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Trusting the Poles? Constructing Europe through mutual recognition

Kalypso Nicolaïdis

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ABSTRACT European integration has been and will continue to be flawed with conflicts, conflicts of interests embedded in broader conflicts of identity. I argue that these conflicts and the bargains they require exhibit similar patterns across a wide array of issues, as struggaes around 'mutual' recognition where mutuality plays a crucial role. Indeed, the challenges and perils of recognition are universal. But Europe can be seen as an experimental polity where, more formally than elsewhere, actors debate the contours of a norm which has migrated from regulatory praxis to mode of governance, and beyond, to political principle. If the 'Polish plumber' has come to serve as the emblem for the denial of recognition in the EU, mutual recognition is no less conflictual when it comes to the status of refugees, Bosnians or cartoonists. Normatively, if 'managed mutual recognition' is to serve as a blueprint beyond international political economy, we need to better analyse the relationship between recognition and trust, blind and binding trust, deferential and interventionist recognition.

KEY WORDS Diplomatic recognition; legitimate differences; managed mutual recognition; Polish plumber; struggles for recognition; trust.

INTRODUCTION

This story could well start with the Dutch embassy in Berlin. From without, it advances like the bows of a ship between monuments symbolizing Germany's multifaceted history. As you wander inside, every space offers at least one vista from which to gaze at an adjacent space and from which one can be gazed at. There is no common grand entrance to awe the visitor with a sense of overarching commonality. Nevertheless, she who journeys through this maze of mutually open spaces cannot help but wonder whether the inspiration behind Kolhaus's design wasn't Europe itself. That is, the Union as it is becoming or as some of us wish it to become. A mosaic of intertwined mental and physical landscapes open to each other's soft influences and hard laws, and bound together not by some overarching sense of common identity or people-hood but by the daily practice of mutual recognition of identities,

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histories and social contracts – what I have called elsewhere our European 'demoi-cracy' (Nicolaïdis 2004).

Such an idea of Europe is, of course, an idealization. Unlike Kolhaus's embassy, the European Union (EU) is built on the quicksands of archetypes, the construct of lawyers and political scientists fighting the twin perils of a post-modern Napoleonic vision of a harmonized continent and a Westphalian nostalgia for absolute sovereign autonomy. Nevertheless, like the embassy, it rests on solid foundations – in the law and politics of integration. And like the embassy, it is predicated on some prevailing common notion of *appropriately intrusive trust*, the double movement of creating a claim on someone else and accepting the limits of such a claim (I assume your space will be compatible with, since visible from, mine; but in return, you trust that my gaze will not be overly intrusive and insistent, in the manner of Calvino's Palomar routine around the naked bosom on the beach (Calvino 1983)). It is this kind of trust, I believe, that is owed to all new members of the Union, including the Poles.

Perhaps to generalize, 'given the opaqueness of the other's intentions and calculations', trust needs to be predicated on identifying and strengthening the *ties that bind* in order to be sustainable (Seligman 1997: 43; Hoffman 2002). The fabric of human intercourse is less often made of *blind trust* and more often the product of *binding trust* between individuals, groups, organizations or indeed countries. Trust of the first kind may only superficially be seen as deeper in that it is most often predicated on separateness at best, mutual ignorance at worst. But if trusting the other is to seek to bind her to one's expectations, such trust requires prior and continued knowledge about such other. International regimes and institutions can be seen as elaborate mechanisms for mutual monitoring, a consensual form of reciprocal spying predicated on residual amounts of trust, trust that we will each refrain from cheating in the blind spots of our commonly agreed standards. International regimes must strike a balance between acceptable *intervention* in each other's affairs and *deference* to each other's systems. With time, the systems might come to be predicated on increasingly *blind* trust, where it is the mutual spying which becomes residual, only the amount necessary to reassure each other that continued trust is warranted. At some point, changes in the scale and purpose of the interaction and in background conditions – be they political, ideological, social, economic or technological – may call into question the whole design on which such a combination of binding and blind trust rests, requiring new additional amounts of binding trust. A new cycle then begins.

This article is a preliminary exploration of the sources and implications of the subtle balance between autonomy and connection, deference and intervention, *blind* and *binding* trust which underlies political and societal bargains around mutual recognition in the EU. In order to do this, I start with the story of the Polish plumber explored in much greater detail in this volume (Nicolaïdis and Schmidt 2007). I suggest a two-step approach to defining 'managed mutual recognition' which highlights the *preconditions* and the *limits* attached

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to it. I then seek to generalize this approach and explore the conflicts that lay behind the construction of Europe in other realms (justice and home affairs (JHA), diplomacy and freedom of expression) through the lenses of such managed mutual recognition as applied in the single market.

While the first twofold comparison (with JHA) is undertaken elsewhere in this volume (Lavenex 2007), the other two (recognition of state sovereignty and recognition of identities) can be considered as the two ends of the spectrum – from the broad macro to the micro level – and in this way emblematic of the function of recognition in international relations. Clearly, as the object of recognition changes – other countries' laws, other countries themselves, other 'others' – so do its preconditions, including the type of trust required. But I argue that the main patterns stay the same. Indeed, these areas illustrate the connection between recognition as a technical, legal or regulative norm to a more general form of transnational governance to a philosophical principle (Nicolaïdis 1993, 1997, 2004; Kostoris Padoa Schioppa 2005).

