TRANSNATIONAL MUTUAL RECOGNITION REGIMES: GOVERNANCE WITHOUT GLOBAL GOVERNMENT

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I
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 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 shaping 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 na-

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1. Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (Summer/Autumn 2005).

2. *See* Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 GOVERNANCE 73 (2003).

tional 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 by putting forward normative models as to how these mechanisms should operate, often in the hope of influencing decisionmakers 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.[3] Why such a demand for foregoing the age-old notion of "when in Rome do as the Romans do" in favor 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 "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 gov-

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 counterpart's regulatory system. The "mutuality" component indicates that the reallocation of authority is reciprocal and simultaneous.

ernance. 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."[4] 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 arm's length.

This prospect can be liberating for some but feared by others, as exemplified by the debate around the proposed "Bolkenstein directive" in the European Union (E.U.) regarding the liberalization of trade in services.[5] 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 E.U. 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 E.U. 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 E.U. "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" (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 known for its development and implementation within the E.U., the term "mutual recognition agreements," in reference to inter-governmental agreements, is not actually used in the internal E.U. context for government-to-government agree-

4. The Organsation for Economic Co-operation and Development (OECD) was involved in a broad scale assessment exercise of the interrelation between trade liberalization and regulatory reform between 1995 and 2001. For a synthesis, see Kalypso Nicolaidis, *Harmonisation and Recognition: What Have we Learned? in Trade and Regulatory Reform: Insights from Country Experience*, OECD Publications (2001).

5. *See* Commission Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, COM(04)2 final/3. For a discussion of the interrelation between the role of ideas and interests in the liberalization of trade in services see William Drake & Kalypso Nicolaidis, *Ideas, Interests and Institutionalization: "Trade in Services" and the Uruguay Round*, 46 INT'L ORG. 37 (1992).

ments. Rather, the principle of "mutual recognition" is embedded in directives and regulations agreed upon through E.U. political processes or applied in judgments of the European Court of Justice. In the E.U. context, the term "mutual recognition agreements" was introduced to describe contracts between private conformity assessment bodies from different member states that 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 E.U. 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.

II

MUTUAL RECOGNITION AS CONSENSUAL EXTRATERRITORIALITY: MUTUAL RECOGNITION, NATIONAL TREATMENT AND HARMONIZATION

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 regarding citizens of other states.[6]

As a result, mutual recognition regimes are key to any global administrative law regime. Rather than conceptualize governance in terms of a national versus

6. *See* IMMANUEL KANT, *To Perpetual Peace: A Philosophical Sketch*, *in* PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 107 (Ted Humphrey trans., 1983).

global dichotomy, mutual recognition represents the operation of a third, 'middle way' of transnational economic governance, one that is already happening in a global economic order—that of recogniting 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?

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 the others do, rather than of their respective existence and boundaries, the islands of extraterritoriality are larger and more pervasive.[7] 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,[8] to the sanctions applied in response to European assistance for the Soviet oil pipeline,[9] to the application of U.S. securities and antitrust law to conduct abroad, as in the Hartford Fire Insurance case.[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 com-

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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 in which, 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.

8. Cuban Liberty and Democratic Solidarity (Libertad) Act Of 1996 (Helms-Burton Act), 22 U.S.C. § 6082 (2005).

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).

10. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). For a discussion of the extraterritoriality of securities law, see *Oversight by the U.S. Securities and Exchange Commission of U.S. Securities Markets and Issues of Internationalization and Extraterritorial Jurisdiction*, 29 INT'L LAW. 731 (1995). For a discussion of the extraterritoriality of antitrust law and the Hartford Fire Insurance case, see Andreas F. Lowenfeld, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*" 89 AM. J. INT'L. L. 42 (1995); Philip R. Trimble, *The Supreme Court and International Law*, 89 AM. J. INT'L L. 53 (1995); Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750 (1995).

mercial parties before U.S. courts regarding conduct that was apparently 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, in which 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 labor, 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 E.U., 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 that 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 decisionmaker, 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 that Mexican imports into the United States were produced under less stringent labor 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 respecting 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.*

Table 1

Graph 1:
Trade, regulation and territoriality:
The traditional model for regulation of products and modes of production

Enforced In:	Rules Of: HOST (Importing Country)	Rules Of: HOME (Exporting Country)	
HOST (Importing Country)	***Sovereign Control***		1. Laws and regulations affecting the characteristics of *products* (goods and services) sold in the importing country, *e.g. food safety standards*
HOME (Exporting Country)		***Sovereign Control***	2. Laws, policies and regulations affecting *modes of production* in exporting country, *e.g. labor rights*

Graph 2:
Towards "legitimate differences":
The two way erosion of economic sovereignty

Enforced In:	Rules of: HOST (Importing Country)	Rules of: HOME (Exporting Country)	
HOST (Importing Country)	→	**Extra territorial control**	1. Recognition of home state laws affecting characteristics of *products* as a means to lower technica barriers to trade (ex; expansion of national treatment of E.U. and WTO
	Minimal harmonization?		
HOME (Exporting Country)	**Extra territorial control**	←	2. Extraterritorial application of host country rules as a condition of import (WTO) trade/environment classes; proposed social clause re labor standards
	Minimal harmonization?		

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 ex-

pansive interpretation of the national treatment principle. The *Cassis de Dijon* case decided by the European Court of Justice is likely the best known example. In that case the court held Germany must recognize French standards for marketing 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.[11] In the international context, the Sanitary and Phytosanitary (SPS) and Technical Barriers to Trade (TBT) agreements of the World Trade Organization (WTO) can be read as codifications of an expansive application of national treatment. In the *EC–Meat Hormones* case, the WTO Appellate Body determined that WTO rules required the E.U. to accept U.S. hormone-treated beef even though the production of such beef was banned within the E.U.[12] Similarly, in the *EC–Sardines* case, the Appellate Body held the E.U. had to permit the labelling for the E.U. market of a fish caught in the Pacific Ocean and sold from Peru as "sardines," even though the E.U. regulation banning such labelling was neutral on its face.[13] 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 based on how it was produced. In the famous *U.S. Tuna–Dolphin* cases, two GATT panels held the United States was not permitted to ban tuna imports because the tuna had been caught with a technique that killed a large number of dolphins, one the United States had banned for its own fishing fleets.[14] In other words, for production processes, the mutual recognition prin-

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11. The European Court of Justice, in its *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. *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).

12. Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R (Jan. 16, 1998) (on file with Law & Contemp. Probs.), *available at* http://docsonline.wto.org/ (last visited Apr. 12, 2005).

