Managed Mutual Recognition Regimes: Governance Without Global Government

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INTRODUCTION

Scholars of globalization and international and transnational governance are putting forth a growing number of conceptual frameworks to examine and address issues of law and global governance. These frameworks include constitutional, contract, and (now) global administrative law constructs. As the framing paper in this symposium issue defines it, “global administrative law” comprises “the mechanisms, principles, practices and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision and legality, and by

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providing effective review of the rules and decisions they make.”¹ This article discusses managed mutual recognition regimes within a global administrative law framework, although, as will be seen, it often uses the term “transnational administrative law” (or “transnational governance”) because of the horizontal, trans-governmental character of mutual recognition regimes. This article argues that transnational mutual recognition regimes are not simply one option among many available in the palette of global administrative law, but rather a core element of any global governance regime that eschews global government. The diffusion of mutual recognition regimes partakes in the shaping of a system of global subsidiarity that rejects (or at least does not unquestionably accept) the temptations of centralization and hierarchical constitutionalization of global economic relations.²

As a practical matter, the global administrative law construct is forced to deal with the limitations of any “global” governance regime in relation to national analogues. On the one hand, there is no “government” at the global level, whether in the form of a global legislature, global executive, or global court with mandatory jurisdiction and enforcement powers. On the other hand, the world is globalizing in terms of the intensity and extensiveness of exchange, governance mechanisms are emerging to deal with those exchanges, 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

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¹ Benedict Kingsbury et.al, *The Emergence of Global Administrative Law*, this symposium issue.
operate, often in the hope of influencing decision-makers in the way they might steer global and transnational processes.

This article examines the model of mutual recognition within the concept of an emerging, inchoate, and fragmented system (if one may be so bold to use the term “system”) of global and transnational administrative law. Mutual recognition forms an essential part of any global administrative law regime by creating conditions under which participating parties commit to the principle that if a product or a service can be sold lawfully in one jurisdiction, it can be sold lawfully in any other participating jurisdiction. In order to give effect to this general principle, governments adopt mutual recognition as a contractual norm whereby they agree to the effective transfer of regulatory authority—or jurisdiction—from the host country where a transaction takes place, to the home country from which a product, a person, a service, or a firm originates, subject to agreed (and managed) conditions. Why such 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 for analysis.

In practice, mutual recognition, in all its incarnations, is conditional. 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 their application within their borders is

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3 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
“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 forego the application of their own rules to products, persons, firms and services, provided that the agreed 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. To answer the question, governments and social actors must assess what constitutes “legitimate” or “acceptable” differences between them, that is, differences that should not preclude the application of home country rules on host country territory or in relation to host country citizens. Such assessment can be made unilaterally or through collaboration. In fact, a great deal of recognition occurs as a result of unilateral regulatory reforms that are oriented to be “mutual recognition friendly”. These unilateral developments may or may not be supplemented by negotiations over recognition where “acceptable differences” become the object of negotiation. In either case, the globalization of economic management always results in the direct confrontation of differences of all sorts—legal, social, political, fiscal—in areas where these differences had previously been confronted at arms-length.

counterpart’s regulatory system. The “mutuality” component indicates that the reallocation of authority is reciprocal and simultaneous.

This prospect can be liberating for some but feared by others, as exemplified by the current debate around the proposed “Bolkenstein directive” in the European Union (EU) regarding the liberalization of trade in services. The proposed 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 was a main objective of the 1986 White Paper published under Jacques Delors’ leadership, but it has failed to be implemented in many services sectors. Many actors across the political spectrum have opposed it precisely because home country rule is regarded as a potential menace to host state social and economic order. The recent enlargement of the EU to include ten new countries, resulting in greater economic and cultural gaps than ever before, has exacerbated these fears. At the same time, enlargement has expanded the coverage of EU “regional administrative law” and made it a better laboratory than ever as to what may eventually happen in the realm of global administrative law.

This article uses alternatively the terms “mutual recognition regimes” and “mutual recognition agreements” (or MRAs). The latter term 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 know for its development and implementation within the EU, the term “mutual recognition agreements” in reference to inter-governmental agreements is not actually used in the internal EU context for government-to-government agreements. Rather, the principle of “mutual recognition” is embedded in

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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.

This article is in seven parts. Following this introduction, Part II situates the norm of mutual recognition in relation to alternative approaches to manage globalization by assessing its relationship with the principles of extraterritoriality, national treatment, and harmonization. Part III examines the structure of mutual recognition regimes within a (potentially) emerging order of global administrative law, including the subject matters and the principle actors involved. Part IV assesses the factors that explain the rise and operation of mutual recognition regimes and their constraints. Part V addresses mutual recognition regimes from the normative perspectives examined in the framing paper—those of administrative accountability, private rights, and democratic legitimacy—focusing particularly on accountability mechanisms and the democracy dilemma. Part VI examines primary concerns regarding MRAs in terms of power asymmetries, concerns that apply to all global and transnational governance mechanisms so that evaluations should be comparative in practice. Part VII concludes by showing how MRAs provide a lens for assessing the overall global administrative law project.
Mutual recognition regimes are at the core of the sovereignty/globalization nexus. As a result, a better understanding of the norm of mutual recognition provides a lens through which to view the landscape of global administrative law as a whole. This lens, however, forces questions regarding any sharp distinction between “domestic” and “international” bodies of law and levels of enforcement. Mutual recognition consists instead 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.  

As a result, mutual recognition regimes are key to any global administrative law regime. Rather than conceptualizing governance in terms of a national versus global dichotomy, mutual recognition represents the operalization 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 so?

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A. Cooperative vs Unilateral Extraterritoriality: Mutual Recognition as a Cosmopolitan Form of Extraterritorial Law

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. But when one examines states’ recognition of what each other do, rather than of their respective existence and boundaries, the islands of extraterritoriality 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. While mutual recognition is an expression of the broader category of “extraterritoriality,” it is not extraterritoriality of a “unilateralist” (or “imperial”) 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, to the sanctions applied in response to European assistance for the Soviet oil pipeline, to the application of U.S. securities and antitrust law to conduct abroad, as in the Hartford Fire

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7 Questions regarding mutual recognition 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. Negotiations over such mutual recognition are often protracted. Witness the 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.


9 For a more complete description and analysis of these sanctions, see Harold G. Maier, Interest Balancing and Extraterritorial Jurisdiction, 31 AM. J. COMP. L. 579, 580 n.3 (1983).
Insurance case.\textsuperscript{10} The United States has typically applied its law without engaging in any collaboration or coordination whatsoever. The Hartford Fire case, for example, was brought by U.S. private commercial parties before U.S. 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 Act, where the primary target has been the Cuban government, not European and Canadian companies. The United States acts unilaterally not only because its national political and judicial processes determine that such action is necessary to protect its overall security and constituent interests, but because it holds the power to do so.

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 individuals are no longer prisoners of their 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 home laws and regulations, citizens 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). The 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 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 extraterritorialize their and their counterpart’s laws are the threads that make the fabric of global administrative law. But are these always consciously-made decisions?

B. Extending vs. Denying Recognition: Mutual Recognition and National Treatment

Mutual recognition is not always the result of a decision, the end product of a negotiation between states and other concerned actors. Mutual recognition by default and
its extraterritorial effects are everywhere in today’s partially globalized world. The question faced by a decision-maker, if there is a decision to make, is not only whether mutual recognition should be extended where it doesn’t hold, but also whether mutual recognition should be denied where it has reigned supreme.

Mutual recognition operates frequently outside of formal agreements between countries. Trade has always been synonymous with the movement of goods and services produced under home rules of production that were recognized implicitly. For example, there was no need for a mutual recognition agreement to accept the fact that Mexican imports into the U.S. were produced under less stringent labour laws or that Korean computer chips were produced under less demanding 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 administrative law regime.

Today, however, there are two movements in opposite directions in respect of recognition, both implicitly reflecting, in contrasting ways, the extraterritorial application of laws and regulations. In some 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 administrative 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 of Table 1*.

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), 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 have been negotiated for distinct products, services and sectors. However, in other areas, mutual recognition of product standards 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. Here the court held that Germany must recognize French standards for the marketing of the aperitif *cassis* (and thus could not ban the French imports on consumer protection grounds) because Germany could satisfy its objectives
through the less trade-restrictive alternative of labelling.\footnote{The European Court of Justice, in its \textit{Cassis de Dijon} ruling of 1979, broadly interpreted article 28 (then article 30) of the Treaty Establishing the EC to cover non-discriminatory regulatory barriers to trade. This case is often the reference used for defining mutual recognition. \textit{See} Case 120/78, Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein, [1979] E.C.R. 649, para. 14, (1979) 3 C.M.L.R. 494, 510 (1979).} 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 \textit{EC-meat hormones} case, the WTO Appellate Body found that WTO rules required the EU to accept U.S. hormone-treated beef even though the production of such beef was banned within the EU.\footnote{Report of the Appellate Body, \textit{EC Measures Concerning Meat and Meat Products (Hormones)}, WT/DS26/AB/R(Jan. 16, 1998), \textit{available at} http://docsonline.wto.org/ (last visited Apr. 12, 2005)(on file with Law and Contemp. Probs.).} Similarly, in the \textit{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 banning such labelling was neutral on its face.\footnote{Report of the Appellate Body, \textit{European Communities–Trade Description of Sardines}, WT/DS231/AB/R (Sept. 26, 2002), \textit{available at} http://docsonline.wto.org/. (last visited Apr. 12, 2005)(on file with Law and Contemp. Probs.).} 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 on their face.
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 *U.S. 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 were caught through a technique that killed a large number of dolphins, a technique that the United States 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. The presumption of mutual recognition was denied, however, in the *U.S. shrimp-turtle* case where the WTO Appellate Body ultimately found that the United States 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 examined below.

The situation becomes even more complex in the context of the movement of persons, as in mode IV of the WTO General Agreement on Trade in Services (GATS)

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15 For example, the GATT makes express exceptions for products produced with prison labour (General Agreement on Tariffs and Trade, Oct. 30, 1947, 81 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [herinafter GATT],Article XX(e)), and products produced in violation of domestic intellectual property rights (GATT Article XX(d)).

concerning the movement of persons from a home state to provide services in a host state.\textsuperscript{17} Such services raise the issue as to what law applies to regulate a factor of production (labour) that involves a home state worker who has been temporarily transferred to a host country to provide a service. For example, what labor law applies when construction companies enter into turnkey contracts where they supply the entire workforce, as from China? To what extent does one differentiate if the worker stays one week or one year? Where does one draw the line? Such a decision involves issues of recognition, confidence, fundamental rights, and exceptions to the recognition of foreign law on grounds of social peace.

In sum, mutual recognition principles implicitly apply to both traded goods and underlying production processes. In this way, they engage traditional “trade” issues (e.g. technical standards), so-called “trade and . . .” issues (e.g., differential labour and environmental standards linked to the production process), and new issues arising in relation to the transnational provision of services. 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 and social policy concerns through applying mutual recognition and national treatment principles to products and production processes thus lies along a continuum.

