Journal of European Public Policy
Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/rjpp20

Mutual recognition as a new mode of governance

Susanne K. Schmidt

Published online: 19 Oct 2007.

Journal of European Public Policy 14:5 August 2007: 667–681

Mutual recognition as a new mode of governance

Susanne K. Schmidt

ABSTRACT Mutual recognition is generally not mentioned in debates about new modes of governance, though it is an important alternative to hierarchical steering in the form of harmonization. Next to its broad use in the single market, mutual recognition has been transferred to justice and home affairs, and becomes relevant also beyond the European Union. This article discusses how far mutual recognition meets the criteria of new modes of governance. Comparing mutual recognition to its alternative – harmonization and national treatment – it gives an introductory overview of the characteristics of the principle. Mutual recognition, it is shown, faces significant preconditions as rules to be mutually recognized have to be equivalent; moreover, rules with a high degree of input legitimacy are difficult to transfer. Yet, mutual recognition also offers significant advantages over its alternatives, making it an important topic for governance research.

KEY WORDS Governance; harmonization; mutual recognition; national treatment; single market; trade.

INTRODUCTION

Mutual recognition is generally not mentioned in debates about new modes of governance (Eberlein and Kerwer 2004; Héritier 2003; Scott and Trubek 2002). Yet, mutual recognition is the principle on which the single market is built. Stemming from an innovative interpretation of the freedom to trade goods in the *Cassis* judgment, it allowed the Community in the late 1980s to push the realization of the single market despite its incapability of agreeing on the harmonization of rules. Due to its novelty – the idea being that goods being marketed according to the regulations of any member state could be marketed in principle in all other member states – the principle of mutual recognition roused significant interest. Analyses were related particularly to the danger of a 'race to the bottom' of regulatory standards (regulatory competition), which could occur if products marketed according to lower standards could be sold just as easily as more expensive, higher-standard ones (e.g. Gatsios and Seabright 1989). But as European integration progressed with monetary union, the addition of

Journal of European Public Policy
ISSN 1350-1763 print; 1466-4429 online © 2007 Taylor & Francis
http://www.tandf.co.uk/journals
DOI: 10.1080/13501760701427797

the second and third pillars, and three enlargement rounds, attention to these issues and the concomitant Treaty negotiations soon diverted interest from mutual recognition and the single market. Therefore, when the debate on the new modes of governance came up in the mid- to late 1990s – particularly in relation to the need for economic policy co-ordination in view of monetary integration – mutual recognition was no longer at the centre of attention. 'The most important of Europe's institutional innovations is hardly mentioned any longer in the debates on the so-called "new modes of governance"' (Joerges and Godt 2005: 95).

Why reconsider the principle of mutual recognition? Here it is useful to start by returning to the underlying distinction between government and governance. While the former implicates the potential for hierarchical steering, the discussion about the latter gained ground with the realization of how little gains from co-ordination and co-operation can be assured on an exclusive hierarchical basis. Domestically, states rely on the co-operation of various associations and other non-state actors (policy networks). Internationally, 'governance without government' (Rosenau and Czempiel 1992) exposes the need for non-hierarchical solutions to co-ordination and co-operation needs. Mayntz points to three distinct uses of the term. Originally, governance was equated with governing. Then the term was 'used to indicate a new mode of governing that is distinct from the hierarchical control model, a more cooperative mode where state and non-state actors participate in mixed public–private networks' (Mayntz 1998: 8). Governance now refers to different forms of social co-ordination, going back to Williamson's analysis of markets and hierarchies, and the extension of his typology to include other forms of co-ordination (Williamson 1985).

As with the definition of governance, there is little agreement as to what 'new' modes of governance (NMG) are. New modes of governance, to start, are those that allow for the provision of governance functions in an innovative, but not yet established, way. Authors who attempt to positively characterize NMG generally emphasize that these new modes achieve governance functions in a less binding way (voluntariness), drawing in a wide range of relevant actors (inclusion). Thus, the legitimacy and effectiveness of political decisions is thought to be enhanced (Héritier 2003: 106). Topics much studied in the context of the debate on NMG are the open method of co-ordination (OMC), comitology, and independent regulatory authorities. Apparently, there is difficulty in distinguishing new modes of governance from governance. Moreover, while OMC has been new for the European Union (EU) and has proliferated into several policy fields, the way member states co-ordinate their policies via OMC is most similar to the non-binding co-ordination achieved in other international regimes such as the Organization for Economic Co-operation and Development (OECD) or the International Monetary Fund (IMF) (Schäfer 2006). Similarly, independent regulatory authorities have been new in the context of the EU but are established in the US.

