

***Globalization with Human Faces:  
Managed Mutual Recognition and the Free Movement of Professionals***

by

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## **1. INTRODUCTION<sup>1</sup>**

While short term capital flows and foreign direct investment have never moved across borders so freely, never either has the international movement of people been so “managed”. This is one of the apparent paradoxes at the heart of today’s pattern of globalisation. In an era of arch proclaimed liberalism, rules at the national level governing conditions for the granting of visas, work or residence permit, and ultimately permanent residence and naturalisation constitute perhaps the strongest remaining expression of state power. These rules are hardly subject to any international oversight, or even coordination, save in the restricted realm of asylum, where the national norms relating to the movement of people become subject to international human rights norms. The paradox, of course, is only apparent. The weight of forces driving the liberalisation of capital movement dwarf those driving the free movement of people. More fundamentally, policies addressing migration, bound up as they are with the “who is ‘us’”, the definition of political as well as economic boundaries, and, ultimately, the flexibility or lack thereof of group identities, escape the sole constraint of economic rationality.

There is nevertheless, a real paradox. That is that in one of the few areas where developed countries actually have domestic incentives to address the demands of the developing world they have been so hard pressed to do so. In one guise, the international movement of people has become embedded in the global trade regime: as part of “trade in services.” Individuals with professional training, from doctors or teachers to software engineers form part of a growing third world constituency seeking to provide their services abroad, more cheaply and often more diligently than their counterparts in host countries. These host countries on their part often face demographic circumstances and skill supply gaps which would make such labor supply precious. Indeed, periodically, quotas are issued in one country or another for one category of professionals or another. Yet, while globalization itself increases the need for international provision of professional services there is no mechanism in place for the global management of professionals in a more systematic and holistic fashion. Instead, in most sectors and most countries, professionals face numerous obstacles including residency or investment requirements. Foremost among such obstacles are domestic requirements for practicing their profession.

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<sup>1</sup> A substantial part of the research for this paper was conducted for the Organisation for Economic Cooperation and Development (OECD) and is contained in the report: Kalypso Nicolaïdis “Promising Approaches and Principal Obstacles to Mutual Recognition,” in *International Trade in Professional Services: Advancing Liberalization through Regulatory Reform*, OECD Publications, 1997; See also “Managed Mutual Recognition: The New Approach to the Liberalization of Professional Services,» Politics Research Group, Kennedy School of Government, Harvard University, *Working Paper 97-14*, Spring 1997.

Obviously, tackling such obstacles to the free movement of people-as-professionals is no easy mission. The difficulties that, to this day, plague efforts to do so within the European Union, the world's most sophisticated negotiating machine, testify to the greatest obstacle of all: the lack of trust between countries in their respective training and certification systems.

This paper focuses on mutual recognition of qualification, licensing and certification requirements as the central mechanism that can be used to address the impact of national regulations on the capacity of professionals to exercise their activities across borders. Under this approach countries or regulatory bodies recognize (conditionally of course) their counterparts' stamps as equivalent to their own and therefore the legality of their respective professionals. The paper tackles the issue of mutual recognition at two levels. At the first one, the micro level, I ask under what conditions can individual mutual recognition deals be negotiated, what are the most promising approaches as well as the principal obstacles revealed by experiences with mutual recognition agreements in the field of professional services. Examples are drawn from the professions of architecture, law, accounting and engineering, although lessons are generalizeable across professions.

At the second level, the macro level, I analyze the broader institutional and political context with an eye to the normative implications of liberalisation in this field. Mutual recognition I believe, can and should be seen as the human face of globalisation. Most importantly in this regard, I argue that we need to recognize and address the detrimental brain drain effects in the originating countries of permanent migration - as well as to a lesser extent the kind of social polarization increasingly witnessed in the receiving countries. Thus it may be argued that designing an international regime easing the *temporary* movement of people would contribute in addressing concerns on both sides. Temporary movement, or better still back and forth movement should maximize remittances and skill transfer while minimizing social disruption. In this light, the GATS should be considered as a privileged venue for experimenting with "globalisation with a human face" by better operationalizing and promoting the distinction between temporary service provider movement and permanent migration. Some go so far as to argue that immigration policies that focus on permanent migration should be replaced by "mode 4" type movement (mode 4 is defined in GATS as the provision of a services by an individual moving to the exporting country). Some would argue conversely that the two regimes must be strengthened together. Whatever the spillover effects on permanent migration however, temporary movement of service providers does represent the human face of globalisation.

