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‘Mutual Evaluation’: A New Policy Tool for Dealing with ‘Behind the Borders’ Barriers

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Introduction

Continued economic integration increasingly reveals measures behind borders that may or may not be non-tariff barriers. These measures may be the result of differing policy imperatives or lack of regulatory equivalence. The principle of mutual recognition, first created by the Court of Justice of the European Union, was a response to dealing with such measures. In some instances, the measures under challenge were held incompatible with EU law; in other instances, although incompatible with EU law, the measures were permitted under one of the accepted derogations under the treaty or as a result of EU case law. The principle was quickly taken up in EU legislation, becoming a centrepiece for the European Commission’s approach to continued economic integration in the EU.

However, as economic integration proceeded, the measures challenged as ‘behind the borders’ barriers to trade were increasingly associated with areas in which the member states retained significant legislative competence and around which there were greater national sensitivities. This was highlighted in the controversy around the promulgation of the 2006 Services Directive. The original draft directive proposed that service providers be regulated only in accordance with their country of origin (the so-called country of origin principle set out in Article 16 of that document) without any intervention or veto from the host state. This was met with great resistance with many in the 'older' member states fearful they would be inundated by service providers who were governed by unsatisfactory regulatory requirements in their country of origin. Such fears, however unrealistic or unreasonable, almost caused the proposed Directive to founder. The version of the Directive that finally entered into force in 2006 contained a milder version of the concept of mutual recognition—what has been described elsewhere as a form of 'managed mutual recognition' (Nicolaïdis 2001).

What lay at the heart of this resistance to the application of the country of origin principle (mutual recognition in its strongest form) was a lack of trust between member states; a lack of trust that the regulatory framework, particularly in the newer member states, was sufficiently rigorous to ensure that consumer interests in host states would be at least as well protected as they were by the host state regulatory environment. There was and is no empirical evidence to suggest that the concerns were well-founded, nor that the Directive in its final form would increase or reduce transaction costs. The Directive was an example of politics being the art of the possible. What it also introduced, however, was a novel policy tool for dealing with this lack of trust: the process of mutual evaluation. That process and its relationship with the principle of mutual recognition is the focus of this chapter.

Origins of the concept of mutual recognition in the EU

Mutual recognition was expressly referred to in the original European Economic Community Treaty (EECT) in the title on the free movement of persons and services. Article 57 of the EECT required the member states to adopt directives 'for the mutual recognition of diplomas, certificates and other evidence of formal qualifications'. However, the treaty was silent on mutual recognition in relation to the production and marketing of goods. It was not until the 1970s that the concept of mutual recognition was developed and applied in that context and, then, it was as a result of the jurisprudence of the European Court of Justice. The first relevant decision concerned the importation of Scotch whisky from France to Germany.[1] This decision was a preliminary ruling of the court on the interpretation of Community (now EU) law. Before dealing with the decisions themselves, it is therefore necessary to speak briefly about this aspect of the court's jurisdiction.

In the Treaty of Rome, the member states had committed themselves to creating a common market for the purpose, among other things, of enhancing the welfare and standard of living of their citizens. The treaty provided for the member states to develop Community measures to that end. However, at the time, the voting procedure for such measures required unanimity. This—combined with a period of political paralysis in the late 1960s as a result of France's resistance to measures it perceived to be harmful to its national interest[2]—resulted in a failure on the part of the member states to act to bring about the common market. In the face of the member states' inaction, the European Court of Justice, in effect, took the lead in pushing forward the integrative process to which the member states had committed themselves in the Treaty of Rome.