To be sure, recognition has become an increasingly fashionable concept in ethics and political theory as 'liberation movements' around the world have learned to see themselves as objects of dis-recognition and subjects struggling for recognition (Taylor 1994; Fraser 1995). In all social conflicts, in other words, resistance to an established social order is always driven by the moral experience of in some respect not receiving what is taken to be justified recognition (Honneth 1996). On such grounds, the recognition conception of justice, translated in various kinds of non-discrimination laws and multicultural practices, has given rise to considerable debate, including on the virtues of restorative justice.

While this enquiry assumes that developments and ideas related to the economic, political and societal realms cannot but inform one another, I will not revisit these philosophical debates here, but instead focus on the actual and potential meaning of *mutual* recognition in the EU itself. In the EU context, it took a long time for observers and politicians alike to see that, in whatever guise, what I call 'pure mutual recognition' is far from a panacea. It necessarily constitutes a surrender of sovereignty, control, dominance, monopoly. In implementing it, states must constantly fine-tune the balance between the liberal imperative of recognition, on the one hand, and the republican constraints that need to be attached to it, on the other. This article suggests that as we explore different realms, we identify three variants of 'managed recognition' and the binding trust that ought to come along with it: recognition as embedded, constitutive and, indeed, mutual.

1. TRUSTING THE POLES? THE CONTESTED NATURE OF MUTUAL RECOGNITION

I have argued elsewhere that we may think of the current times as a Tocquevillean moment for the EU, an EU poised between its aristocratic past and an uncertain but irrevocable future where citizens enjoy the power of their collective vetoes

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(Nicolaïdis 2005b). If so, we need to better understand the tensions that arise in the attempt to adapt the existing ethos of the EU to these changing circumstances. The story of the Polish plumber illustrates the great difficulty which comes with such an adaptation.

It is striking that the 'no' to the draft Constitution started its inexorable rise in the French polls at the same time as discussions on the so-called 'Bolkestein directive' reached a crisis. Ironically, the opponents of the directive claimed with great vehemence that it was not the liberalization of services in itself which they were targeting but only the principle of home-country rule, which they claimed was a new principle for the EU, surreptitiously introduced by a neo-liberal Commission. In their view, this principle represented the soullessness of the market logic at its most extreme. It was symbolized by the infamous-to-be Polish plumber who, by gaining unfair competitive advantage through the application of his home-country rule, threatens the integrity of the host-state social contract (Nicolaïdis and Schmidt 2007). The conflictual nature of mutual recognition should come as no surprise (Nicolaïdis 1993, 1997; Nicolaïdis and Shaffer 2005). This is a Janus-faced norm, usually branded as the 'easy option' and yet the hardest of all. As a horizontal transfer of sovereignty, it is both about respecting sovereignty and radically reconfiguring it – by delinking the exercise of sovereign power from its territorial anchor through a reciprocal allocation of jurisdictional authority to prescribe and enforce laws.

The real puzzle then is why the public trial of recognition in the EU and its unprecedented political visibility came so late. In fact, it has everything to do with our Tocquevillean moment for two reasons. First, because in such a transitional moment, market regulation norms acquire a political resonance which they lacked until then, while the political class is unable to construct a public discourse that would prevent such migration to the public sphere from being captured by populists and demagogues. Second, this tension is made worse as the Union enlarges to encompass a degree of diversity of socio-historical systems now in competition beyond the 'mental absorption' capacity of its citizens. In short, at a turning point in our history, the issue of mutual recognition highlighted the instability of European bargains between both ideological families and between member states, especially old and new ones, shifting from the former to the latter over time.

Introducing managed mutual recognition

In this context, alternative regulative principles for the single market definitely bear different connotations with regard to diversity. The classic construct in the EU narrative on the single market is to contrast recognition with, on the one hand, national treatment (which if narrowly interpreted as a ban on discrimination does not solve the problem of regulatory fragmentation) and, on the others, harmonization (which is both impossible to attain and sustain and irrelevant to problems of jurisdiction of control *per se*) (Nicolaïdis 1989, 1993, 1997; Schmidt 2007). When we wish to generalize, the archetypical contrast,

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of which this threefold distinction is a category, is that between mutual recognition, that is, the engagement with differences, and, on the one hand, isolation, ghetto-ization or ignorance of these differences; and, on the other hand, assimilation or negation of these differences. In both cases, the other side must become like me, either upon entering my territory or through a process of harmonization. The move to mutual recognition comes with the acknowledgement that such sameness is usually neither feasible nor desirable. The denial of recognition comes in the form of the standard reply: your rules, or those governing the production of your products, the supervision of your firms or the training of your workers and professionals do not have to be the *same as mine* but they need to be *compatible with mine*.

