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A World of Difference
Exploring the Dilemma of Mutual Recognition

by
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That my intellectual voyage in the (serious) study of world politics began with Robert Keohane was institutionally pre-determined. Who better to supervise a thesis at Harvard in the late 1980s on an emerging norm for cooperation within the EU, yet relevant to the world beyond? As I started to explore the landscape of mutual recognition regimes Bob served as my sherpa and my intellectual conscience. It was indeed a voyage I will never forget, as I sought to follow Bob's path of rigorous comparative framework, while hopelessly getting diverted by the flow of my story, its underground current and legal jungle. At the end, Bob boldly cut all my Gordian knots, relabeled and shuffled my analytical categories and sent me off to "the world beyond". I have continued to be inspired by Bob even while our paths seemed to diverge as I crossed the Atlantic to come back to Europe. How not to be inspired by the way Bob, like other intellectual pioneers, transfers insights between fields and between people while at the same time pursuing a greater and consistent agenda. My own work on European and global politics is driven by the same spirit: to ask what makes it more or less likely for actors to cooperate internationally – to create more optimal 'working institutions for a global polity of unprecedented size and diversity'¹ – if we understand world politics as a third way between politics among states and politics beyond states. Like Bob, I have moved from a focus on explanation to normative enquiry, including of late delving in what he has called "external accountability gaps". This paper draws on several of my publications in the last few years that have continued along the path I stepped on under his guidance. It explores what I call the dilemma of mutual recognition as they relate to the politics of trade liberalization in the EU and beyond, and as they relate, ultimately to the politics of Constitution-making.

We live in a world of difference. Can we live with it? Or do our attempts to rationalize and steer this world unavoidably lead to a narrowing down of these differences? Transnational mutual recognition regimes are not simply one option among many, but rather a core element of any global or transgovernmental governance regime which eschews global government from both positive and normative perspectives.² As governance mechanisms are emerging nevertheless, and publics are demanding that these mechanisms be more accountable, scholars have responded by trying to understand (positively) what is happening on the ground, and by putting forward normative models as to how these mechanisms should operate, often in the hope of influencing decision-makers in the way they might steer global and transnational processes. I believe it most fruitful to start by asking the question: on what common basis can legal, regulatory and political systems interact without

¹ Robert Keohane, "Governance in a partially globalized world," APSR, 2001

² I generally use alternatively the terms "mutual recognition regimes" and "mutual recognition agreements" (or MRAs). The latter is prevalent in diplomatic speech but of a narrower import. Under MRAs parties apply the principle of mutual recognition to specific economic sectors, subject to varying constraints and caveats. Although the concept of mutual recognition is best known for its development and implementation within the European Union (EU), the term "mutual recognition agreements" in reference to inter-governmental agreements was not actually used in the internal EU context for government-to-government agreements. Rather, the principle of "mutual recognition" was embedded in directives and regulations agreed through EU political processes or applied in judgments of the European Court of Justice. In the EU context, the term "mutual recognition agreements" was introduced to describe contracts between private conformity assessment bodies from different member states who would evaluate and (where applicable) certify products and production processes. The use of the term was subsequently transferred to the external bilateral context to describe agreements between states (including between the EU and other states) to implement the mutual recognition principle.

merging into one, in other words, how do they decide what are legitimate differences between them?³ One way to answer this question is to enter into a on-going conversation about these differences, to determine when trade ought to be possible in spite of them, on the basis of mutual trust and mutual monitoring combined. In order to give effect to this general principle, governments adopt mutual recognition as a contractual norm whereby they agree to “swap” jurisdictional authority among themselves.⁴ Why should they do that?

Robert Keohane was the first to stress that cooperative regimes must be explained first and foremost through an understanding of the demand side of the equation.⁵ Why then should there be a demand for foregoing the age-old notion of “when in Rome do as the Romans do” in favour of the recognition, and thus extraterritorial application, of national laws? And under what conditions is this move acceptable to the various actors involved? These questions form the starting point of my analysis.

I have long believed that these questions are not confined to issues related to transnational regulatory interdependence. On the contrary, mutual recognition is a norm that pervades international relations, starting with the basic prerequisite of relations between states: their mutual recognition *qua* states within a system where, at least theoretically, such recognition implies privileges and obligations. The key here is that recognition, in all its incarnations, is always conditional. Witness the protracted negotiations over recognition between what used to be two Germanies, between the two sides of Europe at Helsinki, between Israel and Palestine, or between northern and southern Cyprus.

The form and implications of such conditionality is also key to the specific instance of mutual recognition analyzed here. In practice, mutual recognition regimes set the conditions governing the recognition of the validity of foreign laws, regulations, standards and certification procedures among states in order to assure host country regulatory officials and citizens that the application of such foreign laws within their borders is “compatible” with their own, and that incoming products and services are safe. These conditions involve different types of obligations for *home states*, who benefit from conditional recognition of the laws and regulations applicable to products, persons, firms and services, and *host states*, who are required to forego the application of their own rules to products, persons, firms and services, provided that these conditions are met.

In this sense, mutual recognition regimes are always “managed,” and thus differ from a pure “free trade” model by involving a (often highly) political process of assessment of mutual compatibility between national systems of governance. What constitutes such compatibility is usually seriously contested. That governments and social actors engage in assessing what constitutes legitimate differences between them, implies that they assess differences that should not preclude the application of home country rules on host country territory or vis-a-vis host country citizens. Such assessment can be made unilaterally or through collaboration – in fact, it is usually the main object of negotiations. But it always results in the direct confrontation of differences of all sorts—legal, fiscal, social, political—in areas where these differences had previously been confronted at arms-length.

This prospect can be liberating for some but also feared by others. It is no wonder that the current debate around the so-called “Bolkenstein directive” in the EU has raised passions on both sides.⁶ The directive purports to apply the principle of home country control across all remaining services that have not previously been subject to a specific EU law. The generalization of this approach from goods to services was of course the main objectives of the White Paper published under Jacques Delors leadership in 1986, but the Commission had failed to implement it in many sectors. Many actors across the political spectrum have belatedly come to oppose the new broad-ranging directive precisely because home country rule is regarded as a potential menace to host state social and economic order. In fact the home country principle has been referred to in this context as perverse and dangerous. And the recent enlargement of the EU to ten new countries with greater economic and

³ For a discussion, see Anne Marie Slaughter, *The New World Order*, 2004.

⁴ These jurisdictions are generally sovereign states, but they can also be sub-national units of federal entities. The term mutual recognition can be broken down into its two components. The “recognition” component entails recognition of the “equivalence”, “compatibility” or (at least) “acceptability” of a counterpart’s regulatory system. The “mutuality” component indicates that the reallocation of authority is reciprocal and simultaneous.

⁵ Robert Keohane, “The demand for international regimes”.

⁶ Add cite

cultural gaps than ever before is making such determinations and fears more acute. At the same time, this makes the EU more universal, and a better laboratory than ever as to what may eventually happen in the realm of global governance.

In this context, it should be no surprise that mutual recognition regimes are often linked in practice to harmonized standardization and judicial or administrative review. Mutual recognition regimes are more likely to flourish if regulatory officials operate under procedures and standards with which they are familiar and if they trust that there is ongoing review and monitoring of the regime's application. International standards can facilitate the negotiation of bilateral mutual recognition agreements because, where parties operate under common standards and procedures, they more easily understand and develop trust in each other's regulatory practices to enforce these standards.⁷ Sustained transnational engagement among public and private actors spurred by mutual recognition agreements can also facilitate an ongoing convergence of regulatory procedures and standards through increased mutual familiarity *ex-post*, rather than harmonization *ex-ante*. Indeed, part of the aim of mutual recognition regimes, I have argued elsewhere is to transfer the cost of building such familiarity –the transaction costs of cooperation in Robert Keohane words- from the period prior to when liberalisation takes place to the period following it. In other words, from *ex-ante* to *ex-post*.⁸

This paper seeks to lay out in an integrated framework the dilemma associated with putting mutual recognition into effect. Part I situates the norm of mutual recognition within the broader globalization context by assessing its relationship with the principles of sovereignty and extraterritoriality. Part II assesses the factors that explain the rise of mutual recognition regimes in spite of resistance to its extraterritorial character. Part III addresses mutual recognition from a normative perspective, focusing on how to fill the accountability gap the give rise to. Part IV extends this overall enquiry to the Constitutional politics of the EU.