13. Report of the Appellate Body, *European Communities–Trade Description of Sardines*, WT/DS231/AB/R (Sept. 26, 2002) (on file with Law & Contemp. Probs.), *available at* http://docsonline.wto.org/. (last visited Apr. 12, 2005). The E.U. regulation maintained that only the species *Sardina pilchardus Walbaum* could be marketed in the E.U. under the name "sardines." The species *Saridina pilchardus* swims in European waters and is largely fished by E.U. vessels. Because of the E.U. regulation, fish species such as *Sardinops sagax sagax* which inhabits the Pacific Ocean could not be sold under the name "sardines" in the E.U. market. *See* Gregory Shaffer & Victor Mosoti, *EC Sardines: A New Model For Collaboration In Dispute Settlement?*, BRIDGES, Oct. 2002, at 15.

14. The United States, however, effectively blocked adoption of these panel reports. *See* GATT Dispute Panel Report on United States Restrictions On Imports Of Tuna, 30 ILM 1594, 1620 (1991) (unadopted panel report, Aug. 16, 1991); GATT Dispute Panel Report on United States Restrictions

ciple was the presumption, and was subject to only limited exceptions.[15] The presumption of mutual recognition was denied, however, in the *U.S. Shrimp–Turtle* case, in which the WTO Appellate Body ultimately decided the United States could ban the import of shrimp caught without the turtle-protective devices prescribed by the United States, subject to conditions examined below.[16]

The situation is 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) concerning the movement of persons from a home state to provide services in a host state.[17] Such services raise the issue as to what law applies to regulate a factor of production (labor) that involves a home state worker temporarily transferred to a host country to provide a service. For example, what labor law applies when construction companies enter into turnkey contracts in which 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 labor 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 ways in which states balance trade liberalization and sovereignty and social policy concerns through applying mutual recognition and

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on Imports of Tuna, , 33 ILM 839, 899 (1994) (unadopted panel report, June 16, 1994). *See also* overview in Richard W. Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO INT'L ENVTL, L. REV. 1 (1999).

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

16. Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW (Oct 22, 2001), *availale at* http://docsonline.wto.org/. The devices, referred to as "turtle excluder devices" (or TEDs), are a mechanism that permits turtles to escape from shrimp trawling nets to avoid drowning. *See* Sabino Cassese, *Shrimp, Turtles, and Procedures: Global Standards for National Administrations*, in this symposium issue; Gregory Shaffer, *United States–Import Prohibition of Certain Shrimp and Shrimp Products,*" 93 AM. J. INT'L. L. 507 (1999); Gregory Shaffer, *Power, Global Governance and the WTO: The Need for a Comparative Institutional Approach*, *in* POWER AND GLOBAL GOVERNANCE 130 (Michael Barnett & Raymond Duvall, eds., 2005).

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 Introduction to the GATS (October 1999), *available at* http://www.wto.org/english/tratop_e/serv_e/serv_e.htm.

national treatment principles to products and production processes thus lies along a continuum.

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, in combination. Mutual recognition regimes may, for example, be linked to harmonized standards.[19] Mutual recognition regimes may more likely flourish if regulatory officials operate under procedures and standards with which they are familiar and if they trust review and monitoring of the regime's application is ongoing. International standards can facilitate the negotiation of bilateral mutual recognition agreements because, when parties operate under common standards and procedures, they more easily understand and develop trust in each other's regulatory practices to enforce these standards.[20] Sustained transnational engagement among public

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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" (that is, conformity assessment procedures). Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods, Hein's No. KAV 3778, at cxliii.

19. *See* Kalypso Nicolaidis, *Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects*, in *Regulatory Reform and International Market Openness*, OECD Publications, (1996), *reprinted* in (Jean Monnet Working Papers No. 7, 1997) (on file with Law & Contemp. Probs.), *available at* http://www.jeanmonnet program.org/papers/97/97-07.html (last visited Apr. 12, 2005).

20. For example, the 1997 U.S.–E.U. 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

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.[21] For this reason, MRAs initially targeted conformity assessment systems rather than underlying standards.

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 been only 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 cre-

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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.–E.U. 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, E.U. 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.

ate 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—in particular, the 1997 U.S.–E.U. 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 to be equivalent to each other or, even better, on common standards.[22] 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 is inevitable or desirable. Rather, 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.

22. Taken from *Commission Staff Working Paper: Priorities for Bilateral/Regional trade related activities in the field of Mutual Recognition Agreements for industrial products and related technical dialogue*, SEC (Aug. 25, 2004) 1072/1 (on file with Law & Contemp. Probs.), *available at*: http://register.consilium.eu.int/pdf/en/04/ st13/st13616.en04.pdf. (last visited Apr. 12, 2005).

Table 2
Alternative combinations of principles underpinning
Mutual Recognition regimes

Standards vs. Conformity Assessment

		Standards		
		Host	Home	Harmonized
Conformity Assessment	Home country	Tradt'l MRAs	EU/90s Enhanced MRAs	Form of Enhanced MRAs
	Host country	EU/70s WTO norm		Int'l standards

National Treatment, Harmonization and Mutual Recognition

	NT	**H**
• Single rule?		
• From firm viewpoint	NO	YES
• From systematic viewpoint	NO	YES
• Within jurisdiction	YES	YES

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 transnational 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 decisionmaking, 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 that 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 E.U. 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.[23] At the international level, WTO members have signed agreements calling

23. NAFTA, article 908, provides: "[E]ach 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. 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

for bilateral and plurilateral negotiation of MRAs.[24] The WTO also sets rules that constrain the adoption of mutual recognition agreements, in particular, those that discriminate against other WTO members (for example, Article I of the General Agreement on Tariffs and Trade,[25] as well as the most-favored-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 *EC-meat hormones* and *EC-sardines* decisions noted above.[26]

2. Transnational Network Administration

Administration by transnational networks of regulatory officials is the basis for administering mutual recognition regimes. Host states must accept products and services from home states, subject to negotiated administrative 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 when 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. They must therefore take into account the impact of the administration's 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.

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apply any standards-related measure with a view to or with the effect of creating an unnecessary obstacle to trade between the Parties." *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.

24. *See, 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 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), *citing* GATS Annex 1B.

25. *See* GATT, *supra* note 15.

26. *See* Appellate Body, *supra* notes 12 and 13.

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.–E.U. "safe harbour" negotiations over the recognition of privacy standards, the E.U. 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 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.[27] Even in formally transgovernmental 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.[28] Consumer groups and businesses unhappy with the operation of MRAs are likewise the primary providers of information to governments to challenge the regime's implementation.

