

2. A theoretical framework

The overall background of this study is bilateral negotiations between the European Union and the United States on domestic environment and consumer regulation between 1995 and 2003. The U.S. has been defined the *sender state*, putting the EU under pressure not to erect trade barriers by unilaterally introducing new regulations. The EU is considered the *target-state* being pressured by the foreign government to reject its planned regulatory activities.

Let us for a moment consider the discussion of such intergovernmental negotiations from the perspective of neo-realist IR theory. Scholars belonging to this school of thought generally assume that *unitary countries* hold a specific *national interest* which they seek to promote in the international arena. Helen Milner (1998: 768f) asserts that this assumption can be justified in one of three ways:

- ✓ By assuming that the national interest is defined by one actor in a country;
- ✓ By assuming that everyone in the country has identical preferences;
- ✓ By assuming that the domestic political process results in a single set of preferences that can be treated as if it resulted from a single actor.

None of these assumptions seems to be realistic in a study on bilateral regulatory cooperation, even though differences might exist between issues and countries. With respect to the first and second assumption, scholars have argued that regulatory decision making in democratic countries is largely determined by domestic interest groups with conflicting interests as well as by a country's respective political culture and underlying norms, beliefs or values (Vogel 1995; Duffield 1999).³⁴ The unitary country assumption might thus qualify as a useful simplification of international bargaining situation but falls short of explaining decision making in regulatory affairs.³⁵ The third assumption, albeit more convincing, has been refuted for two reasons. Sebastiaan Princen (2002: 55) has argued that first, even if there was a single set of national preferences, changes thereof could only be explained by domestic political processes. And second, if preferences were considered stable, variations between countries then could only be explained by external factors, such as a country's position in the world system. In the field of environmental and consumer protection, however, such macro explanations are rather unsatisfactory. In order to explain national regulatory policies and preferences which underlie international bargaining, we need a theory of domestic politics.

³⁴ Moreover, even in non-democratic countries there may exist different factions with different (regulatory) priorities within a ruling elite (e.g. Hawkins 1997).

³⁵ Back in the mid 1960, the unitary-actor assumption had already been challenged by the *behavioral theory of social negotiations* developed by Walton und McKersie (1965).

Since the late 1980s, international relations scholarship has sought to explore how domestic factors shape state's negotiating positions (e.g. Putnam 1988; Evans, Jacobson, and Putnam 1993; Moravcsik 1993a; Legro 1996). In the field of international political economy this literature has made substantial contributions to our understanding of major empirical phenomena such as trade liberalization, regional economic integration, financial market globalization, and global regulation (e.g. B  the and Mattli 2011; Farrell and Newman 2008; Moravcsik 1993b; Frieden 1991; Rogowski 1989).

Robert Putnam's metaphor of *two-level games* (Putnam 1988) offers a useful framework for analysing the way in which domestic politics impact the outcome of prevention-focused regulatory cooperation. The central insight of the two-level game framework is that international negotiations take place at two stages (Ibid.: 436):

1. bargaining between the negotiators, leading to a tentative agreement [Level I];
2. negotiations with domestic players needed for ratification [Level II]

Decision-makers on the "international table" know they have limited room to negotiate as, according to this dichotomy, Level I agreements need to be formally or informally endorsed or implemented at the subsequent Level II.³⁶

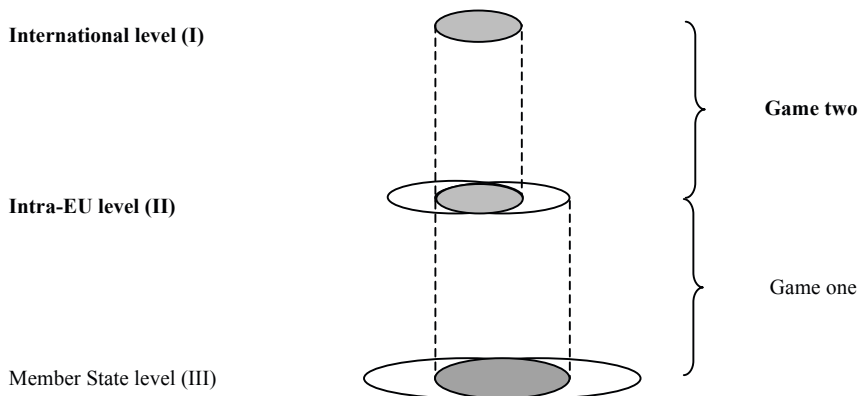
Putnam's two-level game model is often used when analyzing international negotiations between the EU and third parties (e.g. Pollack 2003; Collinson 1999; Meunier 1998; Patterson 1997; Devuyt 1995; Odell 1993). In such a case, an extension of the model is made, as the EU plays a role in two parallel games (see figure 2). "In one game the EC is the international level (Level I) at which the member governments representing their domestic interests (Level II) seek to find a common position. In the second game the EC is the domestic level (Level II) and the Commission (or the Council presidency) negotiates at the international level (Level I)" (Young 2003: 55-56). Level I in the first game and Level II in the second game are the same game on the same level, but looking in opposite directions. Level III involves decision-making in the domestic backgrounds of Member States; Level II refers to the Intra-EU negotiations, where the common position is forged by the EU institutions and Member States, which subsequently mandate the Commission to negotiate at Level I.