In 1962, no doubt concerned that the member states (and their Community institutions) could not be relied upon alone to drive that process, the court had established a doctrine of Community law: the doctrine of direct effect. According to this doctrine, if certain criteria were satisfied, a person or economic agent of a member state could rely directly before their own national courts on provisions of Community law to protect themselves against domestic laws of their state that were incompatible with the Community measure. In effect, the European Court of Justice empowered member states' nationals to hold their own governments to account for failing to comply with the latter's treaty obligations. Member states, for their part, could have avoided such actions if they had given effect to their obligations under the Treaty of Rome in the time frame they had stipulated in the treaty. This is the context of the two decisions that are the foundation of the principle of mutual recognition in the EU: *Dassonville,* and the more famous 'mutual recognition' decision of *Cassis.*[3]

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1 *Procureur du Roi v. Dassonville* (C 8/74) (1974) ECR 837.

2 Leading to the 'Luxembourg Compromise', a political compromise in which the six member states agreed that a qualified majority vote would not be used on any issue on which a member state felt that important (national) interests were at stake. Although this formally did not amount to a veto by a member state, practically that was the result.

3 *REWE-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (C-120/78) (1979) ECR 649 ('*Cassis*').

Dassonville

In 1970 Belgian wine merchants sought to import into Belgium whisky that had been imported legally into France from Scotland. France did not require a certificate of origin for such imports whereas Belgium did. This meant that the merchants were unable to bring the Scotch whisky across the border from France into Belgium. In order to resolve this issue, the merchants made their own certificates of origin, which they affixed to the whisky being imported. The forgeries were discovered and the merchants prosecuted under Belgian law. In their defence, they argued in effect that the Belgian requirement for a certificate of origin on goods already in circulation within the Community was incompatible with Belgium's obligations to avoid maintaining measures having an effect equivalent to a quantitative restriction. In making its ruling, the court stated [7]:

> All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

Cassis

It was in the context of this broad definition of what is now Article 34 of the Treaty on the Functioning of the European Union (TFEU) (ex Article 30 EECT) that the court later ruled in the better-known decision of *Cassis de Dijon*. In that case, a German company, REWE-Zentral AG, sought authorisation from the German Federal Monopoly for Spirits to import certain spirits into Germany from France, including a liqueur, Cassis de Dijon. This liqueur had an alcohol volume content of 15–20 per cent. German law at the time, however, stipulated that only spirits with an alcohol volume content of 32 per cent could be marketed in Germany. On this basis, the Germany Federal Monopoly for Spirits refused to grant the authorisation requested. The company appealed this decision and a question was referred to the European Court of Justice on the interpretation of the term 'measure having equivalent effect [to a quantitative restriction]' (an MEQR). In effect, the court was asked to rule on whether the interpretation of that term meant that a national measure setting a minimum alcohol content that was above the content of traditional spirit products of other member states would amount to an MEQR. In answering this question, the court made two significant statements in that judgment relevant to the development of the concept of mutual recognition. At [10] it noted:

> In the absence of common rules relating to the production and marketing of alcohol … it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory. Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be **accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.** [emphasis added]

The statement from the judgment more usually quoted is in [16]:

> There is … no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State …

This statement is the basis of the mutual recognition concept although the court did not label it as such. In fact, the court has been reluctant to 'unambiguously' embrace the concept (Janssens 2013: 12). This reticence on the part of the court has resulted in a variety of alternative terms being used to refer to the concept including the principle of equivalence and the principle of home states control (Janssens 2013: 12). The statement from [10] of the judgment is also relevant here for two reasons.

First, the court acknowledged the broad legislative discretion left to the member states to legislate *where the Community institutions had failed to act.* Second, it created an inexhaustive list of grounds (the so-called mandatory requirements) that would justify member states derogating from the application of the mutual recognition approach it subsequently introduces. At [10] the court is acknowledging that, *in the absence of common rules,* an absence of regulatory equivalence in the common market may be justified. These 'mandatory requirements' are distinct from the 'derogation power' contained in Article 36 TFEU (also ex Article 36 EECT) and only apply to indistinctly applicable measures (i.e. those that apply equally to domestic and imported goods but in fact impose a heavier burden on imports).