5. 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 certification of companies' online privacy practices.[29] In this way, on-line businesses can meet criteria in multiple jurisdictions without the need for drawn-out treaty negotiations.

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27. *See* Gregory Shaffer, *Reconciling Trade and Regulatory Roles: The Prospects and Limits of New Approaches to Transatlantic Governance Through Mutual Recognition and Safe Harbor Agreements*, 9 COLUM. J. EUR. L. 29, 68 (2002).

28. The telecommunications industry, for example, has sought MRAs for lucrative markets in Asia and Latin America, which U.S. and E.C. authorities have signed through APEC and CITEL, respectively. APEC, the Asia Pacific Economic Cooperation, promotes open trade and economic cooperation among APEC's twenty-one member 'economies' around the Pacific Rim. *See* 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* http://www.citel.oas.org/. (last visited Jan. 11, 2005). Telecommunications was also at the center of the 1997 U.S.–E.U. MRA.

29. The Japanese counterpart is 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.

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 E.U. 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 E.U. has announced that it "has negotiated or is in the process of negotiating [MR] agreements with about 38 third countries."[30] 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 in which individual states in the United States wield most regulatory power.[31] About half of the MRAs notified to the WTO, in contrast, concern professional services, such as accountants, engineers, or architects.[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. "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."[33] Under this principle, courts may decline to rule on a case in deference to another forum with greater interests in, and links to, the dispute.[34] Administrative agencies may also

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30. *See* SEC, *supra* note 22.

31. The E.U. 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 229) 62); on 1/1/02 with Japan (Agreement on mutual recognition between the European Community and Japan, 2001 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 (on file with Law & Contemp. Probs.), *available at* http://europa.eu.int/comm/enterprise/international/indexb1.htm#intro (last visited Jan. 11, 2005). *See also* Shaffer, Reconciling Trade and Regulatory Goals, *supra* note 27, at 36.

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.

33. BLACKS' LAW DICTIONARY 267 (6th ed. 1990).

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) ("[T]here is the additional question which is unique to the interna-

create "positive comity" arrangements, as did the United States and E.U. 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."[35] In this way, host state administrative and judicial bodies may mutually defer to 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 E.U. regulation and a number of treaties.[36] 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.[37] 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.[38] The 1997 U.S.-E.U. MRA negotiations required the involvement of multiple state agencies since the negotiations comprised a framework agreement with 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

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tional 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.").

35. Youri Devuyst, *Transatlantic Competition Relations*, *in*, Transatlantic Governance in the Global Economy 127, 135-36 (Mark A. Pollack & Gregory C. Shaffer, eds., 2001).

36. *See* Commission Regulation 44/2001, 1971 O.J. (L 12) 1. *See also* Convention on International Jurisdiction and the Effects of Judgments in Civil and Commercial Matters, The Hague (Feb. 1, 1971) (on file with Law & Contemp. Probs.), *available at* http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=78 last visited Apr. 12, 2005); Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968 O.J. (C 027) 1 ; Convention on the Law Applicable to Contractual Obligations, Rome (June 19, 1980), 19 I.L.M. 1492 (1980); Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano (Sept. 16, 1988) 28 I.L.M 623 (1989); and Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, Brussels (May 28, 1998) (1998 O.J. (C 221)), a modification of the 1968 Brussels Convention that adds judgments in matrimonial matters and matters of parental responsibility.

37. *See* Melissa Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L. J.; Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1104 (2000) ("Judicial globalization . . . describes a much more diverse and messy process of judicial interaction across, above and below borders, exchanging ideas and cooperating in cases involving national as much as international law."); *see also* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002); Paul Schiff Bermann, *Towards a Cosmopolitan Vision of Conflicts of Law: Re-Defining Governmental Interests in a Global Era*, 153 U. PA. L. REV. (forthcoming 2005).

38. *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

agreement.[39] 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, authority has been delegated in these areas not only to autonomous public agencies, but to private certification bodies that may compete with one another. Precisely because of this fragmentation, the E.U. 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 E.U. 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 E.U. 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.[40] These developments illustrate the continued state-centric character of global administrative law. Even when private bodies actually "do the work," state commitment is still what matters.

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39. *See* Shaffer, *supra* note 27, at 40; Kalypso Nicolaidis & Rebecca Steffenson, *Managed Mutual Recognition in the Transatlantic Marketplace*, *in* THE FUTURE OF TRANSATLANTIC ECONOMIC RELATIONS: CONTINUITY AMID DISCORD (Gregory Shaffer and Mark Pollack, eds, 2005).

40. Joel Reidenberg, however, questions whether the FTC actually has the powers contemplated under the Safe Harbor agreement. Joel R. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*, 38 HOUS. L. REV. 717, 740-42 (2001).

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.[41] 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.[42] 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."[43] Businesses have multiple strategies. At the domestic level, trading firms hoped that the U.S.–E.U. 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.[44] 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.[45]

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 a MRA faces greater hurdles. For example, no U.S. constituency pressed for implementation of the transatlantic electrical safety MRA.[46] This would have

41. 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, *The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue*, *in* Pollack & Shaffer, *supra* note 35, at 215.

42. To give one example of TABD's work, see 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 Pre market Evaluation Reports, 63 Fed. Reg. 17,744, 17,747 (proposed Apr. 10, 1998) (noting views of TABD).

43. Paula Stern, *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).

44. Since the MRA telecommunications and electromagnetic compatibility annexes rely on recognition of foreign Conformity Assessment Bodies, the United States needed (at a minimum) to adopt a program permitting the use of private testing laboratories were it to enter into the MRA.

45. Telephone Interview with FCC Official (June 8, 2001).

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

meant constituent pressure on OSHA to show good will towards the E.U. and to recognize laboratories designated by E.U. 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 E.U. market which, unlike in the U.S. market, requires third party conformity assessment.[47] Because of their experience with OSHA-certified laboratories, most U.S. producers encountered relatively less difficulty with OSHA's requirements for conformity assessment than their European competitors and could thus 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.[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 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.[49] 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 characters and set in place, this section addresses the factors that lead to the adoption of mutual recognition as a core principle of transnational administrative law.

"that the MRA, in fact, was having little impact on the 'day-to-day operations' of companies that manufacture products covered under the agreement." *See* Gary Yerkey, *EU Set to Withdraw from Agreement with U.S. to Boost Trade in Electrical Goods*, 19 INT'L TRADE REP. (BNA) 956 (May 30, 2002).