'New' seems to relate as much to the context of where a particular mode of governance is brought to bear as to the mode itself and its true novelty.[1] Rather than attempting a positive definition of NMG which aims at delineating its features, several authors therefore prefer a negative definition, defining NMG in the EU as deviating from the classic Community method (i.e. the adoption of directives and regulations by the Council and the Parliament based on proposals from the Commission) (Eberlein and Kerwer 2004: 122; Scott and Trubek 2002: 1, 5). This definition makes it possible to take into account all 'new' forms, without limiting the analysis because of previous alternative definitions (e.g. no legal measure or the inclusion of private actors as a precondition) (Eberlein and Kerwer 2004: 136).

We do not need to decide whether it is sensible to speak of new modes of governance or simply of governance modes. Mutual recognition, it is apparent, could be seen to be just as new as other examples studied, such as the OMC, comitology, and independent regulatory authorities. While the principle of mutual recognition originally surfaced in the early 1980s with moves to complete the single market, in the late 1990s it was also transferred to the field of justice and home affairs. Outside of the EU, mutual recognition has gained in importance, especially within the World Trade Organization (WTO) but also in other trading blocks. Considering the other characteristics of NMG, how does mutual recognition relate to them?

If we look at the inclusion of a *broad range of actors*, mutual recognition typically works when actors (such as companies and professionals) offer their goods and services abroad. They need to actively take up their rights under mutual recognition, and act under the assumption that the regulations they abide by are deemed to be equivalent. Thus, as far as mutual recognition provides governance functions, it is due to the extent to which multiple actors act according to the principle. If mutual recognition is not used, it cannot function. Moreover, private actors also seem to play a role in the control of the equivalence of regulations. Established companies in a market have an interest in monitoring the entrance of differently regulated competitors well, and are willing to claim non-equivalence if reasonable.[2]

If we turn to *voluntariness*, the case law of the European Court of Justice (ECJ) requires member states to accept equivalent products of other member states. However, the extent to which equivalence exists is not clearly defined or easily established. In their assessment of equivalence, actors have much leeway, with the ECJ being the final arbiter. For the member states, it is not acceptable to simply let any goods or services which are marketed anywhere into their markets. In his article in this volume, Trachtman (2007: 785) calls this 'rootless recognition'. There is a restriction on equivalent products. Member states retain the right to restrict free trade. The need for exceptions quickly becomes clear when we think of products that, when traded, have particular political implications. Thus, without exemption, the Netherlands could export their liberal drug policy, as it would be possible to sell everything sold on Dutch markets in the Community. Of course, this is an extreme example. As member states remain politically responsible for the products traded in their territory, there are many other instances where clarity is lacking, regarding whether or not products meet the equivalence condition with possible consequences for health, the environment or other important societal goals. In his contribution to this issue, Pelkmans (2007) elucidates how difficult it is to bring mutual recognition to work.

Because of the inherently uncertain nature of where equivalence starts and where it stops, Weiler, for instance, deems mutual recognition inappropriate for building the single market (Weiler 1999: 367f.). Although there is an apparent need for exceptions, in fact, it is also clear that there is a fine line between legitimate exceptions and protectionism. Despite the obligation for mutual recognition stemming from the interpretation of the basic freedoms by the ECJ, mutual recognition therefore has more voluntary aspects than other forms of hard law.

Mutual recognition also embodies many of the claimed benefits of NMG compared to 'old' modes of governance, such as the Community method. Mutual recognition allows for more flexibility, for decentralization, and increased public–private co-operation, all of which are features claimed for NMG thought to improve policy output and compliance, in addition to increasing legitimacy (cf. Kohler-Koch 2005: 14). Thus, mutual recognition may be said 'to realize common concerns while accommodating diversity and respecting the institutional integrity and political autonomy of its Member States in all matters where uniformity and centralization are not necessary or not possible' (Scharpf 2001: 13), which are aspects Scharpf relates to NMG.

There is yet another reason to link mutual recognition to the debate about NMG, irrespective of how convincing its voluntariness and broad inclusion of actors is. If we think of governance as responding to the limits of hierarchical government, mutual recognition is an important alternative. Instead of agreeing on a common regulatory solution, governments agree on a patchwork of equivalent national rules. It is only by focusing on this alternative to hierarchy that the growing transnational activities of national administrations become a focus of analysis. Their relevance is increasingly being analysed on an international level (Raustiala 2002; Slaughter 2004). Within the more deeply institutionalized multi-level system of the EU, these horizontal forms of governance play an even larger role.