My first conceptual move in the international political economy (IPE) field has been to establish that in fact the deeper and more relevant contrast is one step removed from this one. It is between pure and managed mutual recognition, blind trust and binding trust, or between recognition as an alternative to versus an overarching concept encompassing elements of national treatment and harmonization. To a great extent, the distinction is parallel to that discussed by Joseph Weiler and others between the *Dassonville* jurisprudence – at least on one reading of its implications – of generalizing an *obstacles-based approach* to national regulation (all national rules are potentially subject to an assessment of illegality, and therefore to pure mutual recognition/home-country rule by judicial fiat), and the more circumscribed *Cassis* doctrine of *functional equivalence*, especially as further constrained in *Keck*, which involves precisely the identification of the conditions and limits of recognition (Weiler 2005). It must be noted here that only by migrating from the judicial to the legislative arena is it possible to spell out the full panoply of instruments for the management of recognition, which I have described elsewhere as the attributes of recognition (Nicolaïdis 1993, 1997, 2005a).[1] Therefore, while it is important to analyse the role of the rulings of the European Court of Justice (ECJ) in the European story of mutual recognition, it is also true that all the Court could do when it came to designing this more sophisticated understanding of the principle was to provide a road map for politicians and technical experts later drafting the laws (Nicolaïdis 1993; Nicolaïdis and Egan 2001).

Thus my second conceptual move is to ask what makes for sustainable recognition; in other words, how can institutions contribute in the entrenchment of *binding trust?* Binding trust is not only performative, based on what you do, but also *constitutive*, based on who you are – or who you should be – and involves therefore both an act of delineation of that other with whom I accept to interact and a peek inside her boundaries. Managed mutual recognition encapsulates the various ways in which this subtle balance can be struck through political bargains and the move from ex-ante to ex-post conditions (e.g. with less initial convergence we have to accept more extensive mutual monitoring down the road) as well as between such conditions in general and the limits – in scope and effectiveness – that can be put around recognition. The key to these trade-offs consists in resolving conflicts that unfold over acceptable differences and acceptable deference.

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The services directive in perspective

The idea that the working out of legitimate differences constitutes the most progressive challenge for Europe today remains relatively far from the left's ideological repertoire, especially parts of the French left, which shares with its Gaullist counterpart a lingering attachment to Europe as *Grande France* (Nicolaïdis 2005b). Whatever the actual flaws of the Bolkestein directive, and there were many, to reject it wholesale, and to vilify the home-country principle in doing so, is to fail to see the EU for what it has become, a 'mutual recognition space'. In fact, the rules adopted by the EU to 'complete' the single market in the last decade have created many kinds of firewalls against all-out competition *à l'americaine* through the kind of managed recognition discussed above.

This has long been the ambition of the European legislator, following on the ECJ's jurisprudence: to create a wide net for legislation on the single market and from this baseline only harmonize or retain host-country control when differences are illegitimate. When should differences be considered so is the object of a vast literature – any pronouncement here is bound to be contested. Suffice to say that to the extent that recognition ought to be conditional on some sort of convergence, we must first decide if it is for the sake of the Polish plumber himself, in order to avoid *his* (unfair) exploitation, or for the sake of the French plumber, in order to avoid *her* (unfair) displacement. One way to reconcile both concerns is to ask whether a service provider on the move can live on his or her wages in the host country. And there is surely a link between legal transnational recognition and domestic social recognition, as workers struggling for wage increases tend to see the injustice of their situation in terms of misrecognition on the part of their own society too.

Indeed, the fate of the Polish plumber had been sealed a decade earlier by the so-called posted workers directive which, in the wake of the *Rush Portuguesa* judgment, reinterpreted the 1980 Rome convention which had instituted mutual recognition in the first place, precisely in order to avoid what can be called 'face-to-face social dumping' (Nicolaïdis and Schmidt 2007). But national negotiators had fiercely disagreed on the scope of host/home-country jurisdiction, agreeing, for instance, to include only 'universally applicable' collective agreements in the list of standards that host countries were allowed to impose on foreign posted workers.

It may be argued that the Bolkestein directive suffered from the ambiguities arising from this prior settlement, which it sought only to clarify (with a liberal bent) while removing remaining administrative obstacles to the operations of the employing firms themselves. Nevertheless, the draft directive may have floundered precisely because it failed to 'manage' mutual recognition enough: its brand of recognition was too deferential to home state systems. Almost in mirror image, many of the opponents of the directive failed to understand that mutual recognition could be more or less managed with pure home-country control at one end of the spectrum. Interestingly, as the debate

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reached an ideological stalemate, those seeking a compromise in the European Parliament (EP) and elsewhere tried to convey this idea by seizing on an exaggerated distinction between the (bad) country of origin principle and (good) mutual recognition.[2] There were certainly semantic reasons for this shift (mutual recognition 'sounds' progressive and desirable) but I would argue that the real distinction they were after was between the two forms of mutual recognition contrasted in this article, namely 'pure' and 'managed'.

As the debate on services illustrates, a philosophy of recognition is based not only on reciprocal trust but also on the consensual delineation of the limits of such a trust. Can the Polish authorities be trusted to act in the interests of Polish workers? Can trade unions in the West be trusted to act in solidarity *with*, not in protection *against*, Polish plumbers? And what kind of externalities at the local level are created by such patterns of trust? Any interaction or interdependence and thus any formal integration process are conditioned by the collective determination of where tolerable differences start and end between groups or nations. Obviously, the assumption that differences are legitimate until proved not so is conditioned by some kind of will to live together, some basic sense of commonality. It may well be the case that EU enlargement to east and central Europe has widened the perception of differences to such an extent, and thus so weakened the shared sense of belonging, that this underlying philosophy of 'legitimate differences' as the default option must be reinvented anew.