A rich and complex case law has developed since these decisions, generating considerable academic comment including discussion about the limits of the meaning of 'measure having equivalent effect', and the relationship with the case law on the derogations and mandatory requirements. Such developments also gave rise to a directive on mutual recognition (European Union 2006a; subsequently repealed); a regulation (European Union 2008) and non-binding guidelines developed by the European Commission.[4]

Evolution of the concept of mutual recognition

In its strongest form, the concept of mutual recognition requires the jurisdiction of an importing or host state to accept the regulatory determination of the exporting or 'home' state. Bhagwati and Hudec (1997: 91) define it as requiring jurisdictions to accept:

> [f]or domestic purposes certain regulatory determinations of other jurisdictions even though those determinations and the criteria on which they are based are not harmonized.

The mutual recognition concept now also appears in its strongest form in the TFEU 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). However, the principle is hardly ever given effect in that form.[5] Far more frequently, it is given effect as 'managed mutual recognition', a term coined by Kalypso Nicolaïdis.[6] She defines this as a form of regulatory cooperation motivated primarily by trade liberalisation concerns (Nicolaïdis 2001: 107):

> 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

4 Found at ec.europa.eu/growth/single-market/goods/free-movement-sectors/mutual-recognition/index_en.htm.

5 A notable exception is the Trans-Tasman Single Economic Market (TTSEM). See further, Leslie & Elijah (2015).

6 See, for example, Nicolaïdis (1997).

> 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.

The extent to which 'mutual recognition' is 'managed' varies depending on the nature of the regulatory regime to be recognised. The attributes of mutual recognition that give it a 'managed' character for services have been summarised (Nicolaïdis 2001: 107). They consist of prior conditions for equivalence between national systems; automaticity and regulatory scope; and scope of market access. 'Prior conditions for equivalence' involves the relevant parties establishing equivalence of some sort between their national regulatory systems (Nicolaïdis 2001: 107). 'Equivalence' is defined as meaning 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 2001).

'Automaticity' refers to 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. Such a requirement might be as simple as 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 2001: 107). 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. Related to this last point is the third criterion for 'managed' mutual recognition, the 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 (Nicolaïdis 2001: 108).

In its strongest form, mutual recognition results in regulatory harmonisation in the field in question. The work on the 'management' of mutual recognition reveals the reluctance of states, for a variety of reasons, to undertake the regulatory reforms that result in such harmonisation.

The risk of too much 'management' of mutual recognition is that the result can be that nothing is in fact recognised mutually in any substantive way. There are many reasons why states are reluctant to pursue mutual recognition in its strongest form: resistance from domestic agencies fearing a loss of authority; concerns within a market that domestic operators will be forced out of the market by operators from other states; and fear among consumers that operators from other states will not be regulated as rigorously as those from the home state. Most of these concerns can be allayed if trust and confidence in the home state's regulatory practice can be fostered and promoted. One of the most effective ways of achieving this is to share information about differing practices and to engage in dialogue around similarities and differences of approach. The new policy tool of mutual evaluation is directed to this end.

The concept of mutual evaluation as established in the EU Services Directive

The process of mutual evaluation was first introduced by the European Commission in the EU Services Directive in 2006. It is set out in Article 39 of that Directive under the heading 'Mutual Evaluation'. The procedure involves member states reporting to the Commission essentially on three matters: the measures they have retained in their systems with which service providers from other member states must comply in order to be able to provide services and/or establish themselves in the host member state; the justification for these measures, including demonstrating that they have complied with the essential criteria of non-discrimination, necessity and proportionality; and the measures they have abolished in relation to the delivery of cross-border services and the right of establishment.

The next steps in the process are fascinating and potentially contain the strength of this process. Having received the reports from the member states concerning all the measures they have maintained, together with the reasons and justifications for them, the Commission then circulates these to the member states for their observations. Essentially, the member states comment on each other's restrictions and compliance measures and forward those comments to the Commission, which collates them and forwards them to a committee established under the Directive (Article 40) to assist the Commission. The committee may make observations and the Commission then presents a summary report to the European Parliament and the European Council in light of the observations of the member states and of the committee. Where appropriate, the Commission's summary report will also be accompanied by proposals for additional initiatives (Article 39[4]).