If this special issue is about mutual recognition as a new mode of governance, then the idea is not to prove how far mutual recognition meets the criteria of inclusion and voluntariness, or whether efficiency and legitimacy are really enhanced by it, as is claimed for other NMG. As mentioned, 'newness' is a tricky attribute of NMG. Rather, the idea is to take a broader approach to NMG as innovative means of providing governance functions. Instead of trying to establish criteria for categorizing NMG, mutual recognition is taken as a – comparatively new – mode of governance, and the goal is to analyse its potential to solve governance problems. The questions asked aim at an assessment of the way mutual recognition may provide governance functions, including the preconditions it needs for its functioning (e.g. trust of the member states, (Majone 1994: 75, 83)), the positive implications of achieving co-ordination through it, as well as its negative side effects (e.g. the danger of a regulatory race to the bottom). In order to provide for such an assessment, the articles in this volume look at the application of mutual recognition in different areas: in the market for goods (Pelkmans 2007) and services (Nicolaïdis and Schmidt 2007; Kostoris Padoa Schioppa 2007), in the area of justice and home affairs (Lavenex 2007), in tax policy (Genschel 2007), and in the WTO (Trachtman 2007) as well as linking the concept to other forms of recognition in international relations, political philosophy, and international political economy (Nicolaïdis 2007). Before introducing the different contributions, I turn to the concept of mutual recognition in greater detail, in order to provide for an initial understanding of its features.

GOVERNANCE THROUGH MUTUAL RECOGNITION

Mutual recognition allows for the integration of previously distinct markets. This is how the principle is used in the context of the single market (or in other trading blocks). Markets, which are constituted by specific regulations for goods, services or professions, and thereby held distinct, can be integrated through mutual recognition. Mutual recognition thus can act as an alternative to harmonization, which depends on the classic Community method and had been the way to integrate the common market before the turn to mutual recognition. But not only markets can be integrated in this way. The decision to implement mutual recognition in JHA, for instance with the European arrest warrant, is an attempt to integrate potentially all areas marked by different regulations, including core areas of statehood. To approach the issue of how mutual recognition works, and in which policy fields it is an option, it seems best to compare it to the existing alternatives for treating diversity. These alternatives consist of, on the one hand, harmonization, where diversity is overcome by finding a common denominator. On the other hand, diversity can be dealt with by agreeing on the use of the rules of the country where the activity takes place – that is, national treatment or host-country control, compared to home-country control under mutual recognition.

Dealing with diversity: national treatment, harmonization, and mutual recognition

The simplest approach to market integration is *national treatment* (non-discrimination) (cf. Nicolaïdis and Shaffer 2005: 7–15; Maduro 1998: 101–49; Armstrong 2002: 229). Member states open their borders to goods and services of foreign origin, if the providers of these comply with the rules of the host country. The only obligation, then, is not to discriminate against foreign products. This approach leaves the sovereignty of the host country intact. It is responsible for market regulation. Companies, however, are burdened with significant costs of adaptation, with the need to comply with different national rules wherever they are selling their products. This approach establishes the primate of political control. Possible trade benefits are forgone by burdening costs on business, but member states keep their regulatory control over markets.

Under national treatment markets remain separated by different regulations. However, it should be noted that this is the approach largely followed in the United States (Maduro 1998: 143). With *harmonization*, diversity can be overcome. Regulatory obligations are harmonized ex ante. This, however, imposes significant negotiation costs on governments. A vertical transfer of sovereignty results at the supranational level. Once regulations of a sector have been harmonized, member states are no longer free to alter them unilaterally. They can only enact new regulatory goals by starting supranational negotiations again. This is another cost of integrating markets to such an extent. As a result, companies do not face additional adaptation costs when targeting the markets of other member states. Ideally, co-operation in harmonization allows for the balancing of the possible benefits of trade with the political interest in regulation. Trade is no longer hindered by the need of companies to fulfil different regulatory obligations, which may just as well be alternative solutions to the same regulatory problem.

