4).

While the EU emphasises trade concerns, the US pays extra attention to investment injuries. In the deliberation of 14 August 1998 on the relationship between investment and competition policy, for instance, the US claims that competition policy, amongst other things, is an instrument to maximise the benefits of investment, "not the least by making sure that any residual local monopolies do not nullify those [investment] benefits". The US then concludes that "... both investment liberalization and competition policy work should proceed apace..." (US, 1998d:8).

Elsewhere the US asserts that:

“It is the view of the United States that ... modern, proconsumer competition policies can enhance open investment regimes, increasing the value of such regimes to both investors and consumers. The two sets of policies thus can and should be mutually reinforcing, creating a virtuous circle of progress” (US, 1998f:1).

As far as the WTO’s extant rules are concerned, between trade and investment concerns, the WTO cannot be stronger in defending trade interest and market access. This is not to claim that the WTO does not protect investment interests, because it does; however, the strength of such defence is considerably milder than that accorded to trade. Moreover, in defending investment interests, the current WTO rules, being trade related, are primarily targeted to the investment harms that also affect trade. These points will be explained in more detail below.

Regarding the relationship between anticompetitive measures and trade interests, it is not wrong to say that the WTO’s extant rules are in full support of trade. The WTO’s first and foremost objective is ensuring full realisation of market access of the members of the institution, so when it comes to the assessment and redress of injuries, GATT draws on the powerful term of nullification and impairment of benefits. By definition, nullification and impairment may result from an action (or in the case of obligations, inaction) of a member that imposes negative consequences on the international market access of other members (GATT Article 23). The underlying concept is that countries become members of the multilateral trading system to ensure that the market access that has been exchanged under the reciprocity principle with other countries is not harmed or nullified in any way. The term ‘in any way’ is purposefully designed so broadly to allow for complaints where the accused party is *not* even in violation of any commitments under the multilateral system. The text of GATT Article 23 specifically mentions that if a member considers that any trade benefit accruing to it, directly or indirectly, is being nullified or impaired as a result of “the failure of another contracting party to carry out its obligations” or “the existence of any other situation” it can trigger the formal dispute settlement process.

With trade concerns to the fore, however, it bears noting that in the wide territory that GATT’s ‘nullification and impairment’ provision sketches, obviously not only the damage to the trade but also harm to the investment interests of a party will receive attention. For instance, the Trade Related Investment Measures Agreement (TRIMs) recognises that, because certain measures adopted by a country may result in a negative impact on the investment interests of other countries, no contracting party shall apply any measures, which are inconsistent with national treatment and prohibition of quantitative restrictions of GATT, in a way that negatively affects other parties’ investments.

All the same, it should not be overlooked that, despite the attention paid to investment injuries, TRIMs does not add anything really significant to the protection that the WTO affords to its members. All it does, perhaps, is furnish a future ambition, paving a road, or showing a direction. Something that, at its best, serves as a prelude, and perhaps facilitator, to more substantial investment protection to follow later. More significant than the support it renders to investment interests, therefore, is a promise for more work to be done in the WTO with regard to investment provisions and competition policy in a broader sense. TRIMs reads “the Council for Trade in Goods shall consider whether the Agreement [TRIMs] should be complemented with provisions on investment policy and competition policy”.

Apart from the very mild stance adopted in TRIMs for the protection of investment, it should be noted that even the remedies envisaged in the multilateral trading system are more a means of defending market access than protecting investment interests. In fact, this WTO attribute has been used by the EC to further its objectives in having an agreement on competition policy in the WTO:

“...Attention should particularly focus on those aspects of competition law and policy which are more relevant for the multilateral trading system, ... Indeed an effective competition law regime is essential to combat anticompetitive practices which deny to foreign producers effective equality of competitive opportunities, thereby undermining WTO market-opening commitments” (EC, 1999a:1-2).

All in all, in the dichotomy of trade-investment as a test of injury of anticompetitive practices, the WTO’s current rules align more closely to the EU proposal than that of the US. The heavier protection afforded to trade makes the WTO a much friendlier context for the EU to pursue its proposal. All the same, the US call for recognition of investment interests as the test of injury for countervailing measures against anticompetitive practices is also not so far away from, let alone in contradiction with, the WTO. The difference between the US and the EU is more a matter of relative emphasis than substitution; while both countries refer to trade and investment interests, the US’s push for investment is relatively stronger than the EU’s. As a result, the WTO has provided the legal infrastructure for the cooperation of the two sides over the test of injury in anticompetitive cases.

Causality and the Efficiency Debate

Despite some degree of convergence over the injury test of anticompetitive measures, the two countries have their differences about the quality of the relationship between anticompetitive practices and damage to trade and investment. The disagreement concerns the causality relationship between anticompetitive actions and the injury.

For the EU, the relationship between anticompetitive practices and injury to the interests of foreign entities, in terms of market foreclosure and limited competition opportunity, is a

straightforward yes or no relationship. In the EU proposal, the injury caused to a foreign firm is the main criteria and no other variable needs to be involved. Under certain circumstances, all forms of anti-competitive practice are capable of causing injury to the trade of partners. According to the EU, an injury to trade needs a remedy without any efficiency defence being possible. In other words, contrary to the US perspective that slots in an efficiency variable between the injury and anticompetitive measures, rather than requiring evidence for further impact to competition itself, the EU automatically regards an inhibition to the trade of a member as a breach of fair competition. In its deliberation of 22 April 2002 to the WGTCP, for instance, the EU clearly connects different anti-competitive practices to untoward trade consequences, and encourages member countries to devise cooperation measures in the WTO's CPA for resolving international issues. These are practices that affect international trade, e.g., international cartels; practices that affect market access such as import cartels, exclusionary abuses of a dominant position. Finally, other practices include export cartels, the abuse of a dominant position by a foreign corporation that has an impact on the trade flows to and from a different geographical market than that in which the practices have been conceived (EC, 2002c, 4).

The EU's approach to causality between an anticompetitive action and trade foreclosure received a mixed response from its US counterpart. Except for the cartels and the case for SOEs, the US counter-argues the EU's automatic causal relationship by highlighting the case for the impact of efficiency gains in competition-related business activities. On a number of occasions, and in connection with different actions that are otherwise called anticompetitive such as vertical arrangements and mergers (see for example, US, 1997a; US, 1998d:7; US, 1998a:14), the US adds the efficiency argument into its approach to competition policy investigation. According to the US approach, attention must be paid to the efficiencies that an allegedly anticompetitive business action creates. Also known as the 'rule of reason', the efficiency argument holds that the actions and practices, such as some types of horizontal agreements, vertical restrictions and arrangements, practices by dominant firms and mergers with international scope, can, but not necessarily always, have anticompetitive consequences (US, 1998a).

For the mergers, more specifically, the US mentions that:

“Yet another objective of competition policy is to enhance efficiency. Competition often drives firms to achieve a certain minimum size or degree of integration or diversification. Competition policy is designed to sort pro-competitive, efficiency-enhancing mergers from those mergers that pose a threat to competition (even though an increase in production or operational efficiency may be achieved)” (US, 1997a:2).

A similar approach can also be found in another US deliberation (1998a:14) for vertical arrangements.

The US efficiency argument holds that as a result of increased competition, inefficient enterprises, whether being national or foreign, will eventually leave the market. This is a fortunate outcome as far as competition is concerned because it serves the same objectives as having a competition regime in the first place; which presumably is a more useful allocation of resources in an economy. The concerns for dominance of foreign firms in the local markets are at times similar to infant industry intercourse that, in effect, disfavours competition from abroad. The US additionally mentions that such concerns have led occasionally to investment screening regimes under the rubric of a competition policy rationale, one based on the concern that efficient new market entrants could harm existing local competitors and achieve a local monopoly. The claim that more efficient multinational enterprises could enter a liberalised market and replace multiple local competitors, thereby losing “market contestability”, does not resonate as being a strong argument for the US envoy, as they believe that the previously closed market had almost certainly been operating at an “inefficient level”, and “quite possibly without significant competition either”. Thus, “generally speaking, allowing more efficient providers to enter a market through FDI should benefit consumers even if providers ultimately are fewer in number” (US, 1998d:7).

Overall, the US position suggests that in cases other than cartels if a restraint is examined, the effects on efficiency, and perhaps consumer welfare, must also be considered. Viewed from the EU perspective with its sensitivity to trade, the action is deemed anticompetitive if trade is adversely affected by denying a foreign producer the chance to compete in a market. However, as one US report sees it, “the restraint may arguably have efficiency-enhancing properties for the participants in the local market” (International Competition Policy Advisory Committee, 2000:210). It must be further noted that the impact of efficiency creation is only considered for US markets. If an action creates efficiencies somewhere else in the world but has negative impact within local markets, the US still seeks remedy, “if a merger had anti-competitive potential within the United States, but might create efficiencies concentrated in some other countries, those external effects would not save the transaction under United States law” (US, 1999a:6).