I. “Whither sovereignty?”: Mutual recognition as consensual extraterritoriality

Mutual recognition regimes are at the core of the sovereignty/globalisation nexus. A better understanding of the norm of mutual recognition provides a lens through which to view the landscape of global governance as a whole. In using this lens, however, we must systematically question any sharp distinction between “domestic” and “international” bodies of law and levels of enforcement. Instead, mutual recognition consists in intermingling domestic laws in order to *constitute* the global. In fact, mutual recognition may be the foremost legal incarnation of what Kant referred to as cosmopolitan law – that is, the law that exists *between* domestic and international law, the law that defines the obligations of a state with regards to citizens of other states. It is meant to respect sovereignty on one hand (by foregoing the option of total harmonization and centralisation on the one hand, while radically reconfiguring such sovereignty on the other –by delinking regulatory control from the territorial anchor of sovereignty. It should be little surprise that such reconfiguration be more likely in the EU than in the US context, given the respective prevailing notions of sovereignty.⁹

Rather than conceptualizing governance in terms of a national versus global dichotomy, mutual recognition represent the operationalization of a third, ‘middle way’ of transnational economic governance, one that is already happening in a global economic order—that of recognition of foreign regulatory determinations implicit in the import of traded goods and services. Mutual recognition principles constitute an extension of the territorial principle of national treatment and a cooperative, ‘mutualized’ approach to the inherent demand for, and challenge of, extraterritoriality in a global economic order. How?

A. Cooperative vs unilateral extraterritoriality: Mutual recognition as a cosmopolitan form of extraterritorial law.

⁷ For example, the 1997 U.S.-EU Mutual Recognition Agreement is based largely on the mutual recognition of test results by “Conformity Assessment Bodies,” which, in turn, are evaluated pursuant to international standards set forth in ISO/IEC Guides.

⁸ On transaction costs as a driver of the forms of cooperation see Keohane *After Hegemony*, 1982.

⁹ Keohane, “The ironies of sovereignty: EU vs US”.

Recognition creates extraterritoriality. In the diplomatic world, this happens in a minimalist guise through the establishment of embassies as extraterritorial islands of home country sovereignty in the host state.¹⁰ But when we turn to the mutual recognition of what states do, rather than of their legitimate existence and boundaries, the islands of extraterritoriality created are larger and more pervasive. In fact, they cannot be thought of as islands anymore, but more aptly as rivers and streams flowing from one domestic legal landscape to another. If mutual recognition is thus an expression of the broader category of “extraterritoriality,” this is not, however, extraterritoriality of an “imperialist” bent, but rather extraterritoriality applied in a consensual or at least bi- or plurilateral, “other-regarding” manner.

The United States is best known for applying its law “extraterritorially” in a unilateral manner, from the Helms-Burton act regarding investments in Cuba,¹¹ to the sanctions applied in response to European assistance for the Soviet oil pipeline, to the application of US securities and antitrust law to conduct abroad, as in the Hartford Fire Insurance case. It has typically applied its law, however, without engaging in any collaboration or coordination whatsoever. The Hartford Fire case, for example, was brought by US private commercial parties before US courts regarding conduct that apparently was legal under the regulatory system of the United Kingdom. Moreover, unilaterally-determined trade sanctions typically affect third parties who are not the primary targets of the legislation, as in the Helms-Burton case, where the primary target has been the Cuban government, not European and Canadian companies. The United States acts unilaterally, however, not only because it holds the power to do so, but because its national political and judicial processes determine that such action is necessary to protect its overall security and the individual interests of its constituents. Most importantly, in these cases, extraterritoriality serves to limit not expand trade.

Mutual recognition, in contrast, represents a form of managed “joint governance” of extraterritoriality. In calling for participating states or jurisdictions to recognize their respective norms, rules, and standards as valid in each other’s territory, it represents a search for a more effective division of labour, not between a global center and the periphery (or a hegemonic state and peripheral states), but between regulators and lawmakers across countries through relatively more optimal combinations of home- and host-country control. It reflects not a force outside all (or most) states to which they have become subject, but a proactive political choice to institutionalize and ‘mutualize’ extraterritoriality. It constitutes a reciprocal allocation of jurisdictional authority to prescribe and to enforce. As a result, when applied to the recognition of education, skills, and professional qualifications, it means that we, as individuals, are no longer prisoners of our original polity and can choose to live among a variety of polities, even while physically staying in one territory. While relying on the passport of our home laws and regulations, we are also granted a new form of social contract that includes the—still limited—right to choose among those different national polities (such as among the nations in the European space). As further discussed below, the European Union (EU), in light of its own internal developments, has advanced this more cooperative form of extraterritoriality.

From the point of view of domestic regulatory authorities, a unilateral policy choice nonetheless still needs to be made to implement a mutual recognition regime. The domestic authority must determine whether it should recognize a given non-domestic standard, and thus implicitly incorporate it as equivalent or compatible with the domestic system’s requirements. This determination is made, however, in a cooperative context. Two or more parties must agree over standardization and/or mutual recognition and over how the agreement will be implemented. National regulators must ensure that the process justifies the effective externalization or de-nationalization of law and standard-making processes, yet they do so within a collaborative framework. Decisions to extra-territorialize their laws and that of their counterpart become the basic component of the fabric of global governance and law. But are these always decisions?

B. *Extending vs denying recognition: Mutual recognition and national treatment.*

In fact, mutual recognition is not always the result of a decision, the end product of a negotiation between states and other concerned actors. Mutual recognition and therefore extraterritorial effect are everywhere in the partially globalized world that we live in. In fact, the question faced by a decision-maker, if there is a decision to make nevertheless is whether mutual recognition should be extended where it doesn’t hold, or whether it should be denied where it reigns supreme, or both. How is that?

¹⁰ Ruggie, “Beyond territoriality”, *International Organization*, 1993.

¹¹ Cuban Liberty and Democratic Solidarity (Libertad) Act

Mutual recognition is not only the prevailing principle in recent contexts when countries agree to forego the application of their own rules to those entering their borders. In fact, trade has always been synonymous with the movement of goods and services produced under home rules of production that were recognised, but implicitly. There was no need for a mutual recognition agreement to accept the fact that Mexican imports into the US were produced under less stringent labour laws or that Korean computer chips were produced under less stringent environmental laws. These home laws were accepted through the very fact of import. As depicted in graph 1 (summarizing the traditional territorial model) this approach was consistent with a territorial model of administration whereby the home country regulated *production processes* in the home country, while the host country regulated the characteristics of the *product* that would be directly “encountered” by the consumer or client, typically pursuant to the national treatment principle. In other words, unilateral recognition lies at the heart of trade and thus of any transnational legal regime.