This study particularly focuses on *game two*: Level I negotiations between the Commission and the U.S. administration and, even more important, Intra-EU (Level II) negotiations between the Commission, the European Parliament, and the EU Council. For the purpose of simplification, Member States' preferences (Level III) will be taken as given or, if necessary, U.S. lobbying towards EU

³⁶ Putnam calls this process *ratification* but does not only refer to formal ratification processes. He rather uses the term "generically to refer to any decision-process at Level II" (Putnam 1988: 436). The actors at Level II, according to Putnam, "may represent bureaucratic agencies, interest groups, social classes, or even 'public opinion'" (Ibid.).

Member States will be discussed individually in the case studies. Major focus, however, remains on the decision making process at the Intra-EU level. In the following, I will thus revert to Putnam's genuine two-level game and concentrate on the international and the Intra-EU level.

Figure 2: Depiction of a three-level game



Based on Young 2003

Putnam argues that the two levels are connected by the concept of a *win-set*, a “set of all possible Level I agreements that would ‘win’ – that is, gain the necessary majority among the constituents – when simply voted up or down” (Putnam 1988: 437).³⁷ The idea is that if an agreement requires domestic ratification, the set of international agreements which all the relevant domestic constituents are willing and able to approve is usually much smaller than the set of all the acceptable agreements for the negotiators. Larger win-sets, according to this idea, make Level I agreements more likely.³⁸ Smaller win-sets, on the other hand, reduce the range of agreements for which the Level I negotiator can expect to receive backing. Each game has its own win-set that is determined by domestic political processes.

³⁷ The idea of a win-set is borrowed from Kenneth Shepsle (1987) who examined the interaction, bargaining and probability of agreement and compromise in the dynamic, multi-actor setting of congressional committees.

³⁸ “By definition, any successful agreement must fall within the Level II win-sets of the parties to the accord. Thus, agreement is possible only if those win-sets overlap, and the larger each win-set, the more likely they are to overlap” (Ibid.: 438).

According to Putnam, the size of the win-set is affected by three main factors (Putnam 1988: 442).

Level I negotiators' strategies
Level II preferences and coalitions
Level II institutions

The first factor refers to the strategies of a Level I negotiator to increase his or her relative bargaining leverage. The second factor refers to the distribution of power, preferences, and possible coalitions among domestic constituents. Putnam particularly highlights the role of isolationist forces opposing international cooperation in general and internationalists offering broad support. The third factor deals with political institutions relevant for the ratification of international agreements.

Putnam's model provides the basis for our case study analysis. The two-level game approach will be applied but broadened and specified in crucial ways. As Moravcsik (1993a: 23) has emphasized, the two-level framework, in its original formulation, is a metaphor rather than a full-fledged theory.³⁹

In order to generate empirical hypotheses about state behaviour, Putnam's two-level-games metaphor requires more restrictive definition. It is essential to specify the preferences of and constraints on the major actors. Three essential theoretical building blocks are needed: specification of domestic politics (the nature of the "win-sets"), of the international negotiating environment (the determinants of interstate bargaining outcomes), and the statesman's preferences.

In the remainder of this chapter, I will consider these specifications, yet reversing the order of treatment somewhat. First, I will specify negotiations between unitary countries at the international level (Moravcsik's "international negotiating environment") by highlighting the role of economic resources, bargaining strategies, and arguing and communicative action. This section will also deal with "statesman's preferences." Next, I will specify the domestic political process ("the nature of the win-sets") by drawing on Putnam's distinction between interest group preferences and domestic institutions. The former will be specified by applying an analytical model of regulatory capture developed by Mattli and Woods (2009). The role of domestic institutions will be discussed with particular focus on the governance structures of risks and uncertainties, which are of major importance in the study of environment and consumer regulation. The part is based on a typology of risk governance developed by Millstone et al. (2004).