By superimposing the WTO on the proposals of the two countries about a causality relationship between anticompetitive actions and an injury, one realises that the foreclosure/discrimination proposal of the EU resonates much more favourably than the US efficiency argument in the WTO. The WTO is primarily preoccupied with liberalisation and market openings. As a result, any action by the private sector, or government policy, that has the effect of keeping markets open to international trade flows, would be treated favourably. Equally, the actions with an exclusionary impact resulting in blocking markets to foreign competition in any way, be it an efficient or inefficient manner, generally receives criticism under the non-discrimination doctrine and is entitled to countervailing measures under GATT/WTO arrangements. Moreover, the WTO’s

National Treatment (NT) principles require members of the organisation to treat foreign products, and therefore the producers, equally as well as they treat their own nationally produced goods and services. As a result, the business arrangements that deny equal competition opportunity to foreigners are not generally accepted. The market access argument has been explained in detail in the trade-investment injury discussion; the following discussion will therefore only tackle the NT argument.

The market foreclosure impact of anticompetitive practices falls at odds with the WTO's NT principle. This is particularly the case in arrangements that deny equal competition opportunity to foreign producers. GATT Article 3 holds that foreign products that are imported into the territory of any other contracting party, "shall be accorded treatment no less favourable than that accorded to like products of national origin". Such treatment concerns all laws, regulations and requirements affecting foreign products with regard to "their internal sale, offering for sale, purchase, transportation, distribution or use". GATS wording on NT and anticompetitive measures is somewhat even clearer than GATT's because it indicates that,

"formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member" (GATS Article 17).

It bears noting that the NT principle does not mean the eradication of all types of discrimination. In fact, one can argue that the essence of competition is discrimination. Competition policy aims to differentiate between actors and products that serve the market better than their competitors. As such, competition regimes should provide the conditions in which competitive firms survive and grow and others leave the market. Nevertheless, what the WTO's NT principle emphasises is that discrimination should be based on the merits of the producers rather than their nationality. Therefore, if by ignoring equal treatment to both foreigners and locals a competition regime allows the less competitive actors to stay in the market, it has actually failed to meet its basic objective.

As it currently stands, the non-discrimination impact of business practices applies equally to both *de jure* and *de facto* discrimination. In fact, the Havana Charter was essentially meant to pursue the objective of furthering:

"...the enjoyment by all countries, on equal terms, of access to the markets, products and productive facilities which are needed for their economic prosperity" by "the reduction of ...other barriers to trade and the elimination of discriminatory treatment in international commerce" (Havana Charter, United Nations, 1948:14).

In this vein, a report by the WTO secretariat mentions that there is a general recognition among the members of the WGTC that, "...the fundamental principles of the WTO are already applicable, at least to an extent, to the field of competition law and policy, in the light of general provisions of the GATT, the GATS and other agreements" (WTO, 2002b:7).

Some analysts believe that a compromise between the EU and the US approaches is not technically possible giving a slim chance of convergence (see for example, ABA, 1999; ICPAC, 2000; Marsden, 2003:127-160). This makes the WTO's impact on cooperation over the injury test even more important. Marsden's (2003) study claims that since the US follows the efficiency route, which contradicts the trade rules that demand prohibition of exclusive business arrangements, there is no chance of compromise between the two because, "either you allow arrangements that do not demonstrably lessen competition substantially or you prohibit them, there is no middle ground" (Marsden, 2003:133). In the same vein, the report of an important advisory group to US Attorney General Reno and Assistant Attorney General Klein in 2000 goes as far as suggesting that the conclusions reached by the trade route (the EU proposal) and competition approaches (the US position) result in fundamentally different remedies. For instance, over the action of vertical integration, the report mentions that:

"...consideration of a vertical restraint from a trade perspective versus a competition policy perspective can lead to quite different conclusions regarding the effects of a restraint ... thus, there are areas where the distinction between trade versus competition policy concerns can be drawn quite sharply" (ICPAC, 2000:210).

In all, as Table 6.7 below shows, the WTO's extant rules do not significantly foster cooperation by reducing the gap between the EU and the US over the scope of injuries in the CPA. The WTO is at ease with the EU proposal that relies on trade factors to discipline anticompetitive measures. With its stress on inclusion of efficiency variable in the injury investigations, this demotivates the US from cooperation. The WTO is intolerant of exclusive arrangements because they are inconsistent with market access objectives and the NT principle. The role of the WTO on injury tests, and consequent remedies, is particularly important because the positions expressed by the EU and the US are heavily vested in their economic systems and a compromise is not technically possible between the two approaches.

Table 6.7- Summary of the EU, US Proposals and the WTO on Scope of Test of Injury

	Trade	Investment	National origin and impact	Tolerance of discrimination
EU	Strong Yes	Yes	No	Strong NO
US	Yes	Strong Yes	No	Except for cartels and SOEs, Yes if involving efficiency
WTO	Strong Yes	Mild Yes	No	Strong NO

Source: Author

Scope of Remedies: Remedies, National Competition Law and International Cooperation

The last thing in the series of the decisions to be made by the US and the EU about the scope of the CPA concerns the remedies available to countries on exhaustion of injury tests. Having identified the scope for the actors, the actions and the injury areas, the members of the WGTCP had to discuss the breadth and width of the correcting measures against anticompetitive measures. In this regard, three practical questions must be answered; a) what needs to be done, b) who must do them and c) how they must be done. These three areas are discussed in this subsection. However, as the discussion below shows, the weight of the debate falls on the last question, the factors that condition the way remedies are carried out, so more space will be allocated to the ‘how’ question than the other two.

To give a snapshot of the discussion, the boundaries of the discussion that follows will first be drawn. In short, as far as the first question is concerned, the remedies must address trade and investment concerns of the signatories of the CPA (see for instance, EC, 1998b:12; EC, 1997c:49; US, 1997d; US, 1998a). This obviously builds on the injury discussion presented above. For the “who” part, in its turn, both sides have stressed the role of governments in their domestic activities, including the necessity of having clear efficient competition laws (see for example, EC, 1997a:2; EC, 1999a:3; US, 1997d:3). The parties’ positions, however, diverge significantly on the role of the WTO, a subject that has been discussed in the centralisation chapter. The “how” question carries the weight of discussions and involves transparency (see for instance, EC, 2001b; US, 1999a), non-discrimination (EC, 2002a; EC, 2001b:2; US, 1999a; US, 2002a), and international cooperation (see for instance, EC, 2002a; US, 1999a; EC, 2001b; US, 2002a). Particular attention is paid to the last part as it assumes the bulk of the talks in the WGTCP.

The ‘What’ Question

As to the question of ‘what’ needs to be done against an injurious anticompetitive action, the answer for both parties includes the trade and investment interests (see for instance, EC, 1998b:12; US, 1997d; US, 1998a). As one EU deliberation mentions, while following the objective of re-establishing “a level playing field” (EC, 2002a:4), the remedies must reflect the injuries identified by both sides in terms of trade and investment. Both parties also suggest that any remedy needs to be designed so wide to address the issues faced not only by national entities but also by international firms. Implementing flexibility in design and enforcement of competition policy is also another consideration that is shared between the two countries (see for instance, EC, 2001a:7). On this last point, for instance, the EC (2001b:7) reminded the WGTCP that a WTO competition agreement does not imply harmonisation of members’ laws. On the contrary, such laws and policies need to be carefully designed and adapted to adequately reflect the stage of economic development of a given country, as well as its overall policy priorities.

Despite their shared emphasis for flexibility in remedies, both Europe and the US nevertheless stress that national competition regimes must take a hard stance against hard-core cartels (for a detailed account of the views see, amongst others, WTO, 2002c). They may decide to remain silent on other forms of anticompetitive practices as the flexibility concerns might demand, but hard-core cartels are so likely to cause damage to competition, consumers and competitors that can *not* be left unaddressed (see for instance, US, 2002c; EC, 2002b). As will be explained later in the chapter, the ideas in the proposals are, to some extent, analogous to the case for export subsidies in the Agreement on Subsidies and Countervailing Measures (SCM). Also known as red-light subsidies, after the traffic lights, the approach indicates that, as with export subsidies that are deemed injurious without even a positive test of injury, the existence of hard-core cartels *per se* is the reason for injury, hence the need for immediate remedy.

The ‘Who’ Question

Concerning the ‘who’ question, the EU and the US furthermore share the view that it is primarily the responsibility of each country at the national level to tackle the concerns in the first place (see for instance, EC, 1997a:2; US, 1997d). Members must make certain that neither government policies nor actions of the private sector hinder competition or deny the right of competitors – national and international – to have a fair ground for competition. In fact, the European side showed so much enthusiasm on this matter that some commentators have interpreted Europe’s proposal as perhaps a change of mind from its proposal to shift the centre of responsibility from the WTO, “...to one of promoting the sound development of national competition institutions” (Anderson and Holmes, 2002:4-5).

The ‘who’ question within the remedy discussions is about deciding the distribution of responsibilities between a member states and the WTO; the tasks that governments accept to perform in their own capacity and the functions they pass on to the WTO to handle. This has been discussed in detail in the centralisation chapter, where the analysis focuses on the distribution of tasks. This section, therefore, merely focuses on the content and attributes of national competition laws. Moreover, before tackling the rest of the argument for the ‘who’ discussion, it is important to remember that there are three important factors that are very close to this subject. These are the need for attention to impartiality, i.e., the non-discrimination argument, transparency, and cooperation. For the sake of clarity, however, these have been distilled from the ‘who’ debate and will be discussed under the rubric of the ‘how’ question in the coming subsection.