The mutual evaluation process was an evidence-based 'peer review' exercise following a methodology established by the Commission across 30 states, including the European Free Trade Association states of Iceland, Liechtenstein and Norway. The Commission reported on the outcomes of the process in 2011 (European Commission 2011a). The strength of this procedure is, by putting in place a structured dialogue between member states, the process has created transparency around the implementation of the Directive itself and helped in identifying and promoting good regulatory practice (European Commission 2011a: 6). A detailed consideration of the process and the methodology adopted by the Commission must wait for another occasion. The relevance to the present discussion is the Commission's findings concerning development of a practice of engaging in dialogue and the resulting benefits of transparency of process and promotion of goods regulatory practice. These are the aspects the Commission sought to strengthen in its 2013 amendment to the Professional Qualifications Directive (European Union 2013).

The concept of mutual evaluation as set out in the Professional Qualifications Directive

The concept of *mutual evaluation,* developed by the European Commission, was first introduced in the EU Services Directive discussed above. The same process was included in the Professional Qualifications Directive of 2005 (amended in 2013). However, the process was varied slightly in the latter instrument, ostensibly due to the different legal bases of the two directives.

The Professional Qualifications Directive was first enacted in 2005 (European Union 2005). The aim of the Directive is to facilitate mobility of professionals within the EU by defining a set of rules allowing professionals qualified in one member state to exercise their profession in another member state. The Directive consolidates a system of mutual recognition based on 15 directives. It provides for automatic recognition for a limited number of professions based on harmonised minimum training requirements (sectoral professions), a general system for the recognition of evidence of training and automatic recognition of professional experience. In 2011, the Commission evaluated the Directive against the criteria of effectiveness, efficiency, relevance, consistency and acceptability (European Commission 2011b: 5). The Commission involved a wide array of stakeholders in the assessment, resulting in revisions to the amendment being made by directive in 2013. The mutual evaluation process was incorporated into the Professional Qualifications Directive by the amending directive.[7]

The Recitals in the Professional Qualifications Directive specifically refer to the 'positive experience' with the mutual evaluation process in the Services Directive. Curiously, however, the Professional Qualifications Directive has a similar but not identical evaluation process and it is not referred to as 'mutual evaluation'. At [35] of the Recitals and Article 59, the concept of 'transparency' rather than 'evaluation' is highlighted.

This 'similar' evaluation system was included in the Professional Qualifications Directive to 'contribute to more transparency in the professional services market' (Recital [35]). The original version of Article 59 was replaced by a provision with the heading 'Transparency'. This is an interesting choice of title for the section, given that it was simply called 'Mutual Evaluation' in the Services Directive. It is explained in the Directive's preamble (at [35]) on the basis that such a system would contribute to more transparency in the professional services market.

Casting the mutual evaluation process in the Professional Qualifications Directive as a means of enhancing transparency might well be explained by the fact that whereas the free movement of services is a fundamental freedom established by the primary law of the treaty, the recognition of professional qualifications is not. This distinction is significant for the following reason: the Services Directive is a secondary measure of EU law intended to give effect to primary obligations under the treaty, i.e. the freedom to provide (and to receive) services within the internal market; and the right of establishment (Article 49, TFEU: Establishment; Article 56, TFEU: Services). The treaty prohibits restrictions on the freedom of establishment of nationals of a member state in the territory of another member state (Article 49, TFEU). This prohibition also applies to

7 Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) no. 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2013] OJ L354/132.

restrictions on the setting up of agencies, branches or subsidiaries by nationals of one member state in the territory of any other member state. The Article defines 'freedom of establishment' to include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as a member state's own nationals.