\textsuperscript{17} General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, General Agreement on Trade in Services, 33 I.L.M. 46 (1994). As stated in a note by the WTO secretariat, ”Mode 4” consists of services involving “the admission of foreign nationals to another country to provide services there. Mode 4 may also be found alone, with no permanent commercial presence, and the visiting persons involved may be employees of a foreign service supplier, or may be providing services as independent individuals.” See WTO Secretariat Trade in Services Division, An
C. The Crucial Distinction Between Underlying Standards and “Conformity Assessment” Procedures: From “Traditional” to “Enhanced” MRAs?

Analysts usually fail to give adequate prominence to a third, equally important distinction—that between substantive regulatory standards and “conformity assessment” systems. Conformity assessment systems address the conformity of a product with the applicable substantive standard. In addition to enforcing substantive regulations, governments require that exporters comply with various certification procedures—e.g. certification for goods, licensing for professionals, controls for manufacturing processes, and financial supervision for banks. Under conformity assessment procedures, public regulatory authorities, or (increasingly) quasi-public or private entities to which authority has been delegated, assess and enforce conformity with underlying substantive standards. Thus, regardless of the standards applied to a product in the host state, some entity (whether a public agency, a public-private hybrid, a private entity, or the company itself under a self-regulatory regime) is responsible for assessing and (possibly) certifying the conformity of the product with such standards. This distinction between standards and conformity assessment lies at the core of MRAs.18

When it comes to underlying standards, standardization and recognition can be used alternatively, or, as is often the case, combined. Mutual recognition regimes may, for example, be linked to harmonized standards.19 Mutual recognition regimes may more

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18 The TBT Agreement, for example, recognizes this key distinction. Articles 2-4 of the TBT Agreement address “technical regulations and standards,” while articles 5-9 cover “conformity with technical regulations and standards” (i.e. conformity assessment procedures). Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods [hereinafter TBT], Hein’s No. KAV 3778, at cxliii.
likely 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. Sustained transnational engagement among public and private actors spurred by mutual recognition agreements can also facilitate an ongoing adaptation and possible convergence of regulatory procedures and standards through increased mutual familiarity ex-post, rather than harmonization ex-ante.

Although standardization of assessment procedures may sometimes be a prerequisite, it is not in itself sufficient. Some form of recognition of foreign conformity assessment procedures is the only mechanism for liberalization. For this reason, MRAs initially targeted conformity assessment systems rather than underlying standards.


20 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. The international standard-setting bodies relevant to the sectors covered by the transatlantic mutual recognition agreements include: the International Standards Organization (ISO) (for a broad range of standards); the International Electrotechnical Commission (IEC) (for testing and certification standards); Codex Alimentarius (for food-related standards); the International Conference on Harmonization (for pharmaceutical standards); the Global Harmonization Task Force (for medical device standards); and the International Maritime Organization (for marine safety standards).

Codex Alimentarius, a joint undertaking of the World Health Organization and the Food and Agricultural Organization, is relevant to the U.S.-EU Veterinary Equivalence Agreement. This latter agreement is not yet operational and is not covered in this Article. The International Conference on Harmonization is a program that “harmonizes requirements and guidelines for testing drugs and biologies.” Its members are the Commission, the European Medicines Evaluation Agency, EU member state regulators, Japan’s health ministry and U.S. European and Japanese pharmaceutical trade industry associations. See Linda Horton, Mutual Recognition Agreements and Harmonization, 29 SETON HALL L. REV. 692, 717-18 (1998). The Global Harmonization Task Force consists of regulators from the United States, EC, Canada, Japan and Australia, although the Task Force now admits observers from many other countries.

21 This being said, one could eventually envisage the creation of supranational agencies responsible for conformity assessment or for overseeing and monitoring its delegation.
In negotiating MRAs, states face a fundamental initial choice regarding which standards to apply—those of the home or of the host state. They can engage upfront in an evaluation process which determines whether their different regulatory systems are comparable and their standards are functionally equivalent. If so, each host state could effectively recognize the other (home) state’s standards as equivalent. Home state standards would thus apply to both products consumed within it and products exported to the host state. Alternatively, states could agree that each regulatory system will recognize only its own standards, but that certification, monitoring, and enforcement of such (host state) standards will take place primarily in the exporting (home) state. In this case, conformity assessment would be regulated by the home state, but the home state conformity assessment body would assess or certify a product’s conformity with host state standards.

From a political economy perspective, conformity assessment without the recognition of home and host state standards as equivalent can be costly. Assessors and certifiers must be trained to assess separate standards for each jurisdiction instead of a single one, complicating their mission. Enterprises must incur the cost of redundant testing under home and host state standards for these separate markets—even if MRAs authorize the very same authorities to do the testing. In other words, the better division of labor that was sought through mutual recognition, saving host enforcers from redundant controls, may have only been a mirage since the work of “adapting to diversity” has now been thrust on the home state regulator, who, in turn, externalizes this cost to firms. Moreover, enterprises may also have to assume the cost of having to create separate production lines so that products conform to these distinct standards.
As a result of its experience with conformity assessment under a number of MRAs, and, in particular, the 1997 U.S.-EU MRA, the European Commission published a paper in August 2004 that assessed lessons it had drawn. The Commission made a distinction between “traditional” MRAs, which focus on the mutual recognition of conformity assessment certifications without aligning relevant standards, and “enhanced” agreements which are based on standards deemed equivalent or, even better, on common standards. The Commission concluded that the “traditional” form of MRA has proven unattainable. These conclusions may, of course, change over time based on new experience. They do, however, need to be taken into account when evaluating cost constraints on the “supply” of mutual recognition regimes.

The crucial point is not that harmonization or convergence are inevitable or desirable. Rather, the point is that mutual recognition is relevant to two categories of governance: the content or substance of rules and the application or enforcement of rules. While for the first category, options for transnational administrative law range from full harmonization to full recognition, there is no such choice in the latter category. Short of the unlikely move of setting up a world enforcement agency, the only alternative to the “when in Rome” principle for a functioning transnationally integrated economy is mutual recognition.

To summarize, mutual recognition constitutes 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...
transnational economic relations on regulatory matters. There is no question, however, as to which approach is more or less demanding. 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 must be examined with fine lenses. *Table 2* summarizes the similarities and differences between national treatment, harmonization, and mutual recognition approaches, on the one hand, and between the application of standardization and conformity assessment approaches, on the other.

* [Place Table 2 around here]

III

**Mutual Recognition Regimes: Structure, Subject Matter, Actors**

A. Structural Analysis: Horizontal and Vertical Components of Transnational Mutual Recognition.

Traditional conceptions of global governance tend to simplify governance into categories of local, state, regional, and global institutions along a vertical axis of ‘multi-level’ governance. They thus tend to de-emphasize trans-national mechanisms of horizontally allocated authority among and between states. Structurally, mutual recognition regimes involve both horizontal and vertical relations among global, transnational, and national institutions, but they concentrate on the horizontal allocation
of authority, thus avoiding the pitfalls of ‘global’ governance, and, in particular, the lack of a democratically legitimate global center with anything resembling a functioning legislature. Mutual recognition regimes, however, can also set in place autonomous mechanisms at the supranational level overseeing national decision-making, thereby implicating vertical relations among global, transnational, and national legal regimes. Supranational institutions can set the standards and procedures for recognition, adjudicate the implementation of the regime, and provide global certification of local assessment bodies operating under the regime. Nonetheless, by coordinating state level administrative action and creating constraints on home and host states, mutual recognition regimes can primarily be viewed as a *legalized form of horizontal cooperation*. They institutionalize and deepen forms of recognition that already happen implicitly when products are traded.

Mutual recognition regimes thus involve each of the five main types of global administrative law typologized in the framing paper by Kingsbury et al, even though the framing paper explicitly identifies MRAs in terms of the second and (tentatively) third types only. They do so in the following ways.

1. *International Administration*. Mutual recognition regimes often provide for international administration, political oversight, or legal review of the arrangement. In the European Union, the mutual recognition principle is embedded in numerous EU directives and regulations in accordance with the Treaty Establishing the European Community; the European Commission oversees its implementation and the European Court of Justice adjudicates and enforces its application. Chapter 9 of NAFTA likewise
includes provisions incorporating mutual recognition principles, and specifically provides for recognition of the parties’ conformity assessment bodies.\textsuperscript{23} At the international level, WTO members have signed agreements calling for bilateral and plurilateral negotiation of MRAs.\textsuperscript{24} The WTO also sets rules that constrain the adoption of mutual recognition agreements, and, in particular, those that discriminate against other WTO members (for example, Article I of the General Agreement on Tariffs and Trade\textsuperscript{25}, as well as the most-favoured-nation provisions in other WTO agreements). Any such discrimination is subject to challenge before the WTO Dispute Settlement Body. Similarly, a number of WTO agreements and rules have been interpreted in a manner that advances mutual recognition principles, as in the \textit{EC-meat hormones} and \textit{EC-sardines} decisions noted above\textsuperscript{26}.

2. Transnational Network Administration. Transnational network administration is the basis for administering mutual recognition regimes. Host states must accept products and services from home states, but subject to negotiated administrative

\textsuperscript{23} NAFTA, article 908, provides: “each Party shall accredit, approve, license or otherwise recognize conformity assessment bodies in the territory of another Party on terms no less favorable than those accorded to conformity assessment bodies in its territory.” North American Free Trade Agreement, 32 I.L.M. 296 (1993), at 388. [hereinafter, NAFTA]. Article 904.4 addresses the impact of national standards of the host country on products from the home country. It provides: “No Party may prepare, adopt, maintain or apply any standards-related measure with a view to or with the effect of creating an unnecessary obstacle to trade between the Parties.” \textit{Id.} at 387. Since most regulations affect trade, the key issue becomes whether the national standard is “necessary” for the pursuit of an objective that is not adequately ensured by the home states’ regulatory system. Such legal provisions can facilitate a managed form of mutual recognition.

\textsuperscript{24} See, \textit{e.g.}, Article 6 of the Agreement on Technical Barriers to Trade and Article 7 of the General Agreement on Trade in Services). Article 7 of GATS encourages signatories to adopt measures, by way of bilateral agreements or autonomously, “to recognize the education or experience obtained, requirements met, or licenses or certification obtained in a particular country.” See Kalypso Nicolaides & Joel P. Trachtman, \textit{From Policed Regulation to Managed Recognition: Mapping the Boundary in GATS} in \textit{GATS 2000: NEW DIRECTIONS IN SERVICES TRADE LIBERALIZATION}, (Pierre Sauve & Robert M. Stern, eds., 2000) citing GATS Annex 1B.

\textsuperscript{25} See GATT, \textit{Supra} note 15.
procedures and ongoing monitoring mechanisms involving networks of home and host state regulatory officials. Through these mechanisms, host states can be reassured that the regulations prevailing in the home states are not downgraded to a level incompatible with the initial bargain. Mechanisms for redress in cases where consumers have been harmed are also set in place. In short, transnational administration serves primarily to alleviate fears of a “race to the bottom” or “legal dumping” under MRAs.