The European and the American delegations have highlighted the importance of formal national level competition regimes, more specifically national competition laws with enough resources allocated for enforcement (see for instance, US, 1997a:8). Expressed in the deliberations of both countries, the first step is handling anticompetitive actions by requiring member states to maintain a well-defined, national level competition regime. An EU deliberation, for instance, reads:

“An agenda for negotiations at WTO level for reform could include: setting standards for strengthened domestic competition laws... bearing in mind that international effects of competition policies depend first and foremost on the relative strength of national competition regimes...” (EC, 1997c:49).

This is a point also emphasised by the US delegation when they said, “there should also be a genuine commitment on the part of the government to guard against the fostering of anticompetitive practices through the government’s action or inaction” (US, 1997a:8).

Under the CPA, national competition laws are meant to defend the rights of two sets of objectives. First, providing a defence mechanism for national businesses against anticompetitive measures originated in other countries. Second, giving assurance to foreign business entities that their interests, in terms of trade and investment, are protected against anticompetitive practices in the country. On this second point, Sir Leon Brittan and Karel Van Miert (the EU’s commissioners of trade and competition) once said, “...firms ... face a competitive disadvantage if they have to compete on world markets with foreign producers operating from home markets that are subject to less vigorous competition policies” (Communication from the Commission to the Council, 1996:3).

The European approach suggests that a national level competition law is the first remedy in its own right that cannot be substituted by the institution of the WTO. The absence of national level competition law in certain cases creates a vacuum that may lend itself to a *de facto* nullification of commitments undertaken previously by a WTO Member (EC, 1997a:2). According to the EU (for

instance, EC, 1998b:12), the absence of clear national competition law can potentially have a foreclosure effect or raises the barriers to entry into a market, thereby upsetting the equality of competitive opportunities in a similar manner to government measures (EC, 1998b:1).

A similar message was indicated much earlier in 1997 by the US delegation when expressing that the development and enforcement of effective competition laws help ensure that, "... competition-inhibiting private conduct, the regulation of markets, ... do not take the place of other more obvious governmental policies in restricting entry (domestic or foreign) into markets" (US, 1997b:2). In the US approach national competition laws, at least as far as the US is concerned, are required to follow the interests of national firms regardless of the international borders (see for instance, US, 1997d:3; US, 1998a:). As such, the jurisdictional reach of national competition authorities is defined as essentially global and extends to other territories as the test is always the damage or benefit to national interests. However, in the context of a multilateral CPA where often a party's interest is the other(s) loss, it does not say how such a policy might play out:

"The jurisdictional reach of US antitrust laws extends to any anticompetitive conduct that affects US domestic commerce or US foreign commerce ... regardless of where such conduct occurs – inside or outside the territorial boundaries of the United States – or the nationality of the parties involved" (US, 1997d:3).

The proposals see a distinct role to be played by national authorities in addressing anticompetitive measures, other than the activities of the WTO. Both sides emphasise that, under the CPA, governments must be guardians of the equality of competitive opportunities between foreign and national entities (see for instance, EC, 1997b; US, 2002c:3). The EU and the US further mention that a clear national competition law is just the first such measure to fulfil this objective. An EU deliberation in November 2002 pinpoints that an effective domestic competition policy and its careful enforcement help importing or host countries to avoid some of the perceived risks that are sometimes associated with market access concessions or inbound FDI, "...that is, of foreign firms or investors with market power disproportionate to that of domestic firms, abusing such power" (EC, 2002a:5). The EU, moreover, acknowledges that one of the implications of the liberalisations of the previous rounds, the Uruguay Round in particular, has been in fact increased foreign investment; however, this in turn has increased the vulnerability of countries to anticompetitive practices from foreign sources. A national level CP law addresses the:

"...concern that in certain instances foreign enterprises may ... engage in ... anti-competitive practices. Competition law provides a legitimate and non-discriminatory instrument, based on market-oriented standards, to counter anti-competitive practices with an impact on the domestic market..." (EC, 1997b:2).

The WTO's basic structure is compatible with the idea of splitting the responsibility of enforcing the CPA between member countries and the WTO, hence a decentralised adjudication of

competition matters. Such a mechanism internalises a member country's commitments and is complementary to the tasks played by the WTO. For one thing, the positive impact of national laws on foreign interests has not gone unnoticed in GATT/WTO. In fact, on a number of occasions, the members of the WTO have been required to put their commitments into national bodies of legislation. For instance, an acceding country is required to ratify its protocol of accession by the highest authority in its political system, which is usually the parliament. Within the rubrics of the multilateral trading system, having, and efficiently enforcing, a national competition law is a signal to partners that a country is actually committed to fulfil its responsibilities under a specific arrangement. National laws are, in principal, sustainable compromises between different stakeholders of an economic matter. Each stakeholder gets a share of the benefits and often bears some costs of the legislation. Through the internal bargaining process, which might involve some kind of give and take of benefits and advantages, with or without exchange of compensations (Ehrlich and Hearn, 2014), the forces that are likely to destabilise the deal in the future cancel each other out and an internal political equilibrium is achieved. Such equilibrium is sustainable and reduces the chances of fundamental alterations in future. This is because a change in the law, or non-enforcement of the law, upsets the existing order of costs and benefits, and is likely to face resistance in national quarters. Existence of such a mechanism gives stability assurance, not only to the national interest holders, but also to the concerned foreign entities that the incumbent country will refrain from upsetting the equilibrium by respecting its laws over time.

The 'How' Question

Within the discussion for the scope of remedies, the emphasis on having a national competition law under the CPA requires an answer to a third set of questions. These are questions about the qualities that need to be incorporated into the ways that remedies are exercised. In the WGTCP, these issues have been referred to as the 'core principle'. Three 'hows' are discernible in the EU and US deliberations; non-discrimination, international cooperation, and transparency. The similarities and differences of each of these in the US and the EU proposals will be briefly explained, as well as the WTO's influence over cooperation.

Both sides have expressed the view that maintaining non-discrimination and impartiality in national competition laws is an indispensable tool in remedying anticompetitive practices (US, 2002a; EC, 2002a). Similar to other agreements within the multilateral trading system, the non-discrimination proposals for the CPA has two dimensions: one concerns the equal treatment of national and international entities (the so-called NT principle) and the other concerns equality of treatment between foreign entities but from different countries, known as the MFN principle in the WTO. As a reminder to the reader, MFN is essentially a commitment by a country to treat

activities of another country, being trade, investment, etc., at least as favourably as it treats other countries.

From the two dimensions of the non-discrimination debate (NT and MFN), the US and EU proposals are closer on the former, and differences are seen in their approach to MFN. In short, where the EU supports an MFN provision across the board, the US sees a full-reciprocity mirror-image approach to be more appropriate for the CPA. These will be explained shortly.

The EU view is simple and straightforward. It proposes non-discrimination with some mild twists to match the specific requirements of the competition policy:

“we believe there is a need for the inclusion of the principle of non-discrimination in a WTO framework agreement on competition by way of a separate, specific provision, which would take into account the particularities of competition law and policy” (EC, 2001b:2).

In this view, the overall aim of non-discrimination in the CPA is generally the same as the WTO's other agreements. However, the CPA must include issue specific non-discrimination provisions.

However, the EU proposes restricted access, in terms of MFN, to the concessions given by a member outside of the scope of a CPA. According to the EU, provisions on non-discrimination within the scope of CPA should not be extended to cover existing or future cooperation arrangements in the competition area. This includes bilateral cooperation agreements on competition, as well as consultation and cooperation provisions contained in bilateral or regional free trade agreements:

“Were such a limitation not to be placed on the non-discrimination core principle, situations could occur whereby one or more WTO members not parties to e.g. a bilateral cooperation agreement would seek to avail themselves of the provisions of such an agreement by invoking MFN” (EC, 2002a:5).

The US proposal also distances itself from nationality-based discrimination but, unlike the EU, demands full reciprocity in exchange. The US bases its proposal on the situation in the US by claiming that it has long been the policy of the competition authorities in the United States to avoid discrimination based on nationality. The US also recommends that the WGTCF follows the US suit in accepting the basic tenet in the United States' antitrust law that intends “to protect competition in the market as a whole, not individual competitors” (US, 1999a:5). The US additionally declares that it supports non-discrimination for a number of reasons, including that it assures other countries that the national competition regime about discrimination remains unchanged: “Invidious discrimination against parties or firms on any ground, including their

nationality, would be fundamentally inconsistent with this principle [i.e., general approach to securing non-discrimination]” (US, 1999a:5).