Today, however, we are witness to two movements in opposite directions in respect of recognition, both implicitly reflecting, in contrasting ways, the extraterritorial application of laws and regulations. In some issue areas, mutual recognition is being extended where national (territorial) treatment used to prevail, whereas in other areas mutual recognition is now questioned where it had been the rule (*Graph 2*). This story can be told through examining the relationship between the principles of national treatment and mutual recognition. At first sight, national treatment and mutual recognition constitute contrasting conceptual pillars of transnational law. As a minimal constraint on importing states, the *national treatment principle* is protective of sovereignty since, in general terms, it provides that a host state is only prohibited from applying discriminatory standards to foreign products and services, and is otherwise free to set the standards that it deems appropriate. The host state may thus deny the marketing of a product or service if it does not meet its own national criteria. Under the *mutual recognition* principle, in contrast, the host state is typically obligated to accept home state standards, subject to any agreed conditions. The relationship among home and host states under these principles is depicted in *Graphs 1 and 2*.

In practice, however, the application of these two approaches—mutual recognition and national treatment—involves a continuum. In some areas (such as consumer protection standards for products themselves), national treatment and host state sovereignty have been the norm, and mutual recognition an exception that is determined on an ad hoc, product-by-product, or sector-by-sector basis. Distinct MRAs are negotiated for distinct products, services and sectors. However, mutual recognition of product standards at least historically, was initially applied as an expansive interpretation of the national treatment principle. The *Cassis de Dijon* case decided by the European Court of Justice is likely the best known example. In the international context, the Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) agreements of the World Trade Organization (WTO) can be read as codifications of an expansive application of national treatment. In the *EC-meat hormones* case, the WTO Appellate Body found that WTO rules required the EU to accept US hormone-treated beef even though the production of such beef was banned within the EU. Similarly, in the *EC-sardines* case, the Appellate Body found that the EU had to permit the labelling for the EU market of a fish caught in the Pacific Ocean and sold from Peru as “sardines,” even though the EU regulation was neutral on its face. In these two cases, the mutual recognition principle operated in complement with “voluntary” international standards adopted by the Codex Alimentarius Commission. The Codex standards may be voluntary, but, under the SPS and TBT agreements, a host state has an increased burden to justify its regulatory measures as necessary when they do not meet these standards, even though the state’s regulatory standards are non-discriminatory.

In other areas, in contrast, mutual recognition has been the norm and is now being called into question. For example, under the former GATT regime, GATT panels determined that countries could not prohibit the importation of a product on the basis of how it was produced. In the famous *US tuna-dolphin* cases, two GATT panels held that the United States was not permitted to ban the import of tuna on the grounds that the tuna was caught through a technique that killed a large number of dolphins, a technique that the US had banned for its fishing fleets. In other words, for production processes, the mutual recognition principle was the presumption, and was subject to only limited exceptions.¹² The presumption of mutual recognition was denied, however, in the *US shrimp-turtle* case where the WTO Appellate Body ultimately found that the US was permitted to ban the import of shrimp when the shrimp were not caught using turtle protective devices prescribed by the United States, subject to conditions.

¹² For example, the GATT makes express exceptions for products produced with prison labour (GATT Article XX(e)), and products produced in violation of domestic intellectual property rights (GATT Article XX(d))

In sum, mutual recognition principles implicitly apply to both traded goods and underlying production processes. In this way, they engage both traditional “trade” issues (e.g. technical standards) and so-called “trade and...” issues (e.g. differential labour and environmental standards linked to the production process). As host state regulators move to scrutinize production “processes” as opposed to only “product” risks, trade policies intersect with an increasing number of regulatory domains. The way in which states balance trade liberalization and sovereignty concerns through applying mutual recognition and national treatment principles to products and production processes thus lies along a continuum.

To summarize, mutual recognition is simply a reciprocal, negotiated and institutionalized form of extraterritoriality. As such it must be contrasted both with national treatment and with harmonization as the two alternative paradigms for managing trans-national economic relations in regulated realms. There is no fact of the matter, however, as to which approach is more or less demanding, more or less legitimate. Clearly, extraterritoriality, even of the consensual kind, promises a world that is more complex to navigate than the prevailing territorial order. As a matter of fact, however, this new world is already with us and we must examine it with fine lenses.

II. “Why do it?” The Supply and Demand of Mutual Recognition Regimes

It should be no surprise that mutual recognition be a difficult prospect to consider for politicians who need to appear in control of their voters’ environment and regulators jealous of their jurisdictional domain. Willingly creating regimes organizing the extraterritorial application of foreign law is a perilous exercise. Nevertheless, mutual recognition has quickly spread as a governing principle for trans-national exchange in the last 15 years. I had argued before this trend, that we could expect this to happen as politicians would seek to shift the transaction costs of cooperation from ex-ante to ex-post. I have systematised this analysis below.¹³

A. *The Rationale for “Managed Mutual Recognition.* Technical barriers to trade may result from domestic interest group pressures, domestic political actors advancing perceptions of the national interest and general welfare, or a combination of both.¹⁴ This analysis, however, focuses not on the determinants of technical barriers, but rather on the ways in which they may be addressed so that trade liberalization and regulatory protection may be mutually managed.

Following following on Keohane (ref), the distinction between the demand and the supply of a regime can be roughly viewed in terms of key actors’ perceptions of the desirability and feasibility of the regime’s implementation. Changes on the demand side tend to reflect changes in the value attributed to mutual recognition and standardization in light of the perceived costs and limitations of alternative policies. Changes on the supply side tend to reflect the calculations and degree of resistance of national regulators, industry, and consumers who must implement, operate, and live with mutual recognition agreements and any agreed common standards. I do not suggest that demand and supply factors can be independently specified. The same actors may be “demanders” and “suppliers” and similar factors may affect the demand and supply side.¹⁵ However, bargaining dynamics will reflect the effects of demand and supply factors and translate them into particular outcomes.

Through a process of “*strategic spillover*,” internal dynamics can generate demand for further liberalization. For example, in the EU context, demand has been generated from both internal and external EU players. Internal players were keen to exploit strategic opportunities offered by mutual recognition arrangements. The internal move created potential strategic disadvantages for external players who demanded further liberalization, including a transatlantic MRA, to overcome them. These new mutual recognition

¹³ This section is drawn primarily from Nicolaidis and Egan, “Regional Policy Externality and Market Governance: Why Recognize Foreign Standards?” in *Journal of European Public Policy*, Special Issue on Governance and International Standard Setting, Vol 8, n3, 2001 ; Reprinted: *The Political Economy of Standardization*, Walter Mattli, ed, Cambridge University Press, 2002.

¹⁴ see Gourevitch, 1986; Katzenstein, 1987; Krasner, 1987; Mansfield and Busch, 1995.

¹⁵ Keohane, 1982 pp 142-143. When we consider the impetus for change, on the demand side—and resistance to change, on the supply side—we examine the role played by the same array of actors.

agreements may, in turn, place pressure on third countries to enter into negotiations so that their firms are not disadvantaged—leading to a potential “contagion effect.”¹⁶ Each MRA can thereby provide leverage to domestic firms to demand new MRAs with third country counterparts to equalize market access. Considerations of reciprocal market access benefits can also help to explain the structure of MRAs.¹⁷

In short, it is a heightened demand for liberalization in a world where harmonization is either impossible (underlying standards) or does not apply (certification) which creates the setting for mutual recognition regimes. Ultimately, however, an agreement’s characteristics—or what I call its attributes—tend to depend on supply side factors—that is, on the capacity and propensity of regulatory actors to enter the logic and constraints of a mutual recognition order. The following supply factors appear to be critical:

1) *cross-national regulatory compatibility*. The first and most obvious factor has to do with the basic question a decision-maker asks when entering a mutual recognition agreement: can my country live with this degree of extraterritorial law emanating from this or these *specific* actors? In other words: are our systems compatible enough? Regulatory compatibility is a function of the degree of convergence across regulatory culture, policies, and standards which affect perceptions of regulatory effectiveness. Differences in risk assessment, scientific evidence, and the goals of regulations, of course, all hinder mutual recognition. In the transatlantic context, mechanisms for regulatory cooperation have fared less well where regulators have not been guided by sufficiently comparable regulatory laws and cultures.¹⁸ Compatibility has played a particularly important role in the north-south context where regulatory divergences are a primary explanation for the lower likelihood of collaborative market governance mechanisms between developed and developing countries, as well as for the frequent “lowest common denominator” approach in international standardization to address divergent levels of “regulatory development.” In short, developed countries’ lack of trust in developing countries’ regulatory systems explains why developed countries have been more reticent to enter into MRAs with them. Of course, because compatibility is a stretchable concept, it only offers explanatory leverage if we measure it independently from the observed outcome of recognition negotiations.