3. **Distributive National Administration.** Mutual recognition regimes are sustained through a form of distributed administration in which each state (or non-state) party is responsible for transactions occurring, in part, outside of its territory and must therefore take into account the impact of its rules and decisions on constituents in the other’s jurisdiction. Home state officials are to take account of the protection of consumers in the host state. Host state officials are to take account of the impact of their decisions on producers and service providers from the home state. Home and host state officials are spurred to cooperate in order to ensure that this distribution of administrative functions protects the constituents to whom they are most directly responsible.

4. **Hybrid Intergovernmental-private Administration.** Hybrid public-private administration is widespread in mutual recognition regimes, which can involve the outsourcing of monitoring, certification, and assessment functions. For example, in the U.S.-EU “safe harbour” negotiations over the recognition of privacy standards, the EU member states’ data privacy authorities met with BBB OnLine, a private U.S. entity, to see how its certification works within the U.S. context. When European authorities

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26 *See* notes 12 and 13, *supra*. 
became more comfortable with U.S. oversight mechanisms that involve private entities, backed by potential enforcement by the U.S. Federal Trade Commission, they agreed to the transatlantic Safe Harbor understanding.\textsuperscript{27} Even in formally trans-governmental regimes, the law-in-action of mutual recognition can involve intensive interaction of public-private networks. Private actors are often the primary demanders of the regime, as the telecommunications industry has been regarding the telecommunications MRAs existing today.\textsuperscript{28} Consumer groups and businesses that are unhappy with the operation of MRAs are likewise the primary providers of information to governments to challenge the regime’s implementation.

5. \textit{Private Administration.} Many mutual recognition regimes effectively involve forms of self-regulation. Private bodies themselves can either enter into mutual recognition regimes or be the main implementers of the regimes. For example, private groups may negotiate contracts for joint seal programs in other jurisdictions, such as that concluded in 2001 between BBB OnLine and a Japanese counterpart involving the


\textsuperscript{28} The telecommunications industry, for example, has sought MRAs for lucrative markets in Asia and Latin America, which U.S. and EC authorities respectively have signed through APEC and CITEL. APEC is the Asia Pacific Economic Cooperation promotes open trade and economic cooperation among APEC’s 21 member ‘economies’ around the Pacific Rim. See its web site at http://www.apec.org/ (last visited Jan. 11, 2005). CITEL is “an entity of the Organization of American States, is the main forum in the hemisphere in which the governments and the private sector meet to coordinate regional efforts to develop the Global Information Society according to the mandates of the General Assembly of the Organization and the mandates entrusted to it by Heads of State and Government at the Summits of the Americas.” See its web site at http://www.citel.oas.org/ (last visited Jan. 11, 2005). Telecommunications was also at the center of the 1997 U.S.-EU MRA.
certification of companies’ online privacy practices. In this way, on-line businesses can meet criteria in multiple jurisdictions without the need for drawn-out treaty negotiations.

B. Subject Areas for Mutual Recognition Regimes

Mutual recognition is a principle that may be applied to services as well as to products, and to professional services in particular. In the EU context, the principle has been applied to a vast number of sectors, from toys to telecoms, finance to architects, doctors to accountants. Similarly, internationally, the EU has announced that it “has negotiated or is in the process of negotiating [MR] agreements with about 38 third countries.” In 1997 it negotiated an MRA with the United States in six sectors including pharmaceuticals, medical devices, recreational craft, and telecommunications. It has proven impossible however to expand this approach to services where individual states in the United States wield most regulatory power. About half of the MRAs

29 The Japanese counterpart is named JIPDEC, a public-private body working with the Japanese Ministry of Trade and Industry. Telephone interview of Shaffer with Gary Laden, Director BBB OnLine Privacy Program (June 6, 2001). The seal designates that the web site is subject to the rules and monitoring of the third-party organization, in this case BBB OnLine in the United States.

30 See SEC, supra note 22.

31 The EU reports that it has concluded seven Mutual Recognition Agreements on conformity assessment between the European Community and third countries: on 1/12/98 with the United States (Agreement on mutual recognition between the European Community and the United States of America, 1999 O.J. (L 31) 3); on 1/11/98 with Canada (Agreement on mutual recognition between the European Community and Canada, 1998 O.J. (L 280) 3); on 1/1/99 with Australia (Agreement on mutual recognition in relation to conformity assessment, certificates and markings between the European Community and Australia, 1998 O.J. (L 229) 3); New Zealand (Agreement on mutual recognition in relation to conformity assessment between the European Community and New Zealand, 1998 O.J. (L 292) 62); on 1/1/02 with Japan (Agreement on mutual recognition between the European Community and Japan, 2002 O.J. (L 284) 3); on 1/5/00 with Israel in the Sector of Chemicals Good Laboratory Practices (GLP), (Agreement on mutual recognition of OECD principles of good laboratory practice (GLP) and compliance monitoring programmes between the European Community and the State of Israel, 1999 O.J. (L 263) 7); and 1/6/02 with Switzerland (Agreement between the European Community and the Swiss Confederation on mutual recognition in relation to conformity assessment, 2002 O.J. (L 114) 369). See Mutual Recognition Agreements, http://europa.eu.int/comm/enterprise/international/indexb1.htm#intro (last visited Jan. 11, 2005)(on file with Law and Contemp. Probs.). See also Shaffer, Reconciling Trade and Regulatory Goals, supra note 27, at 36.
notified to the WTO, in contrast, concern professional services, such as accountants, engineers, or architects.\(^\text{32}\)

Recognition-type arrangements are also applied in areas other than in trade. For example, recognition issues may arise in the handling of conflicts over which substantive law to apply under the jurisdictional principle of ‘objective territoriality,’ more commonly known as the ‘effects doctrine,’ as applied in particular in antitrust and securities law. The principle of “comity” operates as a counter to the extraterritorial application of national law in such cases. As defined by Black’s Law Dictionary, \textit{comity} concerns “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protections of its laws.”\(^\text{33}\) Under this principle, courts may decline to rule on a case in deference to another forum that has greater interests in, and links to, the dispute.\(^\text{34}\) Administrative agencies may also create “positive comity” arrangements, as did the United States and EU in the competition field in the 1990s. Such an arrangement “enables one side adversely affected by anticompetitive conduct carried out in the other’s territory to request the other party’s competition authority to take enforcement action.”\(^\text{35}\) In this way, host state administrative and judicial bodies may mutually defer to

\(^{32}\) According to the WTO’s website, as of February 24, 2005, WTO members had notified 47 MRAs (regarding goods) to the Committee on Technical Barriers to Trade and 48 MRAs (regarding services) to the Council for Trade in Services.


\(^{34}\) For an application, see for example Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 613 (9th Cir., 1976) (“there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.”).

application by their counterparts in another jurisdiction (the home state) of that state’s law and regulatory regime. Similarly, courts engage in mutual recognition when states agree to recognize and enforce judgments from each other’s jurisdictions, whether in a civil, commercial, or penal matter, as now codified in an EU regulation and a number of treaties. Judges have also created and participated in transnational networks of exchange with their foreign counterparts to facilitate mutual learning and cooperation when common and overlapping cases arise. This judicial exchange can facilitate recognition of each other’s judgments.

C. The Actors

States are typically the parties to MRAs, and state representatives typically play the leading roles in negotiating and implementing MRAs. Yet the negotiation and implementation of MRAs also highlight the disaggregated nature of the state in the modern era. The 1997 U.S.-EU MRA negotiations required the involvement of multiple state agencies since the negotiations comprised a framework agreement with


38 See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).
annexes covering six separate regulatory sectors. The Office of the United States Trade Representative and the Commission’s Trade Directorate-General (DG) led the negotiations of the MRA framework agreement.

Each of the annexes, however, was negotiated by the regulatory agency or agencies responsible for the sector concerned. On the European side, this process was simpler because of the centralization of the responsible agency officials within the Commission’s DG Enterprise and these officials’ long experience with coordinating the twin goals of regulatory protection and free trade within the single market. On the U.S. side, in contrast, separate independent federal agencies negotiated the annexes. The Federal Communications Commission (FCC) handled the telecommunications and electromagnetic compatibility annexes; the Occupational Safety and Health Administration (OSHA), a division of the Department of Labor, negotiated the electrical safety annex; the Food and Drug Administration (FDA) negotiated the annexes for medical devices and pharmaceutical good manufacturing practices; and the Coast Guard oversaw the recreational craft annex.

However, while some sectors were mostly governed by one agency (e.g. the FDA for pharmaceuticals), others were characterized by a plethora of accreditation and certification bodies. More often than not, as mentioned above, authority has been delegated in these areas not only to autonomous public agencies but to private certification bodies which may compete with one another. Precisely because of this fragmentation, the EU was concerned, when negotiating with the United States, about potential U.S. defections after signing the agreement. It therefore insisted that, even

though some of the relevant regulating bodies may be private, the ultimate commitments must be made by states. Because the United States lacked a coordinated system of accredited testing and certification laboratories, European officials were concerned about the ability of U.S. regulators to guarantee the competence and quality of U.S. conformity assessment bodies. In response, the U.S. National Institute of Standards and Technology, a division of the Department of Commerce, created a new U.S. program named the National Voluntary Conformity Assessment Program. Taking from the EU model, the U.S. program aims to coordinate and oversee U.S. conformity assessment bodies, and thereby provide greater confidence to regulatory officials, whether domestic or foreign. Similarly, in the Safe Harbor negotiations over data privacy protection, although the EU engaged in discussions and review of certification procedures of private bodies, such as BBB OnLine, ultimate enforcement powers were to reside in the U.S. Federal Trade Commission.\footnote{Joel Reidenberg, however, questions whether the FTC actually has the powers contemplated under the Safe Harbor agreement. Joel R. Reidenberg, \textit{E-Commerce and Trans-Atlantic Privacy}, 38 HOUS. L. REV. 717, 740-42 (2001).} These developments illustrate the continued state-centric character of global administrative law. Even in cases where private bodies actually “do the work,” state commitment is still what matters.