On the MFN leg of non-discrimination, however, the US proposal demands more attention. For one thing, the US proposes a kind of MFN that allows countries to have contingent behaviour. By asserting that “MFN is not a “one size fits all” legal “straitjacket” imposed regardless of context or circumstance” (US, 1999a:8), US diplomats argue that circumstances may demand different countries to be treated differently: “... In substantive antitrust analysis, it may be appropriate to treat firms from different countries differently” (US, 1999a:8). The contingency factor that determines the type of behaviour against other nationals, however, is primarily the degree of reciprocity that has been exchanged with each single country. A US deliberation on this matter emphasises the point:

“... there are a variety of situations in which they [competition authorities] may have valid reasons for differentiating between and among them [foreign persons]... any such differentiation would reflect not a party’s nationality, ...but... of cooperation and assistance that parties are willing to offer” (US, 1999a:7).

The US approach is a mirror-image type of MFN. Accordingly, full reciprocity from other countries is demanded for any advantage given: “the United States continues to explore additional and improved antitrust cooperation agreements with other countries [who are] willing and able to reciprocate” (US, 1999a:7). Such an MFN calls for almost identical commitment by all participatory countries in the CP interactions. Therefore, a commitment in one area/sector must be matched with an exactly identical commitment by other countries. The result is likely to be a narrow agreement because, given the different approaches proposed by the many members of the WTO, the end results eventually reflect only the least common denominator of all proposals. This is because no country is willing to commit itself in one area in exchange for a commitment by another country in another area. Obviously, the negotiation process will also be considerably longer given that countries have to interact on a bilateral basis with any single country in the WTO.

Regarding the WTO, there is a detailed background on non-discrimination in terms of NT and MFN. In short, however, it is enough to mention that national treatment requires WTO members treat similar goods and services from other members of the WTO no less favourably than those of their own nationals. The MFN principle has been used slightly differently across WTO documents, yet the basic format requires that a member country treat similar goods, services and persons of another member country no less favourably than those of any other country. A US document highlights that these two non-discrimination principles together “aim to promote

equality of competitive opportunity for Members' goods, services and enterprises, to avoid distortions of the competitive process" (US, 2002a:1).

The NT part has been discussed in some detail in the injury discussion above; this section concentrates more on MFN. However, it should be mentioned that the National Treatment Principle, reflected in GATT Article 3, is based on the concept that trade of other countries, once border formalities have been exhausted, does not receive a less favourable treatment than that afforded to local trade. The same notion is repeated in TRIPs Article 3 and GATS Article 17. The principle of national treatment is also incorporated in various other agreements that reflect the particularities of the subject matter of the agreement. For example, the Agreements on Technical Barriers to Trade and on the Application of Sanitary and Phytosanitary Measures both have provisions with regard to non-discrimination.

The proposals made by the US and the EU are very close to the WTO's extant NT rules. This is acknowledged by one US deliberation: "The US experience has been that antitrust rules and their application are supportive of and consistent with the WTO's basic non-discrimination principles" (US, 2002a:2). Therefore, the WTO could actually facilitate cooperation over matters involving the NT.

Returning to the MFN discussion, first, the current WTO's MFN provisions are reflected in GATT Article 1 and GATS Article 2. Accordingly, any advantage, favour, privilege or immunity granted by a country to any product originating in or designed for any other country will be accorded, immediately and unconditionally, to the like product originating or destined for the territories of all other countries.

With one main exception that will be discussed shortly, the WTO's MFN rules require overall, across-the-board, general reciprocity commitments are granted immediately and unconditionally to all members of the WTO, regardless of the accession time and concessions accepted. Therefore, it is different from the type of MFN proposed by the US for the CPA, in that the granting country does not necessarily condition the MFN treatment to reciprocal behaviour from the recipient side. Nor would the granting country elicit payments, even though proportionately much less than that granted, from the third countries for the additional commitments made to one country. Therefore, by the WTO's extant MFN, when the US grants a privilege to the EU under the WTO's CPA, for instance in terms of cooperation for providing information in specific cases, other countries in the WTO are automatically, immediately and unconditionally entitled to receive the same behaviour, without necessarily having to reciprocate proportionally. However, GATS Article 5:7, as well as GATT Article 24 (as interpreted by Understanding on the Interpretation of Article 24 annexed to GATT 1994) introduce an exception. By this article, commitments made by a member within the

framework of preferential trade agreements (PTAs) being bilaterals, customs unions and free-trade areas, can be withheld from members of the WTO who are not party to the PTA in question. Although open to debate (see for instance, Bhagwati and Panagariya, 1999; Mrázová et al., 2013), the argument in support of this exception is that the PTAs are pro-trade arrangements that serve the ultimate objectives of the WTO, and eventually pave the road for more liberalisation inside the WTO.

The difference in approaches shows itself in the case of the concessions given in the context of bilateral/regional competition agreements. Cooperation with one country (even if both are members of the WTO) and not another (which is also a member of the WTO) could arguably raise discrimination concerns in a potential WTO competition agreement. In situations like this, the United States believes that such cooperative situations should not be considered “a violation of MFN”; it acknowledges, however, that, “nevertheless, it is unclear whether this position is shared by other Members” (US, 2002a:4).

The answer was positive because one can see traces of the US argument for conditional reciprocity in the Europe’s proposal as well. It is not as strong as the US proposal, but Europe’s certainly did not want the MFN treatment to constitute a basis for non-reciprocity. For instance, as mentioned earlier, the EU proposed that the CPA’s MFN apply to the concessions exchanged within the WTO’s CPA, and not to the concession granted either before or after the CPA outside the WTO, for instance, in bilateral/regional competition or trade agreements. The EU’s argument converges to that of the US when it reasons that, “...bilateral cooperation agreements are the result of a long-standing, continuously evolving relationship between competition authorities..... Extending the provisions of such agreements to countries not originally parties to such agreements would ... defeat the underlying foundation for such agreements...” (EC, 2002a:5).

So far we have tackled the non-discrimination debate of the ‘how’ question in remedying anticompetitive practices. Before starting the discussion for international cooperation and transparency, it would be helpful to mention that each of the two types of MFN render a distinct repercussion. In case the current MFN of the WTO is accepted for the CPA, many countries would see it as lucrative to delay committing themselves to a concession that is at least as significant as the one they receive as a result of the unconditional general MFN. The free-riding effect that results, when added to the consensus decision-making of the WTO, means that one country can substantially slow down the progress of the CP talks, keeping everyone as hostage, and demand a ransom of unconditional MFN. On the other hand, the current WTO MFN, i.e., the general MFN, however, has the advantage of huge savings on transaction costs on reaching a deal as it reduces the need for a bilateral bargaining process among the countries; these would be substantial, if not impossible, between 130 members of the WTO at the time of CP negotiations.

The result of the US proposal for the CPA is that it reduces the free-riding risk. As noted by John Jackson (1994:159), the possibility of free-riding acts as an incentive to some potential signatories to shun their responsibilities in an arrangement. This may lead into mutually destructive actions that effectively restrain full commitment as the parties try to avoid being the victim of exploitation by the others. The US proposal tackles that risk as each country receives no more than the treatment that it itself is willing to commit to it.

In sum, the WTO's MFN is clearly general and unconditional. With the exception given to the PTAs, it is significantly closer to the EU proposal than it is to that of the US. However, it must be noted that the mirror-image reciprocal MFN suggested by the US is not unprecedented in the multilateral trading system. For instance, as observed by one commentator, in the course of the Tokyo Round, some signatories of certain codes took the position that the benefits of code treatment would be granted only to countries that became signatories of the code, thus accepting similar commitments to those adopted by others (Jackson, 1997:162). This result is actually observed by the US competition convoy in the WGTCP when they assert: "the US experience has been that antitrust rules and their application are supportive of and consistent with the WTO's basic non-discrimination principles" (US, 2002a:2).

Next to non-discrimination conditions, transparency is yet another factor that has been mentioned in relation to the "how" question. Both sides could not emphasize more the importance of transparency in terms of legislation, cooperation, investigations and enforcement in the national competition regimes of the CPA signatories. The secretariat of the WTO's WGTCP (WTO, 2002b) reports that there has been general recognition among members of the working group that transparency is a principle critical to ensuring the smooth application of national competition laws. For one thing, transparency demonstrates compliance of a member to its obligations towards other countries. For another, a transparent CP regime elicits support by the public at large for relevant laws and policies. A US deliberation to the WGTCP neatly summarises the benefits of transparency in remedying anticompetitive practices as:

"Transparency principles...help ensure the public knowledge and realization of commercial opportunities and the according of due process to interested parties, including competitors. Transparency is also crucial to the individual and collective surveillance by WTO Members of other Members' implementation of their obligations, e.g., in the notification of domestic legislation, regulations and other measures of relevance to individual WTO Agreements. Finally, transparency in the operation of the WTO itself has become a critical factor in ensuring the long term credibility of the multilateral system" (US, 1999a:1-2).

As far as addressing anticompetitive exercises are concerned, the national level competition regimes of the CPA signatories should build on the WTO principle of transparency, with the ultimate objective that the interests of both national and international actors under the WTO are

not forfeited due to a second barrage raised, not by governments but rather by the private sector. The US and EU approaches share a number of points on transparency in remedying anticompetitive actions. To begin with, they draw on equal opportunity for market participants. By emphasising that the transparency requirements ensure a level playing field for all participants, the proposals stress on providing equal competitive opportunities for firms, their products and services. Moreover, the EU (EC, 2001b), similar to the US, asserts that transparency helps in bringing about a higher degree of predictability. It enables firms to familiarise themselves with existing rules and regulations before making major business decisions, just as consumers may become more familiar with their rights. The EU further suggests that in the competition field, any commitment would apply to laws, regulations and other government measures taken in application of domestic competition law. The transparency obligation would apply not only to publications of relevant laws and regulations, but also to guidelines, as appropriate, for their future application and interpretation, as well as possible exclusions and exemptions as they may apply (see for instance, EC, 2001b).