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This paper puts forth three interrelated arguments about mutual recognition in the field of professional services - arguments embedded in a broader set of analysis on mutual recognition across sectors (see other contributions in this volume as well as Nicolaïdis, 1993a, 1993b, 1995, 1997):<sup>2</sup>

Managed Mutual Recognition as a process: The European experience with mutual recognition demonstrates the value of adopting a form of “managed mutual recognition” which does not require extensive prior harmonisation of qualifications across borders. Instead, MRAs can involve variations in scope, automaticity and reversibility of access to compensate for existing differences in the ways in which professions are regulated. Moreover, they should be thought of as the basis for dynamic processes of learning-by-doing and progressive liberalization.

“Open Recognition” through Pro-active Multilateralisation: The WTO should adopt a cautious approach to the enforcement of unilateral obligations -including unilateral recognition- by judicial fiat. Instead, under the Doha round, it needs to create incentive for the negotiation of “open” MRAs as well as devise mechanisms to guard against disruptive discriminatory effects and accelerate the multilateralisation of MRAs, including through the drafting, updating and administration of MRA guidelines with the support of the OECD.

Transatlantic Regulatory Cooperation and Regulatory Development: MRAs cannot be struck in a vacuum. Because they are vulnerable to conflicts of interpretation and changes in domestic circumstances, they must be designed so as to minimise risks of disruptive conflicts. They therefore require corollary regulatory cooperation in the form of on-going and systematic exchange of information, mutual monitoring and cooperative enforcement. In this context, the US and the EU should renew their efforts at cooperation on mutual recognition of professional services, not only as a means of reinforcing transatlantic ties but also as the basis for expansive and conditionally open agreements including developing countries - as suggested in point 2 above.

## **2. MUTUAL RECOGNITION IN THE CONTEXT OF OVERALL LIBERALISATION**

### *Unilateral and Mutual Recognition*

Unilateral recognition conducted on an ad-hoc basis has long been the norm for professional wishing to practice across borders. This involves comparing the qualifications acquired by a professionals in a home state with those required in a host state where the professional requests recognition, and where the competent authorities are to assess some level of equivalence according to unilaterally determined criteria. But such a way of allowing entry for foreign professionals constitutes partial and arbitrary liberalisation. Partial, because most of the time, the foreign professional is not granted unconditional access; arbitrary because the ad hoc character of the procedure does not ensure objective and predictable assessments.

Agreements on mutual recognition turn the above procedure from a unilateral to a reciprocal one, reducing transaction costs of granting entry for regulatory bodies and reducing the uncertainty related to rights of entry for professionals (mutual recognition is sometimes referred to by professional bodies as “inter-recognition” or reciprocity). Mutual recognition theoretically covers the various components of professional qualifications: professional education sanctioned by diploma, professional experience, and formal licensing or certification requirements -- including examination and membership of professional association. In practice, recognition agreements can focus on one or all of these elements.

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<sup>2</sup> See also later work by Kalypso Nicolaidis extending the approach presented her (Nicolaidis, 2000a, 2000b, 2001a, 2001c)

Mutual recognition is a principle that can be applied to products as well as services in general and professional services in particular. Formally, mutual recognition can be defined as a contractual norm between governments -or bodies with delegated authority- mandating the transfer of regulatory authority from the host country (or jurisdiction) where a transaction takes place, to the home country (or jurisdiction) from which a product, a person, a service or a firm originate (jurisdictions are generally sovereign states but they can also be sub-national units in federal entities). This in turn embodies the general principle that if a professional can operate, a product be sold or a service provided lawfully in one jurisdiction, they can operate, be sold or provided freely in any other participating jurisdiction, without having to comply with the regulations of these other jurisdictions. The “recognition” involved here is of the “equivalence”, “compatibility” or at least “acceptability” of the counterpart’s regulatory system; the “mutual” part indicates that the reallocation of authority is reciprocal and simultaneous. A Mutual Recognition Agreement (MRA) is one in which the respective regulatory authorities accept, in whole or in part, the regulatory authorisations obtained in the territory of the other Party or Parties to the agreement in granting their own authorisation. It is therefore a specific instance of application of the general principle, between specific parties, applying to specific goods and services and including more or less restrictive constraints and caveats<sup>3</sup>.