The Services Directive is anchored in the fundamental freedoms of services and establishment. Since the 1970s, the treaty provisions establishing these freedoms have been directly effective in the EU legal system. This means that citizens have rights under EU law corresponding to the obligations imposed on the member states in those treaty provisions. More significantly, from the perspective of the member state, it means that the member states cannot legislate inconsistently with their obligations under EU law. In the context of services, this means that member states may not introduce measures that could constitute a restriction on the freedom of establishment (Article 49) or the provision of services (Article 56). Now, in both treaty provisions, the obligation is qualified by the phrase, 'Within the framework of the provisions set out below …'. The Services Directive is a measure that has been introduced within that framework and it is one of the more recent pieces of secondary legislation in the field of services. As a matter of EU law, when the EU institutions begin to legislate in a particular field, the member states lose their legislative competence in that field, to the extent that the EU measure covers it. Practically speaking, what this means is that, in respect of services, the member states retain little unilateral legislative competence in the field of services. It was in this context that the Services Directive was developed. The political compromise in the Services Directive was, on the one hand, to preserve to member states the right to establish or maintain authorisation schemes for the establishment in their state of service providers, provided such schemes met criteria of EU law of non-discrimination, necessity (overriding reason relating to the public interest) and proportionality. On the other hand, member states are required under the Directive to report to the Commission on their authorisation schemes (under Article 9[2]), the criteria they require to be evaluated (under Article 15[5]) and the restrictions they maintain on multidisciplinary activities (under Article 25[3]). The Commission is required under Article 39 to circulate these reports to all member states for their comment and to consult interested parties on those reports.

Similarly, restrictions on the freedom to provide services within the EU are also prohibited in respect of nationals of member states who are established in a member state other than that of the person for whom the services are intended. The rights of establishment and freedom to provide services are subject to the qualifications in Articles 51–54. In these provisions, activities that may, even occasionally, be connected with the exercise of official authority of a member state are exempt (Article 51); national measures providing for special treatment for foreign nationals on the grounds of public policy, public security or public health prevail over the right of establishment and freedom to provide services (Article 52); activities of self-employed persons are subject to measures of EU law concerning the mutual recognition of qualifications and the coordination of member states' laws concerning taking up and pursuing activities as self-employed persons (Article 53); and legal entities are to be treated in the same way as natural persons in respect of the right of establishment and freedom to provide services (Article 54).

Professional qualifications, on the other hand, do not benefit from any primary obligation on the part of the member states for cross-border recognition.

The Professional Qualifications Directive is justified under what are now Articles 46, 53(1) and 62, TFEU. Article 46 authorises the European Parliament and the Council to issue directives or make regulations setting out the measures required to bring about freedom of movement for workers. Article 53 requires the European Parliament and Council to issue directives and make regulations for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in member states concerning the taking-up and pursuit of activities as self-employed persons. Article 62 stipulates that the provisions of Articles 51–54 shall apply to the freedom to provide services. In other words, the Professional Qualifications Directive is an ancillary measure intended to facilitate the realisation of the fundamental freedoms of services and establishment. This would seem to have implications for the way in which the mutual evaluation concept can be implemented in this context.

The evaluation process that has been incorporated into the Professional Qualifications Directive differs from that in the Services Directive in one significant aspect: whereas in the Services Directive, member states are required to report to the Commission on both those measures they have dismantled and those measures they have retained (including demonstrating that such measures satisfy the essential criteria of non-discrimination, necessity and proportionality), under the Professional Qualifications Directive, states are only required to report on those measures they have dismantled. There is no requirement for states to report on the measures they have retained and the justification for doing so. The reason for this difference in reporting requirements may be explained by the fact that, as explained above, the balance of legislative competence (although shared) is weighted more heavily in the sphere of the member states in the case of professional qualifications and in the sphere of the EU institutions in the case of services.