47. Telephone Interview with DG Enterprise Official in Brussels (June 13, 2001).

48. *Id.*

49. *See, e.g.*, *U.S.–E.U. Mutual Recognition Agreement (MRA)/Congressional Hearing* (on file with Law & Contemp. Probs.), *available at* http://www.publiccitizen.org/trade/harmonization/MRA/articles.cfm?ID=6156 (last visited Mar. 10, 2002) (reporting on hearing before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce, 105th Cong. (1998)); Mary Bottari, Peter Lurie & Sidney M. Wolfe, *Public Citizen Comments on Pharmaceutical Annex to U.S.–E.U. Mutual Recognition Agreement* (on file with Law & Contemp. Probs.), *available at* http://www.publiccitizen.org/trade/harmonization/MRA/articles.cfm?ID=4302, (last visited March 10, 2002); *see also* Steffenson, *supra* note 39, at 22 (concerning reactions of the Transatlantic Consumer Dialogue (TACD) and of the Transatlantic Environment Dialogue (TAED)). The TACD and TAEC consist of non-governmental organizations from both sides of the Atlantic. *See* Francesca Bignami & Steven Charnovitz, *Transatlantic Civil Society Dialogues, in* Pollack & Shaffer, *supra* note 35, at 255.

A. Demand and Supply Factors[50]

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 of these.[51] 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.

The distinction between the demand and the supply of a regime can be viewed roughly in terms of key actors' perceptions of the desirability and feasibility of the regime's implementation.[52] 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 cannot be independently specified. The same actors may be "demanders" and "suppliers" and similar factors may affect the demand and supply side.[53] 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 E.U. context, demand has been generated from both internal and external E.U. 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."[54] Each MRA can thereby provide political leverage to domestic firms to demand new MRAs with third-country counterparts to equalize market

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50. This section is drawn primarly from Kalypso Nicolaidis & Michelle Egan, *Regional Policy Externality and Market Governance: Why Recognize Foreign Standards?*, 8 J. EUR. PUB. POL'Y 454 (2001).

51. *See* Peter Gourevitch, POLITICS IN HARD TIMES (1986); Peter J. Katzenstein, *Conclusion: Domestic Structures and Strategies of Foreign Economic Policy*, *in* BETWEEN POWER AND PLENTY (Peter J. Katzenstein ed., 1987); Stephen D. Krasner, DEFENDING THE NATIONAL INTEREST: RAW MATERIALS INVESTMENTS AND US FOREIGN POLICY (1978).

52. *See* Nicolaidis & Egan, *supra* note 50.

53. Robert Keohane, *The Demand for International Regimes, in* INTERNATIONAL REGIMES 142-43 (S. Krasner, ed., 1982). When this article considers the impetus for change, on the demand side—and resistance to change, on the supply side—it examines the role played by the same array of actors.

54. *See* Nicolaidis & Trachtman, *supra* note 24; Kalypso Nicolaidis, *Non-Discriminatory Mutual Recognition: An Oxymoron in the New WTO Lexicon? in* REGULATORY BARRIERS AND THE PRINCIPLE OF NON DISCRIMINATION IN WORLD TRADE LAW: PAST AND PRESENT, JOURNAL OF WORLD TRADE, The World Trade Forum series, (Petros Mavroidis & Patrick Blatter, eds., Univ. Mich. Press 2000); Nicolaidis, *supra* note 4; Kalypso Nicolaidis, Mutual Recognition Among Nations, (1993)(unpublished Ph.D. thesis, Harvard University).

access. Considerations of reciprocal market access benefits can also help to explain the structure of MRAs.[55]

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:

1. Cross-national Regulatory Compatibility

The first and most obvious factor has to do with the basic question a decisionmaker 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 when 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 offers explanatory leverage only 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.–E.U. MRA, the involvement of both

55. *See* Shaffer, *supra* note 27, at 39.
56. *See* Pollack & Shaffer, *in* Pollack and Shaffer, *supra* note 41, at 297-99.

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, that are accountable for ensuring domestic regulatory oversight and which must respond to domestic pressures are best able to make commitments on market openness that are credible.

3. Supranational and Transnational Institutional Conditions

Finally, standards problems often take the form of a "prisoner's dilemma" that require institutional solutions to develop mutual trust and monitoring to ensure that countries do not defect on their commitments. This concern provides the core rationale for the "managed" character of mutual recognition. Supranational and transnational institutional development can compensate to some extent for gaps in transnational regulatory compatibility. Trade liberalization is facilitated if the states involved operate within a common institutional framework for trade-oriented regulatory cooperation and dispute resolution. Here, as elsewhere, agreement on the creation of such institutions depends on long-term trust and short-term adoption of confidence building measures.[59] 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.

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57. *See* Shaffer, *supra* note 27, at 40.

58. *See, e.g.*, MICHELLE P. EGAN, CONSTRUCTING THE EUROPEAN MARKET 131 (2001) *supra* (noting that, in the United States, "the public and private sector have remained much more distinct," and the policy style is less "state-directed"); Robert Kagan, *How Much Do National Styles of Law Matter*, *in* REGULATORY ENCOUNTERS: MULTINATIONAL CORPORATIONS AND AMERICAN ADVERSARIAL LEGALISM 3 (Robert A. Kagan & Lee Axelrod eds., 2000) (noting the much more legalistic and adversarial regulatory style in the United States).

59. *See infra* notes 72-87 and accompanying text. *See also* DAVID VOGEL, TRADING UP (1995); GIANDOMENICO MAJONE, REGULATING EUROPE (1996); Nicolaidis, *supra* note 4.

Table 3 summarizes the operation of the above factors in three institutional settings—the European, transatlantic and international contexts.

Table 3[60]
Explanatory Factors for standardization
and mutual recognition across three contexts

Contexts: *Factors:*	European Cooperation (re: standards and conformity assessment)	Transatlantic Cooperation (re: conformity assessment)	International Cooperation (re: standards)
Country-specific capacity to deliver (private regulatory accountability & public regulatory autonomy)	Private bodies made accountable through notification	Very asymmetric. High in the EU. Low in the United States given lack of accountability and high autonomy.	Widespread differences.
Cross-national regulatory compatibility	Generally high by the 1980s but for conformity assessment procedures.	Lower than within the E.U. but not insurmountable.	Widespread differences.
Transnational institutional foundation	Pre-existing mutual monitoring techniques. Formation of EOTC. Sanctions for non-compliance. Enforcement by Commission and European Court of Justice.	Some pre-existing sectoral cooperation. Incentives to build mutual monitoring capacity as "confidence building measures." Relatively weak dispute settlement procedures.	High 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.