But enlargement was not the only culprit. Opposition to the directive was based on two changing ideological frames: from the old vision of Europeanization as (good) 'non-discrimination' to Europeanization as (bad) globalization; and from associating the EU single market with *liberismo* to *liberalismo*, from free trade to economic liberalism. Under the first vision, the single market itself is an instrument against nationalism and a conveyor of solidarity; under the second, this solidarity function can only be fulfilled through convergence of rules. Under a progressive understanding of recognition, it is possible as a cosmopolitan and solidarist to defend liberty as free movement, or *liberismo*, without necessarily defending economic liberalism, or *liberalismo*, as an anti-state deregulatory ideology. Decisions by the ECJ may constrain the capacity of host states to police their territory but they do so by upholding *liberismo* not by promoting *liberalismo*. Ultimately, recognition, even in the judicialized EU, has been a political decision. Indeed, as I will stress in the next sections, we are speaking here of recognition *of* acts of states *by* states and therefore a mechanism that highlights rather than denies state power.

2. FROM PLUMBERS TO REFUGEES: RECOGNITION AS EMBEDDED

It is worth noting that the 'no' campaigners in France – often lumping together 'no' to Bolkestein and to Giscard – hardly noticed a critical move contained in the draft Constitution, namely the systematic extension of the principle of

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mutual recognition to the realm of JHA; in other words the acceptance by judges and police forces throughout Europe of each other's judgments and procedures. While the move had been anticipated in practice, it testifies to the increased prevalence of the recognition paradigm beyond the strict realm of the single market (Lavenex 2007). Most spectacularly, September 11 accelerated the adoption of mutual recognition in the EU in the case of arrest warrants; that is, final judicial decisions: 'wanted in one EU country, wanted everywhere in the EU.' In fact, recognition had been adopted as the goal of the system of state responsibility for the examination of asylum claims since the 1990 Dublin Convention in order to ensure that applications would be constrained by a one-stop entry system: rejected in one country, rejected everywhere. No doubt such recognition was driven by division of labour considerations rather than a sudden conversion to the business of trust. And therefore it is no surprise that the system has not been extended to this day to 'positive recognition' – for refugees, that is, accepted once/accepted everywhere.

What can we learn from contrasting the fate of plumbers and refugees seeking to move *in* or *within* Europe? Lavenex (2007) argues that what serves as an instrument of liberalization in one sector, by expanding the societal *vis-à-vis* the governmental sphere, may work in the opposite direction in another. In JHA, '[t]hose benefiting from mutual recognition are hence not societal actors but state representatives.' In short, the field of JHA does not support the liberal credentials which characterize mutual recognition in the single market realm – neither *liberalismo* nor *liberismo*.

To be sure, there is a difference between recognizing who gets to be a criminal *across borders* and what gets to be a certified aircraft or for that matter who gets to be a certified lawyer – *across borders*, although both of the latter can kill too! Crucially, states have learned to delegate authority vertically to non-state bodies in areas pertaining to markets while parliaments are still in control in areas pertaining to justice; in that sense, recognition affects democratic accountability to different degrees in these different areas (Nicolaïdis and Schaffer 2005; Schmidt 2007).

Yet, Lavenex overstates the difference between the two realms for two reasons. First, we cannot say that recognition allows the free movement of products on the one side and the free movement of (state) judgments on the other. In fact, recognition – at least as it relates to international relations (IR) – is always about granting extra-territorial jurisdiction to the acts of states (or bodies with delegated public authority), be they policies, regulations or laws and the ways in which states may help each other in enforcing these acts. The object of recognition is always embedded in a system of state practices (Nicolaïdis 1997; Nicolaïdis and Egan 2001).

Second, the insight that recognition is not *in and of itself* a liberal principle is fundamental but in fact not specific to JHA. When it comes to the movement of professionals, if a doctor has been struck off the register in France, she has also been struck off throughout the EU. True, we can contrast the initial core intent: to reduce regulatory duplication in order to expand EU-wide trade, on the one

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hand, and to reduce regulatory duplication in order to reduce EU-wide asylum application processing, and presumably successful ones, on the other. Whether the transnational enforcement of state acts curbs or, on the contrary, empowers individuals or society against the state depends on the context. The management of mutual recognition will generally involve a division of labour between host and home states – an area where again the difference between the two realms should not be overstated. In judicial matters, for instance, the member state issuing the warrant delegates the act of arresting a suspect to another – unwilling host state – which therefore lends out its monopoly of force. In trade or establishment, the host state may similarly conduct investigations of foreign firms or professionals in order to enforce their home-state standards or codes of conduct. In both realms, the risks of 'collusion in state control' are real and need to be counterbalanced by enhanced individual rights – hence, the Commission proposal on procedural rights in criminal matters, and the right of appeal devised for service providers in the services directive. But then, such a need to embed mutual recognition in a system of rights may itself run counter to the queen of all objections: subsidiarity.