2) *domestic level institutional conditions*. Regulatory compatibility may be a necessary factor, but it is not a sufficient one. We need to explain the variation in mutual recognition across sectors exhibiting comparable degrees of regulatory compatibility. Negotiations are sometimes bogged down in spite of apparent compatibility because a country’s regulatory institutions and the structure of power relationships between trade and regulatory agencies affect the state’s propensity to recognize foreign standards, ex-ante, and to “deliver” substantial commitments, ex post. As in any complex trade negotiation, trade negotiators act as agents for a variety of interests, including industry, consumers, and bureaucratic and regulatory bodies responsible for the state’s regulatory system. For example, in the 1997 US-EU MRA, the involvement of both trade officials and regulatory officials resulted in *intra*-U.S. agency conflicts. Trade officials more aggressively pushed for an agreement, and U.S. regulatory officials, in particular the FDA and OSHA, were reticent about accepting foreign certification of safety standards, making actual delivery problematic. These agencies obstructed implementation of the MRA where they believed that their regulatory missions might be compromised. In addition, consumer organizations in the United States tend to show greater distrust of MRAs that involve cooperation with foreign regulatory officials and private or quasi-public certifiers because, in the U.S. context, private actors lack the tradition of cooperating with regulatory authorities that exists in more corporatist, state-directed European systems. Ultimately, those agencies and entities, public and/or private, which are accountable for ensuring domestic regulatory oversight and which must respond to domestic pressures are best able to make commitments on market openness that are credible.

3) *supranational and transnational institutional conditions*. Finally, standards problems often take the form of a “prisoner’s dilemma” that require institutional solutions to develop mutual trust and monitoring to ensure that countries do not defect on their commitments. This concern provides the core rationale for the “managed” character of mutual recognition. Supranational and transnational institutional development can compensate to some extent for gaps in transnational regulatory compatibility. Trade liberalization is facilitated if the states involved operate within a common institutional framework for trade-oriented regulatory cooperation and dispute resolution. Here, as elsewhere, agreement on the creation of such institutions depends on long-term trust and short-term adoption of confidence building measures.¹⁹ Ex-ante, if

¹⁶ See Kalypso Nicolaidis, “Globalization with human faces”

¹⁷ See Shaffer, Reconciling Trade and Regulatory Goals.

¹⁸ See Mark Pollack and Gregory Shaffer, “Who Governs?” in *Transatlantic Governance in the Global Economy*

¹⁹ (Nicolaidis, 1993; Majone, 1996; cf Vogel, 1995).

regulators feel some degree of “ownership” in a regulatory or standard-setting process that occurs beyond their borders, they are more likely to accept its validity. Ex-post, if regulators can be reassured that they will be able to engage in some degree of mutual monitoring and collaborative division of labor, they are less likely to fear an uncontrolled lowering of standards as a result of recognition or of delegation of regulatory authority to private bodies. Since agreements over standardization and recognition are vulnerable to conflicts of interpretation and changes in domestic circumstances, they need to be designed to minimize risks of disruptive conflicts, and possibly include third party dispute settlement mechanisms.

Table 1 summarizes the operation of the above factors in three institutional settings—the European, transatlantic and international contexts.

How then have each of these factors played out in the contexts described above? In a nutshell, mutual recognition has not only been the hallmark of the EU single market since the early 1980s but has arguably become the *modus operandi* for the EU as a whole. The high degree of transnational institutional foundation in the EU played a key role in the generalization of mutual recognition under the Europe 1992 program. Pursuant to the EU’s “global approach” to regulation, products may be assessed and certified within any member state in order to receive a “CE” marking, which indicates that they comply with “*Communauté Européen*” norms. All member states must recognize these assessments and certifications (i.e. mandatory mutual recognition), so that products may circulate freely throughout the EU market. In 1990, the member states formed the European Organization for Testing and Certification (EOTC) to coordinate national bodies engaged in the assessment and certification processes and thereby help assure national authorities of the reliability of tests conducted in other member states.²⁰ Each member state must approve and is responsible for overseeing the assessment bodies within its jurisdiction and must notify the Commission’s Enterprise Directorate-General of its approvals.²¹ Member state authorities periodically meet and exchange information about the process’ operation through working groups and committees created pursuant to the respective EU directives. They thereby attempt to build and retain confidence in the system. This EU system can be characterized as governance by coordinated cross-border public-private networks. The system is backed, however, by potential enforcement through the actions of supranational bodies, and, in particular, of the Commission and the European Court of Justice.

In light of the EU’s experience with application of the mutual recognition principle, the EU - not surprisingly- is a major advocate of its use internationally. EU regulatory authorities have operated for over a decade under a dual mission of ensuring public safety, on the one hand, and ensuring free movement of goods and services within the EU’s single market, on the other. They consequently are more experienced in managing the coordination of distinct national regulatory systems than many of their counterparts.²² The EU experience thus offers a model to be considered and adapted for other transnational contexts.

Nonetheless, one observes a great deal of variance in the patterns of mutual recognition. As discussed above, progress has been slow in the transatlantic context, perhaps above all due to the low capacity of the US to deliver accountability mechanisms. The decentralized and privatized character of US regulation in some sectors, the jealously guarded autonomy of federal agencies in other sectors, and the role of US states in the regulation of many services, have made US negotiation of mutual recognition agreements more difficult. At the global level, finally, mutual recognition is in its infancy, reflecting, in particular, the dearth of institutional foundations for creating and maintaining trust among regulatory authorities.²³ The WTO provides a potential framework for facilitating the multilateralization of mutual recognition arrangements, but this framework remains, and probably should remain, weak in light of the primary need to build trust and confidence horizontally among state regulatory systems.

B. The foundations of confidence: Trust, monitoring, capacity building, other-regarding regulatory cultures. As has been noted, the negotiation and implementation of MRAs raise fundamental

²⁰ Michelle EGAN, CONSTRUCTING A EUROPEAN MARKET

²¹ These testing and certification laboratories consequently are referred to as “notified bodies.” The overall process is called the “global approach” because once a notified body certifies that a product meets EU standards, the product may be marketed in all fifteen member states.

²² Although the United States is a federalist system under which states may retain separate regulatory regimes unless preempted by federal legislation, the areas covered by the 1997 Mutual Recognition Agreement largely have been federalized, with federal regulatory agencies overseeing federal regulations. The US approach differs significantly from the multi-level coordinative ones used in the EU.

²³ See Nicolaidis and Egan, *op cit.*

questions of the compatibility of substantive laws and institutional cultures. But from where do such judgements of “compatibility” come? The answer is not straightforward. Parties must know something about each other’s standards and practices, but they operate in a game of incomplete information. Mutual recognition provides for implementation of a new international division of labour between regulators and regulatory systems precisely because of the costs associated with regulators having to extract information about the quality of foreign products. Thus, while home regulators must be seen to do their job, they also must be trusted for what is not seen. In fact, the balance between “blind trust” and monitoring to compensate for the lack of such trust constantly shifts when parties apply mutual recognition arrangements. To be successful, parties engaged in mutual recognition arrangements must build trust through transparency, sustained exchange, monitoring, and (in the case of developing countries) capacity building. These mechanisms, in turn, make it less necessary to simply trust other parties in their regulatory roles.