To understand the political economy of MRAs, one must, however, also take account of private parties’ central bottom-up role. Private parties often lie behind MRA negotiations themselves. For example, large businesses on each side of the Atlantic, working under the auspices of the Transatlantic Business Dialogue (TABD), have promoted the concept of mutual recognition agreements as a concrete policy initiative
that would meet business needs.\footnote{The Transatlantic Business Dialogue was launched in 1995 roughly at the time as the creation of the New Transatlantic Agenda. As documented by Cowles, the TABD consists of CEOs of over 100 of the largest firms on each side of the Atlantic. See Maria Green Cowles, \textit{The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue}, in Pollack & Shaffer, \textit{supra}, note 35, at 215.} TABD rapidly became an independent voice, identifying areas of concern and coordinating pressure on officials to set time tables for the signature and implementation of mutual recognition agreements.\footnote{To give one example of TABD’s work, see \textit{Mutual Recognition of the Food and Drug Administration and European Community Member State Conformity Assessment Procedures; Pharmaceutical GMP Inspection Reports, Medical Device Quality System Evaluation Reports, and Certain Medical Device Premarket Evaluation Reports}, 63 Fed. Reg. 17,744, 17,747 (proposed Apr. 10, 1998) (noting views of TABD).} As Paula Stern, former chair of the U.S. International Trade Commission and advisor to TABD, states, “TABD quickly established the Trans-Atlantic Advisory Committee on Standards, Certification and Regulatory Policy (TACS) to formulate recommendations, organized on a sectoral basis, for the elimination of regulatory barriers between the two economies.”\footnote{Paula Stern, \textit{The Trans-Atlantic Business Dialogue: A New Paradigm for Standards and Regulatory Reform, Sector by Sector}, in OECD PROCEEDINGS: REGULATORY REFORM AND INTERNATIONAL MARKET OPENNESS 155-56 (1996).}

Businesses have multi-fold strategies. At the domestic level, trading firms hoped that the U.S.-EU MRA would promote domestic adoption of harmonized standards and deregulated certification requirements. The main targets of these firms were U.S. independent regulatory authorities, and they had some success. Since 1998, the FCC has instituted a program pursuant to which private testing laboratories may certify new telecommunications equipment, whereas formerly only the FCC could do so.\footnote{Since the MRA telecommunications and electromagnetic compatibility annexes rely on recognition of foreign Conformity Assessment Bodies, the United States (at a minimum) needed to adopt a program permitting the use of private testing laboratories were it to enter into the MRA.}

Internationally, firms also hoped that the bilateral arrangement could be a stepping stone for reaching mutual recognition agreements with third countries, thereby offering increased access to more markets.\footnote{Telephone interview of Shaffer with official from the FCC, June 8, 2001.}
Private actors can also question or even undermine a regime’s efficacy if the
market context creates incentives to do so. Domestic firms benefit from regulatory
barriers to their foreign competitors. When no domestic business constituency actively
presses for domestic regulatory change, implementation of an MRA faces greater hurdles.
For example, no U.S. constituency pressed for implementation of the transatlantic
electrical safety MRA.\textsuperscript{46} This would have meant constituent pressure on OSHA to show
good will towards the EU and recognize laboratories designated by EU member state
authorities. But, as a Commission official points out, this MRA annex was not
“balanced” since U.S.-based firms do not need conformity assessment to sell electrical
safety equipment in the EU market, unlike in the U.S. market which requires third party
conformity assessment.\textsuperscript{47} Most U.S. producers encountered relatively less difficulty with
OSHA’s requirements for conformity assessment than their European competitors
because of their experience with OSHA-certified laboratories, and thus could gain an
advantage. Similarly, laboratories already certified by OSHA had a relatively protected
market, and would not benefit from new competition from laboratories certified by
European authorities.\textsuperscript{48}

Finally, as with other trade-related matters, one must consider the role of
consumers and consumer groups in the shaping of mutual recognition regimes. On the
one hand, as with liberalization generally, consumers stand to gain from increased

\textsuperscript{46} The U.S. National Electrical Manufacturers Association, “which represents some 450 U.S. companies,”
initially “opposed conclusion of the electrical safety MRA.” An industry source confirms that U.S.
“companies manage to have their products tested and certified without much difficulty” and “that the
MRA, in fact, was having little impact on the ‘day-to-day operations’ of companies that manufacture
\textsuperscript{47} Interview of Shaffer with official in DG Enterprise, June13, 2001 in Brussels.
\textsuperscript{48} Interview of Shaffer with official in DG Enterprise, June13, 2001 in Brussels. NOTE: DIFFERENT
AND ALL CONFIDENTIAL SO NO SOURCE NAME, WHICH IS NORMAL.
competition and product choice. On the other hand, greater choice in the market does not always compensate for the fears associated with the perceived downgrading of standards through exposure to foreign rules. Thus consumer organizations pressure politicians and regulatory agencies if they believe that implementation of an MRA will lead to a lowering of standards. In the United States, for instance, a number of consumer advocates, such as Public Citizen, have distrusted MRAs because of concern over corporate influence in their design. This distrust is likely to spur consumer vigilance over the implementation of any agreement.

IV
EXPLANATORY FACTORS: THE SUPPLY AND DEMAND OF MUTUAL RECOGNITION REGIMES

With the characters and the set in place, this section addresses the factors that lead to the adoption of mutual recognition as a core principle of transnational administrative law.

A. Demand and Supply Factors

Technical barriers to trade, which MRAs are asked to surmount, may result from domestic interest group pressures, domestic political actors advancing perceptions of the national interest and general welfare, or a combination. The analysis here, however, focuses not on the sources 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 on Nicolaidis and Egan, 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. Demand and supply factors can not be independently specified. The same actors may be “demanders” and “suppliers” and similar factors may affect the demand and supply side. 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 once MRAs are in place. 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 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.” Each MRA can thereby provide political 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.

Ultimately, however, an agreement’s likelihood and characteristics, as well as its normative appeal, tend to depend on supply side factors—that is, on the capacity and propensity of regulatory actors to enter the logic and constraints of an effective mutual recognition order. The following supply factors appear to be critical both from positive and normative perspectives:

55 See Shaffer, Reconciling Trade and Regulatory Goals, supra note 27, at 39.
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 the 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.\(^{56}\) 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 measured independently from the observed outcome of recognition negotiations.

2. Domestic Level Institutional Conditions. Regulatory compatibility may be a necessary factor for the emergence of a mutual recognition regime, but it is not a sufficient one. An explanation is needed for 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. In the 1997 U.S.-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.57 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.58 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.

57 See Shaffer, Reconciling Trade and Regulatory Goals, supra note 27, at 40.
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. Ex-ante, if 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 3 summarizes the operation of the above factors in three institutional settings—the European, transatlantic and international contexts.

59 See infra notes68-85 and accompanying text. See also Nicolaidis, supra noteError! Bookmark not defined.; David Vogel, Trading Up (1995); Giandomenico Majone, Regulating Europe (1996).
Table 3. Explanatory Factors for standardization and mutual recognition across three contexts

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<td>Factors:</td>
<td>Country-specific capacity to deliver (private regulatory accountability &amp; public regulatory autonomy)</td>
<td>Private bodies made accountable through notification.</td>
<td>Very asymmetric. High in the EU. Low in the United States given lack of accountability and high autonomy.</td>
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How have each of these factors played out in the contexts described above? In a nutshell, mutual recognition has not only been a hallmark of the EU single market since the early 1980s but is arguably a *modus operandi* for the EU as a whole. The high degree of transnational institutional foundation in the EU played a key role in the

<table>
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<tr>
<th>Cross-national regulatory compatibility</th>
<th>Generally high by the 1980s but for conformity assessment procedures.</th>
<th>Lower than within the EU but not insurmountable.</th>
<th>Widespread differences.</th>
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<td>Transnational institutional foundation</td>
<td>Pre-existing mutual monitoring techniques.</td>
<td>Some pre-existing sectoral cooperation.</td>
<td>High transaction costs of building monitoring networks. Voluntary compliance, with no obligation to use international standards, although WTO SPS and TBT agreements create incentives to use them.</td>
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<td>Enforcement by Commission and European Court of Justice.</td>
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*Source: adapted from Nicolaidis and Egan, 2001*
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. 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. Member state authorities periodically meet and exchange information about the process’s 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

60 Nicolaidis Thesis, supra note 54; Nicolaidis, supra note 54.
61 Michelle Egan, Mutual Recognition and Standard Setting: Public and Private Strategies for Governing Markets, in Pollack & Shaffer, supra note 35, at 190. See also Egan, supra note 58, at 152 (noting the purpose of the EOTC was to “(1) coordinate testing and certification practices to prevent firms from having to undergo multiple market entry and approval requirements, and (2) develop a common European framework to encourage mutual confidence and trust in member countries regulatory and self-regulatory testing and certification practices”).
62 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.
63 Firms and laboratories also remain subject to post-marketing member state regulatory controls, as well as market-reputational constraints.
actions of supranational bodies, and, in particular, of the Commission and the European Court of Justice.

In light of the EU’s experience with applying 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 non-EU counterparts.\(^{65}\) The EU experience thus offers a model to be considered and adapted for other transnational contexts.

Nonetheless, this model is hardly universal, and 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 United States to deliver accountability mechanisms. The decentralized and privatized character of U.S. regulation in some sectors, the jealously guarded autonomy of federal agencies in other sectors, and the role of U.S. states in the regulation of many services, have made U.S. negotiation of mutual recognition agreements more difficult. Lastly, at the global level mutual recognition is in its infancy, reflecting, in particular, the dearth of institutional foundations for creating and maintaining trust among regulatory authorities.\(^{66}\) The WTO provides a potential framework for facilitating the multilateralization of mutual recognition arrangements, but this framework remains, and

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\(^{65}\) 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 U.S. approach differs significantly from the multi-level coordinative ones used in the EU.
probably should remain, weak in light of the primary need to build trust and confidence horizontally among state regulatory systems and the resource-intensive character of “managed” recognition.

B. The Attributes of Managed Mutual Recognition

In the end, as discussed by Nicolaidis elsewhere, the key to the acceptability of mutual recognition to all the parties concerned, and thus of its “supply,” is its managed character.\textsuperscript{67} Patterns of mutual recognition may vary enormously but such variance can nevertheless be analyzed around four main dimensions along which recognition can be managed or fine-tuned, namely:

(1) The establishment of prior conditions for the recognition of equivalence between national systems will vary, as recognition will be a function of “compatibility thresholds” that will differ across issues, across partners, and over time. Equivalence can also be assessed at different levels. For example, in the case of professionals, regulations can examine the equivalence of the content of the education itself, of the system of accreditation of training bodies, or of the system for granting rights to practice;

(2) The degree of automaticity of access for the individual economic actors may vary. It may be that national systems as a whole do not pass such an equivalence test but that, given some broad equivalence at the macro-level, beneficiaries of recognition such as professionals can be subjected to some residual equivalence test at the individual level.

\textsuperscript{66} See Nicolaidis & Egan, supra note50
MRAs need to establish procedures to deal with variations and gaps between systems and must design means to bridge these differences. For the professions, for instance, criteria can vary as to eligibility for recognition in the first place or as to compensatory requirements;

(3) There is considerable variation in the scope of recognition. For example, what is the range, mode, and object of practice to which banks or professionals benefiting from recognition actually have access? Or what type of consumers are sophisticated enough to be subject to mutual recognition (this distinction is relevant for instance in the case of insurance services)? Scope can be a highly controversial issue simply because modalities of access to a given market can vary from one country to the next for nationals themselves. Even when this is not the case, limiting scope during the initial phase of a mutual recognition process can be seen as an opportunity to create a laboratory to test the impact of liberalization;

(4) Finally, variation in ex-post guarantees can serve to compensate for loss of host country control by increasing the confidence that parties have in the mutual recognition process and therefore the legitimacy and sustainability of the agreement.68 But control mechanisms are not costless, and their development is therefore itself an object of negotiation.

*Table 4* describes these four attributes across three issue areas, namely products, financial services and the professions.