Finally, markets can be integrated via *mutual recognition*. At the lowest level is the assumption that member states' regulations do present alternative solutions to the same underlying problem. By being lawfully marketed in one member state, products may also enter the markets of other member states. Thus, member states do not need to face the bargaining costs of ex-ante harmonization, nor do companies need to face the adaptation costs of having to comply with different national standards. Regulation falls exclusively under the responsibility of the home state. Home-state control, however, implies a *horizontal transfer of sovereignty* (Nicolaïdis 1993: 490–93). Member states can no longer guarantee a certain level of regulation of products marketed to their nationals as these regulations are being determined by other countries. The previous unity of territory, legitimation and the setting of rules is broken up. Governments have to trust other member states to regulate and control their companies sufficiently. Subsequently, we can see that mutual recognition is quite a demanding principle of market integration. While it promises to realize the gains of trade without levying particular ex-ante costs on governments (such as for harmonization) or companies (such as when adopting host-country regulations), consumers may face significant information costs next to profiting from increased variety. Moreover, significant costs may arise ex post. Governments may be held politically accountable for products marketed in their country if these imply risks, even though these governments were never in a position to regulate these companies. As the costs of insufficient regulation are partly being exported, while low regulatory standards give advantages to companies, member states may face incentives to engage in regulatory competition – under the assumption that companies are cost-sensitive to the regulations at issue (Holzinger and Knill 2004: 26). Mutual recognition is therefore often regarded as the market solution to regulatory diversity where competitive pressures lead to an efficient outcome. However, the prisoner's dilemma teaches us that a 'race to the bottom' may result, and member states may end up with a suboptimal level of regulation (Majone 1992; Gatsios and Seabright 1989).[3]

In the Community different legal positions match the different principles of integration. Under the *Cassis de Dijon* case law, the ECJ gives a broad meaning to the market freedoms (for goods, services, persons, and capital). As long as goods or services are legally marketed in a member state, in other words, if they conform to the regulations of their home state, they can also be marketed in all other member states. This is the obligation to *mutually recognize* goods and services from the other member states. There is, however, a caveat. The Treaty of Rome gives member states the right to hinder trade and to regulate their markets, if they can claim overriding concerns. While Article 28 assures the freedom of goods, Article 30 mentions different exceptions. The other freedoms face similar restrictions. Additionally, by broadening the reach of the market freedoms under the *Cassis de Dijon* case law, the ECJ simultaneously enhanced the possibilities of member states to regulate their domestic markets, by invoking mandatory requirements to which goods would have to adhere ('rule of reason'). Despite the need to mutually recognize the regulations of others, member states can individually determine the re-regulations of sensitive areas (Hatzopoulos and Do 2006: 965f.).

With these exceptions, member states maintain areas of regulation they can individually determine; it is here that host-country control applies. As this right of *national treatment* hampers the single market, minimum harmonization is foreseen in these areas under the single market programme. By extending the reach of mutual recognition to all fundamental freedoms (goods, services, persons, and capital), while targeting minimum harmonization at those areas where member states have a legitimate claim to exemptions, the Commission's new approach to the single market was one with no need for national treatment. Consequently, national treatment is rarely mentioned in political science analyses of the single market. However, minimum harmonization faces high agreement costs. Rules under national treatment are common whenever member states cannot be obliged to accept mutual recognition and the Council does not agree on joint rules.

While it is uncommon to associate the principle of national treatment with the Community, it plays a large role in the General Agreement on Tariffs and Trade (GATT). This raises an important question: is it fair to say that national treatment is a way to allow for trade that does not have an impact on the sovereignty of the member state, given that we know market pressures on domestic regulations also result from the GATT? To explain this puzzle, it is necessary to refer to the well-known distinction between product and process standards (Scharpf 1999: 91–101). While the GATT may allow its members to define the product standards for goods according to national treatment, nothing is necessarily said about the process standards being used. While goods travel independent of their production processes, the latter in fact often have to be mutually recognized, even in the GATT. A case in point are the famous tuna/dolphin cases; the US wanted to ban all tuna from its market, in the production of which dolphins were being killed. However, it was not allowed to do so – exemplifying the mutual recognition of production processes in the GATT (Scott 2000: 143).[4] It is this 'implicit' mutual recognition that emanates from market pressures on national regulations, not the national treatment of product standards. See Table 1.

Different from the GATT, the single market officially gets by without national treatment. This is because, in the EU, institutionalized, binding means of co-operation exist, allowing for the definition and implementation of common regulations. These regulations are meant to fill in those areas where member states would otherwise take exception to the market freedoms. However, these institutions are only a necessary condition to arrive at co-operation; actors also have to agree on a common solution. Where actors fail to do so due to heterogeneous preferences and/or technical problems of devising solutions adequate for all member states, member states will sometimes 'agree not to agree', and subsequently pass off this right as one of national treatment (Schmidt 2004: 58).

Table 1 Characteristics of principles of market integration

	National treatment (non-discrimination)	*Harmonization*	*Mutual recognition*
Authority of regulation	Host-country control	Unified supranational regulation	Home-country control
Costs	Adaptation costs of companies	Negotiation costs of states	Costs of control of hosts; information costs for consumers
Political consequences	No transfer of sovereignty	Vertical transfer of sovereignty	Horizontal transfer of sovereignty, regulatory competition
Focus	Primate of politics	Possible balance of trade and politics	Primate of trade
Legal basis	Exception from the market freedoms	Secondary law	Market freedoms

Source: Adapted from Schmidt (2004: 75).