Trust has been much written about across fields.²⁴ Trust is usually understood to be interpersonal and *subjective* in nature in so far as it relates to specific exchanges between actors in specific contexts. If we consider that mutual recognition describes a relationship between regulatory *systems* underpinned by a relationship between public and private actors, then what ultimately matters is institutional confidence—that is, a more *objective* phenomena combining networks of interpersonal trust with on-going updating and deepening of mutual knowledge between the systems. In other words, *confidence* can be viewed as the necessary objective character of the structure within which the recognition relationship occurs, while *trust* can be viewed as the defining subjective character of the relations between agents operating within the structure.²⁵ Confidence, therefore is predicated on a greater degree of knowledge of what is (and is likely to be) than trust, which involves a greater degree of risk. In effect, the managed character of mutual recognition can be seen as a mechanism to transform a situation relying (imperfectly) on trust, to one (more steadfastly) relying on confidence.

Regulatory change is a key variable in this process. While mutual recognition is negotiated at a given moment in time, home regulations and enforcement practices are bound to change as a function of participating actors, prevailing beliefs, and technological developments. Home and host states can, to start, notify regulatory changes to each other to ensure greater transparency, a process that has been institutionalized through the WTO SPS and TBT agreements which require WTO members to notify regulatory changes to the respective WTO oversight committees. However, although information is a prerequisite and can serve, at least in part, as an alternative to trust, information alone is likely insufficient. Trust also needs to be institutionalized through sustained practice. Regulators engaged in this process must gain and sustain trust and confidence in each other’s decisions, in particular, in areas affecting public health and safety where they are asked to rely on testing, certifications, and accreditations by foreign laboratories and officials. They will only trust each other if they are assured that their regulatory counterparts hold the necessary capacity to advance the social goals of a coordinated regulatory program. As Majone writes regarding the EU’s internal regulatory networks, “for a coordinated partnership... to operate effectively,... each participating organization must be able to perform the tasks assigned it, and there must be sufficient trust among the partners to keep the costs of transacting within acceptable limits.”²⁶ In the framework developed here, I would argue that mutual recognition regimes rely on convergent mutual expectations predicated on systemic confidence and inter-subjective trust. Mutual recognition arrangements provide for the legalization and institutionalization of regulatory exchange pursuant to which greater confidence may be built and sustained.

Information and regulatory exchange are not free. To the extent that regulators are already overburdened, they may not take the time, *ex ante*, to engage with their foreign counterparts or, *ex post*, to review information, especially where it may be provided in either a foreign language or by an official not fully fluent in a common language, such as English. Regulators must also hold the resources necessary to make managed mutual recognition work over time. In the end, however, in an age of limited government resources for the oversight of rapidly changing, expanding and interacting economies, regulators can save costs through enhanced cooperation with foreign regulatory officials and decentralized product certification systems. The US FDA, for example simply does not have the resources to adequately conduct all testing itself, especially where

²⁴ In psychology, see Garfinkel, 1963; in social psychology see Frankel, 1977; in economics see Ben-Ner and Putterman, 2002, Dos Anjos, 1999; in political science see Dasgupta, 1988, Fukuyama, 1995; Putnam, 2000; in law see Hardin 1996; TBC

²⁵ Cite Shachar Nativ.

²⁶ See Giandomenico Majone, *Regulating Europe* (1996), at 276. Majone further notes how “the principle of mutual recognition is extremely demanding in terms of mutual trust”). *Id.*, at 279.

testing involves significant foreign travel. By permitting an “over-extended and under-resourced” FDA to outsource testing and evaluation of medical devices to private bodies, the FDA can reallocate its resources to areas of higher concern, while retaining high product and process standards and post-market surveillance controls.

Where MRAs include developing countries, significant capacity building and technical assistance may be prerequisites for recognition of their standards and conformity assessment decisions. The EU has engaged in assisting developing countries to upgrade their home standards in order for them to be recognized so that their products and services may be marketed in the EU. For example, the EU provided refrigerators and free consulting to African countries in the “great lakes” region so that the fish that they wish to export to the EU can be accepted. Similarly, the United States has provided technical assistance to help countries catch wild shrimp in a manner that does not threaten endangered sea turtles. Article 11 of the TBT Agreement calls its members to provide technical assistance to developing countries regarding the preparation of technical regulations and the establishment of national standardizing and conformity assessment bodies. However, although trade-related capacity-building endeavours abound, they are often not well-coordinated, hampering the development of north-south mutual recognition arrangements.

Finally, mutual recognition regimes are most likely to be successful if states implement “other-regarding” regulatory approaches, thereby helping to build trust over time. In many cases, there may be functional substitutes for other-regarding processes because domestic importers and consumer groups serve as proxies for outsider interests. Protectionist behaviour (including the refusal to extend recognition for arbitrary reasons) hurts domestic actors who, in internalizing the injury to the outside third party, become a domestic proxy. However, this proxy may be ineffective because of political malfunctions. For example, the protectionist group may have higher per capita stakes in the outcome, spurring them to organize politically to block the competing import, and consumer groups may face significant collective action problems.

Home and host countries can adapt mechanisms to take into account the effect of their regulations on the other’s constituents. The transatlantic business and civil society dialogues represent one approach in so far as they are able to coordinate input to their respective regulators on both sides of the Atlantic.²⁷ Transnational institutions can also spur other-regarding national processes. A number of WTO judicial decisions have attempted to facilitate such exchange. In the US shrimp-turtle case, for example, the Appellate Body effectively required the United States to create an administrative procedure pursuant to which foreign governments or traders would have an opportunity to comment on U.S. regulatory decisions that affect them. The Appellate Body held that the initial application of the U.S. trade measures were “arbitrary” in that the certification process was not “transparent” or “predictable,” and did not provide any “formal opportunity for an applicant country to be heard or to respond to any arguments that may be made against it” (par.180). It admonished the United States for failing to take “into consideration the different conditions which may occur in the territories of... other Members” (par.164). It required the United States to assure that its policies were appropriate for the local “conditions prevailing” in developing countries. The WTO Appellate Body, within the institutional constraints that it faced, attempted to foster institutional processes of less-biased participation that involve increased inclusion of affected parties.

In a five-year-long exercise dedicated to the support of regulatory reform across the world, the OECD secretariat developed a panoply of criteria to assess the effectiveness of such domestic reforms. One concerned trade-compatibility, although the OECD noted the way in which compatibility could be fostered depended on domestic contexts. Mutual-recognition friendly regulatory reform meant, in particular, that domestic regulatory processes were to be more open to the influence of third parties, that non-nationals were not to be barred from applying for certification, and that laboratories and other bodies from other countries were to be given accreditation authority to the extent possible.

In the end, regulators are more likely to engage in effective mutual recognition regimes if they know that they will be implemented in a transparent manner, are subject to monitoring and other ex post controls, and, ultimately, allow for reversibility based on new information. Reversibility is, of course, the “nuclear option” in recognition deals. If all the safeguards put in place to ensure continued confidence between parties simply fail, then each party has the option to renege on its commitments. In fact, MRAs generally contain such a reversibility clause.

²⁷ See Maria Green Cowles, “The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue,” in Pollack and Shaffer, *Transatlantic Governance*, supra note 28; and Francesca Bignami and Steve Charnovitz, “Transatlantic Civil Society Dialogues,” in Pollack and Shaffer, *Transatlantic Governance*, supra note...

Nevertheless, in light of technological and other market developments, reversibility may be difficult to implement in practice. How can the UK for instance practically forbid its citizens to access worldwide television channels through satellite links? Such controls would require unprecedented and costly policing! Increasingly, technologies and commercial links allow actors to escape the kind of state control that would simply allow regulatory authorities to activate the on/off switch, whether they enter into mutual recognition arrangements or not. An advantage of mutual recognition arrangements, once more, is that they foster regulatory coordination and confidence-building in an economically integrating world where the alternative is often de facto unilateral recognition of foreign standards and procedures as a result of otherwise autonomous technological and market forces.

