

MUTUAL RECOGNITION

An evolving policy tool

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Mutual Recognition: a policy tool, a legal transplant

A policy tool for promoting economic integration

A legal transplant transferred from the EU to the global trading system

Mutual Recognition: transplantation of a legal idea

‘Mutual Recognition’ does not fit readily into the category of ‘legal transplants’

‘Mutual Recognition’ as a legal principle

‘transplanted’ not only from the EU to the international trade context but also from law to public policy

Mutual Recognition

Underpins the internal market of the EU

In it's strongest form, it articulates the 'Country-of-origin Principle' (CoOP)

However, that which is mutually recognized must always be defined

Origins of the Concept of Mutual Recognition

C 8/74 Procureur du Roi v Dassonville [1974] ECR 837

C 120/78 REWE-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] 649 ('Cassis');

Evolution of the Concept of Mutual Recognition

In its strongest form, the concept requires the jurisdiction of an importing or host state to accept the regulatory determination of the exporting or 'home' state.

The mutual recognition concept now also appears in its strongest form in the Treaty on the Functioning of the European Union in Title V (Area of Freedom, Security and Justice) in relation to the recognition of criminal judgments and civil judgments and extrajudicial rulings (e.g. arbitrations) (Arts. 70, 81 and 82 TFEU).

Mutual Recognition as a policy tool: ‘managed mutual recognition’

The “managed” character of mutual recognition entails the reintroduction of regulatory imperatives “through the back door”, as it were, in the process of trade liberalisation. The management of recognition is the trick that regulators have found to satisfy their political masters and trade colleagues while at the same time minimising the effects of recognition in terms of regulatory competition. The conditions and caveats attached to recognition are meant to ensure against such competition by transforming mutual recognition into a sophisticated form of regulatory co-operation. In short, the ‘management’ of recognition can be thought of as the contribution of regulators to the process of recognition.

(Kalypso Nicolaïdis, “Harmonisation and Recognition: What Have We Learned? Some Preliminary Reflections” Chapter 9 in OECD, *Trade and Regulatory Reform: Insights from Country Experience*, OECD Publications, Paris, 2001, 107)

Attributes of ‘managed’ mutual recognition

prior conditions for equivalence between national systems:

relevant parties establishing equivalence of some sort between their national regulatory systems;

‘Equivalence’ means that the parties are agreed on what are the acceptable differences between their systems and that their respective systems have reached such equivalence either through convergence or by agreement to respect supranational regulations

(Nicolaïdis, OECD, 2001: 107)

Attributes of ‘managed’ mutual recognition

automaticity

the automatic recognition of the beneficiaries of mutual recognition: the automatic right of economic agents — a service provider, for example — of one member state being able to access the host state market without first having to satisfy some initial requirement eg., providing evidence that the service provider is duly authorised in its home state to provide the service in question. The greater the number of requirements, the less automatic the recognition, the less one can speak of ‘horizontal delegation’.

(Nicolaïdis, OECD, 2001: 107)

Attributes of ‘managed’ mutual recognition

regulatory scope:

refers to the scope of regulation that will be recognised; the narrower the scope, the less ‘automatic’ the recognition. A host state might recognise the licensing regulation of a home state for particular service providers, but may retain considerable residual regulatory jurisdiction to determine where, when and how such licensed service providers may operate in the host state’s market.

(Nicolaidis, OECD, 2001: 107)

Attributes of ‘managed’ mutual recognition

regulatory scope; and scope of market access:

for this criterion, it is necessary to ask what kind of market access is granted as a result of mutual recognition and on what terms.

(Nicolaidis, OECD, 2001: 107)

Mutual Recognition: Goods v Services

Regulatory environment for goods is more settled and more harmonized than it is for services

Efforts to include in the EU Services Directive, for example, the principle of mutual recognition on the basis of 'country of origin' or 'home state regulation' failed (original Art.16)