Indeed, the analogy between JHA and the single market is better served by using the single market in services rather than goods and considering the EU entry of third-country nationals. The asymmetry is clear. In principle, the licensing of a non-EU lawyer by a public authority can be seen as analogous to granting a 'licence to stay' to an asylum seeker. But the crucial difference here is that, in the case of asylum, EU states have not yet agreed on positive recognition, only negative recognition. Indeed, in both cases, state denial of the 'licence' will deny free movement – in the case of professionals, an inability to pursue their profession, either because of a lack of a diploma or for a breach of a professional code of conduct (Nicolaïdis 2005a). The bias towards the restrictive rather than the permissive side in the case of JHA is not due to a structural difference in the 'object of recognition' – always acts of states – but rather to the very nature of the acts being recognized (regulative versus coercive functions of the state) and the alternatives left on the table for the individuals concerned (consider where an 'unrecognized' lawyer versus a refugee will have to return to). In both cases too, lack of trust (of the binding kind) may mean that recognition is so 'managed' that it becomes meaningless, as Lavenex illustrates for JHA.

Thus here again recognition is predicated on binding trust. Both realms make clear that mutual recognition of state acts and harmonization or convergence of standards are not pure alternatives. In fact, recognition is predicated on convergence which may or may not require formal harmonization of the underlying standards, rules or criteria used by regulators, asylum law enforcers, diploma issuers to grant entry. But even the most adamant proponents of harmonization have to accept that recognition is a challenge that is posed above and beyond. The distinction between underlying laws and how such standards are interpreted applies across the board: given an existing level of convergence between asylum granting or professional training standards in different countries, should a host country recognize as valid the access granted by the home-country authority?

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In JHA, recognition means that a 'member state not only recognizes a law as being equivalent but recognizes the judicial act in its interpretation of all relevant provisions in a given case' (Lavenex 2007: 765); under single market rules recognition means an ongoing acceptance of how a partner state interprets professional training standards when accrediting licence-granting bodies. In both cases ongoing recognition is predicated on trust that another state's enforcement of mutually compatible standards will result in mutually compatible decisions.

Recognition must remain embedded to remain sustainable. This was the message of the UK Court of Appeal which – after stating in 1998 that a discrepancy of approach between various member states to the criteria of refugee protection did not matter unless deemed 'outside the range of tolerance' – refused recognition of French and German asylum jurisdiction because it did not acknowledge persecution by agents other than the state as grounds for granting refugee status (see Lavenex 2007). It is little surprise that such a life-and-death difference in standards would fall outside the range of tolerance.

3. FROM ACTS OF STATES TO THE CONSTITUTION OF STATES: RECOGNITION AS CONSTITUTIVE

But recognition, of course, before involving the 'acts of states' actually concerned the constitution of states themselves and their becoming members of international society. Since the Treaty of Westphalia (1648) a vast body of legal thinking and state practice has developed to regulate the emergence of new actors, that is, states, in the international order. Here the coveted prize is *statehood*, defined as 'a claim of right, based on a certain legal and factual situation' (Crawford 1979), in practice, the requirements for statehood listed in the 1933 Montevideo Convention: a permanent population; a defined territory; government and capacity to enter into relations with other states. To be sure, it seems that at first sight 'diplomatic recognition' is a far cry from the kind of regulatory and legal recognition as a mode of governance that occupies us in this volume in that it is simply about bringing about sovereignty rather than the deeper horizontal sharing of sovereignty. And yet more profoundly, it can also be seen as the foundational interventionist act on the part of the community of state. Indeed, we could argue that the circumstances of diplomatic recognition demonstrate more vividly and tragically than with other realms the import of appropriately 'managing' such recognition.

Europe's Tocquevillean moment started with a struggle for recognition of this kind, at the edges of the Union, namely, that of the republics emerging from the ashes of Yugoslavia. In this context, the conditional granting of recognition of constituent states as fully sovereign members of international society was to be the foremost foreign policy instrument available to the EU. The story has often been told how the EU's recognition strategy, painstakingly designed in the course of 1991 to stall conflict, actually contributed to increasing it (Caplan 2005).

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The basic assumptions made by European governments at the time were twofold. First, recognition would lead to a change of unit of interaction and would therefore externalize the conflict, making it more legitimate for outside actors like the EU to intervene, which in turn would deter Serbian aggression. Second, the EU could use the leverage of *conditional* recognition to enforce a change in the internal behaviour of its beneficiaries. Indeed, EU authorities, including the Badinter Commission of legal experts, went to considerable lengths to try to devise such conditions, relying on and adapting traditional criteria for statehood.

And here again, we see a balance between blind and binding trust, deferential and interventionist recognition. On the one hand, European states added to traditional Montevideo criteria for statehood – as with the requirement to hold a referendum on independence in Bosnia-Hercegovina, for instance. On the other hand, recognition itself is not supposed to introduce any *arbitrary* change in the subject which is recognized, namely the boundaries of the new states which, according to the legal principle of *uti possidetis juris*, can only reflect the territorial status quo of the former Yugoslav republics (at the time, Montenegro could be recognized but not Kosovo).

Our original distinction between blind versus binding trust as underpinning two very different kinds of recognition is reflected in the long-standing debate between the *declaratory* and the *constitutive* schools of diplomatic recognition (Caplan 2005). Advocates of the former argue that the role of recognition is simply to acknowledge that a territorial entity has satisfied the criteria of statehood but does not itself create states; those of the latter see a political or strategic role for recognition in that the very existence of a state depends on the political existence of other states and their acknowledgement of the attribute of sovereignty. Obviously, the reality is more subtle: Israel, Cyprus and Macedonia have existed as states short of universal recognition. But there is indeed what Caplan (2005) calls a recognition paradox: recognition provides the very evidence of statehood – and acknowledgement of the rights associated with it – that may be needed to attract recognition in the first place. It is only after the fact that what is recognized as (pre)existing, in fact, comes to exist.