### *Mutual Recognition Agreements in practice*

There are still strikingly few MRAs in the professional sector, but there is a growing sense that their development could play a key role, both to maintain the regional and international momentum for services liberalisation and to provide impetus for regulatory reform across the world (as spearheaded for instance by OECD)<sup>4</sup>. Mutual recognition will likely be at the heart of trade diplomacy in the next decades and should focus prominently in the Doha round. It has proved contagious since its broad-base adoption in the context of the Single Market in Europe, especially as applied to products. Its adoption generally comes in two phases. First, it is enshrined in a broader treaty or agreement as a general principle for further liberalisation. As with the Treaty of Rome forty years ago, NAFTA, APEC the FTAA and the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) all call for future negotiations on mutual recognition. At the global level, the signatories of the Uruguay Round called for the bilateral or plurilateral negotiation of MRAs both in the Agreement on Technical Barriers to Trade (TBT Article 6) and in the General Agreement on Trade in Services (GATS Article 7)<sup>5</sup>.

Second, following these injunctions and guidelines, actual MRAs involving specific rights and obligations are negotiated at bilateral, plurilateral or multilateral levels.<sup>6</sup> MRAs for professional services are still in their infancy. In the wake of the Uruguay Round, the Working Party on Professional Services operating under the aegis of GATS engaged in a major endeavour to apply mutual recognition and harmonisation to the field of accounting, leading eventually to the publication of a model MRA. Recognition agreements were under the umbrella of NAFTA, including on engineering in June 1995, followed by legal consultants and architecture – with a

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<sup>3</sup> See Kalypso Nicolaïdis, “Mutual Recognition of Regulatory Regimes: Some Lessons and Prospects,” in *Regulatory Reform and International Market Openness*, OECD Publications, November 1996.

<sup>4</sup> See “Regulatory reform project: Professional Business Services,” DAFFE, OECD, November 1996.

<sup>5</sup> Article 7 of GATS encourages signatories to adopt measures, byway of bilateral agreements or autonomously, “to recognize the education or experience obtained, requirements met, or licenses or certification obtained in a particular country.” See Nicolaidis and Trachtman, 2000b

<sup>6</sup> MRAs in the field of products are being now negotiated or considered both bilaterally -e.g. between the United States and the European Union, Australia and New Zealand- plurilaterally -the G4 countries- and regionally -within APEC, ASEAN, NAFTA and the FTAA.

number of other professions on the way (nurses, dieticians, veterinarians)<sup>7</sup>. One of the most far-reaching agreements is the Trans-Tasman MRA (which builds on the ANZCERTA) implemented in 1997.

What are the factors behind this drive towards mutual recognition? First, mutual recognition has a central place among the array of methods to liberalise trade in services in general, but above all professional services (Drake and Nicolaidis, 1995; see also Feketukuty, 1988, Chicago Legal Forum, 1986). Since 1995, under the auspices of the OECD Committee on Capital Movements and Invisible Transactions (CMIT), the broad range of barriers that impede the free movement of professionals across borders either in their capacity as individuals, or as professional firms has been extensively documented and analysed<sup>8</sup>. Lack of recognition of foreign qualification and experience has been cited repeatedly as a core impediment to trade in professional services. Other impediments are either more basic (citizenship) and therefore addressed earlier; or they subsist in spite of mutual recognition and need to be dealt with by domestic competition law.

Mutual recognition also carries benefits beyond rights of access. First, it may be a way for the importing country to make better use of imported skills and increase its comparative advantage in certain professional fields. Second, MRAs allow the various regulatory bodies involved in granting rights to practice on a case by case basis to save time and resources by working together and engaging in a more effective division of labour. It is this growing awareness that is leading professional associations and licensing boards to enter discussions on MRAs on their own initiative. Third, engaging in such recognition may also enhance mutual learning and the transmission of regulatory experience, thus raising professional standards as well as the level of access to professional services around the world. Maybe most importantly, the very prospect of having to negotiate MRAs can constitute a stimulus for internal regulatory reform and the necessary adaptation of the professions to changing economic and social environments.