[place Table 4 around here]

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68 This line of thinking can be presented under the general category of “securing insecure contracts”. For a discussion, see Nicolaïdis, *supra* note **Error! Bookmark not defined.**
The point is that managed mutual recognition can be viewed in a static or a
dynamic manner. At a given point in time, variations along each of these dimensions
indicate how far parties have traveled down the road to full recognition. Dynamically,
mutual recognition can be viewed as a process, involving implicit or explicit trade-offs
between these dimensions to accommodate the “supply side” (for example, regulators’
requirements) that may change over time. The more parties are aware of these potential
trade-offs, the higher the likelihood that they will reach agreement and devise solutions
acceptable to all. In some cases, it may be more appropriate to relax prior conditions of
equivalence and concentrate on the fine-tuning of automaticity (EU). In others, reducing
initial scope may be considered as a way to test the grounds (NAFTA). From a dynamic
viewpoint, scope and automaticity can be reduced initially to accommodate insufficient
prior equivalence and expanded later in light of ex-post cooperation. In general,
however, all of these dimensions are ultimately a function of the degree of confidence
between systems.

C. The Foundations of Confidence: Trust, Monitoring, Capacity Building, and Other-
Regarding Regulatory Cultures

As shown above, the negotiation and implementation of MRAs raise fundamental
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 in order

69 For a detailed discussion see id.; see also Nicolaidis, supra note 67
to reduce the costs associated with regulators independently 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, which has been much written about across fields, is usually understood to
be interpersonal and subjective in nature in so far as it relates to specific exchanges
between specific actors in specific contexts. Since mutual recognition describes a
relationship between regulatory systems underpinned by a relationship between public
and private actors, what ultimately matters is institutional confidence—that is, a more
objective phenomenon 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. Confidence,

70 See, e.g., H. Garfinkel, A Conception of, and Experiments with 'Trust' as a Condition of
Stable, Concerted Actions, In Motivation and Social Interaction, Cognitive Determinants (O.
J. Harvey. Ed. 1963) (in psychology ); S. Herbert Frankel, Money: Two Philosophies: The Conflict
of Trust and Authority (1977) (in social psychology); Francis Fukuyama... Trust: The Social
Virtues and the Creation of Prosperity (1995) (in political science); Robert D. Putnam, Bowling
Alone: The Collapse and Revival of American Community (2000) (in political science); Trust:
Making and Breaking Cooperative Relations (Diego Gambetta, ed., 1988) (also in political science).
University)
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 relying (more steadfastly) 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. This process has been institutionalized through the WTO SPS and TBT agreements which require WTO members to notify regulatory changes to the respective WTO oversight committees.72 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

72 WTO Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, Annex 1A, Legal Instruments—Results of the Uruguay Round, vol. 27 (1994), available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm, art. 7 (requiring members to notify changes in their sanitary and phytosanitary measures and provide information on their sanitary and phytosanitary measures); TBT, Supra note 21, art. 2.5 (requiring a member—upon request from another member—to justify a technical regulation that has a “significant effect” on trade of other members), art. 2.9 (requiring members that propose new technical regulations that do not comply with international standards and that significantly effect trade to publish, notify other members, provide copies of the new regulations, and allow other members reasonable time to comment), art. 2.11 (requiring members to promptly publish or otherwise make available all new technical regulations), art. 5.28 (providing a procedure to review complaints and take corrective action concerning the operation of technical regulations conformity assessment procedures), art. 5.6 (similar to article 2.9 but applying to conformity assessment procedures), and art. 10 (requiring inquiry points to answer reasonable inquiries regarding technical regulations, standards, and conformity
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 co-ordinated 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.”

In the framework developed here, 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 also save costs through enhanced cooperation with foreign regulatory officials and decentralized product certification systems. The U.S. FDA, for example simply does not have the resources to adequately conduct all testing itself;

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See also Article X of GATT (“Publication and Administration of Trade Regulations”).

73 Majone, supra note 54, at 276. Majone further notes how “the principle of mutual recognition is extremely demanding in terms of mutual trust”). Id., at 279.
especially where testing involves significant foreign travel. By permitting its “over-
extended and under-resourced” staff\(^{25}\) 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 there 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.\(^{76}\) Similarly, the United States has provided
technical assistance to help countries catch wild shrimp in a manner that does not threaten

\(^{74}\) FDA officials also note that by freeing the FDA from having to conduct tests in Europe, FDA can
allocate more resources to products produced elsewhere, such as “surgical gloves produced in Malaysia.”
Telephone interview of Shaffer with FDA official (June 8, 2001).

\(^{75}\) Richard A. Merrill, The Importance and Challenges of ‘Mutual Recognition’, 29 SETON HALL L. REV.
736, 745 (1998), (further noting “that resources have not kept pace with workload”). “Since the early
1960s, however, FDA has found it necessary to develop new cooperative arrangements with foreign
governments to facilitate its surveillance of imported regulated products. The need for these agreements has
grown in direct proportion to the volume of imports under the agency's purview, which have increased from
500,000 shipments in 1970 to 3,700,000 shipments in 1996.” Sharon Smith Holston, An Overview of
International Cooperation, 52 FOOD & DRUG L.J. 197, 198 (1997). Ms. Holston was FDA Deputy
Commissioner for External Affairs (when??).

\(^{76}\) “The EU is currently funding several projects aimed at improving the post-harvest handling of fish
catches, particularly for artisanal fishermen in several African countries. Many of these projects are
motivated by Art. 34(3) of the Cotonou Agreement in which the EU agreed that economic and trade
cooperation shall aim at enhancing the production, supply and trading capacity of the ACP [Africa,
Caribbean, Pacific] countries. There is currently an on-going five-year 45 million Euro project, funded by
the European Development Fund (EDF, created pursuant to Art. 131 and 136 of the 1957 Treaty of Rome).
The project, which started in 2002, is operated jointly by the European Commission and the ACP
Secretariat and targets 17 African ACP countries, including those around the great lakes region. The
project makes provision for technical assistance in fisheries management, direct infrastructural lending for
improved landing and storage facilities and equipment (including a credit line for artisanal fishermen),
enhanced testing laboratories and processing factories among others.” Email to Shaffer from a
representative of the Food and Agriculture Organization, (Jan. 16, 2005).
endangered sea turtles. Article 11 of the TBT Agreement calls on 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, protectionist groups may have higher per capita stakes in the

77 See Status Report by the United States, Addendum, United States--Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/15/Add.4, at 2 (Jan 17, 2000), available at http://docsonline.wto.org (last visited Apr. 12, 2005)(on file with Law and Contemp. Probs.). These status reports of progress on implementation of recommendations are required pursuant to Article 21.6 of the DSU.
78 See, e.g., TBT, Article 12.7: “Members shall … provide technical assistance to developing country Members to ensure that the preparation and application of technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to the expansion and diversification of exports from developing country Members.” TBT, Supra note 18, at clvii.
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. Transnational institutions can also spur other-regarding national processes. A number of WTO judicial decisions have attempted to facilitate such exchange. In the *U.S. 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.” It admonished the United States for failing to take “into consideration the different conditions which may occur in the territories of... other Members.” It required the United States to assure that its policies were appropriate for the local conditions prevailing in developing countries. The WTO Appellate Body,

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80 See Cowles, *supra* note 41; *supra* Francesca Bignami & Steve Charnovitz, *Transatlantic Civil Society Dialogues*, at XX both in Pollack & Shaffer, *supra* note35.
82 *Id.*, para 180.
83 *Id.*, para 164.
within the institutional constraints that it faced, attempted to foster domestic institutional processes that permit for greater participation of affected foreign parties.\textsuperscript{84}

In a five-year-long exercise dedicated to the support of regulatory reform across the world, the OECD secretariat developed a set of criteria to assess the effectiveness of such reforms. One, for example, 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.\textsuperscript{85}

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 contols, 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.

Nevertheless, in light of technological and other market developments, reversibility may sometimes 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.

\textsuperscript{84} This point is developed in Shaffer, Power, \textit{supra} note16
\textsuperscript{85} Nicolaidis, \textit{supra} note 4.
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.

V

NORMATIVE FRAMEWORK: FROM MECHANISMS OF ACCOUNTABILITY TO THE HARD DEMOCRATIC DILEMMA

In order to understand the main features of any emerging global administrative law, its normative underpinnings must be considered. 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.

The framing paper for the global administrative law project presents a three layered normative framework, typologized in terms of intra-regime accountability,\textsuperscript{86} rights-based mechanisms, and democracy-enhancing measures. Of the three, the

\textsuperscript{86} However, by “intra” they refer to “global,” so the accountability frame appears to cover everything within the field.
proponents appear to be most comfortable with the accountability frame, taking from Keohane’s recent work, with the other two being complementary to it. This choice seems reasonable, although all of the frames can be collapsed into the broader concept of accountability while still highlighting the democracy dilemma.

The concept of accountability refers to the ability of affected parties to hold decision-makers accountable, ultimately through sanctioning them. 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, the “rights” and “democracy” frames can be viewed as tools to ensure the accountability of decision-makers to affected parties.

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87 See e.g., Robert Keohane & Joseph Nye, Redefining Accountability for Global Governance in Governance in a Global Economy (Miles Kahler & David A. Lake, eds., 2003); Robert Keohane, Global Governance and Democratic Accountability, in Taming Globalization, Frontiers of Governance (David Held & Mathias Koenig-Archibugi, eds., 2003) [Hereinafter Keohane, Global Governance].

88 Kingsbury et. al. use the English school distinction between patterns of pluralism, solidarism, and cosmopolitanism, and juxtapose the above three normative conceptions of the role of global administrative law in terms of these typologies. Pluralism implies that value conflicts are not resolved within the system and that the power of implementation is retained by states. In this frame, global administrative law serves to enforce internal administrative accountability (“securing their accountability to the legitimating center”). Solidarism, describes a system of deepened cooperation among states based on shared values pursuant to which rights are defined and enforced at the global level. In this frame, global administrative law serves to protect private rights through participation and judicial review, irrespective of nationality. Finally, cosmopolitanism draws from network theory and theories regarding global (borderless) markets. In this frame, global administrative law ought to be premised on the promotion of democracy beyond the state. On this basis, the authors differentiate three normative conceptions against which global administrative law is to be measured—those of accountability (associated with pluralism), of rights protection (associated with solidarism), and democracy (associated with cosmopolitanism). It seems conceptually strained and inaccurate to focus on these three different goals solely in relation to these distinct governance models. Thus the focus on the normative mechanisms separately from the English school typologies.

89 See Keohane & Nye, supra note87.
After examining specific accountability measures applicable to mutual recognition arrangements, this section turns to the broader democracy dilemma facing mutual recognition regimes and global governance generally.

A. Horizontal Accountability Mechanisms

Mutual recognition regimes call for the same categories of accountability as those identified in the framing paper by Kingsbury et al for global administrative law generally, but with an important twist. In this case, networks of horizontal division of labour raise questions of horizontal accountability between political, judicial, and regulatory authorities in one country towards not only regulators, but also publics in another. Supranational 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 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 presented in most analysis of global governance that address the degree of autonomy of the international sphere from the state (focusing on the vertical dimension of global governance), to a context where the transfer of sovereignty is horizontal.

A central issue in assessing accountability, and in particular when speaking of horizontal governance in the form of mutual recognition regimes, is the issue of
accountability to whom. That is, to whom are domestic regulators accountable in an economically integrated world where one jurisdiction’s decisions can have significant impact on outsiders, whether because the national system may regulate too little, too much, or simply take 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 it.\footnote{supraId., at 141.} 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 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, nonetheless, 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. It is useful to 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.