The potential of governance through mutual recognition

The discussion of mutual recognition has been notably absent in the context of the debate on NMG, but there has been much controversy on both its benefits and pitfalls in the framework of the single market. As mutual recognition does not unify regulations, it is often perceived as a market approach to regulation, where states compete with their regulatory solutions against each other. This market analogy has much influenced the debate on mutual recognition. Often, depending on the degree to which authors believe markets to be perfect or imperfect, they regard market pressures on regulation through mutual recognition as a blessing or a curse. Thus mutual recognition is intimately linked to an ideological debate about regulatory markets. This is hardly satisfactory.

If this volume is about understanding the potential of mutual recognition as a form of governance with regard to its preconditions and positive and negative implications as mentioned above, a differentiated outlook seems necessary. Thus, (1) mutual recognition is bound to work differently in different policy fields – making it more acceptable in one compared to the other; (2) mutual recognition will have different implications for different people and different geographical areas; (3) mutual recognition is generally applied in a restricted way, mediating its consequences; and (4) for an assessment of mutual recognition a dynamic perspective is needed, taking into account its longer term effects, while being aware of both the advantages and disadvantages of its alternatives.

(1) Having been originally introduced for goods, the implications of home-country control in other areas like the freedom of services and persons do not seem settled. Whether goods comply with the relevant regulations under home-country control can be checked by the home country, which is also responsible for the setting of these rules. This is different with services, which generally cannot be traded independently of their provider. Being provided in a different country under home-country rules, it is much more difficult for home-country control to take place. Moreover, in JHA, police in one state are asked to enact the laws of another state. If there were mutual recognition in taxes, member states would have to collect each others' money. With the number of member states increasing, and therefore the number of regulatory regimes increasing, this divided authority over the setting and control of rules raises particular difficulties for the application of mutual recognition beyond the trade of goods. If mutual recognition relies on trust, this reliance is much enhanced when member states need to trust each other not only in the setting and enforcement of rules on their respective territory (the home country) but also on their own territory (the host country).

The fact that mutual recognition gives rise to complicated control issues in some policy fields is only one relevant matter. Moreover, the kind of rules which are being mutually recognized is important. Depending on the issue area, the democratic legitimation of rules differs starkly. For goods, the definition of technical regulations is often delegated to standards bodies; rules in JHA or for taxes, however, concern individual freedoms or redistributive issues. These are in need of a higher input legitimacy (Scharpf 2003), and are normally subject to parliamentary rule. If these rules require the legitimacy of parliament, it must be more difficult to delegate the responsibility over their setting and control to another member state than it is with rules, for the setting and control of which delegation to standardization or certification bodies is normally used.

(2) Whether mutual recognition leads to positive outcomes like diversity and decentralization or to negative outcomes like social dumping depends much on which perspective is taken. For example, consider the possible application of mutual recognition to social security systems (cf. Kostoris Padoa Schioppa 2005). For highly qualified professionals, for instance university professors, their treatment under home-country rules would most likely increase mobility and personal well-being, as scientists could easily move across borders without the hassle of determining how their healthcare and pensions would be affected if they spent some years abroad. However, for relatively low-qualified builders, mutual recognition of their social security would, on the one hand, help to abolish labour-market rigidities; but, on the other hand, there would be a risk of exploitation of wage differentials to an extent that wages and pension contributions paid in high-wage countries to workers from low-wage countries would not permit them to live in the country where the work is being done (cf. Streeck 2000).

(3) Mutual recognition is never absolute. Kalypso Nicolaïdis (1993) pointed out very early on that mutual recognition is 'managed', meaning that it is applied in a context that buffers competitive pressures. Alternatively, we can think about mutual recognition being combined with other integration principles (Schmidt 2004). This is most obvious when mutual recognition is linked to European minimum harmonization/standardization, creating a common baseline. Thus, for the single market we actually have to differentiate between mutual recognition when it only applies to the testing of the compliance of products with harmonized rules (avoiding the duplication of certification) and mutual recognition of product regulations (Nicolaïdis and Shaffer 2005: 17).

However, mutual recognition can also be combined with national treatment. For instance, in the provision of insurance services, insurance companies act under home-country control, but they also have to comply with different national insurance contract laws because otherwise consumers would not know what their insurance protection is (Schmidt 2004: 122). In combination with other market principles, the impact of mutual recognition is modified. This implies that we need to take into account that actors may – wrongly – perceive competitive pressures and act upon them, although they do not take off.