However, if that is the explanation, it is difficult to understand why this distinction was not made from the beginning. A review of the Commission's draft proposal for the amendments to the Professional Qualifications Directive reveals that it was not until the very last stage of the legislative process that the text was amended, apparently without explanation, to require that only one, rather than both reports, be circulated among the member states. The text that was accepted by the European Parliament seemed to require both the report on the measures that had been retained as well as that on those measures that had been abolished, to be submitted to the Commission for subsequent circulation among the other member states.[8]

The final text on which the Council voted, however, only required the report setting out the measures that had been dismantled to be submitted.[9] It may be that the change was simply a textual correction to remove a perceived ambiguity in the language (after all, without comparing the same provision across all the official language versions of the instrument,

8 European Commission 2011c: 50, Article 59(6): 'The Commission shall forward *the reports* to the other Member States which shall submit their observations within six months. Within the same period, the Commission shall consult interested parties, including the professions concerned' (emphasis added).

9 European Union 2011: 145, Article 59(7): 'The Commission shall *forward the reports referred to in paragraph 6* to the other Member States which shall submit their observations within six months. Within the same period of six months, the Commission shall consult interested parties, including the professions concerned' (emphasis added). The reports in paragraph 6 deal only with requirements that have been removed or made less stringent.

it is impossible to say whether the change only occurred in the English-language version). It is unclear why the mutual evaluation process set out in the Services Directive was not simply replicated in its entirety in the amendments to the Professional Qualifications Directive. However, it is still an improvement on what was in place prior to those amendments. It is also encouraging that the mutual evaluation principle, more broadly, appears to have been accepted as a useful and effective policy tool in the market integration process.

Structuring dialogue through mutual evaluation

Mutual recognition, whether managed or not, concerns the acceptance of the 'other' as being as trustworthy as one's 'own' system. Mutual evaluation, however, applies to the stage before that: where the parties are establishing their prior conditions for equivalence. It is argued here that mutual evaluation is not a part of 'managed' mutual recognition, it is the precursor to it. It is part of the process of convergence that results in one of the preconditions for 'managed' mutual recognition noted by Nicolaïdis and discussed earlier—that of 'prior conditions for equivalence'. 'Managed mutual recognition' is set out in Chapters III–VI of the Services Directive. The mutual evaluation process is set out in Chapter VII, 'Convergence Programme'. Mutual evaluation is a 'trust-building' tool, it enables a conversation between the negotiating parties that may lead to greater convergence but certainly to greater trust over time simply by virtue of the transparency it inculcates in the process. Under the mutual evaluation procedure in the Services Directive, states are required to report on the measures they have dismantled and on those they have retained, giving reasons both for why they have retained them and explaining how they satisfy the proportionality, non-discrimination and necessity criteria.

The process itself, as set down in the Services Directive, is one that negotiating parties could always undertake, similar to the '*ex post guarantees*' to which Nicolaïdis refers (2001: 108); that is, guarantees between the parties after the treaty—in which the mutual recognition process is set out—has been adopted. However, the advantage of formalising this process, as has been done in the Services Directive, is that it imposes a discipline on the contracting states to undertake the process. Strictly speaking, as a matter of EU law, failure by a member state to comply with its obligations to report and to provide observations as stipulated in Article 39 of the Services Directive puts it in breach of EU law and can result in the state being the subject of infringement proceedings brought by the European Commission before the Court of Justice of the European Union. Such proceedings seldom run their course because the member state, working with the Commission, will do what is required to meet its obligations. The threat, and the initiation of infringement proceedings, however, assist the state in prioritising such obligations in a way that would not happen in the absence of such sanctions.

The same discipline could also be achieved in an international (as distinct from a supranational) agreement if the parties included provisions establishing a joint committee that would have responsibility for ensuring such reporting obligations were met.

Conclusion

As the discussion in this chapter has demonstrated, the principle of mutual evaluation has great potential as a policy tool for trade negotiators in the current and future negotiating environment. Barriers to trade—perceived or real—will be, for the foreseeable future, increasingly located behind borders, embedded in domestic policy settings. Understandably, in this context, even managed mutual recognition is difficult to achieve. The extent to which negotiating parties have reciprocal trust and confidence in their respective regulatory systems is varied and fragmented even where such parties are homogenous. This becomes even further accentuated where the regulatory, political and social cultures are heterogenous, as is the case, for example, among many of the states currently negotiating the Trade in Services Agreement (TiSA).