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 E.U. single market since the early 1980s but is arguably a *modus operandi* for the E.U. as a whole.[61] The high degree of transnational institutional foundation in the E.U. played a key role in the generalization of mutual recognition under the Europe 1992 program. Pursuant to the E.U.'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 E.U. market. In 1990, the member states formed the

60. Adapted from Nicolaidis and Egan, *supra* note 50.
61. Nicolaidis, *supra* note 4; Nicolaidis Thesis, *supra* note 54.

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.[62] 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.[63] Member state authorities periodically meet and exchange information about the process's operation through working groups and committees created pursuant to the respective E.U. directives. They thereby attempt to build and retain confidence in the system.[64] This E.U. system can be characterized as governance by coordinated cross-border public-private networks.[65] The system is backed, however, by potential enforcement through the actions of supranational bodies, in particular of the Commission and the European Court of Justice.

In light of the E.U.'s experience with applying the mutual recognition principle, the E.U.—not surprisingly—is a major advocate of its use internationally. E.U. 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 E.U.'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-E.U. counterparts.[66] The E.U. 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. The slow progress in the transatlantic context is due, perhaps above all, 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

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62. 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").

63. 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 E.U. standards, the product may be marketed in all fifteen member states.

64. Firms and laboratories also remain subject to post-marketing member-state regulatory controls, as well as market-reputational constraints.

65. *See* Renaud Dehousse, *Regulation by networks in the European Community: the role of European agencies*, 4 J. EUR. PUB. POL'Y. 246 (1997); EGAN, CONSTRUCTING A EUROPEAN MARKET, *supra* note 58, at 12; *see also* R.A.W. Rhodes, *The New Governance: Governing without Government*, 44 POL. STUD. 652 (1996) (theoretical background on governance through networks).

66. 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 E.U.

many services, have made U.S. negotiation of mutual recognition agreements more difficult. And 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.[67] The WTO provides a potential framework for facilitating the multilateralization of mutual recognition arrangements, but this framework remains, and probably should remain, weak in light of the primary need to build trust and confidence horizontally among state regulatory systems and the resource-intensive character of "managed" recognition.

B. The Attributes of Managed Mutual Recognition

In the end, the key to the acceptability of mutual recognition to all the parties concerned, and thus of its "supply," is its managed character.[68] 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. 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 types 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

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67. *See* Nicolaidis & Egan, *supra* note 50.

68. *See* Kalypso Nicolaidis, *Globalization with Human Faces: Managed Mutual Recognition and the Free Movement of Professionals, in* THE PRINCIPLE OF MUTUAL RECOGNITION IN THE EUROPEAN INTEGRATION PROCESS (Fiorella, et al, eds., 2004); Kalypso Nicolaidis, *Regulatory Cooperation and Managed Mutual Recognition: Developing a Strategic Model*, *in* TRANSATLANTIC REGULATORY COOPERATION (George Bermann et al., eds, 2000).

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.[69] 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: products, financial services and the professions.

69. This line of thinking can be presented under the general category of "securing insecure contracts." For a discussion, see Nicolaïdis, *supra* note 4.

Table 4
The main attributes of "managed mutual recognition"[70]

Examples:	**Products**	**Professional services**	***Financial services***
Variation in:			
Prior conditions: Requirements for equivalence between national systems	a. Equivalence in health, safety and other technical standards b. Equivalence of standards of enforcement, including of testing and certification procedures c. Mutual recognition of accreditation bodies d. *Ex-ante* confidence building measures	a. Equivalence of professional standards b. Equivalence of accreditation and licensing procedures c. Inter-recognition between competent bodies	a. Equivalence of prudential standards b. Equivalence of authorization and licensing procedures
Automaticity: Regulatory scope of recognition and residual entry requirements from entrant's point of view	a. Test data & inspection report vs final approval b. Additional tests and approval procedures	a. Eligibility: recognition of professional training and competence b. Compensatory requirements	a. Notification by home state b. Proof of licensing c. Additional spot checks
Scope of access: Limitations on scope of access to importing country market	Usually full scope of access except for consumer type (limitations on market access stem from other market characteristics, e.g. distribution channels, fragmented domestic jurisdiction)	a. Right to practice vs title b. Scope of permissible activity c. Rules of conduct and enforcement d. Cross-border supply vs establishment e. Temporary vs permanent right of access	a. Initial entry vs ongoing supervision b. Scope of permissible activities / products c. Rules of conduct and enforcement d. Cross-border supply vs establishment e. Consumer type
***Ex-post* guarantees:** Alternatives to host country control (applies to all three)	a. Mutual monitoring b. Collaboration and accountability c. Competition law and dispute resolution mechanisms d. Case-by-case safeguards and overall reversibility		

70. Nicolaidis, *in* BERMAN (2000).

The point is that managed mutual recognition can be viewed in a static or in 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 (E.U.). 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.[71] 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

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 labor between regulators and regulatory systems in order to reduce the costs associated with regulators' having to extract information about the quality of foreign products independently. 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, about which much has been written across fields,[72] is usually understood to be interpersonal and *subjective* in nature insofar as it relates to specific

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71. For a detailed discussion *see id.*; *see also* Nicolaidis, *supra* note 68.

72. *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).

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 ongoing 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.[73] Confidence, therefore, is predicated on a greater degree of knowledge of what is (and is likely to be) than trust, which involves a greater degree of risk. In effect, the managed character of mutual recognition can be seen as a mechanism to transform a situation relying (imperfectly) on trust, to one 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.[74] 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 in which they are asked to rely on testing, certifications, and accreditations by foreign laboratories and officials. They will trust each other only if they are assured their regulatory counterparts hold the necessary capacity to advance the social goals of a coordinated regulatory program. As Majone writes regarding the E.U.'s internal regulatory networks, "for a co-ordinated

73. *See* Shachar Nativ, E-money in the age of globalization, (Unpublished D.Phil thesis, Oxford University).

74. 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), *at* http://www.wto.org/english/docs_e/legal_e/15-sp5.pdf, art. 7 (requiring members to notify changes in and provide information on their sanitary and phytosanitary measures); TBT, *supra* note 18, 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 assessment procedures); *see also* Article X of GATT ("Publication and Administration of Trade Regulations").

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."[75] In the framework developed here, mutual recognition regimes rely on convergent mutual expectations predicated on systemic confidence and intersubjective 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 when 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. Food and Drug Administration (FDA), for example, simply does not have the resources to adequately conduct all testing itself, especially when testing involves significant foreign travel.[76] By permitting its "over-extended and under-resourced" staff[77] to outsource testing and evaluating 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.