(4) With regard to the fear of a race to the bottom, the long-term effects of mutual recognition could be said to have dominated the perception of the concept. At the same time, few examples of downward spirals have actually become known, probably because mutual recognition is normally 'managed', mediating competitive pressures. But if instances of a race to the bottom are rare, this does not mean that mutual recognition does not have dynamic implications. Thus, the awareness that mutual recognition operates may make it difficult to adapt existing regulations, due to the potential impact on trade. But if mutual recognition hampers national reforms, these barriers must be seen in the context of existing alternatives. While national treatment leaves national politicians totally free to act, the constraints on domestic reform under mutual recognition may be still less severe than under harmonization. Here a qualified majority of member states – next to the European Parliament – have to agree to any future modification, giving a minority a veto position on all future reforms.

In view of these qualifications, it is doubtful how far the market analogy is appropriate. The amount of trust and mutual reliance needed for mutual recognition to function means that there are no anonymous market participants but well-acquainted co-operators who put mutual recognition to work. It might therefore be likened to a cartel rather than a market. Initiating competition and the search for competitive advantages may well risk destroying co-operative benefits. Member states are likely to perceive competition as a misuse of trust which has been given to a joint approach to co-operation problems rather than as a legitimate attempt of some to acquire competitive advantages over others.

CONCLUDING REMARKS

The following contributions enhance our understanding of the complex characteristics of mutual recognition. Beginning the process, Kalypso Nicolaïdis (2007) embeds mutual recognition in the wider context of the conditions for recognition discussed in political philosophy, international relations, and international political economy. She draws connections between economic mutual recognition and the recognition of states, and then moves on to discuss the conditions of 'integration across Europe' (Nicolaïdis 2007: 694), building on managed mutual recognition. As this implies an internalization of 'the interests and beliefs of others' (p. 695), she makes clear that managed mutual recognition reaches as far as possibly questioning the freedom of speech: 'should limits to free speech be legal or moral questions, should bans be considered in case of disrespect or only incitement to violence' (p. 695). Against these broader, theoretical reflections, Jacques Pelkmans (2007) turns towards the actual working of mutual recognition in goods markets. Interestingly, he provides empirical evidence on the problems that different actors face with mutual recognition. Moreover, he discusses the standstill procedure that member states are obliged to respect when enacting new regulations, in order to provide other member states and the Commission with an opportunity to object and to consider whether European rules are needed. This procedure, Pelkmans convincingly argues, serves as an important institutional backing for mutual recognition. Nicolaïdis and Schmidt (2007) analyse the recently agreed services directive. The contention surrounding this proposal showed how mutual recognition becomes unacceptable if differences among member states are perceived as being large and with them the competitive opportunities relating to mutual recognition. Analysing the problems of mutual recognition in the field of services, the article argues that the original proposal went much beyond the practice of 'managed' mutual recognition while the version which was adopted recovers that spirit. In her comment on the services directive, Fiorella Kostoris Padoa Schioppa (2007) emphasizes the benefits of mutual recognition in fostering competition, and is more pessimistic about the achieved compromise.

Philipp Genschel (2007) analyses why mutual recognition has been adopted in goods markets but not in value added tax (VAT). In an interesting historical analysis he shows that mutual recognition was actually originally considered for VAT and declined for goods regulation. With this comparison, he sheds light on the opportunities and limits of governance through mutual recognition, emphasizing the latter. He closes with praise for national treatment (which contrasts nicely with the argument of Nicolaïdis (2007)), stressing the value of diversity as it allows continuing national policy autonomy. Sandra Lavenex (2007) analyses the problems of applying mutual recognition to JHA. Like Genschel, she delves into the market analogy and questions the transferability of the concept into this core area of statehood. While markets are liberalized through mutual recognition, in JHA it serves as a tool of governmentalization. Joel Trachtman (2007) moves beyond the EU with his contribution and discusses the possibilities of embeding mutual recognition in the WTO. He stresses the need to provide for equivalence as a basis for mutual recognition to be acceptable and draws attention to the lack of harmonization at the international level as a precondition of achieving equivalence. Moreover, he emphasizes the risk of excluding developing countries. As he shows, the principle of most-favoured nations established at the WTO can come into conflict with closed mutual recognition arrangements, as the one established in the EU.