Clearly, the consequences of diplomatic recognition, if not totally unpredictable, must be considered as at least unintended. To the extent that recognition constitutes a bet with regard to a future state of affairs, it is generally *irreversible* and can best be understood through the analogy of tipping models with changing dynamics of the system before and after the fact of recognition. However much recognition may be predicated on future monitoring of the emerging states, it constitutes an abdication, an acknowledgement that we will continue to interact in spite of our differences. As with 'single market recognition', the conditional ex-ante becomes conditional ex-post. Binding trust implies that what you do is now my business but even if I am not happy with it, it is difficult to revert to the status quo ante.

In the long run, of course, the recognition of the fledging republics by the EU both enshrined (and some would argue precipitated) the disintegration of

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Yugoslavia and constituted the prelude to the integration of these new states in the broader continent. It can also be argued that many EU conditions for recognition did bite and that it is more the EU's failure to take them seriously than their effectiveness *per se* which is to blame for the lack of progress in the area of minority rights (Caplan 2005: 183).

In a more detailed account we would need to explore the historical cases of *mutual recognition* between two states which have hitherto co-existed in a state of war, often by being each other's significant others: the two Germanys before 1974, the two Koreas, Israel and Palestine. Here more than anywhere else, we see that the decision to interact means acknowledging the other in spite of fundamental political differences and in order to narrow them. In the case of the two Germanys, the binding recognition eventually led to merger in part because it kick-started a process which itself contributed to the end of the Cold War. As with IPE, diplomatic mutual recognition can only be a stable equilibrium if truly constitutive of the other side rather than a means of accelerating convergence.

Generalizing from these regional and bilateral cases, mutual recognition is the very foundation of the international society of states as we know it and the subject of a whole body of international law. The most elementary expression as well as the facilitating factor for the web of diplomatic mutual recognition was the exchange of embassies which took place in the seventeenth century creating islands of extraterritoriality. Of course, the exchange of rights and duties that ensued was not always symmetrical; witness the treaties of capitulation between the Ottoman Empire and the Western powers whereby European law was to be applied in Asia Minor for European citizens only. This was not, of course, recognition as we are discussing it here: the Ottomans were coerced into accepting the extraterritorial application of European law and such extraterritoriality was a one-way mechanism to protect the commercial interests and private property of foreign traders. Which brings us to our third realm of recognition and the core feature of the kind of recognition which occupies us here, namely mutuality.

4. FROM SACRED CONTRACTS TO SACRED SYMBOLS: RECOGNITION AS MUTUAL

To some extent, as Fukuyama reminds us in his *End of History*, the Enlightenment project can be seen as an attempt at taming the lethal thriving for recognition that drove so many individuals to the fight to death. If human intercourse could be organized around the politics of interest rather than the politics of identity, the violent struggle for honour would give way to the peaceful pursuit of mutually assured prosperity. We know what happened to the enlightenment project in the course of the twentieth century. But where are we today in Europe? From Sarajevo's no man's land to Paris's suburbs, even our Kantian island Europe seems more than ever caught up in struggles about identity and their recognition rather than simple bargains over interests. Perhaps the story

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of the Polish plumber is also a mix of pure interest-based corporatism and the fear of loss of identity in an expanding Europe, itself seen as serving as a 'Trojan horse for globalization'.

Indeed, we no longer understand 'European integration' as referring to what happens in and through Brussels but to the integration of citizens within their respective national polities – or 'integration across Europe'. As Paris burnt in the autumn of 2005 the flames licked the wounds of many beyond the hexagon. Social inclusion on the part of individuals and groups disenfranchised economically, ethnically or geographically is perhaps the foremost challenge of European politics today. Here, I argue, we need to understand the demands of these disparate actors – from *banlieusards* to strikers in the docks to illegal migrants – not only as struggles for recognition but as part of greater *mutual* recognition battles on the European scene.

The French philosopher Paul Ricoeur (2004) may be seen as one of the most inspired exponents of this vision of 'conflictual consensus' (*consensus conflictuel*) based on mutuality. While radical thinking about social recognition these days overlooks the importance of mutuality (Fraser and Honneth 2003), recognition, Ricoeur believed, speaks of the fundamental link uniting the members of a polity through Aristotle's 'political friendship', itself based on an even more fundamental relationship of an anthropological nature. Recognition takes us beyond the idea of politics as a simple game of redistribution between individuals well assured of their membership in society (Fraser 1995). Instead, the idea of mutuality exceeds the kind of reciprocity which underpins the liberal contract and this 'plus' is 'constitutive' (again) of the political body (Garapon 2006). Mutual recognition may acknowledge dissymmetry (between, say, a victim and the accused) but it serves to tame otherness, to mediate the risk of violence by literally creating Arendt's *inter-esse*, this transitional space in between individuals which makes for our politics. Recognizing the other cannot be solely a matter of positive law since it is based on 'an equivalence that can neither be measured nor calculated' (Ricoeur 2004: 251). And mutuality is about assessing such equivalence beyond the emotional poverty of procedures and rights.