³⁹ Putnam himself introduced the concept as "a metaphor for domestic-international interactions" (Putnam 1988: 433).

2.1 Level I: Intergovernmental negotiations

According to Robert Putnam, one factor determining the size of the win-set is the strategies of the Level I negotiators. “The larger [the negotiator’s] win-set, the more easily he can conclude an agreement, but also the weaker his bargaining position vis-à-vis the other negotiator” (Putnam 1988: 450). Both parties thus have an incentive to increase the win-set of the opponent in order to increase their own relative bargaining position. In regulatory cooperation arrangements, negotiating parties have three options available in order to do so: threats, promises, and communicative action. Threats and promises can be used in order to increase the willingness of the opponent and his or her constituents to ratify an international agreement. Doing so can increase the win-set of the negotiating partner, and thus increase both the odds of success and the own relative bargaining leverage. At the same time, regulatory coordination opens room for communicative action and arguing or persuasion, respectively, particularly among mid-level officials and experts. Instead of being threatened, domestic actors of the negotiating party might be persuaded to ratify a Level I agreement, thereby increasing the win-set of the opposing negotiator. In this following section I will briefly discuss both options. I will start by shedding light on Moravcsik’s “international negotiating environment,” namely the power-relationship between the negotiating parties.

2.1.1 Bargaining and arguing

To some extent, regulatory cooperation on the intergovernmental level mirrors traditional bargaining games, as it “contains promises and threats and intends to change behavior” (Müller 2004: 397). Theories of international negotiations have particularly dealt with such situations (e.g. Zartman and Rubin 2000; Tollison and Willett 1979; Raiffa 1982). Although most of them explicitly or implicitly adopt the “unitary-actor assumption,” they serve very well our purpose to specify the two-level games underlying “international negotiating environment” (Moravcsik 1993a). At the core of these theories are questions about the power balance between countries, which are considered central to the understanding of a bargaining situation (Drezner 2007; Zartman and Rubin 2000).⁴⁰

At a later point I will expand this narrow view by including domestic politics to the explaining factors of negotiation outcomes. For now I will reflect on the above-mentioned concept of power as one determinant of the bargaining outcome. Early definitions by social scientists denote power as *the ability of one*

⁴⁰ Any exchange in which “a pair of individuals (or organizations) can engage in mutually beneficial trade but have conflicting interests over the terms of trade” (Muthoo 2000: 146) is a bargaining situation.

party to move another in an intended direction.⁴¹ Although this definition has gained quite some prominence, it suffers from serious tautological difficulties, in that the operative element of the defining phrase is the very term being defined (Zartman 1974: 394-397).⁴² The definition has thus been improved by focusing on the determinants of the outcome, not the outcome itself. William Habeeb defines power as “the way in which actor A uses its resources in a process with actor B so as to bring about changes that cause preferred outcomes” (Habeeb 1988: 15). This modified definition closely links the power concept to the resources a nation-state has to its avail and refers to the neo-realist view of power as *a possession* (e.g. Knorr 1975; Gilpin and Gilpin 2001). According to this school of thought, the distributional outcome of negotiations is a function of who has the capacity and leverage to force the opponent into making concessions. Resources are mainly of two kinds: market-related and security-related. While classic realists thinkers understood power primarily as *force* (e.g. Waltz 1959; von Clausewitz 1962) power in the tradition of International Political Economy (IPE) is commonly understood as “the relative size and diversity of an actor’s internal market” (Drezner 2007: 34). This means that negotiating strength can be derived from the size of an actor’s market and by its dependency on the economy of the negotiating partner (Hirschman 1969): the larger an actor’s own internal market and the smaller the dependency on the other, the greater the bargaining power in bilateral negotiations.

The United States and the European Union are commonly identified as the world’s economic two “great powers” because they are “the only two entities that combine relatively large market size with relatively low vulnerability” (Drezner 2007: 36).⁴³ In the absence of fundamental structural asymmetries between negotiating parties, however, as it is the case in transatlantic economic relations, there must be additional factors that determine the distributional outcome of negotiations.⁴⁴ According to Putnam’s two-level game metaphor, one factor is the strategies of the Level I negotiators. Those I will discuss in the following paragraphs.