Adrienne Héritier (2007) draws together several contributions of the volume. Her comparison of mutual recognition across different policy areas employs a rational-choice institutionalist framework. She argues that the adoption of mutual recognition depends on an activist court and on well-developed implementation rules. Thus, for mutual recognition as a new mode of governance to function, a support structure easing the requested equivalence is the key. In the final contribution to this volume, Maduro (2007) takes up the theme from Héritier on the role of the judiciary in a more normative analysis. He discusses three paradoxes that mutual recognition entails, which relate to the question of governance, to its impact on sovereignty, and to its dependence on identity. He emphasizes how mutual recognition in different policy areas raises different issues of participation and representation, which have implications for its legitimacy as the balance of power within the states is affected. Given that mutual recognition is frequently contested, the final responsibility over where it should apply is often delegated to the Court. For the Court, to assume this responsibility he concludes, it needs to be accorded sufficient legitimacy. This implies 'that the political process can always regain control over the policy issues that it, frequently and implicitly, delegates to courts' (Maduro 2007: 824).

In conclusion, the different contributions to this volume shed new light on the strengths and weaknesses of mutual recognition, a principle that is fundamental to the European integration process but nevertheless often overlooked.

Biograpichal note: Susanne K. Schmidt is Professor of Political Science at the University of Bremen, Germany.

Address for correspondence: Susanne K. Schmidt, Jean Monnet Centre for European Studies, University of Bremen/SFG 1340, Enrique-Schmidt Str. 7, 28359 Bremen, Germany. email: skschmidt@uni-bremen.de

ACKNOWLEDGEMENTS

The Thyssen Foundation kindly funded a workshop at the University of Bielefeld which allowed discussion of most of the papers which comprise this volume. I would like to thank all participants for their helpful comments, in particular Philipp Genschel, Sandra Lavenex and Kalypso Nicolaïdis. Much of the research for this article was done at the Max Planck Institute for the Study of Societies; I would like to thank Fritz Scharpf in particular. I am also grateful for support under the 6th framework programme of the European Union (Contract No. CIT1-CT-2004-506-392). I would also like to thank Claudia Haase for language corrections in several contributions, and Julia Spreen for her editorial assistance, as well as Tanja Börzel and Jette Knudsen for comments. Last but not least, I am very grateful to Jeremy Richardson for the opportunity to edit this special issue and his support throughout.

NOTES

1 Considering this, it might be better to omit the adjective in order to prevent NMG from being believed to be inherently new, which might stand in the way of useful comparisons between different contexts where a certain mode of governance is being deployed – however long it has been used.
2 I thank Wendy van den Nouland for this information.
3 Under certain conditions also a 'race to the top' can result. I will come back to this point.
4 In an interesting article Howse and Regan argue that the GATT could also be interpreted as allowing the imposition of process standards on imported products (Howse and Regan 2000).

REFERENCES

Armstrong, K. (2002) 'Mutual recognition', in C. Barnard and J. Scott (eds), *The Law of the Single European Market. Unpacking the Premises*, Oxford: Hart, pp. 225–67.

Eberlein, B. and Kerwer, D. (2004) 'New governance in the European Union', *Journal of Common Market Studies* 42(1): 121–42.

Gatsios, K. and Seabright, P. (1989) 'Regulation in the European Community', *Oxford Review of Economic Policy* 5: 37–60.

Genschel, P. (2007) 'Why no mutual recognition of VAT? Regulation, taxation and the integration of the EU's internal market for goods', *Journal of European Public Policy* 14(5): 743–61.

Hatzopoulos, V. and Do, T.U. (2006) 'The case law of the ECJ concerning the free provision of services', *Common Market Law Review* 43(4): 923–91.

Héritier, A. (2003) 'New modes of governance in Europe: increasing political capacity and policy effectiveness?', in T. Börzel and R. Cichowski (eds), *The State of the European Union*. Oxford: Oxford University Press, pp. 105–26.

Héritier, A. (2007) 'Mutual recognition: comparing policy areas', *Journal of European Public Policy* 14(5): 800–13.

Holzinger, K. and Knill, C. (2004) 'Competition and cooperation in environmental policy: individual and interaction effects', *Journal of Public Policy* 24(1): 25–47.

Howse, R. and Regan, D. (2000) 'The product/process distinction – an illusory basis for disciplining "unilateralism" in trade policy', *European Journal of International Law* 11(2): 249–89.

Joerges, C. and Godt, C. (2005) 'Free trade: the erosion of national, and the birth of transnational governance', *European Review* 13(1): 93–117.

Kohler-Koch, B. (2005) 'European governance and system integration', *European Governance Papers* No. C-05-01, New Modes of Governance/Connex.