III. “Accountable to Whom?” Mutual recognition’s democratic dilemma

Ultimately, any system for transnational governance will only be sustainable if it is legitimate. Economic actors, be they producers, consumers, suppliers, state agents, or private actors granted public authority (and, even more broadly, citizens), must understand enough about the new global dynamics to be able to play their parts effectively in it, however small or complementary those parts may be.

As amply discussed in Robert Keohane’s recent work, holding power wielders accountable is a key to legitimacy globally as well as domestically, but, there is a whole array of accountability mechanisms beyond traditional democratic ones.²⁸ The concept of accountability refers to the ability of affected parties to hold decision-makers accountable, ultimately through sanctioning them.²⁹ As regards democratic accountability, decision-makers must respond to citizen demands or they will be voted out of office. Under rights-based mechanisms, constituents are granted legal “rights” that they may pursue before courts or other processes. If their rights have been infringed, the decisions affecting them are to be reversed or modified and (potentially) they are to receive compensation. Thus, “rights” can also be viewed as tools to ensure the accountability of decision-makers to affected parties. If mutual recognition creates rights for those who benefit from recognition, we must ask, “recognized by whom? On whose behalf?” and as a result “accountable to whom?” I first examine the specific measures accountability applicable in mutual recognition arrangements. I then turn to the broader democracy dilemma as applied to mutual recognition regimes and to global and transnational governance mechanisms generally.

A. Horizontal accountability and symmetries of access. Mutual recognition regimes call for the same categories of accountability as those identified by Kingsbury et al for global administrative law (2004), but with an important twist. Here I am examining *networks of horizontal division of labour* which raise questions of horizontal accountability between political, judicial, and regulatory authorities in one country towards not only regulators, but also publics in another. Supra-national actors play a role, but mainly that of facilitator, broker, mediator, or adjudicator of these horizontal relationships. As mentioned above, the best theoretical analogy to the mutual recognition approach is *Kant’s conception of cosmopolitan law*—that is, the law that exists *between* domestic and international law—the law that defines the obligations of a state with regards to citizens of other states. In the mutual recognition context, the host state is obliged not to discriminate against or unfairly treat those coming from outside of it, while the home state must consider the “consumption” of its rules by consumers and citizens outside of its borders. In sum, from the angle of mutual recognition regimes, the key is to transfer the concepts of accountability that address the *vertical* dimension of “global governance” and accountability, to a context where the transfer of sovereignty is *horizontal*.

A central issue in assessing accountability, and in particular when we speak of horizontal governance in the form of mutual recognition regimes, is the issue of accountability to whom. That is, to whom are

²⁸ See e.g. Robert Keohane and Joseph Nye, “Redefining Accountability for Global Governance” in Miles Kahler and David A. Lake, eds., *Governance in a Global Economy* (Princeton 2003); and Robert Keohane, “Global Governance and Democratic Accountability, in David Held and Mathias Koenig-Archibugi, eds., *Taming Globalization, Frontiers of Governance* (2003); Grant and Keohane, “Accountability and Abuses of Power in World Politics,” March 2004

²⁹ Keohane.

domestic regulators accountable in an economically integrated world where one jurisdiction's decisions can have significant impact on outsiders, whether because the national system regulates too little, too much, or simply takes account of the interests of its own constituents before those of affected outsiders? As Keohane has pointed out, one can speak of internal and external accountability, with *internal accountability* referring to that of national decision-makers toward those within the polity, and *external accountability* referring to accountability toward those outside of the polity.³⁰ I believe, as he does that external accountability gaps tend to pose even greater challenges than internal ones.

In national democracies, internal accountability mechanisms include a key democratic legitimizing component. Although domestic administrative officials are not directly elected, they are held accountable to the citizens through elected legislative representatives who delegate authority to them through legislation and who determine budgetary allotments provided to these officials for the fulfilment of their missions. If citizens are unsatisfied, they can elect a new government that can pass new legislation or exercise other controls over administrative agencies.

In a world of increasing numbers and complexity, however, it is impossible for representative institutions to address all matters having a social impact at the national level as well. Domestic decision-making is thus frequently delegated—whether formally or informally—to non-representative institutions, such as bureaucracies, courts, quasi-public bodies, private companies, public-private networks, and market processes. Analysts often differentiate the concept of *governance* from that of *government* to assess decision-making mechanisms that are not directly accountable to a popularly elected body. Governance relies on other accountability mechanisms as examined below.

The fact that transnational institutions and regimes are not subject to control through direct popular elections or referenda subjects them to frequent charges that they are “illegitimate” because they are not “democratic.” Although there are serious normative concerns about the accountability of global institutions, critics can also manipulate arguments over “legitimacy” to advance particular substantive policy preferences, as opposed to democratic ones. There is nothing inherent that makes global and transnational governance mechanisms more or less representative of affected parties’ competing views and interests than domestic processes. We live in a world of multiple national orders whose disparate decision-making processes affect one another’s constituents. On the one hand, government representatives cannot control for the impact on their constituents of foreign political decisions. On the other hand, government representatives make decisions that affect foreign constituents without those constituents being represented. Global and transnational governance mechanisms address the linkages between these overlapping domestic orders. Moreover, transborder economic processes take place regardless of whether any formal transnational governance mechanisms exist, and these transnational market developments are strengthened by technological developments, whether it be the internet, e-mail, satellite media or future communication and transport modes that have yet to be conceived. Global and transnational governance mechanisms are needed precisely to address these ever new governance challenges, which occur irrespective of the will of citizens around the world.

There nonetheless are tensions between internal and external accountability mechanisms, which take us back to the central issue of accountability to whom. Regulators, in response to domestic constituencies, may refuse to take account of the impact of their decisions on outsiders. Indeed, the US system can be characterized as one involving relatively high levels of internal accountability, but low levels of external accountability.³¹ Yet, as discussed above, the US has strong incentives to engage in mutual recognition arrangements, both to advance the interests of its commercial constituencies and to protect its consumers in a world where technology increasingly facilitates cross-border exchange and, in consequence, transnational impacts on domestic constituents. The US, as any other state, thus has incentives to ensure that foreign regulatory systems are accountable when their decisions affect US constituents, and, in return, to agree to make its own regulatory system more accountable to outsiders. The same applies for the EU with the important caveat, that its entire culture is much more attuned to such external regulatory impact assessments.

Let me examine accountability mechanisms other than democratic ones, ones that reflect those already used in systems of national administrative law for domestic citizens. Transnational accountability mechanisms start with various ways of enhancing the *procedural participation of non-citizens*. National administrators are to operate transparently and to provide reasoned justifications for their decisions. In the mutual recognition context, domestic regulators must give notice of proposed standards, make explicit the extent to which home or

³⁰ cite

³¹ See Keohane, *supra* note..., at 141.

host state rules will apply, and give notice of changes to standards that have already been considered as equivalent. Foreign states and individuals are to have a right to be heard by national administrators, whether directly or indirectly. Any decisions rendered are to be subject to a form of judicial or administrative review, possibly both at the national and supranational levels. In sum, national authorities must “take account” even if only through transparent procedures, of consumers and citizens outside of their national territories if they are to be accountable to those on whom their decisions have an effect.

But extending the concept of national regulatory accountability to constituents outside of a polity, raises not only larger democratic concerns (addressed below), but also pragmatic ones. Pragmatically, what does this extension imply in terms of formal and informal obligations to non-state constituents? To what extent are regulators required to inform foreign actors as thoroughly as domestic ones? Just to start, standards cannot be issued in all languages. Who is to fund these accountability mechanisms, especially if they are to apply to poorer countries? Most mutual recognition regimes require the setting up of “notification and inquiry points” to centralize external information requirements, but these mechanisms require funding of public (or quasi-public) entities. There is no fixed answer to these questions. They are rather subject to negotiation and deliberation as part of the dynamic process institutionalized in a mutual recognition arrangement.