When MRAs include developing countries, significant capacity building and technical assistance may be prerequisites for recognition of their standards and conformity-assessment decisions. The E.U. has engaged in assisting developing countries to upgrade their home standards in order for them to be recognized so their products and services may be marketed in the EU. For example, the E.U. provided refrigerators and free consulting to African countries in the great lakes region so the fish they wish to export to the E.U. can be accepted.[78] Simi-

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75. 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.

76. 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 with FDA Official (June 8, 2001).

77. 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.

78. "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

larly, the United States has provided technical assistance to help countries catch wild shrimp in a manner that does not threaten endangered sea turtles.[79] Article 11 of the TBT Agreement calls on its members to provide technical assistance to developing countries in preparating technical regulations and in establishing national standardizing- and conformity-assessment bodies.[80] However, although trade-related capacity-building endeavours abound, they are often not well-coordinated, hampering the development of north-south mutual recognition arrangements.[81]

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 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 insofar as they are able to

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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." E-mail to Shaffer from a Food and Agriculture Organization Representative (Jan. 16, 2005).

79. *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) (on file with Law & Contemp. Probs.), *available at* http://docsonline.wto.org/ (last visited Apr. 12, 2005). These status reports of progress on implementation of recommendations are required pursuant to Article 21.6 of the DSU.

80. *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.

81. Because donors like to take "credit" for assistance projects, they prefer not to provide substantial funding through an international organization or a common fund. As Susan Prowse of the U.K.'s Department for International Development writes, different agencies thus often support "a vertical multiplicity of trade-related assistance initiatives with little to no horizontal coordination." Susan Prowse, *The Role of International and National Agencies in Trade-Related Capacity Building*, 25 THE WORLD ECON. 1235, 1239 (2002), (citing TOM PENGELLY & MARK GEORGE, BUILDING TRADE POLICY CAPACITY IN DEVELOPING COUNTRIES AND TRANSITION ECONOMIES: A PRACTICAL GUIDE TO PLANNING TECHNICAL COOPERATION PROGRAMMES (UK DFID, 2001) (on file with Law & Contemp. Probs.), *available at* http://www.dfid.gov.uk/pubs/files/buildingtradecapacity.pdf)(last visited Apr. 12, 2005); *see also* Gregory Shaffer, *Can WTO Technical Assistance and Capacity Building Serve Developing Countries?*, *in* REFORMING THE WORLD TRADING SYSTEM: LEGITIMACY, EFFICIENCY AND DEMOCRATIC GOVERNANCE (Ernst-Ulrich Petersmann, ed.) (forthcoming 2005).

coordinate input to their respective regulators on both sides of the Atlantic.[82] 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.[83] 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."[84] It admonished the United States for failing to take "into consideration the different conditions which may occur in the territories of . . . other Members.[85]" It required the United States to assure that its policies were appropriate for the local conditions prevailing in developing countries. The WTO Appellate Body, within the institutional constraints it faced, attempted to foster domestic institutional processes that permit for greater participation of affected foreign parties.[86]

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.[87]

In the end, regulators are more likely to engage in effective mutual recognition regimes if they know 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

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82. *See* Cowles, *supra* note 41; Bignami & Charnovitz, *supra* note 49, *both in* Pollack & Shaffer, *supra* note 35.

83. Report of the Appellate Body, *United States—Import Prohibition of Certain Shrimp and Shrimp Products; Report of the Appellate Body*, WT/DS58/AB/R (Oct. 12, 1998) (on file with Law & Contemp. Probs.), *available at* http://docsonline.wto.org/ (last visited Apr. 12, 2005).

84. *Id.*, para 180.

85. *Id.*, para 164.

86. This point is developed in Shaffer, *supra* note 16.

87. Nicolaidis, *supra* note 4.

UK, for instance, practically forbid its citizens to access worldwide television channels through satellite links? Such controls would require unprecedented and costly policing. Increasingly, technologies and commercial links allow actors to escape the kind of state control that would simply allow regulatory authorities to activate the on-off switch, whether they enter into mutual recognition arrangements or not. An advantage of mutual recognition arrangements, once more, is that they foster regulatory coordination and confidence-building in an economically integrating world in which 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,[88] rights-based mechanisms, and democracy-enhancing measures. Of the three, the proponents appear to be most comfortable with the accountability frame[89] This choice seems reasonable, although all the frames can be collapsed into the broader concept of accountability while still highlighting the democracy dilemma.[90]

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88. However, by "intra" they refer to "global," so the accountability frame appears to cover everything within the field.

89. This from Keohane's recent work, with the other two frames being complementary to it. *See* 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-Archibuigi, eds., 2003).

90. 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

The concept of accountability refers to the ability of affected parties to hold decisionmakers accountable, ultimately through sanctioning them.[91] As regards democratic accountability, decisionmakers 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 decisionmakers to affected parties.

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 labor* raise questions of horizontal accountability between political, judicial, and regulatory authorities in one country towards not only regulators, but also the publics in another. Supra-national actors play a role, but mainly that of facilitator, broker, mediator, or adjudicator of these horizontal relationships. 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 regarding citizens of other states. In the mutual recognition context, the host state is obliged not to discriminate against or unfairly treat those coming within its borders from outside, while the home state must consider the "consumption" of its rules by consumers and citizens outside its borders. In sum, from the angle of mutual recognition regimes, the key is to transfer the concepts presented in most analyses 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 in which the transfer of sovereignty is *horizontal*.

A central issue in assessing accountability, particularly 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 in which one jurisdiction's decisions can have significant impact on outsiders, whether because the national system may regulate too little, too much, or may simply take account of the interests of its own constituents before those of affected outsiders? One can speak of internal and external accountability, with *internal accountability* referring to that of national decisionmakers toward those within the polity, and *external accountabil-*

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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.

91. *See* Keohane & Nye, *supra* note 89.

ity referring to accountability toward those outside it.[92] 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 to 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 decisionmaking 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 decisionmaking mechanisms that are not directly accountable to a popularly elected body. Governance relies on other accountability mechanisms.

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. Nothing inherent in global and transnational governance mechanisms makes them more or less representative of affected parties' competing views and interests than domestic processes. Decisionmaking 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 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 wills of citizens around the world.

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92. *Id.* at 141.

Nonetheless, tensions between internal and external accountability mechanisms 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,[93] a point touched on earlier respecting 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, like any other state, thus has incentives to ensure that foreign regulatory systems are accountable when their decisions affect U.S. constituents, and, in return, has incentives to agree to make its own regulatory system more accountable to outsiders. The same applies for the E.U. with the important caveat that its regulatory culture is much more attuned to such external impact assessments.