There are also major obstacles that need to be overcome in order to engage in MRAs. First is the mere complexity and opacity of the education and training systems prevalent around the world and of the licensing requirements that they are meant to prepare for. Building bridges between such complex systems requires in depth individual and institutional learning. Second is the often expressed fear on the part of government regulators and professional bodies alike that mutual recognition may lead to a lowering of professional standards, both because it would mandate entry for professionals trained below the standards of the host country and because accreditors may be tempted to enter into regulatory competition to expand their “client base”. In addition to purely corporatist reactions, this line of argument is the main cause for the resistance stemming from the professions themselves. These obstacles lead back to the fundamental tension which is at the heart of this whole debate, that between the trade culture which emphasises openness and competition and the regulatory culture which emphasise the need for constraints on such competition and the collective responsibility for mitigating the potentially harmful effects of markets. The challenge for mutual recognition proponents is to show how these two sets of objectives can be reconciled.

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<sup>7</sup> See Bernard Ascher, “Trade Agreements and the Professions,” Paper presented at Euroservices: Transatlantic Trade in the 21st Century, US Department of Commerce, June 18, 1996, p4.

<sup>8</sup> See OECD Secretariat, 1995, Liberalisation of Trade in Professional Services, Paris, OECD publications and OECD Secretariat, 1996, International Trade in Professional Services: Assessing Barriers and Encouraging Reform, Paris, OECD publications (referred to hereafter as OECD Documents, 1995 and 1996). Measures are recorded in the OECD Inventory of Measures Affecting Trade in Professional Services and the survey on Regulation on Access to the Professions and their Activities.

### 3. THE EUROPEAN EXPERIENCE: EMERGENCE OF MANAGED MUTUAL RECOGNITION

The Europeans were the first to systematically apply mutual recognition to the professions. The historical experience accumulated in the EU is worth drawing lessons from both because it illustrates alternative approaches to mutual recognition and because it provides a roadmap for what I argue is the only workable approach to mutual recognition in most circumstances, namely managed mutual recognition.

#### THE HISTORICAL SEQUENCE OF ALTERNATIVE PARADIGMS

We owe the formal invention of mutual recognition in 1957 specifically to professional people. The Treaty of Rome called for the adoption of EU directives on “the mutual recognition of diplomas, certificates and other evidence of formal qualification,” both for the purpose of freedom of establishment and free movement of services<sup>9</sup>. The first interpretation of this injunction dominant until the mid-1970s was that mutual recognition was predicated on the equivalence of diploma and that equivalence meant similarity: far-reaching harmonisation of professional training standards was to be a prerequisite to the mutual recognition of diplomas. Regional integration through convergence- rather than through competition -was the rationale for this approach. On this basis, the European Commission along with member state representatives drafted far reaching proposals in 1969-70 concerning about twenty professions<sup>10</sup>. For each profession, they set out with great precision training requirements which were to be respected in each member state, including quantitative requirements as to the minimal number of hours of courses to be delivered by degree-granting institutions<sup>11</sup>. With such conditions fulfilled, mutual recognition would grant full and unconditional access in the host country to all professional activities that a given diploma granted in a home country.

A second paradigm followed in the mid-1970s, replacing such quantitative harmonisation with qualitative harmonisation as a basis for mutual recognition. In other words, equivalence of diplomas should not be predicated upon their *similarity* but upon their *comparability*. This meant that broad guidelines for the content of curricula would be spelled out along with specification of the required lengths of study. A series of mutual recognition directives did pass on this basis in the mid-1970s concerning medical and para-medical profession, but dozens of other sectoral directives, including for engineers, accountants, professors, and lawyers, reached a stalemate. Thus, of the nearly 150 professions being practised in the EU, only a handful had been liberalised in the first two decades of the EU experience. The last directive adopted in this vein (for architects, in 1985) set out fundamental requirements in terms of skills and abilities without specifying a corresponding content of education and training. It was a precursor to the next phase of liberalisation.

By the early 1980s, a third paradigm was in the making, namely mutual recognition without prerequisite, thus delinking mutual recognition from harmonisation. The lesson seemed clear after

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<sup>9</sup> Article 57.1. Although the European Court decided in a series of cases in the mid-1970s that the provision of the Treaty were to be self-executing in the absence of the Community directives it called for, this did not extend to mutual recognition.