The WTO's extant rules for transparency and predictability are in line with the EU and US emphasis on the existence of transparency in national competition laws to remedy practices that infringe fair competition. Transparency, in the WTO context, is generally discussed in terms of two separate components. One is an obligation to publish, or otherwise make publicly available, relevant measures of general application prior to their entry into force. Two, the notification of such measures to either the WTO, other WTO members, or both. As a requirement for the formulation of national laws/policies and a guiding requirement for the operation of the WTO, it is also firmly incorporated in a number of WTO agreements, including, and most notably, the three main pillars, i.e., GATT (Article 10), GATS (Article 3), and TRIPs (Article 63). Likewise, many WTO agreements contain specific transparency provisions tailored to the requirement of their subject matter. In terms of what practical steps need to be exhausted, GATT Article 10 more specifically requires contracting members to implement their policies "in such a manner as to enable governments and traders to become acquainted with them". In fact, in the Kodak-Fuji case, the US erected its argument against Japan partly on GATT Article 10, claiming that Japan had failed to administer its policies in a clear way and, as such, had violated the clarity and transparency requirements of GATT Article 10.

To wrap up the transparency discussion, the WTO's extant rules are in full compliance with the proposals of the US and the EU, hence a real push for cooperation in this area for the CPA.

The third variable under the 'how' question in the remedy of anticompetitive actions tackles cooperation between parties. The US and the EC (e.g., EC, 2000a; EC, 2002a; US, 1997c) have stressed that one important area to be covered by national competition laws is the requirement for

international cooperation. The EU proposal is very clear on this matter: "...In an increasingly globalized economy, we remain convinced that all WTO Members ... would stand to benefit from international cooperation on competition matters" (EC, 2001b:4-5). The US delegation matches that by asserting: "In this era of increased globalization, cooperation between governments in antitrust law enforcement is more and more necessary..." (US, 1997c:1). The arguments by the US and the EU share the point that with the activities of firms expanded globally, cooperation between competition authorities is a prerequisite of an effective enforcement of national laws.

However, there are important considerations that impose limitations on the span of cooperation, disclosure of business secrets being the major one. The following section starts by an explanation of general approaches suggested by the EU and the US over cooperation with other countries in addressing anticompetitive practices, and ends by revisiting the WTO for its extant rules for appraisal of their impact over cooperation between the US and the EU for the CPA. There is also the issue of division of labour between national authorities and the WTO that is the case for centralisation debate, discussed in the chapter on centralisation.

Both the EU and US proposals require national laws to support intensive cooperation between members of the WTO over the CP matters. For instance, the EU emphasises that WTO members should stand ready to enter into consultation over competition matters with an international dimension. These consultations have different dimensions. For one thing, members may inform other countries whose important interests may be affected by an ongoing investigation and proceeding under its competition laws. Similarly, a WTO member could draw the attention of other members to evidence of anti-competitive practices that adversely affect its trade or investment; they could then seek information about any possible competition investigation regarding such practices (EC, 2001b:5). Likewise, in many instances, including in the communication to the WGTCP on 13 July 1999, the US highlights its dedication to full international cooperation as a means of combatting anticompetitive private actions by mentioning its arrangements with other countries – including the EU – that may go as far as ‘positive comity’ arrangements. In the US (1997a:7) account, under positive comity when anticompetitive conduct adversely affects more than one country, affected countries can ask the authorities best able to investigate and remedy the conduct to do so. Often, this will be the authorities of the country in which the firms are located. The US (1999a) furthermore expressed its satisfaction with the results of the OECD Competition Council published as ‘Revised Recommendation of the OECD Council Concerning Cooperation between Member Countries on Anticompetitive Practices Affecting International Trade’. This document highlights the importance and the modalities of international cooperation, as well as the modalities for conciliation of competition disputes.

In the debate over inter-agency cooperation, two points have been contentious. First is the impact of cooperation requirements on the independence of national competition authorities. On this matter, it is highlighted in the EU proposal – and vehemently advocated by the US (2002e) – that international cooperation is not meant to question or affect national priorities of signatory countries in conducting their competition policies. The deliberations suggest that inter-agency cooperation under the WTO's CPA must not be considered as an intrusion tool for undesired modifications in national competition regimes (EC, 2001b:6).

The second issue area for the inter-state cooperation requirements in national laws concerns business secrets. Individual cases often involve information sharing and this has made it one of the most contentious areas in the CPA debates. There are two reasons for the sensitivity. First, the international exchange of information at times includes sharing private information (e.g., business secrets) that is highly sensitive on both political and business grounds. Second, a decision must be reached as to the administration of the information sharing mechanism. The latter point is discussed in detail in the centralisation chapter, where the dichotomy of national-WTO governance division of work is addressed. The next section discusses the first point only.

The need for information sharing in competition matters is emphasised by both the EU and the US delegations. However, both sides immediately clarify their proposals by drawing attention to the fact that cooperation between competition authorities should not in any way compromise confidentiality of private information. The US draws on its national procedures to emphasise the point, "...In the United States ... much of the information obtained in the course of antitrust enforcement proceedings is required by statute or regulation to be kept strictly confidential" (US, 1999a:4). Investigations and the enforcement of competition laws often involve some sensitive information, informants and witnesses who must be protected, mainly because they are of a non-public nature. This is especially the case for the investigation stage, where authorities dig into the practical details of an action that is suspected to be of an anticompetitive nature. In essence, in the design of the CPA, the concern for private information acts as a defining limit for inter-agency international cooperation, "...the need to protect confidential information ... entails legal and practical limitations on what information can be exchanged. A WTO agreement would need to set out certain basic standards for the protection of such information..." (EC, 2002a:7).

The WTO's extant rules already include some borders drawn between the necessity of inter-state cooperation and the concern for private information. On the one hand, it has some serious provisions on cooperation requirements, while on the other, it acknowledges the right of enterprises to demand confidential treatment of their business secrets. Therefore there is a compromise already in place. On the one hand, some provisions encourage transparency and opening up of information, on the other hand, however, they do not go as far as demanding

disclosure of business secrets beyond the rights of confidentiality. More specifically, Article 9 of GATS and Article 40 of TRIPs formulate mechanisms for inter-governmental consultations over a number of business practices, including allegedly anti-competitive practices in intellectual property licensing. Likewise, Article 10:1 of GATT 1947 and Article 3 *bis* of GATS both assert that members are not required to disclose confidential information, the disclosure of which would prejudice legitimate commercial interests of particular enterprises, public or private. The underlying idea is that a person lawfully in control of secret information with a commercial value must have the possibility of preventing it from being disclosed to, acquired by, or used by others without consent.

Therefore, the WTO could have acted as a facilitator for a compromise between the EU and the US as far cooperation requirements of the CPA is concerned (See Table 6.8). On the one hand, it strongly identifies the need for interstate cooperation in terms of facilitating case-specific interactions, in addition to supporting general exchanges of information and experiences on competition matters. On the other hand, it lines up completely with concerns over the disclosure of private information in the course of competition cooperation. This study's findings with regard to the US and EU approach to the treatment of confidential information with the WTO requirement in this area is likewise identified and acknowledged by US officials. In a late deliberation to the WGTCP in 2002 the US asserts that:

“...US statute or regulation requires much of the information obtained in the course of US antitrust enforcement proceedings to be treated as strictly confidential. This is particularly the case with respect to ... commercially sensitive information... these provisions, which clearly fall within the WTO's confidentiality exception, would impede the US agencies from publishing basic information, including clearance reports, on notified merger transactions.” (US, 2002a:6)

Table 6.8- Summary of the Remedies as in the WTO and in US and EU's Proposals

	Trade Interests as Injury	Investment	Direct Assumed Action-Injury Relationship	Necessity of Having National Laws	NT	Unconditional MFN	Transparency	Cooperation
EU	Strong	Mild Support	Yes	Yes, and Strong Yes for Cartels	Very Strong Support	Yes, Regional-Bilaterals Excluded	Very Strong Support	Strong Yes, Positive & Negative Comity
US	Support	Strong Support	No, Except for Cartels and SOEs	Yes, and Strong Yes for Cartels	Very Strong Support	No, Full mirror-image Reciprocity MFN Needed	Very Strong Support	Strong Yes, Positive and Negative Comity
WTO	Strong	Very Mild Support	Yes	Mild Yes	Very Strong Support	Yes, Regional-Bilaterals Excluded	Very Strong Support	Strong Yes Over Information Sharing and Publications.