⁴¹ Or to put it in Dahl’s famous words, “A has power over B to the extent that he can get B to do something that B would not otherwise do” (Dahl 1957: 203).

⁴² Dahl defines power as the ability to move another, but power and ability are synonyms, and power becomes the power to move another.

⁴³ *Low vulnerability* is caused by a combination of large market size and diversity of the internal market which makes nation-states less dependent on international exchange as a source of goods and capital. Great powers, according to that school of thought, have “go-it-alone” power (Drezner 2007: 35). In chapter 3 I will support the argument that the EU and the U.S. are the two great powers by providing economic data.

⁴⁴ Asymmetrical negotiations between more powerful and less powerful actors have been analyzed, for example, by Zartman and Rubin 2000, Deutsch 1973, Kritek 1994, and Simmons 2001.

2.1.1.1 Bargaining strategies

An actor eager to prevent a negotiation partner from regulatory change can make use of threats and promises as some kind of a bargaining strategy. At a basic level, threats imply punishment and promises imply rewards. Both are contingent on the behavior of the party at which the threat or promise is directed and follow a general form of if-then statement, e.g. “If you don’t give up plans for new regulation then we will sue you.” As regards threats, one important tool for this purpose is *cross-issue linkage* to broaden the stakes of negotiations, that is, linking agreement to a negotiated plan to the other party’s agreement to another issue. Kenneth Oye (Oye 1992: 37) calls a situation in which the linker acts on threats *extortion*, “a weapon of political coercion” that might ultimately damage both parties.⁴⁵ Another possible threat in prevention-focused regulatory cooperation settings is litigation by a supranational body, e.g. the World Trade Organization (WTO). A threat to call WTO dispute panels in case of regulatory action might loom over a party’s decision making process and cause *anticipatory obedience*, thus increasing the other party’s win-set as well as the likelihood of achieving bilateral agreement.⁴⁶ In both cases, however, the chief negotiator’s reaction will depend on his/her domestic constituents as well as domestic institutions. In addition to threats, parties can use promises as bargaining tools. Thomas Schelling (1960) has argued that promises have the following characteristics: what is promised must be perceived by the target as positive; it must be in the interest of the target; it should be something that one would not ordinarily be expected to do; and it should be something that the target perceives to be within the promisor’s control.⁴⁷ In the realm of regulatory cooperation, a plausible if-then statement could be, “If you give up plans for new regulation then we will provide to you market access in sector X.”

Under certain circumstances, the target’s chief negotiator’s preferences can diverge from those of his/her constituents. In such a situation he or she is more (or less) open to threats or promises than his/her constituents would like him/her to be. Principal-agent theory can help explain situations in which a negotiator

⁴⁵ Oye identifies two additional types of linkage: exchange linkage involves taking compensation for acting against one’s best interest while explanation linkage facilitates cooperation by highlighting existing cross-issue tradeoffs.

⁴⁶ To name one example, the European Union’s regulatory framework for the approval, tracking, marketing, and labeling of genetically modified organism (GMOs) was substantially overhauled in the early 2000, in light of both U.S. and WTO external pressure. Pollack and Shaffer argue that some of these reforms “appear to be responses to international pressure, adopted in the hope of mitigating or forestalling WTO legal challenges” (Shaffer and Pollack 2005: 205). Yet despite these reforms the EU has been slow on lifting a 1998 de facto moratorium on GMOs that the WTO ruled illegal in 2006. European decision-makers justify this reluctance with a predominantly GMO-adverse public. Such behavior highlights the role of domestic groups as well as institutions in international negotiations.

⁴⁷ Schelling brings it to the point by stating that “a promise is costly when it succeeds, and a threat is costly when it fails” (Schelling 1960: 177).

who acts as the agent of his/her constituents (the principal) acts on his/her own account.⁴⁸

In sum, threats and promises both constitute bargaining strategies. However, reactions to these strategies depend on domestic circumstances, namely interest group pluralism and domestic institutions. Yet before turning to the domestic sphere I will conclude the paragraph on intergovernmental negotiations by focusing on the role of arguing and communicative action in bilateral negotiations.