Kostoris Padoa Schioppa, F. (2005) 'Mutual recognition, unemployment and the welfare state', in F. Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process*, Basingstoke: Palgrave Macmillan, pp. 190–223.

Kostoris Padoa Schioppa, F. (2007) 'Dominant losers: a comment on the services directive from an economic perspective', *Journal of European Public Policy* 14(5): 735–42.

Lavenex, S. (2007) 'Mutual recognition and the monopoly of force: limits of the single market analogy', *Journal of European Public Policy* 14(5): 762–79.

Maduro, M.P. (1998) *We the Court. The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EU Treaty*, Oxford: Hart.

Maduro, M.P. (2007) 'So close and yet so far: the paradoxes of mutual recognition', *Journal of European Public Policy* 14(5): 814–25.

Majone, G. (1992) 'Market integration and regulation: Europe after 1992', *Metroeconomica* 43: 131–56.

Majone, G. (1994) 'Mutual recognition in federal type systems', in A. Mullins and C. Saunders (eds), *Economic Union in Federal Systems*, Sydney: The Federation Press, pp. 69–84.

Mayntz, R. (1998) *New Challenges to Governance Theory*, Florence: European University Institute.

Nicolaïdis, K. (1993) 'Mutual recognition among nations: the European Community and trade in services', Ph.D. dissertation, Harvard, Cambridge, MA.

Nicolaïdis, K. (2007) 'Trusting the Poles? Constructing Europe through mutual recognition', *Journal of European Public Policy* 14(5): 682–98.

Nicolaïdis, K. and Schmidt, S.K. (2007) 'Mutual recognition "on trial": the long road to services liberalization', *Journal of European Public Policy* 14(5): 717–34.

Nicolaïdis, K. and Shaffer, G. (2005) 'Managed mutual recognition regimes: governance without global government', *Legal Studies Research Paper Series*, Paper No. 1007, University of Wisconsin Law School, <http://ssrn.com/abstract=728383>.
Pelkmans, J. (2007) 'Mutual recognition in goods. On promises and disillusions', *Journal of European Public Policy* 14(5): 699–716.
Raustiala, K. (2002) 'The architecture of international cooperation: transgovernmental networks and the future of international law', *Virginia Journal of International Law* 43(1): 1–92.
Rosenau, J. and Czempiel, E. (1992) *Governance without Government: Order and Change in World Politics*, Cambridge: Cambridge University Press.
Schäfer, A. (2006) 'A new form of governance? Comparing the open method of co-ordination to multilateral surveillance by the IMF and the OECD', *Journal of European Public Policy* 13(1): 70–88.
Scharpf, F.W. (1999) *Governing in Europe: Effective and Democratic?*, Oxford: Oxford University Press.
Scharpf, F.W. (2001) 'European governance: common concerns vs. the challenge of diversity', *MPIfG Working Paper 01/6*, Cologne: Max Planck Institute for the Study of Societies.
Scharpf, F.W. (2003) 'Problem-solving effectiveness and democratic accountability in the EU', *MPIfG Working Paper 03/1*, Cologne: Max Planck Institute for the Study of Societies.
Schmidt, S.K. (2004) *Rechtsunsicherheit statt Regulierungswettbewerb: Die nationalen Folgen des europäischen Binnenmarkts für Dienstleistungen*, Habilitationsschrift, Hagen: FernUniversität Hagen.
Scott, J. (2000) 'On kith and kine (and crustaceans): trade and environment in the EU and WTO', in J. Weiler (ed.), *The EU, the WTO and the NAFTA. Towards a Common Law of International Trade*, Oxford: Oxford University Press, pp. 125–67.
Scott, J. and Trubek, D. (2002) 'Mind the gap: law and new approaches to governance in the European Union', *European Law Journal* 8(1): 1–18.
Slaughter, A.-M. (2004) *A New World Order*, Princeton, NJ: Princeton University Press.
Streeck, W. (2000) 'Vorwort: Europäische? Sozialpolitik?', in W. Eichhorst (ed.), *Europäische Sozialpolitik zwischen nationaler Autonomie und Marktfreiheit. Die Entsendung von Arbeitnehmern in der EU*, Frankfurt/Main: Campus Verlag.
Trachtman, J.P. (2007) 'Embedding mutual recognition at the WTO', *Journal of European Public Policy* 14(5): 780–99.
Weiler, J. (1999) 'The constitution of the common market place: text and context in the evolution of the free movement of goods', in P. Craig and G. de Burca (eds), *The Evolution of EU Law*, Oxford and New York: Oxford University Press, pp. 349–76.
Williamson, O.E. (1985) *The Economic Institutions of Capitalism*, New York: The Free Press.