Accountability mechanisms other than democratic ones 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.[94] In the mutual recognition context, domestic 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 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 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

93. *See id.*

94. The accountability mechanism of transparency is intricately related to the concepts of trust and confidence 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 instrumental role in preventing corruption, financial irresponsibility and underhand dealings." Amartya Sen, DEVELOPMENT AS FREEDOM 40 (1999).

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. Rather, they are subject to negotiation and deliberation as part of the dynamic process institutionalized in a mutual recognition arrangement.

Mutual recognition regimes can also require that all actors involved in the process provide *reasoned decisions*. In particular, parties can be required to justify why they refuse to grant recognition, or refuse to continue to grant recognition, to countries or importers that had benefited from de facto recognition until then (for example, the *U.S. Shrimp–Turtle* case discussed above).[95] 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 to 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.[96] As a result, under mutual recognition regimes, private actors can have both direct rights before foreign courts and administrative bodies and indirect rights before supranational ones.

In mutual recognition cases, the entitlement to judicial review involves, first of all, a jurisdictional decision over the applicable law and the conditions of its application. The MRA itself can specify the applicable law and the court or administrative body that would hear a claim. In practice, international or supranational judicial bodies often determine the conditions pursuant to which a host state can apply host state law or must effectively defer to home state determinations. Supranational judiciaries have played this role within the E.U. system, as in the *Cassis de Dijon* decision and the case law that followed, includ-

95. *See supra* notes 16, 79, and 83.

96. *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.

ing *Keck*,[97] and within the global system, as in the *U.S. Shrimp–Turtle*, *EC–Asbestos*, and SPS and TBT decisions of the WTO Appellate Body.[98] Alternatively, national courts can develop convergent national norms by engaging with and citing each other's judicial opinions.[99] They can also develop their own (non-national) cosmopolitan common law norms.[100] Finally, as noted earlier, they can allocate jurisdictional authority themselves by applying the principle of comity.[101]

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 includes those of *proportionality, means-ends rationality, least restrictive means, and cost-benefit balancing.* From a normative perspective, the question arises whether 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 decisionmaking, 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 failing to 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* in which 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 applica-

97. Case C-267/91, Criminal proceedings against Bernard Keck and Daniel Mithouard, 1993 E.C.R. I-6097, [1995] 1 C.M.L.R. 101 (1993).

98. *See supra* notes 16, 12 and 13 (*U.S Shrimp–Turtle*, *EC–Meat Hormones*, and *EC–Sardines* decisions, respectively); *see also* Report of Appellate Body, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) (on file with Law & Contemp. Probs.), *available at* http://docsonline.wto.org/ (the *EC-asbestos* decision) (last visited Apr. 12, 2005).

99. *See* Slaughter, *supra* note 37; Bermann, *supra* note 37.

100. *See* Graeme B. Dimwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000).

101. *See supra* note 34.

tion as a function of the sensibility of a sector or 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.–E.U. MRA for medical devices only applied to less stringently regulated medical devices, subject to possible expansion based on a "pilot program."[102]

In addition, parties include exceptions in which recognition could threaten national security, financial stability, or social peace ("*ordre public*").[103] Thus, for instance, the "Bolkenstein directive" (which provides for the application of home state law in the services trade) does not apply to the labor 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, social peace is threatened by the application of different labor 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's 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, such as the BIS capital adequacy standards.[104] The WTO itself provides for exceptions to trading requirements when financial stability is threatened, as pursuant to articles XII and XVIII of the GATT.[105]

Even more controversially, national security concerns have become pervasive in a post-September 11 world, infiltrating regulatory domains where they

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102. 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 E.U. 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).

103. 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."

104. *See, e.g.*, David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHICAGO J. OF INT'L L. 547 (2005) (discussing the Bank for International Settlements (BIS) and its role in financial standard-setting).

105. 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, *supra* note 18.

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."[106]

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 States.[107] 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."[108] A CSI agreement between the U.S. and Canada has already been implemented.[109] This approach stands in stark contrast to the pre-September 11 practice of inspecting containers once they reached U.S. shores, of which only around two per cent were subject to rigorous inspection.[110]

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

106. Keohane, *supra* note 89, at 133.

107. *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.

108. *Id.*

109. *Id.*

110. Edward Alden, *US in Efforts to Make Cargo Shipping Safer: Terrorism Fears Have Prompted An Overhaul of International Container Trade Security*, FIN. TIMES, May 22, 2002, at 12.

agreement before the European Court of Justice under internal E.U. data privacy law.[111]

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. If such regimes were on their radar screen, U.S. neoconservatives would tend to concentrate on areas where global governance does not work.[112] There is little doubt 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 these opposing analysts may agree 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 in which 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?

111. The U.S.-E.U. agreement was signed and went into force on May 28, 2004. Under the agreement with the E.U., U.S. customs officials can hold this data for three and a half years and share it with other U.S. government agencies. *See* John Tagliabue, *Europe and the U.S. at Odds on Airlines and Privacy*, N.Y. TIMES, Nov. 2, 2003, § 5, at 3; Paul Mueller, *Europe Asks Court to Rule on Air Security Pact*, N. Y. TIMES, April 22, 2004, at W1; "E.U.–U.S. agreement on transfer of air passenger data officially signed" (on file with Law & Contemp. Probs.), *at* http://europa.eu.int/idabc/en/document/2596/601 (last visited Feb. 18, 2005); "European Parliament asks Court of Justice to annul E.U.–U.S. passenger data deal" (on file with Law & Contemporary Problems), *at* http://europa.eu.int/idabc/en/document/3130/601 (last visited Apr. 12, 2005).

112. *See* ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003).

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 wherever interests may clash. Again the question arises: to whom should national regulators be accountable?

From the perspective of democratic accountability, at least four choices 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 global harmonization of standards and in setting up 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;[113] 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.[114]

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 decisionmaking 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 democratic processes.[115] By requiring its members to be democracies, the Treaty Establish-

113. *See, e.g.*, F.A. HAYEK, THE ROAD TO SERFDOM (1944).

114. The framing paper sets forth the three typologies of pluralism, solidarism, and cosmopolitanism. *See supra* note 90. 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* Part II.