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. Decision-making processes of different national orders affect each other’s constituents. On the one hand, government representatives cannot control the impact of decisions made abroad on their constituents. On the other, national representatives make decisions that affect foreign constituents without those constituents being represented. From an accountability perspective, each domestic order is thus imperfect. Transnational governance mechanisms aim to address the conflicts and the need for cooperation between these interacting national orders.

In addition, transborder economic processes take place regardless of whether any formal transnational governance mechanisms exist. Technological developments, such as the internet, e-mail, satellite media, or future communication and transport modes that have yet to be conceived, strengthen these transnational market developments. 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 U.S. system can be characterized as one involving relatively high levels of internal accountability, but low levels of external accountability, a point touched on earlier in respect of U.S. forms of unilateral (as opposed to cooperative) extraterritoriality. Yet the United States also 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. The United States, as any other state, thus has incentives to ensure that foreign regulatory systems are accountable when their decisions affect U.S. 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 regulatory culture is much more attuned to such external impact assessments.

At this stage of the analysis, let us 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. In the mutual recognition context, domestic

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91 See supra id.
92 The accountability mechanism of transparency is intricately related to the concepts of trust and confidence that we examined earlier. As Amartya Sen writes, “Transparency guarantees deal with the need for openness that people expect: the freedom to deal with another under guarantees of disclosure and lucidity. When that trust is seriously violated, the lives of many people—both direct parties and third parties—may be adversely affected by the lack of openness. Transparency guarantees (including the right to disclosure) can thus be an important category of instrumental freedom. These guarantees have a clear
regulators must give notice of proposed standards, make explicit the extent to which home or 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. 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 more 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

instrumental role in preventing corruption, financial irresponsibility and underhand dealings.” Sen, Development as Freedom (1999), at 40.
importers that had benefited from de facto recognition until then (for example, the *U.S. shrimp-turtle* case discussed above).\textsuperscript{93} 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 may be deemed equivalently protective of the public 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 are 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.\textsuperscript{94} 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.

\textsuperscript{93} See *supra* notes 16, 77, and 81.  
\textsuperscript{94} See GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003). Technically, in the WTO context, WTO members include a few non-state “customs territories,” such as Hong Kong and the European Community.
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 U.S. shrimp-turtle, EC-asbestos, and SPS and TBT decisions of the WTO Appellate Body. Alternatively, national courts can develop convergent national norms by engaging with and citing each other’s judicial opinions. They can also develop their own (non-national) cosmopolitan common law norms. Finally, as noted earlier, they can themselves allocate jurisdictional authority by applying the principle of comity.

In this context, just as under domestic administrative 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

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97 See Slaughter, supra note 37;Bermann, Towards a More Cosmopolitan Vision, supra note 37.
99 See supra note 34.
the state’s action, or the standard of review applied by the transnational arrangement, 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 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 trade restrictive means (such as recognition along with a labelling obligation) imposes one policy approach over others (such as non-discriminatory regulations that ban products that do not meet the standard), ones that might have been preferred by a majority in the state in question. In short, the effects of applying a single principle, such as that of proportionality, vary as a function of the relative importance one gives to internal versus external accountability goals. Once more, the central issue of accountability to whom arises.

Principles and norms typically call for a definition of the context in which they apply, and therefore (implicitly) exceptions where they might not. Hence, the “managed” character of mutual recognition regarding, in particular, its scope and reversibility. 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 surgical instruments is more sensitive than that for band-aids.
Thus, the 1997 U.S.-EU MRA for medical devices only applied to less stringently regulated medical devices, subject to possible expansion based on a “pilot program.”

In addition, parties include exceptions where recognition could threaten national security, financial stability, or social peace (“ordre public”). Thus, for instance, the “Bolkenstein directive” (which provides for the application of home state law in the services trade) does not apply to the labour conditions under which workers employed by home state entities provide services for a particular project through their physical presence in the host state. In this case, the law and collective bargaining conventions applicable in the host state are to apply—although the exceptions to this exception contained in the directive have themselves raised political havoc. The question raised is whether, or to what extent, is social peace threatened by the application of different labour law arrangements in the same physical space. Here, the question that should be asked is whether negative externalities within the host state are potentially so destructive as to justify complete deference to host state standards.

The same issue of externalities applies to mutual recognition in the field of finance, when the import of financially unsound products may put at risk the host country financial system as a whole. In this case, the granting of a “passport” is invariably conditioned upon standardization exercises to address concerns over financial stability,

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100 Appendix 2 of the medical device annex specifies that the agreement only covers class 1 products (such as bandages) and certain listed class 2 products. The U.S. Food and Drug Administration (FDA) can expand this list following its review of a “pilot program,” although in no case does the agreement cover “any U.S. Class II-tier 3 or any Class 3 product.” FDA categorizes medical devices under three classes, while the EU divides them into four. See John Chai, *Medical Device Regulation in the United States and the European Union: A Comparative Study*, 55 FOOD & DRUG L.J. 57 (2000) (providing an overview of these classification systems).

101 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.”
such as the BIS capital adequacy standards.\textsuperscript{102} The WTO itself provides for exceptions to trading requirements where financial stability is threatened, as pursuant to articles XII and XVIII of the GATT.\textsuperscript{103}

Even more controversially, national security concerns have become 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.”\textsuperscript{104}

Indeed, it is not hard to explain the denial of pre-existing mutual recognition arrangements in the field of transport. Before the September 11 tragedy, countries largely engaged in de facto mutual recognition of their regulations for the packing of shipping containers. In the post-September 11 world, however, the United States no longer recognizes the adequacy of foreign authorities to pack shipping containers. Under the United States’ new “Container Security Initiative” (CSI), the United States presses key port countries to sign bilateral treaties that allow U.S. customs agents to be present at foreign ports in order to monitor the prescreening of containers bound for the United

\begin{footnotesize}
\begin{enumerate}
\item See e.g., David Zaring, \textit{Informal Procedure, Hard and Soft, in International Administration}, 5:2 Chicago J. of Int’l L. 547 (winter 2005) (discussing the BIS or Bank for International Settlements and its role in financial standard-setting).
\item Article XII, Paragraph 1: “Notwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article.”; Article XVIII, Paragraph 1: “The contracting parties recognize that special governmental assistance may be required to promote the establishment, development or reconstruction of particular industries or particular branches of agriculture, and that in appropriate circumstances the grant of such assistance in the form of protective measures is justified.” GATT, \textit{supra}, note 18.
\item Keohane, \textit{Global Governance, supra} note 87, at 133.
\end{enumerate}
\end{footnotesize}
States. U.S. and foreign customs agents are to work together to “ensure identification, screening, and the sealing off of high-risk containers at the earliest possible opportunity.” A CSI agreement between the U.S. and Canada has already been implemented. This approach stands in stark contrast to the pre-September 11th practice of inspecting containers once they reached U.S. shores, of which only around two per cent were subject to rigorous inspection.

Similarly, in the pre-September 11 world, airline passengers largely travelled under the blessing of their state of departure, which was most frequently their home state. Countries largely delegated to each other the role of gathering data, if any, on passengers boarding international flights. In the post-September 11 world, once again, the United States no longer recognizes the adequacy of foreign authorities’ collection of data on aircraft passengers to the United States. Rather, pursuant to the U.S. Aviation and Security Act of 2001, U.S. customs officials now collect defined types of information about air passengers before they board a plane to the United States. These new U.S. policies raised consternation in Europe, leading to the negotiation of a transatlantic agreement on passenger data and the European Parliament’s challenge of this agreement before the European Court of Justice under internal EU data privacy law.

105 See Jessica Romero, Prevention of Maritime Terrorism: The Container Security Initiative, 4 CHI. J. INT’L L. 597 (2003). In response to deals reached between the United States and the Netherlands, France, Germany, and Belgium, the European Commission filed a complaint before the European Court of Justice arguing that the “deals effectively give cargo passing through participating ports preferential treatment, and that shippers will start to divert America-bound cargo to those ports from others in the European Union. Under its rules, the union argues, individual members are not allowed to make such deals; the same trade preferences must apply to all 15 members and not be negotiated individually.” Gregory Crouch, Europe Acts Against U.S. Effort on Ports, N.Y. TIMES, Jan. 28, 2003, at W1.
106 Id.
107 Id.
109 The U.S.-EU agreement was signed and went into force on May 28, 2004. Under the agreement with the EU, U.S. customs officials can hold this data for three and a half years and share it with other U.S.
National security concerns demonstrate 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. U.S. neoconservatives, if such regimes were on their radar screen, would tend to concentrate on areas where global governance does not work, as reflected in Robert Kagan’s book *Of Paradise and Power.* There is little doubt that they would therefore discount the utility of mutual recognition. Global governance advocates, on the other hand, would tend to concentrate on where it already constitutes daily practice. Yet where these opposing analysts may concur is that transnational governance mechanisms are not universal or universally applied, and thus do not 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 Hobbesian islands of conflict. In both cases, most commentators recognize that the world of transnational governance (and with it, of mutual recognition) is 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 and
global administrative law 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
boundaries be?

B. The Democracy Dilemma

Beyond various levels of, and mechanisms for, accountability, the global
administrative law project rightly raises the broader normative challenge of democracy.
In this case, the 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 (and global
administrative law generally), regulators are asked to be accountable to those outside the
polity itself, including where interests may clash. Again the question arises: to whom
should national regulators be accountable?
From the perspective of democratic accountability, there are at least four choices that are reflected in the framing paper—that of deference to national polities, as reflected in the national treatment principle, resulting in a pluralist order; that of centralized “solidarist” government, as reflected in the global harmonization of standards and in the setting up of global enforcement agencies; that of the horizontal enlargement of the polity through complete deference to the market along an ordo-liberal, cosmopolitan, “free trade” model enforced through global institutions;\(^{111}\) and that of the horizontal extension of the polity through cooperative decentralized law-making made accountable to a public beyond the polity, as reflected in the discussed version of managed mutual recognition.\(^{112}\)

Some of the comparative advantages and disadvantages of these approaches are discussed in the next section.

In the mutual recognition context, democracy will work primarily at the national level through creating constraints on national administrators. Each state regulatory authority first is subject to its own democratic checks. The procedural requirements of transparency, reasoned decisions, and judicial review operate not only to make national decision-making more accountable to outsiders. They 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 help to ensure that national regulators are held internally accountable to their own publics through traditional

\(^{111}\) See e.g. F.A. Hayek, The Road to Serfdom (1944).