The cartoon controversy which blew up in Europe in the spring of 2006 can be used as a test case here (Nicolaïdis 2006). We do not need to essentialize the relationship between Europe and Islam to acknowledge it as perhaps the most difficult *mutual* recognition challenge facing Europe today. If this is the case, there may be a common cause and common patterns to the denial of recognition with regard to the fate of our Polish plumbers and the fate of Mohammed cartoons on European soil. In both cases, passionate advocates saw grand principles pitted against one another: freedom of movement against sacred social laws when it comes to plumbers; freedom of speech against sacred symbols when it comes to cartoons; socialism versus neo-liberalism in one case; the West versus the rest in the other.

And yet in neither case can we accept the framing of the issue in such stark either–or terms. The real opposition is between self-righteousness on all sides and the difficult search for justice in a globalized world groping for ways to

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manage our increasingly conspicuous – if not actually greater – cultural and economic differences.

At the heart of both controversies lies the same paradox. If we want people from elsewhere to integrate better in our economies and our societies, we need to recognize the validity of at least *some* of their habits and rules from home. Only in the name of an old-fashioned defence of sovereignty and the absolute match between territorial, legal and administrative jurisdiction can we reject the multifaceted demand for recognition.

National treatment, or 'when in Rome do as the Romans do', will not do. If we want their countries to catch up, small businesses and people from east and central Europe cannot be asked to adapt all over again to each country's rule in a European space which is supposed to be borderless. Similarly, we cannot simply ignore the civic responsibilities that come with Europe's claim to primacy in the so-called dialogue of civilization with the Muslim world within and beyond our borders. Most Muslims cannot be expected to buy our hard-earned fondness of blasphemy wholesale, here and now. Recognition, be it of home regulations or identities, means some degree of internalizing the interests and beliefs of others, as a precondition for freedom of movement, on one hand, and freedom of speech, on the other.

This means, however, that recognition must not only be managed, as I have argued above; it must also be mutual. Managed mutual recognition implies that acceptance of other people's norms can and must be reciprocal, conditional, progressive, partial, negotiated, dynamic and predicated on critical safeguards, which in turn makes it progressive and flexible over time. Thus, the services directive enables governments to enforce local rules pursuing social, environmental, health, security and consumer protection objectives, but only to the extent that these are 'necessary' and 'proportional' to the goals pursued. If countries of origin do their job, they will see their laws recognized to the extent that the European court, the Commission and other associated interests remain keen to enforce non-discrimination to the fullest. The sphere of mutual recognition should expand in tandem with the requisite level of convergence and tolerance between social systems.

Which brings us back to the cartoon clash. For Europeans to be truly reconciled to recognizing Muslims sensitivities, mutuality will certainly help. Muslim societies do not have to become like ours – although more freedom of speech in many of their countries would be welcome – but they must understand that many of us hold sacred the right to express disrespect for religion. Here, as with the single market, the spirit of proportionality would help. Moderates ought to argue on the finer points – should limits to free speech be legal or moral questions, should bans be considered in the case of disrespect or only incitement to violence, etc? But surely, the hope is that with time, greater convergence, mutual knowledge and indeed healthy non-violent conflict, the scope for mutual recognition will expand here too.

This is the (idealized) European vision, if there is one: living with our differences and seeking to harmonize if, and only if, such differences are illegitimate in

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the eyes of either one of the parties involved. Recognition is a tough call on all sides of the political spectrum. The left fears social dumping when recognition means importing market rules; libertarians fear political dumping when recognition means importing curbs on free speech. Even if these fears can be exploited to demonize Polish plumbers or Muslim migrants, they must be assuaged. Ultimately, however, they must be transcended if we are to live in Europe and in the world as a community of others.

CONCLUSION

This article cannot do justice to the wide relevance of mutual recognition as a norm or to the many different meanings of the idea itself. It only suggests some benchmarks for exporting recognition across seemingly disparate areas – single market, JHA, diplomacy, multicultural dilemmas. And in doing so, it brings together a set of concepts that ought to accompany the quest for sustainable recognition: managed mutual recognition, binding trust and the accompanying features of recognition as embedded, constitutive and mutual.

The research agenda laid out here is to explore the commonalities between the various theatres where the struggle for recognition unfolds from at least three disciplinary standpoints: trade law and IPE; international relations and political philosophy. In each of these realms the resistance to mutual recognition and the preconditions for extending it are grounded in the same constraint of acceptable differences and necessary deference between the parties involved – in other words the double anchor of the needs for sameness (harmonization) and separateness (national treatment). And these very patterns of resistance are the key to designing sustainable recognition regimes.

Many would argue that demands for recognition are so prone to conflict that societies are better off ignoring them, especially when it comes to transnational affairs. The Hegelian project of playing out and eventually resolving the struggle of recognition echoed by Kojeve's (2005) universal state predicated on generalized mutual recognition continues to constitute a key political horizon in today's world. As a result, recognition holds an ever ambiguous ideological status. On the one hand, it can be seen as second best, limiting the need for more harmonious strategies such as equality of chances and solidarity. On the other hand, struggles for recognition are at the heart of a progressive agenda for world politics. Obviously, the themes touched on above are relevant well beyond the confines of the EU. Increasingly, global institutions are designed to reflect our need to interact in spite of our differences and our capacity to agree on the limits of our mutual trust. With greater interdependence comes a greater awareness of differentiation and the need to work out patterns of recognition that are conditional, partial and managed and as such the only game in town.