Source: Author

Conclusions

Chapter 6 tackled the last part of the empirical analysis of the project by addressing the scope factor in the US-EU interaction for the WTO's CPA. Four areas of concern were discerned from the deliberations of the parties: the scope for actors, actions, outcomes and remedies. Overall, the WTO's impact over cooperation is mixed depending on the issue in question. However, a general look suggests that the extant legal structure of the institution is friendlier to the EU proposal than to the US, dampening the latter's motivation for cooperation in key areas of injury tests and remedies to anticompetitive arrangements.

The analysis presented in this chapter highlights a number of common and contentious areas between the two countries. With the exception of SMEs, the EU proposal demanded a flexible, gradual but almost universal inclusion of all economic sectors in the CPA over time. Moreover, it proposed that all four types of known anticompetitive arrangements (i.e., cartels (particularly export cartels), vertical restraints, monopolisation and mergers) were covered by the agreement, although it took a much lighter stance on mergers than cartels. Additionally, the EU suggested that adverse effect on trade be the main test of injury in measuring the damage caused by anticompetitive practices; in doing so it sees a rather automatic cause-effect approach. In redressing the damage, the EU believed the principles of national treatment (NT), unconditional most favoured nations (MFN), utmost transparency and intense inter-state cooperation must be applied.

The US proposal matches the EU's in several respects. It advocates across the board inclusion of all firms, with particular emphasis on State Owned Enterprises (SOEs), in the scope of the CPA, favours coverage of all four modes of anticompetitive practices (except for export cartels and inclusion of states' economic policies), and adheres to non-discrimination and transparency principles in dealing with the infringing entities. Similar to the EU, the US proposal furthermore advocates close international cooperation between signatories of the CPA on anticompetitive cases.

The two proposals, however, differed on the significant issue of test of injury and application of MFN principle in the CPA. While the EU heavily emphasised trade interest, the US proposal tended to put forward investment interests to be the main injury criterion in anticompetitive investigations under the CPA. Along the same line, the proposals differed on the cause and effect interpretation of injury. The EU emphasised a rather automatic direct cause-effect relationship between anticompetitive actions and injury to trade interests of two countries, but the US argued for a second test based on the benefits of efficiencies that might accrue as a result

of measures that are otherwise known as anticompetitive. Accordingly, for a remedy to be granted to the injured party, the authorities needed to examine if the action in question indeed had an efficiency increasing impact as well.

The EU and the US furthermore had different views on the CPA's MFN provisions. For the US, a signatory offers the MFN treatment to others only if it extracts equally weighted concessions from them. In other words, the US's approach to the MFN in the competition agreement was a mirror-image full reciprocal treatment. The EU, however, proposed a traditional GATT reciprocity where unconditional MFN is granted. So, once a country signs into the CPA, it receives MFN treatment from other signatories no matter its concessions.

One important fact that can be distilled from the analysis presented in this chapter is that the EU's proposed scope for the CPA was more limited than the US's. For one thing, by incorporating investment concerns into the CPA, the US actually opened a whole new horizon for business activities that come under the rule of the CPA. Or, the EU's suggestion that the inclusion of mergers in the CPA could be left to each country to decide would potentially limit the scope of actions under the CPA. We are reminded by our theory framework that a broader scope and the higher linkage between wider issues help parties overcome compliance concerns by connecting a breach to the wider interests of the defecting party, demotivating it from breaking the rules of the CPA.

Concerning the WTO's impact on cooperation between the US and the EU, the analysis presented in this chapter shows that it has been mixed depending on the issue. It boosted cooperation by being unbiased to either of the proposals – or at least supporting them equally – over the scope of actors and actions. It also put its weight to supporting the proposed provisions for transparency and international cooperation. However, its extant legal structure heavily supported the EU proposal for trade as the acceptable test of injury, and supported the EU's opposition to the US's argument for an efficiency test in anticompetitive investigations. The US, therefore, had the dual task of fighting its proposal against the EU who had positioned itself comfortably between the 'yes' and 'no' of the WTO.

Chapter Seven: Conclusions- Evaluation of the WTO as a Catalyst of Cooperation

This final chapter provides a synthesis of the research findings on the impact of the World Trade Organisation (WTO) as the immediate platform of interactions on cooperation between the US and the EU over an agreement on competition policy. The theoretical implication of the project will also be discussed, followed by a policy recommendation for advancing the scholarship on the influence of international institutions in general, and the WTO in particular, in dealing with interstate cooperation. The chapter will be concluded by mentioning the limitations of the results as well as providing recommendations for future research.

In short, the empirical results suggest that the WTO as the context of the US-EU efforts had a substantial impact on the quality of interactions as they unfolded over time. In fact, the institution provided a workable solution for cheating concerns; however, that solution in its own right failed to ensure cooperation between the two countries for the Competition Policy Agreement (CPA). Akin to this point, a future research agenda in the competition policy area must be informed by a revised version of the rational theory of international institutions. It must also incorporate a new definition of the relationship between the two rational theories of interstate cooperation, i.e., neoliberal institutionalism and neorealism, so much so that the two are not substitutes but the former is subordinated to the latter. Towards the end, the chapter offers the policy implications of the research, stating that to remain relevant to intentional economic cooperation, the WTO must compete with other fora by improvising a wider space for possible enforcement solutions.

This project set out to assess whether the WTO, as the immediate underlying platform, had a role over terms of cooperation between the EU and the US for an agreement on competition policy given the failure of the talks in 2004. Such an approach for the research was justified on the grounds that, in the same period of time, the same players (i.e., the EU and the US) managed to cooperate over the same issue (i.e., competition policy) in other arrangements, including the bilateral positive comity agreement of the 1999 and the ICN. In this situation, the method of difference introduced by John Stewart Mill (1882) suggests that the reasons for failure and success must be found in the only non-common variable, which in these cases are the platforms of the interactions. Therefore, the research assumes that the platforms influenced the direction of the interactions and, as far as the CPA is concerned, the WTO just failed to facilitate cooperation.

Attention to the platform as a variable in mediating cooperation filled the gap in the available scholarship over the CPA initiations in the WTO for a better picture. This study did not set out

to falsify, reject, ignore or nullify the results of other studies as each had contributed to our understanding of when, under what conditions and assumptions the WTO's CPA talks could have a better fate. The aim, nevertheless, was to complement what was left out by others, which surprisingly was significant, and in doing so augment our understanding of what happened in the WTO between the US and the EU in the 1997-2004 period over the antitrust deal.

To start, the research question was built on the theory of neoliberal institutionalism and the fundamental claim that, by addressing cheating risks, international institutions can effectuate cooperation between sovereign self-reliant states. For a crisper view and following the triangulation technique, neorealism's perspective was also applied on the question of the research. The concept of nesting institutions, which is endorsed by neoliberal institutionalism and neorealism alike, was additionally slotted in to help visualise the WTO as an independent variable that worked as the catalyst for US-EU cooperation over enforceability of the CPA. To complete the theoretical framework of the project, the theory of rational design of international institutions was superimposed to operationalise the research question. As a result, the enforcement issue, an independent variable by neoliberal institutionalists, was broken down into two workable areas of scope and centralisation. Putting all these together, a predicting behaviour framework was drawn in Chapter 3 that served to establish an outline for the next two empirical chapters where the scope and centralisation variables were the centrepiece of the query.

The main empirical findings of these chapters are summarised within the related chapters. These findings are used together to answer the research question introduced in the introduction chapter that was initially formulated upon the impact of the WTO (a legal body of pre-existing rules, norms and procedures with a lot of vested interests in it) in facilitating cooperation between the EU and the US by addressing enforcement issues in the CPA.

These were all preparations to answer the research question: "Has the WTO's inability in addressing cheating concerns contributed to non-cooperation between the EU and the US over the CPA between 1997-2004?" The answer was given if any of the three logical possible mutually exclusive scenarios were proved:

- A. cheating was never a concern in the CP talks;
- B. the WTO was unable to address cheating concerns, and the failure of the EU-US cooperation can be attributed to this inability;
- C. the WTO was able to address cheating concerns, but other factors were also present that contributed to the failure.

The analysis of the proposals made by the EU and the US in the empirical chapters proves the last of the three scenarios to be the case. The enforcement was actually an important issue for both parties in the CPA talks. Under the WTO, a solid solution for the enforcement was actually available, one that was robust and firm; however, the parties failed to cooperate towards the CPA. The WTO's solution was inadequate to ensure cooperation. More specifically, the location of the proposals against the WTO's extant rules did not facilitate cooperation between the parties, although the WTO clearly provided all the elements that neoliberal institutionalists identify for cooperation in international relations. With the first two proved wrong, we are left to the third hypothesis, one that says the WTO was able to address cheating concerns but there were other factors that contributed to the failure.

As such, the neoliberal institutionalism's claim on the positive impact of international institutions over cooperation is rejected. But what about neorealism's assertion of cooperation; does it hold? Maybe yes, but not necessarily. In fact, neorealism's critique of neoliberal institutionalism has two arguments. First, assured enforceability is a must, but does not necessarily secure cooperation. Second, relative gains considerations matter. Therefore, the findings do not readily prove neorealism in its entirety by rejecting neoliberal institutionalism. To do that, more needs to be done, but should be done in the light of the theoretical implications of this project, as follows.