The 'ASEAN Way': rules of engagement

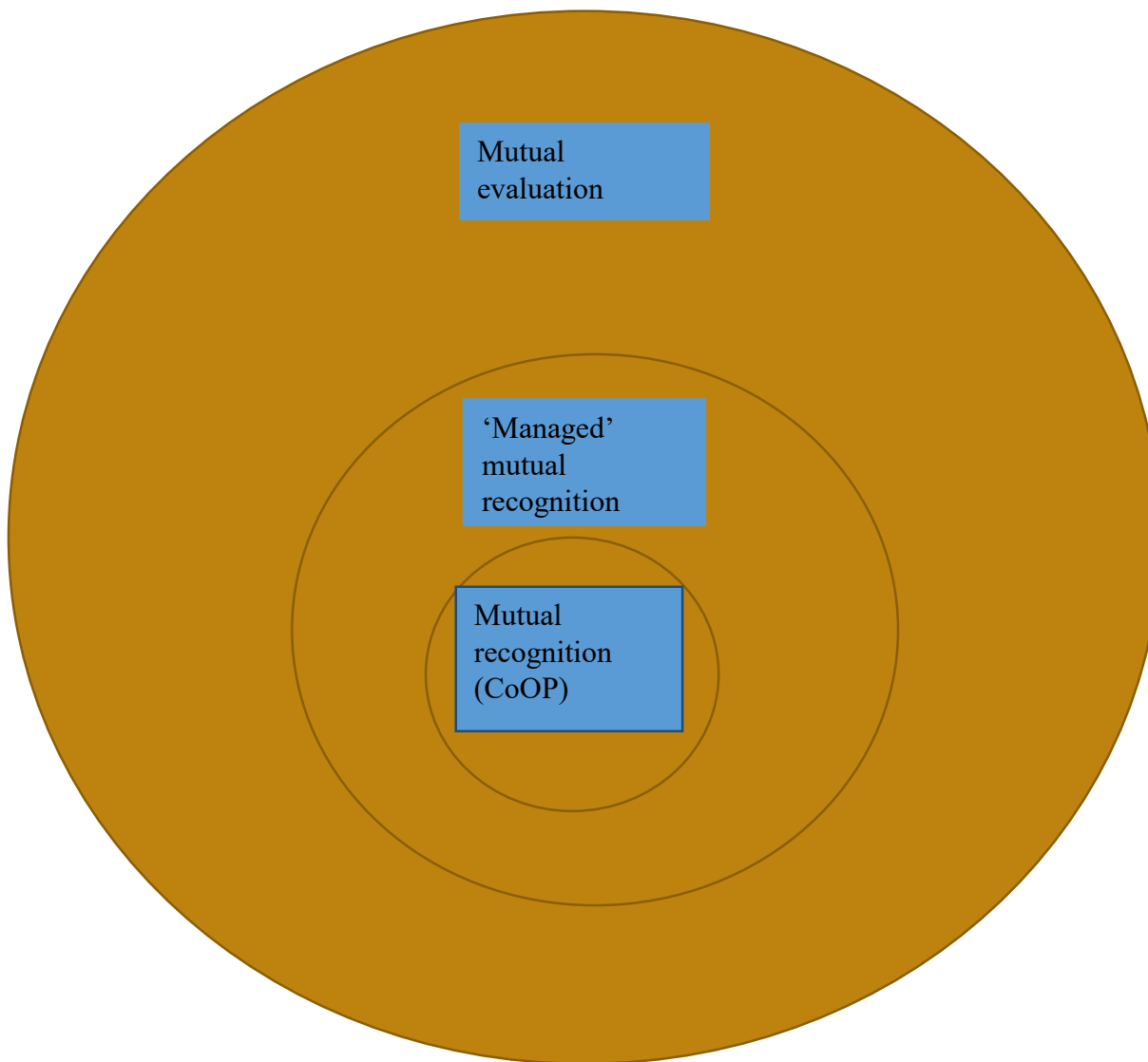
Decisions are reached through consultation and consensus;

The group does not interfere in the internal affairs of its Member States;

The execution of its decisions relies on the authority and resources of Member State governments; and

There is no cessation of national sovereignty to a supranational institution

Asian Development Bank, The Long Road Ahead: Status report on the implementation of the ASEAN mutual recognition arrangements on professional services, Philippines, Asian Development Bank, 2017, p.39



(Figure 1, McNaughton and Lo, Ch.9 in Elijah et al (eds), *Australia, the European Union and the New Trade Agenda*, ANU ePress, Canberra, 2017, p.177)

The Mutual Recognition Paradox

The mutual recognition paradox is expressed by the tension between the requirement for settlers to engage with each other through nomads and the requirement for nomads to defer at least in part to their hosts' norms.

Kalypso Nicolaidis, "Mutual Recognition: Promise and Denial, from Sapiens to Brexit" (2017) 70(1) *Current Legal Problems* 1 – 40, 6.

The Mutual Recognition Paradox

Upholding both diversity and interdependence means precisely managing the extent, conditions, and limits of recognition of the other in our midst.

Kalypso Nicolaidis, “Mutual Recognition: Promise and Denial, from Sapiens to Brexit” (2017) 70(1) *Current Legal Problems* 1 – 40, 6.



The Mutual Recognition Paradox

[T]he concept and praxis of mutual recognition can mitigate anarchy precisely because it speaks to the *engagement* between peoples, groups, or societies and their intermingling as the ultimate result of the very conditions (the interference) that have brought interstate recognition about in the first place. Mutual respect for, combined with engagement with, differences is an inter-cultural and inter-societal idea beyond the diplomatic realm.

Kalypso Nicolaidis, “Mutual Recognition: Promise and Denial, from Sapiens to Brexit” (2017) 70(1) *Current Legal Problems* 1 – 40, 9.

The Mutual Recognition Paradox

How do we bring mutual recognition ‘all the way down’ to the level of individuals, if these individuals are not truly party to the dealings between their states? And given asymmetries of power, to what extent does the mutual *droit de regard* implied by recognition need a referee, and how powerful should this referee be?

Kalypso Nicolaidis, “Mutual Recognition: Promise and Denial, from Sapiens to Brexit” (2017) 70(1) *Current Legal Problems* 1 – 40, 11.

THANK YOU

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