<sup>10</sup> This includes pharmacists, doctors, dentists, engineers, architects, accountants, lawyers, veterinarians, midwives, opticians, nurses.

<sup>11</sup> Every profession was treated along the same scheme under three separate directives concerning respectively, a) the abolition of legal restrictions on freedom of movement; b) the mutual recognition of qualifications; c) and coordination of conditions for the taking up and pursuit of the professions.

almost two decades of protracted negotiations in this area: if quick progress was to be achieved, the sectoral approach which had prevailed until then would need to be abandoned and measures would need to be devised to liberalise in a broad sweep, without entering into the complexities of each particular profession. In 1984, European heads of states called for the introduction of "a general system for ensuring the equivalence of university diplomas in order to bring about the effective freedom of establishment within the Community." This came to be known as the horizontal approach to professional services liberalisation and was embedded in the General System Directives (GSDs). This approach was not to the liking of most professional bodies which, during all the previous rounds of negotiations, had fiercely defended the need to deal with their particular needs and characteristics under separate legal frameworks<sup>12</sup>.

### **THE HORIZONTAL APPROACH: A MULTI-TIERED MECHANISM OF RECOGNITION FOR ALL THE REGULATED PROFESSIONS**

The General System is a stratified system based on the length and character of study or training required to have access to a profession. It is based on two separate directives, one dealing with higher level diplomas corresponding to three or more years of studies, the other dealing with less than three years<sup>13</sup>. In contrast to the prevailing mechanism for unilateral recognition, the General System addresses the issue of equivalence by asking applicants to opt directly for a specific profession rather than selecting the University diploma that they consider equivalent to their own (in most European countries where registration in professional associations is based on the possession of a diploma, unilateral recognition involved ministries of education delivering certificates of equivalence between diploma). The GSD also moves away from the diploma - centred approach of the 1970s by allowing for training and professional experience to play a concurrent role as diploma in assessing equivalence<sup>14</sup>. On this basis, the horizontal approach meant not only that all categories of professions ought to be covered, but that they ought to be covered whatever the mode of their regulation in the home country - that is without setting prior conditions regarding the criteria for accreditation in the home country<sup>15</sup>.

This was revolutionary stuff for regulatory bodies and the culture they reflected. To make up for its basic philosophy of broad-based equivalence, the system therefore establishes a relatively complex set of distinctions between seven types of professional qualifications that may have been obtained

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<sup>12</sup> For greater detail see Jean-Eric de Cockborne in OECD Documents, 1995, op. cit.; and Nicolaïdis, OECD, 1996, op. cit.

<sup>13</sup> Directive 89/48/CEE completed by 92/51/CEE. The first general directive entered into force in January 1991 and the second in 1994. For a detailed description see for instance, Vademecum sur le Systeme de Reconnaissance Des Qualification Pofeionnelles Instauré par la directive 89/48/CE et Complété par la Directive 92/51/CEE - Rapport Final-Clifford Chance, Brussels, 1994.

<sup>14</sup> Article 3 the GSD stipulated that, "where, in a host member state, the taking up or pursuit of a regulated profession is subject to possession of a diploma, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorize a national of a Member State to take up or pursue that profession on the same conditions as applied to its own nationals : (a) if the applicant holds the diploma required in another member state for ... the profession in question... (b) if the applicant has pursued the profession in question full time for two years during the previous ten years in another member state which does not regulate that profession, ... and possesses evidence of one or more formal qualifications ... awarded by a competent authority...which show that the holder has successfully completed a post-secondary education course of at least three years duration... and where appropriate that he has successfully completed the professional training required in addition to the course, and which have prepared the holder for the pursuit of the profession".

<sup>15</sup> This is in keeping with the general philosophy set out in the Court's judgement Cassis de Dijon (1979) where any alcoholic product was to be allowed free entry in any member state if "lawfully produced and marketed" in another member state.

by the professional in her home country<sup>16</sup>. Conditional equivalence is established within each category and bridging mechanisms are set out to cover cases where requirements fall in different categories in the home and host countries. The system is based on the notion of “regulated profession” defined as the specified set of professional activities that constitute a given profession in a given member state<sup>17</sup>. On this basis, a state cannot restrict access to only some activities within a profession and conversely an applicant cannot apply only to one subset of activity (e.g. “syndic de faillite” as part of lawyer).