The following sections will revisit the empirical evidence of the thesis to suggest that future studies over interstate cooperation must be informed of two modifications, one to rational theory of international institutions, the other, to the intercourse between the two theories of neoliberal institutionalism and neorealism in their quest for explaining inter-state cooperation under the influence of international institutions. Regarding the latter, the findings indicate that neorealism's critique of neoliberal institutionalism is justified and the latter needs to be revisited for its argument over interstate cooperation within international institutions. Concerning the rational design of international institutions, the findings suggest a deeper analysis is due, not only regarding the relationship between independent and dependent variables but likewise between the dependent variables. The findings in this study suggest that the two variables of scope and centralisation seem to be able to substitute for one another, affecting the independent variable of enforcement in different ways. These all need more clarification and these will now be discussed.

The WTO's impact over interactions between the EU and the US for the scope of the CPA has unfolded in different ways. For the most part, the WTO accommodated both proposals over the actors. In fact, except for the case of SMEs, a relatively minor disagreement, the EU and US proposals did not have much disagreement over the actors. Both proposals also fitted easily in

the spectrum that the WTO supports for the inclusion of actors. Likewise, the WTO proved flexible enough to include all the four major types of anticompetitive practices, setting a smooth playground for a well-lubricated interaction between the sides. The proposals had different a force and twist for each type of business anticompetitive arrangements, and the EU was particularly keen on disciplining cartels in the export sector. Nonetheless, all parts of the proposals could be accommodated by the WTO's extant rules, norms and procedures, hence the WTO's positive impact on cooperation in that area. Similarly, the WTO supported both proposals for the necessity of national level antitrust regimes, inter-state case-specific cooperation, and the need for transparency and due notifications. On these three areas, the WTO was even as strong as the proposals, powerfully ironing out any obstacle to cooperation for the CPA should the EU and the US reached one.

Despite fostering co-operation over actors, actions and two of the three core principles as mentioned above, the WTO's extant rules hindered cooperation between the US and the EU as they were in odds with some important parts of the proposals of either party. The efficiency factor introduced by the US for the analysis of injuries had no antecedent in the WTO, therefore received no backing by the rules, norms and procedures of the WTO. At the same time, the EU proposal that saw trade concerns good enough to prove injury was reinforced by the WTO. Much the same, by supporting the EU's approach to the CPA's most favoured nations (MFN), the WTO had little to offer in terms of reducing the gap between the two countries over non-discrimination. The type of MFN that the EU suggested, and that is now valid in the WTO, is so integrated into the fabric of the multilateral trading system that the US version of MFN for the CPA looked just odd if not insensible altogether.

A broad view of the findings indicates that, out of the two countries, the EU's proposal has advocated a relatively limited scope for the CPA. In terms of actors, it offered exemption for SMEs for the outcomes, i.e., using the injury test, it was happy with trade injuries solely as the criterion of damage and use of an unconditional type of MFN. As for the degree of centralisation, the EU's proposal for limited scope was coupled with a more centralised administration of the CPA. In terms of the management of an information sharing mechanism, the EU vested much responsibility in the WTO; the peer review in particular, suggested some administration of case specific cooperation to be done centrally in the WTO, and most notably with the settlement of disputes.

In the US approach, the scope of the CPA is defined wider in terms of test of injury, investment interests are included, and the type of MFN that extracts full equal concessions from all members by requiring mirror image full reciprocity commitment. However, the US prefers a more decentralised approach to the administration of the CPA with respect to the roles and

responsibilities invested in the member states, the peer review group, and most importantly WTO's formal dispute settlement mechanism.

To be more precise, as we saw in Chapter 6, both the US and the EU emphasised the anticompetitive impact of cartels, but had their differences on the causal effect of vertical arrangements. Moreover, both sides had their differences on the degree of centralisation in enforcement activities. The EU was willing to grant some responsibilities to the WTO, as the host institution of the CP deal. However, the US favoured the enforcement responsibility to be kept in the hands of member states themselves, with the WTO merely playing the role of a liaising agent without any power to decide any breach or impose sanctions.

As a result, we actually see two competing solutions for ensuring enforceability; one in which the scope is defined wide and the centralisation shallow, and the other that sets a mix of narrower scope but deeper centralisation.

In case each of these 'solutions' really removes cheating risks, and, given the desire and technical knowledge for international deals in the EU and the US, it is assumed they do, then we will have two important theoretical implications. First is that the variables of scope and centralisation are substitutes, if not in full at least to some degree. In other words, for any given country, a bit of one has an equivalent amount of the other that can be exchanged while ensuring that the enforcement concern is equally addressed. Second, the theory of neoliberal institutionalism is not a substitute for neorealism but one that complements it and is actually a subordinate/subset of neorealism. This pushes the theory boundaries much further, opening a huge argument arena.

The theory of rational design of international institutions currently treats each of the three variables of scope, centralisation and membership as if they are mutually exclusive. Knowing this, one starts wondering if some exchange is possible. If so, the possible way of addressing cheating increases, but does that necessarily increase the chances of cooperation? What would be the case for international institutions such as the WTO in helping compromises?

The interlocking of the two variables of scope, membership and centralisation suggests that enforcement is not a mechanism added to a deal at a later stage. Rather, it is part of any line of the agreement; not an accessory but an integral part that represents itself in different shades and forms. As such, enforcement provisions are, in essence, a variable determined within the overall deal. In other words, an enforcement mechanism is nothing but the actual contents of the deal, hence an endogenous variable. It should not be treated as an exogenous factor attached to a deal and executed by an international institution.

The difference between being endogenous or exogenous lies in the fact that being an endogenous variable to an act of cooperation, enforcement provisions are systematically affected by higher order concerns for distribution of gains, as neorealists suggest. The terms of the enforcement of a deal such as the CPA, therefore, are likely to change if, for instance, parties decide to change content of a deal as a result of concerns for the distribution of gains and costs. Putting this argument in the context of the rational design of international institutions means that being endogenous to the deal also suggests that enforcement is a dependent variable within the framework of the CPA falling under independent variable of distribution.

Yet another theoretical ramification of this observation is that neoliberal institutions immediately become subordinated to neorealism. The reason for this is that when there is more than one way of ensuring enforceability, through, say, different mixes of scope, centralisation and membership, then each country competes for the solution that maximises its interests. Then, anti-cheating solutions in their own right become a subject of relative gain rivalry like all other measures for which countries compete, throwing new questions of the way international institutions, as intervening variables, boost cooperation and conflict.

Neoliberal institutionalism's cooperation argument is built on the need for enforceability of international deals. Put simply, once an anti-cheating mechanism is put in place, neoliberal institutionalism claims that cooperation follows. Neorealism on the other hand reasons that ensuring enforceability is a necessary requirement, but more is needed for cooperation to take place. International institutions must address relative gains concerns as well.

As the results of Chapters 5 and 6 suggest, the WTO offered all that is needed by neoliberal institutionalism for ensuring enforceability. Yet cooperation for the CPA did not take place. The WTO could support cooperation by making sure that victims of cheating received early warning of anti-trust practices or unfavourable government policy through a voluntary heavy exchange of information by member countries, or through the peer review mechanism. Moreover, the CPA was buttressed and enforceable as the cheaters could be identified and countervailing action was legitimised by the Dispute Settlement Mechanism (DSM) for the victim country. Likewise, the WTO, by coupling competition policy with trade, warned cheaters that they could jeopardise their reputation and consequently benefits by deciding to maintain/combat anticompetitive practices in their jurisdictions. Moreover, through heavy cooperation requirements, the WTO equipped the victim parties to address the problem by asking the authorities in other countries to cooperate in case specific instances. With all these in place, the cooperation between the EU and the USA did not happen.

These findings are enough to fundamentally shake neoliberal institutionalism's claim and, in doing so, actually subordinate it to neorealism. In the case of the CPA, in fact, ensuring enforceability not only failed to motivate cooperation, but also became a source of conflict in its own right. Juxtaposing the enforcement issue with other issues that are subject to relative gain rivalry, as mentioned earlier, immediately lowers neoliberal institutionalism's rank from a substitute theory to a complementary argument to neorealism. The reason is that its core argument, the anti-cheating role of international institutions, in itself becomes a subject of relative gain, the main claim of neorealists in rejecting the sufficiency of international institutions as the freestanding fosterers of inter-state cooperation. This understanding suggests that neorealism and neoliberal institutionalism are no longer comparable, or even rivals. The latter serves merely as an annexation, although a major one, to the former by describing and explaining one particular aspect of international economic interactions in which relative gains, similar to other aspects of a deal, play out. One consequence of this new relationship is that none of the theories can rule out another. Neorealism, for instance, cannot claim irrelevancy of neoliberal institutionalism, as in that case it would be fighting to eliminate one big chunk of its own theoretical power in an important area. Likewise, neoliberal institutionalism cannot declare independency by falsifying neorealism, as its subject matter is simply a subset of neorealism.