2.1.1.2 Arguing and communicative action

In contrast to the above-mentioned intergovernmental bargaining which “contains promises and threats and intends to change behavior” (Müller 2004: 397), *arguing* is understood as a different kind of speech act as it contains “claims of factual truth or normative validity and intends to convince” (Ibid.).⁴⁹ Thomas Risse (2000) pointed out in his article on “Communicative Action in World Politics” that *arguing* particularly matters in the first phase of negotiations, namely the process of “getting to the table.” This, according to Risse, involves *agenda setting* as well as developing the *common knowledge* about the situation: “actors need to be convinced that there is a problem to solve in a cooperative process before they can start negotiating” (Ibid.: 20). In regulatory cooperation arrangements, it is mainly public officials that serve as agenda setters. Coordinating regulatory policies is a complex field. Chiefs of governments are often little familiar with the detailed material and rather aim at achieving a policy success or establishing reciprocity on the macro policy level. Governmental subunits below the level of COGs, for example regulatory agencies, however, have the technical knowledge and expertise to interact on a daily basis with their counterparts abroad and negotiate regulatory activities (Pollack and Shaffer 2001a). By doing so public officials might be able to argue each other out of planned regulatory activities, for example, by highlighting technical incompatibilities of new standards.

Interaction between governmental subunits and independent agencies is commonly known as *transgovernmental relations*. Keohane and Nye (1974: 43) defined the term as “sets of direct interactions among sub-units of different governments that are not controlled by the policies of the cabinets or chief execu-

⁴⁸ The theory describes the delegation of a task to an agent who then might turn out to have different objectives than the principal who delegates the task (Laffont and Martimort 2002). An apt example is the unsuccessful attempt by Günther Verheugen, former EU Commission Vice President, to lift a decade-old European ban on chlorinated chicken imports from the United States. The Commissioner was assigned to coordinate regulatory activities with counterparts from the U.S. When the U.S. chief negotiator called the chicken ban a “litmus test” for future cooperation, Verheugen tried to pour oil on troubled water and unsuccessfully tried to convince both the European Parliament as well as the Council to lift the ban (Mildner and Ziegler 2009).

⁴⁹ For the German debate between constructivists and rationalists about arguing and bargaining, see (Keck 1995; Keck 1997; Risse-Kappen 1995; Zangl and Zürn 1996).

tives of those governments.”⁵⁰ Transgovernmental interactions can significantly alter the intention towards regulatory activity. Anne-Marie Slaughter (1997; 2004) has argued that transgovernmental officials are increasingly entering into bilateral or multilateral agreements with the densest activities taking place in areas such as competition policy, securities regulation, banking and insurance supervision, criminal law enforcement, and – most important to this study – environmental policy. In general, transgovernmental relations are more likely to emerge in highly institutionalized international environments that provide a common institutional forum and normative legitimacy for cross-national interactions, as Risse-Kappen specified in the mid-1990s (Risse-Kappen 1995a: 31). The transatlantic relationship constitutes such an institutionalized environment (Pollack and Shaffer 2001a). It should be noted that despite these theoretical considerations, measuring the success of arguing in regulatory cooperation is far from easy. Regulatory activities that have been choked off in the beginning due to bilateral dialogue between public officials and never found their way into public documents are almost impossible to detect. Only qualitative interviews with the relevant public officials may yield analytical success.

2.1.2 Conclusion

In the previous section, I have discussed the international negotiating environment in prevention-focused regulatory cooperation settings. Three particular aspects have been emphasized. Firstly, in the absence of fundamental structural asymmetries between negotiating parties, as it is the case in transatlantic economic relations, there must be additional factors that determine the distributional outcome. Secondly, actors eager to prevent a negotiation partner from regulatory change can make use of threats and promises as bargaining strategies. Success of these strategies is determined by potential domestic costs. These costs are made up of interest group pressure and the domestic institutions ratifying international agreements. Thirdly, governmental subunits below the level of COGs, such as regulatory agencies, which have the technical knowledge and expertise to interact on a daily base with their counterparts abroad, might be able to argue each other out of planned regulatory activities. Such interaction is commonly defined in the IR literature as transgovernmental relations.

In the next section, I will discuss what Moravcsik (1993a: 23) has termed “the nature of the win-sets.” I will start with the role of interest groups in the political process.

⁵⁰ In their influential 1974 article, Keohane and Nye distinguish between two types of transgovernmental interaction: *policy coordination*, which refers to “activity designed to facilitate smooth implementation or adjustment of policy, in the absence of higher policy directives” and *coalition building*, which takes place “when subunits build coalitions with like-minded agencies from other governments against elements of their own administrative structures” (1974: 44).