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NOTES

1 As an outcome, managed mutual recognition can be contrasted with 'pure' mutual recognition in the same sense as managed trade can be contrasted with free trade. It involves complex sets of rules and procedures that may serve to reduce, if not eliminate, the open-endedness of access rights. The four main dimensions along which mutual recognition can be fine-tuned are: (a) prior conditions for equivalence, from convergence to inter-institutional agreements; (b) degree of automaticity of access; (c) scope of activities or features covered by recognition; and (d) ex-post guarantees, including ultimately provisions for reversibility. Statically, variation along each of these dimensions can be seen to indicate how far parties have travelled down the road to full recognition. Dynamically, the management of mutual recognition can be viewed as a process involving evolving trade-offs between these dimensions.

2 For instance, Evelyne Gebhardt, of the Parti Socialiste Européen (PSE) rapporteur on the services directive, argued that the Socialist Party was proposing to 'establish the principle of mutual recognition instead of that of country of origin in the directive that is that if one enterprise was established in one country legally it should be able to establish services in the whole of the EU not having to apply all the relevant country of origin principles (*sic*) but operating under a principle of minimum standards applicable in the host country. The "country of origin" principle is not a European answer to the problem – but mutual recognition and harmonization are.'

REFERENCES

Calvino, I. (1983) *Palomar*, Torino: Giulio Einaudi.

Caplan, R. (2005) *Europe and the Recognition of New States in Yugoslavia*, Cambridge: Cambridge University Press.

Crawford, J. (1979) *The Creation of States in International Law*, Oxford: Clarendon Press, pp. 31, 119.

Fraser, N. (1995) 'From redistribution to recognition? Dilemmas of justice in a "post-socialist" age', *New Left Review* I/212: 68–93.

Fraser, N. and Honneth, A. (2003) *Redistribution or Recognition? A Political–Philosophical Exchange*, London: Verso.

Garapon, A. (2006) 'Justice et reconnaissance', *Esprit* 323: 231–248.

Hoffman, A. (2002) 'A conceptualization of trust in international relations', *European Journal of International Relations* 8(3): 375–401.

Honneth, A. (1996) *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, Cambridge: Polity Press.

Kojéve, A. (2005) *Outline of a Phenomenology of Right*, Lanham, MD: Rowman & Littlefield Publishers, Inc.

Kostoris Padoa Schioppa, F. (2005) 'The cultural foundations of mutual recognition', in F. Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process*, Basingstoke: Palgrave Macmillan, pp. 224–31.

Downloaded By: [Staats & Universitatsbibliothek] At: 20:34 5 July 2007

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.
Nicolaïdis, K. (1989) 'Mutual recognition: the next frontier of multilateralism?', *Project Promethee Perspectives*, Paris, July.
Nicolaïdis, K. (1993) 'Mutual recognition among nations: the European Community and trade in services', Ph.D. dissertation, Harvard, Cambridge, MA.
Nicolaïdis, K. (1997) 'Mutual recognition of regulatory regimes: some lessons and prospects', *Jean Monnet Paper Series*, Cambridge, MA: Harvard Law School.
Nicolaïdis, K. (2004) 'We, the peoples of Europe', *Foreign Affairs* 83(6): 97–110.
Nicolaïdis, K. (2005a) 'Globalization with human faces: managed mutual recognition and the free movement of professionals', in F. Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process*, Basingstoke: Palgrave Macmillan, pp. 129–89.
Nicolaïdis, K. (2005b) 'UE: Un Moment Tocquevilien', *Politique Etrangere*, 3 (September): 497–509.
Nicolaïdis, K. (2006) 'Europe and beyond: struggles for recognition', *Open Democracy*, February.
Nicolaïdis, K. and Egan, M. (2001) 'Transnational market governance and regional policy externality: why recognize foreign standards?', *Journal of European Public Policy* 8(3): 454–73.
Nicolaïdis, K. and Shaffer, G. (2005) 'Managed mutual recognition regimes: governance without global government', *Law and Contemporary Problems* 68: 267–322. <http://ssrn.com/abstract=728383>.
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.
Ricoeur, P. (2004) *Parcours de la Reconnaissance*, Trois Etudes, Paris: Stock.
Schmidt, S.K. (2007) 'Mutual recognition as a new mode of governance', *Journal of European Public Policy* 14(5): 667–81.
Seligman, A.B. (1997) *The Problem of Trust*, Princeton, NJ: Princeton University Press.
Taylor, C. (1994) 'The politics of recognition', in A. Gutman (ed.), *Multiculturalism: Examining the Politics of Recognition*, Princeton, NJ: Princeton University Press, pp. 25–73.
Weiler, J. (2005) 'Mutual recognition, functional equivalence and harmonization in the evolution of the European common market and the WTO', in F. Kostoris Padoa Schioppa (ed.), *The Principle of Mutual Recognition in the European Integration Process*, Basingstoke: Palgrave Macmillan, pp. 25–84.