The findings of the present study also have important policy implications. They echo recent calls for a change in the WTO to keep it relevant to international cooperation. The institution that was once hailed as an international body with considerable significance in fostering inter-state cooperation seems to have run out of steam. To the extent that some trade commentators such as Baldwin and Carpenter (2009:1) raise the question "Why not in the WTO?", expressing concern on the shift of gravity from Geneva to regional arrangements, or Wilkinson (2014) who wishes to see "what's wrong with the WTO" and calls for solutions to "fix it". The case of the CPA, as well as a host of recent initiations, such as the collapse of the Doha Round, suggest that the institution itself, at the time that it is highly needed, requires reengineering, reorientation and structural change.

The empirical results obtained here indicate that the WTO's rigidity in terms of the way it mixes scope, centralisation and membership (although the latter was not tackled by the present research) to ensure enforceability of its many agreements has serious distributional ramifications. The rigidity at times not only fails to shorten the gaps between interacting countries in new areas, but more often than not even backfires, hindering cooperation between them. It definitely requires more research to know the dimensions of this conjecture; however, the findings in this study suggest that there is very often more than one solution available for ensuring commitment to an international agreement. Each of the possible solutions has a

different impact on the distribution of gains/costs between members. To ensure sustainable cooperation, an international institution such as the WTO must keep itself open to all these 'points of possibilities'. These points, which are essentially a set of competing 'equilibriums', together form a space; one that contains all the mutually exclusive possible anti-cheating arrangements.

The WTO, as it currently is, captures only a few of these points, whereas, due to its distributional impact, leading states towards an agreement on an enforcement mechanism requires more points to be open to exchange if all chances of cooperation are to be explored. This is not to say that the WTO as it is now cannot be supportive of cooperation in all situations. It can. In the case where a WTO supported equilibrium point is close to the proposals on the table, then cooperation would be facilitated because the parties have the extra assurance that they are accepting a balanced deal that serves everybody's interest. However, that would be more of an exception. This is because chances are that the WTO's imposed equilibrium point may actually demotivate a party from cooperation altogether as its proposal has to overcome the inertia created by the other parties together with the WTO's weight. In this scenario, even if a deal is brokered it would be fragile and susceptible to being reneged because at least some countries would see the deal as unfair, possibly because the solution reflects more of an outdated equilibrium that is not, as Jackson (1997) mentions, "in tune with current actual practice and conditions" (Jackson, 1997:109).

To recap the policy implications argument, it worth noting that international institutions such as the GATT/WTO, however flexible they might be, are still only a frozen point – a picture of an instance – in the history of two or a number of states. They are a point at which each of the participating states are satisfied, most possibly in their different ways, with a set of interconnected and substitutable variables of scope, centralisation and membership that, in addition to addressing cheating concerns, satisfies signatories with a distribution of benefits/costs given the available information and knowledge at that particular instant. This bundle/picture is, in fact (using a more technical term), an equilibrium point, one that is sustained either by a correcting mechanism, such as a centralised dispute settlement mechanism, that maintains the variables in their pre-determined range of oscillation, or is automatic. This means automatic in the sense that the relationship between actors and the interests are set so well in tune that the constituencies all wish to maintain the equilibrium point as is by, say, avoiding exploitation of the arrangement through abuse or cheating.

The argument above inevitably opens the Pandora's Box of rigidity vs flexibility debate in the design of international regimes/institutions, and from there immediately touches upon the scholarship about the boundaries of such flexibility and the agents of flexibility. This study does

not go into the details of such debate as it distracts us from the main argument, which is the impact of the WTO's anti-cheating mechanisms on cooperation for the CPA. However, it is useful to touch on the empirical evidence in the CPA, suggesting that in the presence of institutional rigidity and in the quest for a deal, the chances are that one of the parties may have to carry the burden by imposing on itself less than favourable terms that could perhaps be achieved outside of the WTO.

In this vein, the data show that the EU had tried to rescue the talks by showing flexibility within the WTO's supported equilibrium in terms of proposing different mixes of scope and the degree of centralisation for the CPA. For instance, later into the talks, the EU clearly stopped proposing a more comprehensive detailed scope for the CP agreement than it did in the earlier years of the talks. As the findings in Chapter 6 suggest, the EU proposed devising leniency into the CP deal, similar to the idea of John Ruggie's (1982) 'embedded liberalism', by accepting a framework agreement that did not aim to address all possible competition problems and left a relatively large policy space for members. The EU delegation even suggested that they are happy to go with a framework with the general guidelines around which members could form their national CP regime. They clarified the point by stressing that a basic framework agreement is not meant to provide a "solution" to all the issues that could arise from the internationalisation of competition policies; "...This would clearly be a case in which the best would be the enemy of the good" (EC, 2000a:4). Likewise, the EU suggested that it did not wish to seek harmonisation of national level antitrust regulations, and leave members with much leeway to adopt policies, in terms of scope and cooperation, that fit their interests:

"...A WTO agreement in Competition would not imply harmonisation of Members' laws and would accommodate and respect diversity of national regimes in terms of policy, law and enforcement. The agreement would instead contribute towards gradual convergence and enhanced international cooperation" (EC, 2001b:2).

To conclude the policy implication of the findings, suffice to say that introduction of a new issue, such as the competition policy, into the system upsets the existing equilibrium. Perhaps commanding a new one altogether, another picture in the history, in which the existing balance between the variables change. For the system to accept it, a new maintenance mechanism needs to be devised and fitted.

As for the future of the CPA talks, it is reasonable to imagine that the failure of the WTO to deliver will eventually culminate to either of the two. One is efforts to re-engineer the institution so that it would accommodate cooperation by providing the equilibrium points necessary for combining the previous arrangements with a new issue such as antitrust. The other is starting a parallel whole new institution, or even an array of institutions, contending with the WTO, one

that is relieved from past commitments and competes with the WTO to attract states by offering new possibilities for cooperation.

Regarding the first route, the need for flexibility in terms of different mixes of scope, centralisation and perhaps membership has already been explained. We will therefore give a short discussion on the second route, mostly because of its relevance to the starting point of this project, i.e., to explain how the idea of parallel institutions meets with the literature on venue shopping (Baumgartner and Jones, 1993), polycentrism (Scholte, 2005:Ch. 6), and network governance (Reinicke, 1999), as well as the concept of institutional complexity.

The public policy literature on venue shopping provides insights into the reasons behind a political entity's choice from the available institution. According to the theory, actors willing to form a new policy are often frustrated by biases within the institutions in which key decisions about the new policy are normally made. To overcome the problem, they tend to look for alternative institutions where the existing rules, norms and procedures are friendly or at least not hostile (Prall, 2003). The theory is built on studies that indicate that different contexts can lead to substantively different outcomes, due in part to the existence of different principles, rules and decision-making processes, the participation of new actors and the availability of new understandings of an issue (see for example, Burnett and Davis, 2002). The idea of a new institution for the governance of transnational competition policy beside the existing one, furthermore, is akin to the concept of 'regime complexes' of Raustiala and Victor (2004). The co-existence of different international competition related institutions suggests that the developments in this area have moved towards creating a complex; an array of non-hierarchical, partially overlapping institutions for the governance of competition policy at the international level. Such a situation is marked by the grouping together of like-minded states, and interestingly non-state actors, to create innovative competition governing institutions with an implicit division of labour between them. Hale and Held's (2011:12) description of regime complexes to be "multifarious amalgamations of institutions and actors" resonates with the argument above for the need for hotbeds that let different bundles of membership, scope and centralisation variables have the opportunity to form an array of equilibria for the best to emerge.

Such a move did actually start since it became known to everyone that the WTO's CPA was doomed. The formation of ICN, the growth of antitrust bilateral agreements, and the inclusion of the CP provisions in a great number of bilateral and regional trade and investment deals (see for instance, Laprévote et al., 2015), all suggest that, disappointed with the WTO's CPA, states have turned their attention towards alternative fora in their quest for containing anticompetitive

practices. Alternative venues give states an opportunity to by-pass the forces that have brought halt to progress by maintaining the *status quo*.

The findings of this thesis and similar ones that focus on the impact of environmental factors must be studied akin to the overall developments of the international initiatives for combatting business's anticompetitive practices. In fact, international regulation of inter-firm competition is an embryo that is developing in different wombs; the WTO, bilaterals, regional pacts, ICN, UNCTAD and OECD are all amongst these bedrocks. Giving attention to the impact of the surrounding environment on the way that each of these embryos unfolds is of paramount importance. That said, the genealogy of the embryos in terms of the domestic forces that shape proposals of different countries is no less important. In fact, attention to the systemic forces must not cause myopia in international cooperation studies at the expense of ignoring domestic forces. As such, the present thesis, although never claimed to be comprehensive from the onset, humbly accepts its narrow focus and therefore the need to be read akin to other studies. In fact, as Putnam's (1998) two level games scholarship suggests, it would be impossible to understand cooperation and conflict over international antitrust in its entirety without paying equal attention to the interaction of domestic and international forces. There is a rich scholarship emphasising the significance of public opinion and interest groups in forming foreign policies of countries as fewer and fewer states, as, *inter alia*, Milner (1998), Snidal and Thompson (2003) highlight, can afford to ignore internal calls. Likewise, the international antitrust developments must be read as dynamism in the light of history; not only that of the nation states but also international institutions as the mediators.

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