\(^{112}\) The framing paper sets forth the three typologies of pluralism, solidarism, and cosmopolitanism. See supra note 88. It does not expressly address an ordo-liberal model of free trade, although this could be viewed as a variant of the cosmopolitan frame. The authors are not completely comfortable with these typologies because of their focus on the vertical relation of the state and a global center, and are not sure where their conception of mutual recognition fits into this presentation of English school frames. Managed mutual recognition reflects both pluralist and cosmopolitan visions, supported in many cases by a solidarist process-oriented framework. See the discussion of the structure of MRAs supra.
By requiring its members to be democracies, the Treaty Establishing the European Union thus facilitates the legitimate application of the mutual recognition principle.\footnote{The framing paper distinguishes between rules for states to police delegation of authority to the global center versus rules for the center to police enforcement of rules by states. \textit{See} Kingsbury et al, \textit{supra} note 88 at pp.44-46 of draft. Although the framing paper addresses the role of central judicial institutions in policing national decision-making, these institutions can also police the actions of central rule-making bodies, as they do in federalist systems. The European Court of Justice, for example, can determine that EU bodies have exceeded their powers (as it did in the Tobbacco advertising case), have violated substantive rights, or have failed to exercise due process. \textit{See} Case C-376/98, Germany v. European Parliament and Council of the European Union, 2000 E.C.R. 1-8419, [2000] 3 C.M.L.R. 1175 (2000).\footnote{\textit{See} e.g. Treaty on European Union, Feb. 7, 1992, art. 6, para. 1, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, art. 6 (“The Union is founded on the principles of liberty, democracy, respect for human
democratic processes.\footnote{See e.g. Treaty on European Union, Feb. 7, 1992, art. 6, para. 1, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, art. 6 (“The Union is founded on the principles of liberty, democracy, respect for human

In large part, the aim of transparency, reasoned justifications, and judicial review mechanisms is to empower publics and public advocates, \textit{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 \textit{de facto} recognition of foreign regulatory standards and procedures on account of this exchange, mutual empowerment of publics through these accountability mechanisms is essential.

Mutual recognition regimes thus retain the territorial element of national democratic accountability, which is one of their advantages 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 “collective
preferences” (or “préférences collectives”), in contradistinction to individual preferences reflected in, and facilitated by, autonomous market processes. “Collective choices” (or “choix collectives”), however, may be a preferred term to account for the context-contingent nature of these collective processes. While the term “collective preferences” suggests something inherent which can presumably be inferred (as economists like to do), “collective choices” are not fixed in time, but are determined through political processes. They must be explicitly made and defended.

A number of commentators have theorized democracy operating beyond the state, whether through conceptualizing democracy in traditional ways at a global level, as through the creation of a global parliamentary assembly, or through recasting the concept of democracy in “deliberative” terms. Yet one should be sceptical of the functioning of democracy through global institutions, which is why the decentralized model represented by the mutual recognition approach is preferred by many, including the authors. It makes more sense to expand accountability beyond the polity not through creating elected legislative bodies at the global level, but rather through


117 See e.g. DELIBERATIVE DEMOCRACY (Jon Elster, ed., 1998); DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS (James Bohman & William Rehg eds., 1997).

118 See e.g. Gregory Shaffer, Parliamentary Oversight of WTO Rule-Making: the Political Normative and Practical Contexts, 7 J. INT’L. ECON. L. 629 (2004); Robert Howse & Kalypso Nicolaidis, This is My EUtopia..., 40 J. COMMON MKT. STUD. 767 (2002).
expanding other accountability mechanisms, as those used traditionally in national administrative law examined above. As for the concept of deliberation, while the dynamic, participatory, process-based approach of managed mutual recognition regimes can facilitate deliberative practices, it is not necessary to re-theorize democracy in deliberative terms in order to legitimize and justify these transnational regimes.

Normatively, mutual recognition regimes and transnational governance are best viewed 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, who, in turn, are responsible to their own national constituencies. In this dynamic, reputational accountability plays a key role, both among regulators and law-makers and in relation to their respective publics. 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.

In sum, the various accountability mechanisms—procedural, rights-based, and democratic—can be characterized in terms of operating as ex ante and ex post checks within the mutual recognition process. 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 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. Combined, 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.

Functionally, because mutual recognition regimes rely on national administrative bodies, it is much easier to adapt them—compared to arrangements involving international bodies—to obtain optimal results, and, in this way, more legitimate outcomes. Ultimately, it is the dynamic aspect of managed mutual recognition that must ensure that regulators remain responsive both to each other and to their publics.

VI

POWER ASYMMETRIES: THE NEED FOR A COMPARATIVE APPROACH

Mutual recognition arrangements, as any governance mechanism, are subject to power asymmetries. Power is a complex, multifaceted concept which generally refers to the way actors and structures determine and shape the actions, choices, opportunities, understandings, and identities of others—with different emphasis placed on these terms depending on the school of thought.\textsuperscript{119} Power can operate in multiple ways. In the MRA context, power will tend not to operate directly, where one actor deploys resources, rewards, and threats to alter another’s behavior. Rather, power will tend to operate

\textsuperscript{119} See BARNETT & DUVALL, POWER IN GLOBAL GOVERNANCE (2005); JOHN SCOTT, POWER (2001); DENNIS WRONG, POWER: ITS FORMS, BASES AND USES (2002).
indirectly through structures that constrain the choices that parties have, and the issues and arguments that they may raise.

For example, mutual recognition arrangements could be viewed as based on an “EU model” that the EU is exporting, or attempting to export, globally. To detractors, they reflect European “neo-colonialism” and “economic imperialism,” and to defenders EU “normative power.”120 In the author’s view, the EU model is worth emulating for the way in which it combines diversity, collaboration, and “other-regardingness” in the implementation of regulatory policies.121 Nonetheless, the model does not eliminate the power dimension from the mutual recognition game of mirrors. When the EU negotiates a mutual recognition arrangement with a third party, it has two significant advantages. It has a first-mover advantage in that it already has created functioning structures and standards that involve regulatory exchange among multiple polities. It is thus simpler and more efficient for the third country to adapt to these existing standards and procedural mechanisms than to negotiate the adoption of an entirely new arrangement. Thus, the procedures and standards adopted may tend to be those already implemented within the EU itself. The third country will find itself in a similar situation as a country desiring to accede to the European Union. The EU defines the terms.

In addition to experience, the EU wields considerable market leverage in determining standards and regulatory structures required to implement mutual recognition policies. This market leverage has increased as the EU has continued to expand to encompass new members. Firms that desire access to the large EU market can pressure their national officials to adapt their national system to accommodate a

reciprocal trading arrangement with the EU. Consciously or unconsciously, the EU can export its systems globally because other countries’ constituents desire access to the valuable and expanding EU market.

Mutual recognition arrangements can also be criticized because private parties may use them to push for particular substantive goals, including those of deregulation.\(^{122}\) If mutual recognition arrangements are to be enforced by the home state, and the home state does not do so adequately, there are, of course, moral hazard problems: mutual recognition could facilitate de facto deregulation, at least to the extent that safeguard provisions in MRAs meant to ensure against such developments cannot easily be enforced (think, especially, of recognition applied to internet based services or satellite television). In short, the law-in-action of MRA implementation may differ from the regime’s initial goals. Mutual recognition arrangements can include safeguards, such as monitoring mechanisms and exit options, to ensure that consumers are not harmed. They can also spur regulatory learning that triggers a trading up of standards and procedures, and not a leveling down. Nonetheless, mutual recognition arrangements will need to address concerns that, when improperly managed, they could place consumers at risk.

Mutual recognition agreements can be criticized as well because they have not been applied multilaterally and thus could constitute a form of preferential and discriminatory treatment, undermining the intent of multilateral agreements such as those of the World Trade Organization. The lack of multilateral MRAs thus raises the following key questions. How open are mutual recognition regimes? Are only those

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121 See Howse & Nicolaidis, supra note 107. supra
122 See e.g. Shaffer, Reconciling Trade and Regulatory Goals, supra note 27, at 51 (“Although the original goal of the MRA annexes may have been to facilitate transatlantic trade, firms simultaneously focused on the deregulation of domestic product approvals”).
states having advanced regulatory systems and/or large markets the exclusive
beneficiaries of mutual recognition regimes? Are developing countries once more shut
out of lucrative markets? Is non-discriminatory mutual recognition an oxymoron?123

In principle, the WTO could require bilateral and plurilateral MRA regimes to be
open to third parties, and to a certain extent already does so.124 However, there are strong
reasons that judicial enforcement of “openness” should not be too stringent, or there
could be a strong disincentive to enter into mutual recognition arrangements in the first
place, especially in light of the resource-intensive nature of MRAs. Rather, a preferred
approach would be for WTO members to create procedures for the progressive opening
of MRAs pursuant to a dynamic process. For example, MRAs could include a special
category of “associate parties” who could participate in MRA cooperative networks,
evaluation and accreditation missions, field trips, and meetings so that they may become
more knowledgeable of the conditions for their eventual inclusion. There could also be
procedures for the “transitivity” among MRAs so that where one country is a party to two
MRAs, the other countries could reciprocally benefit from each MRA, subject again to
agreed conditions.125

Nonetheless, developing countries, in particular, are less likely to be parties to
MRAs for multiple reasons. Their markets are small so that there is less bottom-up

123 Nicolaidis, *Oxymoron*, supra note 54
124 See Kalypso Nicolaidis, Promising Approaches and Principle Obstacles to Mutual Recognition in
International Trade in Professional Services: Advancing Liberalization Through Regulatory Reform 133
(OECD Proceedings 1997); Kalypso Nicolaidis & Joel P. Trachtman From Policed Regulation to Managed
Recognition: Mapping the Boundary in GATS, in GATS 2000: NEW DIRECTIONS IN SERVICES TRADE
LIBERALIZATION (Pierre Sauve & Robert M. Stern, eds., 2000); Liberalization, Regulation and
Recognition for Services Trade, in SERVICES TRADE IN THE WESTERN HEMISPHERE (Sherry M. Stephenson,
ed., 2000); Joel P. Trachtman, Toward Open Recognition? Standardization and Regional Integration
demand for them to be parties to MRAs. They are more likely to lack regulatory capacity to ensure the “trust” required for the supply of an effective mutual recognition regime.

The standards that developed countries may require for developing countries to enter the arrangement might not be appropriate for the country’s priorities in light of the regulatory costs of the arrangement and the country’s severely constrained resources. Thus, as other governance models, mutual recognition arrangements could discriminate against constituents in states that are most in need of favourable and preferential access to the world’s most valuable markets. Even if mutual recognition regimes are subsequently extended to poorer states, these states still will not have participated in the initial construction of the regime. They will merely receive what others have “mutually” created beforehand.

This being said, from a policy-making perspective, all governance mechanisms are subject to imperfections, and thus the key issue is how parties participate, or otherwise are represented, in an institutional context in comparison with alternative non-idealized institutional settings.\(^{126}\) From the perspective of choosing policy, one needs to assess mutual recognition arrangements in comparison with their alternatives.

As noted above, the mutual recognition approach contrasts with pure “free trade,” “sovereignty,” and centralized governance models. These alternative governance approaches also suffer from significant defects. The pure free trade approach will often not provide the safeguards necessary for the protection of host state citizens and thus will

\(^{125}\) See discussion in Nicolaidis, *Faces*, supra note 67 The transitivity could be limited to specific sectors that the MRAs have in common, unless they involve horizontal, across-the-board MRAs. There could also be procedures for building trust between any new parties before any extension occurred.

often encounter challenges that will need to be addressed either unilaterally by host state
governments or in collaboration with others. The centralized governance model, focused
on international harmonization, lacks democratic legitimacy at the global level and
functionally does not adequately permit for diversity that responds to rapid technological
change and to local contexts, needs, and priorities. A “sovereignty” approach that relies
only on “national treatment” is likely to give rise to more frequent and intensive cross-
border regulatory conflicts in an economically globalized world.