2.2 Level II: Preferences and coalitions

In his 1988 article on two-level games, Robert Putnam argues that a country's win-set is determined by preferences and coalitions, among other things. In particular, he specifies that the negotiating room of the Level I negotiator, that is, the size of the win-set, depends on the size of two groups: "'isolationists' (who oppose international cooperation in general) and the 'internationalists' (who offer 'all purpose' support)" (Putnam 1988: 443). A similar distinction can be made with respect to negotiations on environmental and consumer regulation. Here we can distinguish between *pro-change groups* demanding more stringent regulatory standards and *defenders of the status quo* opposing unilateral regulatory activities and thus advocating prevention-focused regulatory cooperation. The question we need to find an answer to is that of which group comes off as the winner? In the following, I will introduce an analytical model by Mattli and Woods (2009) that can help answer this question. In addition, I will highlight the particular role of *transnational coalitions* in the decision-making process on regulatory affairs.

2.2.1 Defenders of the status quo vs. Pro-change groups

In his most recent work on international regulatory regimes, Daniel Drezner (2007) argues that international regulatory coordination is determined by one particular kind of domestic groups: "[I]t is the groups that face the greatest barriers to market exit or internal adjustment – or in other words, the least globalized elements of domestic politics – who exert a strong influence on government preferences. These actors, by exercising their political voice, raise the adjustment costs to governments of regulatory coordination." Drezner thus hypothesizes that international regulatory coordination is less likely when the regulation directly affects established or non-tradable economic sectors which are expected to generate the highest level of adjustment costs.

Drezner's theory, however, suffers from severe shortcomings in so far as it overlooks the role of corporate and societal actors who stand to gain from international regulatory coordination. By assuming that governments are only responsive to (or captured by) businesses that stand to lose from regulatory change, Drezner indirectly acts on the assumption that *pro-change groups*, such as consumer groups or environmentalists but also firms which are disadvantaged by the regulatory status quo, sit quiet. In fact, such groups can build powerful coalitions – at times embracing NGOs and large corporations – to lobby governments, particularly in prevention-focused regulatory cooperation settings. In the same way *defenders of the status quo* can lobby governments to refrain from regulatory activities and thus support bilateral prevention-focused regulatory cooperation efforts, proponents of regulatory change can push governments to unilaterally

implement stringent domestic standards or regulation against the will of foreign interests.

In general, I base my work on the neo-pluralist assumption that industry does not act as a monolithic block. Drawing on work by Anthony Ogus (1999), I argued in section 1.5.1 that environmental, consumer, and labor protection standards are *heterogeneous legal products* on which the preferences of interest groups affected may diverge as they often run counter to the interests of at least one group. These standards impose costs on certain producers but might offer competitive advantages to others. The underlying argument is based on the *business conflict school*, according to which business is no monolithic interest group or represents a uniform capitalist class interest (Falkner 2008; Falkner 2005; Falkner 2001). In contrast to early research literature on the rise of multinational corporations and globalization, which tends to view the corporate sector as a homogenous political group, Robert Falkner highlights the privileged position business occupies in the domestic context of foreign policymaking but at the same time emphasizes the need to locate dominant business interests among a diversity of corporate interests. Lines of conflict among firms may exist between national and global firms over the question of whether to advocate protectionism, or between market leaders and laggards over the creation and design of environmental and consumer regulation if it affects the competitiveness of firms or market structures.

All in all, we need to find an answer to the question of *when* and *how* interest groups are to prevail over each other and enforce their very own interests. In order to approach this problem I will draw on an analytical framework developed by Mattli and Woods (2009) that is based on traditional public interest theory and theories on regulatory capture. In a second step, I will deal with the issue that a good deal of regulatory cooperation is motivated by unique transnational relations; and that transnational institutional structures may offer privileged access to some actors, thereby biasing bilateral regulatory outcomes in ways difficult to comprehend from a purely domestic perspective.

2.2.2 Mattli's and Woods' model of regulatory capture

Scholars of business-government relations have often criticized regulatory outcomes for being biased towards business interests because businesses, particularly large corporations with their heavy financial resources, hold significant competitive advantages.⁵¹ While early pluralist work from the 1960s emphasized that competition between interests would prevent the development of political bias

⁵¹ For the most recent discussions of political bias, see (Bouwen 2002; Greenwood and Aspinwall 1997; Baumgartner and Leech 1998; Beyers, Eising and Maloney 2008). See also the respective chapters in (Levi-Faur 2011).

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