115. 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. *See* Kingsbury et al., *supra* note 90. Although the framing paper addresses the role of central judicial institutions in policing national decisionmaking, 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 E.U.

ing the European Union thus facilitates the legitimate application of the mutual recognition principle.[116]

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

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. When national polities hold specific regulatory preferences, these polities will tailor and constrain the substantive scope, procedural conditions, and geographic boundaries of a mutual recognition regime. Former E.U. Trade Commissioner Pascal Lamy recently referred to these national preferences as "collective preferences" (or "*préferences collectives*"), in contradistinction to individual preferences reflected in, and facilitated by, autonomous market processes.[117] "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 that 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,[118] or

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bodies have exceeded their powers (as it did in the Tobacco advertising case), have violated substantive rights, or have failed to exercise due process. *See* Case C-376/98, Germany v. European Parliament and Council of the European Union, 2000 E.C.R. I-8419, [2000] 3 C.M.L.R. 1175 (2000).

116. *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 rights and fundamental freedoms, and the rule of law, principles which are common to the Member Status.").

117. *See* E.U. Trade Commissioner Pascal Lamy, "The Emergence of Collective Preferences in International Trade: Implications for Regulating Globalisation," Address at "Conference on "Collective preferences and global gouvernance [sic]: what future for the multilateral trading system" (Sept. 15, 2004) (on file with Law & Contemp. Probs.), transcript *available at* http://europa.eu.int/comm/archives/commission_1999_2004/ lamy/speeches_articles/spla242_en.htm (last visited Apr. 12, 2005); *see also* Steve Charnovitz, *An Analysis of Pascal Lamy's Proposal on Collective Preferences*. (GWU Law School Public Law Research Paper No. 122, 2004) (on file with Law & Contemp. Probs.), *at* http://ssrn.com/abstract=639322 (last visited Apr. 12, 2005).

118. *See* Richard Falk & Andrew Strauss, *Bridging the Globalization Gap: Toward a Global Parliament*, 80 FOREIGN AFF. 212, 216 (2001); *see also* DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE (1995).

through recasting the concept of democracy in "deliberative" terms.[119] Yet one should be sceptical of democracy functioning through global institutions, which is why the decentralized model represented by the mutual recognition approach is preferred by many, including the authors.[120] It makes more sense to expand accountability beyond the polity not through creating elected legislative bodies at the global level, but rather through expanding other accountability mechanisms, such as those used traditionally in national administrative law. 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 decisionmakers 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 ad-

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

120. *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).

ministrative 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, like 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 emphases placed on these terms depending on the school of thought.[121] Power can operate in multiple ways. In the MRA context, power will tend not to operate directly, as when one actor deploys resources, rewards, and threats to alter another's behavior. Rather, power will tend to operate indirectly through structures that constrain the choices parties have and the issues and arguments they may raise.

For example, mutual recognition arrangements could be viewed as based on an "E.U. model" the E.U. is exporting, or attempting to export, globally. To detractors, they reflect European "neo-colonialism" and "economic imperialism," and to defenders they reflect the E.U.'s "normative power."[122] The E.U. model is worth emulating for the way in which it combines diversity, collaboration, and "other-regardingness" in the implementation of regulatory policies.[123] Nonetheless, the model does not eliminate the power dimension from the mutual recognition game of mirrors. When the E.U. 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 E.U. itself. The third country will find itself in a similar situation as a country desiring to accede to the European Union. The E.U. defines the terms.

In addition to experience, the E.U. wields considerable market leverage in determining standards and regulatory structures required to implement mutual recognition policies. This market leverage has increased as the E.U. has con-

121. *See* BARNETT & DUVALL, POWER IN GLOBAL GOVERNANCE (2005); JOHN SCOTT, POWER (2001); DENNIS WRONG, POWER: ITS FORMS, BASES AND USES (2002).

122. *See* Kalypso Nicolaidis, *The Power of the Superpowerless*, *in* BEYOND PARADISE AND POWER, (Tod Lindberg, ed., 2005).

123. *See* Howse & Nicolaidis, *supra* note 120.

tinued to expand to encompass new members. Firms that desire access to the large E.U. market can pressure their national officials to adapt their national system to accommodate a reciprocal trading arrangement with the E.U. Consciously or unconsciously, the E.U. can export its systems globally because other countries' constituents desire access to the valuable and expanding E.U. market.

Mutual recognition arrangements can also be criticized because private parties may use them to push for particular substantive goals, including those of deregulation.[124] 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 states with advanced regulatory systems 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?[125]

In principle, the WTO could require bilateral and plurilateral MRA regimes to be open to third parties, and to a certain extent it already does so.[126] However, there are strong reasons that judicial enforcement of "openness" should not be too stringent, lest it be a strong disincentive to enter into mutual recogni-

124. *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.").

125. Nicolaidis, *Oxymoron, supra* note 54.

126. *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 (Pierrre 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 Under Article XXIV of GATT*, 6 J. INT'L. ECON. L. 459 (2003).

tion 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 when one country is a party to two MRAs, the other countries could reciprocally benefit from each MRA, subject again to agreed conditions.[127]

Nonetheless, developing countries, in particular, are less likely to be parties to MRAs for multiple reasons. Their markets are small so there is less bottom-up 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, like other governance models, mutual recognition arrangements could discriminate against constituents in states that are most in need of favorable 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 policymaking perspective, all governance mechanisms are subject to imperfections; thus the key issue is how parties participate, or otherwise are represented, in an institutional context in *comparison* with alternative non-idealized institutional settings.[128] From the perspective of choosing policy, one needs to assess mutual recognition arrangements in comparison with their alternatives.

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 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

127. *See* discussion in Nicolaidis, *Faces*, *supra* note 68. 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.

128. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1995); NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001); Shaffer, *Power*, *supra* note 16.

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 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—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 upon 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 occurs 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 regarding 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, it 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 give prominence to 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 *transnational* 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 advantage 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 favor 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 decisionmaking is made accountable to an enlarged public constitute an eminently political project. That the global administrative law project leads back to national administrative practice helps to address 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 decisionmaking, and judicial review.[129]

One can also question whether the project's frame implicitly assumes 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 that recognizes regulatory authority within its borders according to approaches different than those of 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, particularly respecting, the horizontal nature of the vast majority of trans-national governance. This article's analysis of recognition makes clear the distinction 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 a vertical setting: holding authorities in another country accountable

129. *See* Part V.

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,[130] 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 labor 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.[131] 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.[132] 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 when reputational concerns cre-

130. *See* Part II.B.
131. *See* Part II.C.
132. *See* Nicolaidis, Thesis, s*upra* note 54.

ate a check against the temptation to engage in a race to the bottom (which race is seldom observed in practice). Second, it can lead to regulators' increased trust and confidence 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-upon 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 is indeed a defining feature of mutual recognition.[133] 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 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 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 when 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.

133. 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-Archibuigi, *supra* note 89, at 169.