Mutual recognition regimes can also require that all actors involved in the process provide *reasoned decisions*. In particular, parties can be required to justify why they refuse to grant recognition, or refuse to continue to grant recognition to countries or importers that had benefited from de facto recognition until then (see, for example, the *US shrimp-turtle* case discussed above). Reasoned justification must be given on several grounds, including in response to the following questions: What is the scope of the recognition accorded? Why are some parties beneficiaries and others not? What are the conditions attached to such recognition? The requirement of reasoned explanation is essential because parties must explain to their own and foreign producers and consumers not only how the system will operate, but why the legal system governing their interaction will diverge from the traditional territorial paradigm. Broadly speaking, the decision as to whether some observed regulatory or legal differences are legitimate or not cannot be confined to the technical domain of expert decisions.

Next, accountability mechanisms include the *review of these decisions* by judicial processes at the national or transnational levels. This component of accountability mechanisms typically entails the protection of *rights*, whether those rights be granted to private actors or to states. While global governance regimes, such as the WTO, remain formally intergovernmental in nature so that only member states have the right to bring legal claims before WTO panels, these states respond to demands from private actors, often working closely with them through the formation of public-private networks. As a result, under mutual recognition regimes, private actors can have both direct rights before foreign courts and administrative bodies and indirect rights before supranational ones.

In mutual recognition cases, the entitlement to judicial review involves, first of all, a jurisdictional decision over the applicable law and the conditions of its application. The MRA itself can specify the applicable law and the court or administrative body that would hear a claim. In practice, international or supranational judicial bodies often determine the conditions pursuant to which a host state can apply host state law or must effectively defer to home state determinations. Supranational judiciaries have played this role within the EU system, as in the *Cassis de Dijon* decision and the case law that followed including *Keck*, and within the global system, as in the *US shrimp-turtle*, *EC-asbestos*, and SPS and TBT decisions of the WTO Appellate Body (Howse and Nicolaidis, Shaffer). Alternatively, national courts can develop convergent national norms by engaging with and citing each other’s judicial opinions.³² They can also develop their own (non-national) cosmopolitan common law norms.

In this context, just as under domestic law, mutual recognition regimes can set *standards for judicial review* of national decisions, examining whether recognition (or its refusal) is legitimate in a given case. The choice of review standards include those of *proportionality*, *means-ends rationality*, *least restrictive means*, and *cost-benefit balancing*. From a normative perspective, the question arises as to whether the state’s action is disproportionate, or whether the standard of review applied by the transnational arrangement itself is disproportionate. That is, is it appropriate to demand that host state legislators forgo their right under traditional territorial principles to regulate a transaction occurring within their borders, and if so, within what context (the substantive and geographical scope) and within what limits (the conditions)? The less stringent the proportionality required of state decision-making, the more deference (or subsidiarity) provided to national and

³² See Slaughter, op cit; and Paul Bermann,

local political processes. Conversely, the more stringent the standard of proportionality, the more constrained the state's choices over the means to achieve its social goals, and thus the more intrusive on state sovereignty. Hence for instance, requiring the adoption of a *least restrictive means* –which might mean recognition along with labelling obligation for instance- consists in imposing one policy approach over others (non discriminatory of course) approaches that might have been preferred by a majority constituency in the state in question. In short, the application of a single principle, such as that of proportionality, has radically different effects and meanings that vary as a function of the relative importance one gives to internal versus external accountability goals. Once more, we are taken back to the central issue of accountability to whom.

Principles and norms typically call for a definition of the context in which they apply, and therefore (implicitly) *exceptions* where they might not. These differences may be substantive or geographic. Substantively, MRAs are often sectoral in nature, and not cross-cutting. Individually, these MRAs will vary in scope of application as a function of the sensibility of a sector or a sub-part of a sector. For example, mutual recognition of standards and conformity assessment procedures for medical devices is more sensitive than that for pasta, just as that for surgical instruments is more sensitive than that for band-aids. Thus, the 1997 US-EU MRA for medical devices only applied to less stringently regulated medical devices, subject to possible expansion based on a Apilot program.

In addition, parties include exceptions where recognition could threaten national security, financial stability, or social peace (“*ordre public*”).³³ Thus for instance, the “Bolkenstein directive” does not apply to the social conditions under which “seconded workers” are employed by the home states when working through physical presence in the host state. In this case, the law or conventions applicable in the later also apply – although the exceptions to the exception contained in the directive have themselves raised political haveoc. The question that is raised is whether or to what extent social peace is threatened by the confrontation of different social contracts in the same physical space. Here, one would argue, the question that should be asked is when negative externalities are potentially so destructive as to justify maintaining host country standards.

The same criteria of externalities applies with mutual recognition in the field of finance, when the import of financially unsound products may put at risk the home country financial system as a whole. Such concerns over financial stability have led to creating the BIS capital adequacy standards rather than simply allowing a bank's single passport to determine its financial soundness. Even more controversially, national security concerns have become particularly pervasive in a post-September 11 world, infiltrating regulatory domains where they were once less at issue in light of the risk of terrorist attacks on food chains, transport, communication, and energy infrastructures, or in ways yet to be conceived. As Keohane writes, “Attempts to increase accountability in world politics must take account of the airplane assassins of 9/11, their confederates, and their supporters. Political theory will not be credible if it demands that good people enter into what is in effect a suicide pact.”³⁴ And indeed, it is not hard to explain why we have witnessed the denial of pre-existing mutual recognition arrangements in the field of transport. Before the September 11 tragedy, countries largely engaged in *de facto* in the mutual recognition of their regulations for the packing of containers; or for that matter airline passengers in the pre-September 11 world largely travelled under the blessing of their state of departure, usually their home states; countries largely delegated to each other the role of gathering data, if any, on passengers boarding international flights. Post-September 11, however, the United States no longer recognized the adequacy of foreign authorities either to pack either containers or airplanes safely.

National security concerns lead us to the geographically-bounded nature of MRAs. In the post-September 11 world, one can see more clearly how mutual recognition agreements (and global and transnational governance mechanisms generally) are applied differentially between geographic zones. US neoconservatives, if such regimes were on their radar screen, would tend to concentrate on areas where global governance does not work, *a la* Kagan. There is little doubt that they would therefore discount mutual recognition even more. Global governance advocates, on the other hand, would tend to concentrate on where it already constitutes daily practice. Where these analysts may concur is that transnational governance mechanisms are not yet universal or universally applied, and thus do not yet constitute a single space. In other words, one could draw two maps of the world from the neoconservative and global governance perspectives. Neoconservatives tend to see the world as predominantly Hobbesian, dotted by Kantian islands of transnational governance. Global governance advocates tend to see the world as predominantly (or at least potentially predominantly) Kantian, interrupted by

³³ Mutual recognition agreements may simply use a catch-all phrase to capture these concerns, such as an exception for protecting the “public interest” or the “national interest.”

³⁴ Keohane, *Global Governance and Democratic Accountability*, *supra* note..., at 133.

Hobbesian islands of conflict. In any case, the world of mutual recognition is itself bounded and contains defined spaces (and, in some cases, potentially large spaces) of exceptions that will vary in time.

The concept of exceptions to mutual recognition (and global governance more generally) again highlights the issue of the boundaries between the application of transnational mechanisms and their exceptions. That is, when should mutual recognition apply and when should it not? Related to this question is another: to whom should domestic regulators be accountable and to what extent? These linked questions both raise the fundamental issue of boundaries in transnational governance where regulators, who traditionally were accountable to their constituents alone pursuant to territorial principles of sovereignty, now engage in arrangements pursuant to which they are to be accountable to non-constituents. What should these borders be?