The mutual recognition approach, in contrast, represents a coordinated approach
to the regulation of global market processes among diverse jurisdictions. It sets up
collaborative governance forms involving mechanisms of oversight and regulatory
exchange that include multiple countries and that implicitly take account of the interests
and perspectives of those outside of any single polity. Unlike the pure sovereignty
approach, a mutual recognition regime creates ongoing procedures that facilitate
opportunities for mutual learning, technical assistance, and regulatory exchange that
otherwise might not exist, potentially avoiding conflicts in the first place. Mutual
recognition arrangements can also facilitate the resolution of disputes ex post because
regulatory authorities will have experience working with each other. In addition, from a
power-oriented perspective, although the sovereignty approach may be decentralized
formally, in practice, it can entail the unilateral exercise of extraterritorial jurisdiction by
those who can—and, in particular, those wielding market clout, relying on access to their
internal market as leverage to impose their standards and laws in a direct and coercive
manner. Countries will (and should) impose border controls to ensure the safety of their
citizens from harm, one way or the other. The mutual recognition approach, in contrast
to the others, explicitly calls for and creates cross-border networks of collaboration and exchange.

Finally, mutual recognition regimes, when extended to developing countries, can also create leverage for the provision of development aid, technical assistance, and capacity building to ensure that the country can meet health, safety, and other requirements. Under a mutual recognition arrangement, developed country regulators can work directly with those in developing countries to assist them in their regulatory endeavours, in coordination with national and international development agencies.

VII

CONCLUSION: THE MUTUAL RECOGNITION ANGLE, A LENS ON THE GLOBAL ADMINISTRATIVE LAW PROJECT

This article has sought to demonstrate that the study of mutual recognition regimes should be put at the core of the discipline described in this volume as global administrative law. Recognition is pervasive in an economically integrated world, whether that recognition is formal and mutually agreed or is informally applied. Thus, a better understanding of the dynamics and dilemmas of recognition provides an important lens on the project as a whole. This is so on multiple counts.

First, anyone examining the global administrative law construct, or any other analytic frame, must question the value of the distinction between that construct and what is more generally referred to as “global governance.” Is administrative law an alternative or an overarching concept with regards to other analytic frames? Can it be combined
with alternative frames, such as the use of contract analogies by economists, game theorists, rational institutionalists, and law economics scholars to analyze international institutions and regimes, or the use of constitutional analogies by some public choice theorists and many theorists of cosmopolitan governance? Is the distinction between global administrative law and global governance positively and normatively relevant?

Attention to the process of recognition helps to demonstrate the value of a global administrative law frame. To start, the frame is much less abstract than that of global constitutional or contract analogies, and in being more concrete, helps us focus on forms of transnational law praxis that take place every day in the small-scale encounters—and implicit and explicit processes of recognition—that shape regulatory and market outcomes. This positive focus on practice helps to foreground central normative concerns as well. In particular, it presses us to examine the practical mechanisms needed to make transnational governance more accountable and legitimate.

Much of the existing analysis of “global governance” operates not only at a more abstract level. It also misses much of what takes place in terms of trans-national regulatory practice because of its focus on overarching global institution-building. Much of the literature on global constitutionalism, for instance, reflects a focus on the vertical relation between the international and national orders. Similarly, the international contract frame tends to concentrate on negotiations over, and rationales for, global institutions and regimes. In this respect, one of the advantages of the global administrative law frame is that it shows how national law and practice are the starting points for examining the horizontal relationships among state regulatory institutions. As the framing paper highlights, transnational governance necessarily involves regulatory
administration and thus builds and borrows from domestic administrative law regimes. Much of transnational governance can be viewed as an extension of the polity to engage with those outside of national borders. Through such extension, transnational governance involves the interaction among national laws and practices.

It is necessary nonetheless to ask whether the focus on administrative law does not overly deemphasize political concerns in favour of technocratic ones. It appears, for example, that the framing paper exhibits a certain reluctance and constraint in taking on the democracy agenda, possibly as a reflection of the administrative law construct itself. This article has attempted to highlight the political nature of mutual recognition arrangements and the democracy dilemmas that they raise have been highlighted. Mechanisms for the extension of the polity so that national decision-making is made accountable to an enlarged public constitute an emminently political project. The fact that the global administrative law project leads back to national administrative practice is of help in addressing the democratic dilemmas of transnational governance. From a normative perspective, accountability must start with democratic processes at the national level and, from there, operate through accountability chains using such administrative law techniques as transparency, reasoned decision-making, and judicial review.\(^{127}\)

One can also question whether there is an implicit assumption in the project’s frame of the existence of a single administrative space, or at least a single space in the making, on account of the use of the term global administrative law. Are there not rather a number of overlapping, intersecting, international or transnational pluralistic spaces, as highlighted by the lens of recognition? And, if this is the case, is not the key to understanding the emerging transnational administrative law the question of the
relationship between these spaces, and thus implicitly, of the scope, conditions, and procedures for their recognition?

If so, then the project could further examine what constitutes an open or closed space, and, in the case of MRAs, an open or closed mutual recognition regime. This article has thus raised questions about the transitivity of the relationship between overlapping transnational regimes—that is, of how one bilateral or plurilateral relationship interacts (and should interact) with another. In the case of mutual recognition regimes, for instance, the question can be horizontal or vertical. From a horizontal perspective, if regime A recognizes standards or conformity assessment in regime B, and regime B recognizes standards or conformity assessment in regime C, will and should regime A recognize regime C, and if so, under what scope and conditions? The issue of transivity can combine horizontal (between transnational regimes) and vertical (within a multi-level jurisdictional structure) mechanisms of recognition. Thus, if a regime includes a country with a federalist structure which recognizes regulatory authority within its borders according to different approaches than other parties to the regime, will these other parties recognize its domestic patterns of recognition? The potential for, and the absence of, “recognition of recognition” testifies to the complex and fragmented nature of the emerging transnational system. Although transnational mechanisms can spur the plurilateralization and multilateralization of bilateral regimes, the key question, positively and normatively, is—how can it be done?

Connected to these prior points, the project’s analytical categories could be refined, and, in particular, in respect of the horizontal nature of the vast majority of transnational governance. This article’s analysis of recognition makes clear the distinction

127 See Part V.
between vertical and horizontal governance mechanisms—that is, between disciplines shaped and enforced by supranational institutions and disciplines shaped and enforced by states in relation to each other. This distinction again helps us to evaluate the relation of general accountability issues to the democracy dilemma. The key challenge involves the relation of internal and external accountability, contrasting, as do the authors of the framing paper, rules for constraining states and rules for constraining international institutions. There may indeed be qualitatively different accountability challenges in a horizontal and vertical setting: holding authorities in another country accountable may ultimately require a greater degree of democratic delegation than holding international institutions accountable.

In this respect, a key issue for any global administrative law or governance regime is that of the borders of recognition. This article has shown why there should be no defined borders. The advantage of the mutual recognition approach is that it involves a dynamic process of ongoing exchange among public and private actors from different polities. The border for the application of a mutual recognition regime is thus a continuously contested one, subject to negotiation, deliberation, and ex ante and ex post controls. As examined earlier, the line has been shifting through the expansion of national treatment toward mutual recognition of product standards, on the one hand, and away from recognition through the more stringent scrutiny of foreign production processes as reflected in the “trade and . . .” debates involving foreign environmental and labour regulation, on the other. Another advantage of attending to the pluralist, horizontal nature of transnational governance, as opposed to a centralized, vertical hierarchical approach, is that the former explicitly accounts for these shifting boundaries.
In examining the pluralist nature of the transnational order, this article has also stressed the key distinction between substantive standards and the recognition process. Although participating states must determine whether home or host state national standards apply when they allocate jurisdictional competence, they do not need to determine harmonized standards. A central point of managed mutual recognition is that global governance can function without global standards or a global government, thus retaining diversity within a transnational framework. Mutual recognition involves a dynamic process of regulatory coordination, confidence building, and more optimal allocation of administrative authority in order to attempt to ensure that whatever standards are applied are adequate and appropriate. This process involves an ongoing, managed dialogue, and is thus to be distinguished from the more fixed nature of centralized governance, at least when it comes to standard-setting as opposed to ensuring the consistency and fairness of procedures. The only substantive standards entailed in mutual recognition arrangements are those involving the choice over the appropriate standard of review of administrative decisions.

By creating a decentralized framework for transnational engagement, the mutual recognition process is obviously conflict-prone. It can lead to clashes of regulatory and legal cultures, tensions around appropriate jurisdiction, and the infamous “race to the bottom.” But it is more likely to lead to positive outcomes. First, it can lead to adaptation toward more effective standards as regulators learn from each other’s practices. In the process of exchange, regulators engage in forms of mutual technical assistance where reputational concerns create a check against the temptation to engage in

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128 See Part II.B.
129 See Part IIC.
a race to the bottom (which race is seldom observed in practice). Second, it can lead to increased trust and confidence of regulators in each other’s regulatory regimes so that systems may retain their own standards in a pluralist world, but in a manner that facilitates and does not impede mutual exchange. Third, the transparency requirements of mutual recognition regimes can facilitate the formation of transnational processes that, in turn, can help to empower domestic publics to ensure that their own regulators enforce agreed standards. Finally, and perhaps most importantly, mutual recognition regimes can promote greater tolerance for difference, and, as a result, greater resilience of domestic polities when interacting with each other, lessening the potential for conflict. Tolerance indeed is a defining feature of mutual recognition.\(^{131}\) Mutual recognition represents the acceptance of other systems and approaches as valid, having parallels with multiculturalist goals within polities. Instead of requiring others to assimilate to dominant national norms, mutual recognition arrangements promote the acceptance of difference. As a dynamic process, managed mutual recognition regimes can spur all of the above aims.

An implicit goal of the global administrative law project is to re-examine national administrative law itself. National regulatory systems need to adapt if they are to fulfil their functions in a global economic order by developing new mechanisms of regulatory exchange and accountability. As noted throughout this article, transnational economic processes are occurring all around us. Like it or not, forms of unilateral, often

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130 *See* Nicolaidis Thesis, *Suprasupra* note 54

131 Held uses the term “reciprocal recognition” as the “second element of contemporary cosmopolitanism,” pursuant to which “each person . . . is required to respect everyone else’s status as a basic unit of moral interest.” David Held, *From Executive to Cosmopolitan Multilateralism, in* Held & Koenig-Archibugi, *supra* note 87, at 169
unconscious, de facto recognition necessarily take place continuously since recognition is an implicit principle for the functioning of any integrated economic or political order. Mutual recognition arrangements thus constitute an institutionalization and legalization of recognition, offering transnational accountability mechanisms that otherwise would not exist. Mutual recognition is both about expanding recognition where there has been none, and about making prevailing recognition conditional on the respect of fundamental norms, all within a transnational framework. Since regulators already must rely to a great extent on foreign regulatory systems in an economically integrated world, mutual recognition regimes can help to provide the assurance of greater mutual oversight, review, and adaptation of national systems.