Mutual evaluation offers negotiators an effective tool to progress cross-cultural dialogues with a view to developing mutual trust and confidence in differing governance and regulatory structures, where there is significant equivalence of intent. The majority of World Trade Organization (WTO) members continue to confirm their commitment, publicly at least, to a multilateral trading regime under the auspices of the WTO rather than the network of plurilateral and bilateral trade and investment agreements that have flourished in the last two decades.

If we accept, at face value, the commitment of governments across the world to trade liberalisation as a means of improving the standard of living of their citizens, and that this is best done in a multilateral trading context (both arguable propositions when one considers how states behave), we must conclude that those governments are willing to take the steps necessary to remove barriers to trade as they appear. We must also conclude that those governments accept that the removal of such barriers must necessarily result in greater regulatory convergence—there are limits to which different regulatory structures can deliver equivalent outcomes, after all. However, for the reasons set out in this chapter, the further behind the borders such trade barriers are, the greater the difficulty in addressing them. This difficulty is undoubtedly one of the contributing factors to the lack of progress on such trade negotiations through the WTO. This inertia has spawned the plethora of regional and bilateral free trade agreements (FTAs) that have been and are being negotiated at present.

If mutual evaluation is incorporated into the preferential agreements and FTAs currently being proposed or negotiated (e.g. EU–Australia FTA, EU–New Zealand FTA, Transatlantic Trade and Investment Partnership, EU–India FTA, EU–Japan FTA), there is a real chance of progress in liberalising trade in the more contentious areas behind borders. In the case of agreements that have been finalised, whether or not they have entered into force, contracting states can still choose to apply the principle of mutual evaluation informally in their dealings with each other.

The strength of mutual evaluation as a policy tool is that it can foster mutual trust and confidence between the negotiating parties in their respective regulatory systems, even if, initially, there is considerable divergence between those systems. As Figure 1 shows, mutual evaluation is an effective tool to prepare the preconditions identified by Nicolaïdis for establishing managed mutual recognition between systems.

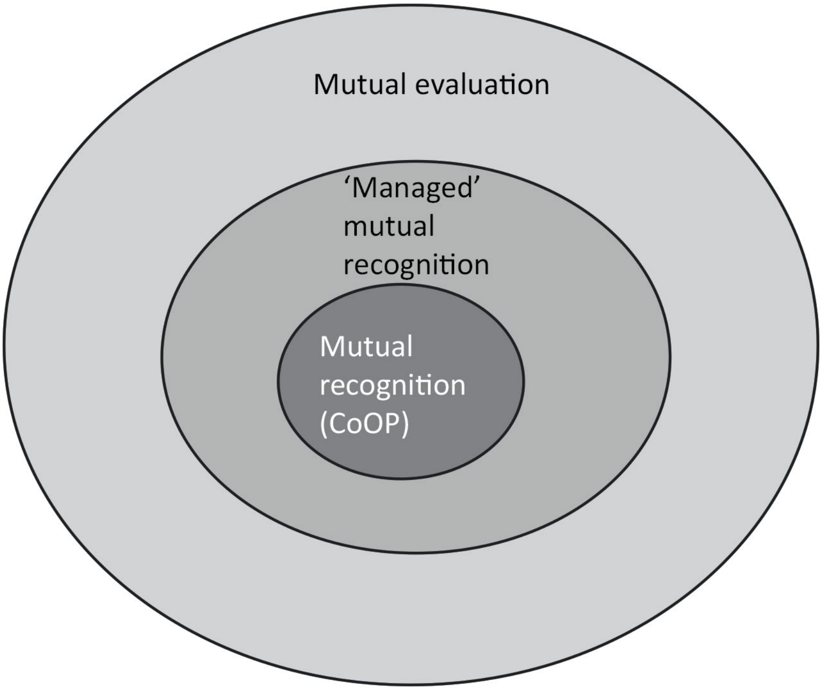

Figure 1. Mutual evaluation as a precursor to mutual recognition
Source: Author.

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