B. The democracy dilemma: mutual recognition in the context of governance beyond the state. Beyond various levels and mechanisms for accountability, however, the broader question of democracy arises because mutual recognition arrangements highlight the tensions between the accountability of regulators to a territorially-defined citizenry, on the one hand, and their accountability to foreign regulators and constituents pursuant to agreements that can involve the application of non-territorially defined and enforced laws, on the other. Under mutual recognition regimes regulators are asked to be accountable to those outside the polity itself, including where interests may clash. We are again returned to the question—national regulators should be accountable to whom?

In the mutual recognition context, democracy works primarily at the national level through creating constraints on national administrators. Each state regulatory authority must be subject to its own democratic checks. At this level, the procedural requirements of transparency, reasoned decisions, and judicial review operate not only to make national decision-making more accountable to outsiders. These requirements also serve to reassure domestic citizens that the regime protects them from processes that inevitably occur outside their borders in an economically integrated world order. They thus serve to ensure that national regulators are held internally accountable to their own publics pursuant to traditional democratic principles.

In large part, the aim of transparency, reasoning, and review mechanisms is to empower publics and public advocates *wherever they are located* to oversee regulators. The institutionalization and legalization of mutual recognition can help to assure citizens of polity A that regulators of polity B act transparently toward their own citizens who, in turn, can press polity B's regulators to protect their own safety. In a world in which transnational economic exchange occurs daily, and in which under-resourced regulators implicitly engage in *de facto* recognition of foreign regulatory standards and procedures on account of this exchange, mutual empowerment of publics through these accountability mechanisms is essential. The Treaty Establishing the European Union therefore requires its members to be democracies, facilitating the legitimate application of the mutual recognition principle.

Mutual recognition regimes thus retain the territorial element of national democratic accountability, which is part of their beauty in comparison with centralized and global market alternatives. Where national polities hold specific regulatory preferences, they will tailor and constrain the substantive scope, procedural conditions, and geographic boundaries of a mutual recognition regime. Former EU Trade Commissioner Pascal Lamy recently referred to these national preferences as "*préférences collectives*," in contradistinction to individual preferences applied in, and facilitated by, autonomous global market processes.³⁵ I agree with Lamy except that I prefer the term "*choix collectives*" because of the contingent, process-based nature implicit in the term "*choix*." "Preferences" are inherent can presumably be inferred (as economists like to do) whereas "*choix*" must be explicitly made and defended. Choices are not fixed in time, but are determined within dynamic domestic political processes, and they too should be subject to some standard of review to assure their legitimacy.

There are reasons to be quite sceptical of the functioning of democracy through global institutions, which is why I tend to prefer the decentralized pluralist model represented by the mutual recognition approach. It makes more sense to expand accountability beyond the polity not through creating elected legislative bodies at the global level, but rather through expanding other accountability mechanisms, as those used traditionally in national administrative law noted above. We must continue to stress of course the importance of the dynamic, participatory, process-based approach of managed mutual recognition regimes that can facilitate deliberative practices. This does not mean that we should re-theorize democracy in deliberative terms in order to legitimize and justify these transnational regimes.

³⁵ ref

Normatively, we can thus view mutual recognition regimes, and transnational governance generally, as operating through chains of accountability. The democratic component operates primarily at the national level. Other (largely procedural) accountability mechanisms are used to ensure the accountability of foreign regulators to each other, each of whom, in turn, is responsible to its own national constituency, a process that is facilitated by these very accountability mechanisms. From a principal-agent perspective, in mutual recognition arrangements, the ultimate principals remain the public within a national polity, their respective agents being their national regulators who, in turn, engage with foreign regulatory counterparts. Although supranational actors and institutions play a role, and although publics can organize transnationally, the starting (and most important) point of the accountability chain remains citizens at the national level.

Finally, at the intersection between markets and politics lies a key accountability mechanism: reputational accountability. In the end, home country government seek to make their products, services or firm more attractive to foreign markets. This in turn relies on the reputation of the soundness of their regulatory control. Obviously the trade-off between regulatory quality and price competitiveness is made differently by different groups of consumers or clients and it will be hard for a home country to assess this trade-off. But such calculation is bound to come into effect.

Overall, the various accountability mechanisms can be characterized in terms of operating both ex ante and ex post within the overall mutual recognition process in implicit and explicit manners. The ex ante and ex post controls facilitate the accountability of decision-makers both to their own publics and to an enlarged public through regulators' interaction with each other. Certain procedural mechanisms, such as transparency obligations, provide implicit accountability safeguards simply by enabling constituents to react to developments based on new information. Other mechanisms, such as ex ante notice and comment procedures and ex post rights to judicial review, provide for more explicit safeguards. Together, they operate as part of an accountability chain, first of regulatory authorities to their domestic publics, and then of regulatory authorities to each other, this time overseen by both domestic and transnationally-organized publics, as well as (potentially) through supranational institutions. Ultimately, it is the dynamic aspect of managed mutual recognition that must ensure that regulators remain responsive both to each other and to their own publics.

IV. What kind of Constitution for Europe? the political import of mutual recognition

[this section is incomplete—main reference: “We the Peoples of Europe” Foreign Affairs, Nov-Dec 2004]

Annex 1:

Graph 1:

**Trade, regulation and territoriality:
The traditional model**

		Rules of:	
		HOST (Importing country)	HOME (Exporting country)
HOST (Importing country) enforced in:	HOST (Importing country)	<i>Sovereign control</i>	
	HOME (Exporting country)		<i>Sovereign control</i>
		<i>Product vs process:</i> 1. Laws and regulations affecting the characteristics of goods and services sold in the importing country <i>e.g. food safety standards</i> 2. Laws, policies and regulations affecting modes of production in exporting country <i>e.g. labor rights</i>	

Graph 2:

**Towards “legitimate differences”:
The two way erosion of economic sovereignty**

		Rules of:	
		HOST (Importing country)	HOME (Exporting country)
HOST (Importing country) enforced in:	HOST (Importing country)		→ - Extra-territorial control
	HOME (Exporting country)	← Extra-territorial control	
		Minimal harmonization?	
		Minimal harmonization?	
		1. Recognition of home rules as a means to lower technical barriers to trade (ex: GATT standards codes; Services and product standards in EU) 2. Extraterritorial application of host country rules as a condition of import (ex: SII; NAFTA side deals; WTO trade/environment; WTO social clause and labor standards)	

Table 1. Explanatory Factors for standardization and mutual recognition across three contexts

<i>Contexts:</i>	<i>European Cooperation</i> (re: standards & conformity assessment)	<i>Transatlantic Cooperation</i> (re: conformity assessment)	<i>International Cooperation</i> (re: standards & conformity assessment)
<i>Factors:</i> <i>Country-specific capacity to deliver</i> (private regulatory accountability & public regulatory autonomy)	Private bodies made accountable through notification.	Very asymmetric. High in EU. Low in the US given lack of accountability and high autonomy.	Widespread dissemination of standards.
<i>Cross-national regulatory compatibility</i>	Generally high by the 1980s for conformity assessment procedures.	Lower than within the EU but not insurmountable.	Widespread dissemination of standards.
<i>Transnational institutional foundations</i>	Pre-existing mutual monitoring techniques. Formation of EOTC. Sanctions for non-compliance. Enforcement by Commission and European Court of Justice.	Some pre-existing sectoral cooperation. Incentives to build mutual monitoring capacity as “confidence building measures.” Relatively weak dispute settlement procedures.	High transnational building monitoring network for compliance, with no comparable international standards. SPS and TBT agreements as incentives to use them.

Source: Nicolaidis and Egan, 2001