## ASSESSING THE NEW BARGAIN

### *a. Replacing prior harmonization by a system of compensation*

The core innovation of the GSD is to have done away with prior harmonisation altogether. For harmonisation is by definition a case-by-case cooperative process incompatible with a horizontal approach. To make up for such lack of negotiated convergence, the GSD allows for reduced automaticity of access under mutual recognition, introducing a "system of compensation" based on requirements of local adaptation periods and sometimes aptitude tests in order to offset the prevailing differences among national degree-granting systems (see part IV for detail). Such compensations create bridges between national systems that differ both as to the content of qualifications and as to how the profession itself was regulated. In short, the basic logic of the directive is the following: national authorities should accept equivalence of qualifications as is, identify areas where there remains "significant" knowledge gaps or "deficits," and seek ways to compensate for these gaps on a case-by-case basis. The idea was in effect to translate the judicial notion of proportionality into Community secondary law, whereby criteria for assessing such proportionality would be codified in legislative form by member states rather than left up to the Court of Justice (ECJ)<sup>18</sup>.

The GSD turns the traditional EU approach of on its head, whereby harmonisation and mutual recognition are to be followed by full and unconditional market access. Instead, mutual recognition might be qualified and therefore grant only conditional market access. The system thus consists of two steps: a premise of broad equivalence of licensing systems, and customised recognition accorded to individuals.

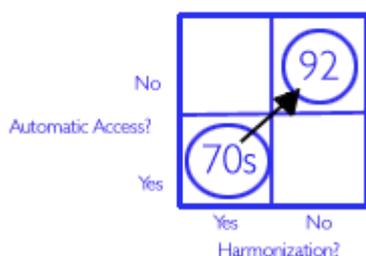
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<sup>16</sup> The first three correspond to alternative levels of training and constitute the basic organizing categories; the next two have been added by the second GSD to cover particular cases (attestation de competence and title FGEPS). The last two -title of training and regulated title of training- cover qualifications acquired in a home state that does not regulate a profession.

<sup>17</sup> In virtually all the member states regulated professions are concentrated in the same fields: education, health care, shipping, law and finance. But social and cultural differences explain variance beyond this core. A professional activity is considered as regulated under two conditions: 1) the regulation is issued by public authority or private authority with delegated public authority. Private professional authorities must be deemed competent to deliver a certificate under the MR system; 2) the regulation must be aimed at conditioning access to the practice of a profession-directly or indirectly- to the possession of a stated type of qualification.

<sup>18</sup> A year prior to the passing of the GSD, the Court had indicated how proportionality ought to apply in the case of salaried activities, stating that host states were required to "take into account" training received in the country of origin and could not refuse access if such training complied with a number of criteria of equivalence. While the case concerned free movement of workers (EEC Treaty, article 48), it was interpreted as applicable by analogy to the professions. Case 222/86, Heylen, judgement of 15 October 1987, ECR 4116.

**Figure 1: The EU horizontal approach:  
Trading off automaticity for harmonisation**



*b. Sustained cooperation: mutual trust in words, mutual monitoring in practice*

While the GSD implies that *ex-ante* transaction costs of negotiation associated with recognition are substantially lower than under the prior harmonisation approach, it also implies that *ex-post* transaction costs associated with liberalisation have dramatically increased. The enforcement of the new system requires a high degree of sustained cooperation on the part of member states. For one, in order to decide whether and how to apply compensation measures, states need to engage in mutual monitoring or mutual oversight, draw up lists of relevant subjects and constantly update the comparison between their respective systems. This means a constant strengthening of the ties and mutual acquaintance among national regulators. As stated by the Commission, "to aid the member state in its task of assessing the qualifications offered and enable it to determine whether these qualifications are adequate, or whether compensatory measures are needed, cooperation is necessary between member states"<sup>19</sup>. For this purpose, cooperation takes place through an information exchange and cooperation procedure both between member states and between member states and the Commission. With the help of the Commission, a group of co-ordinators appointed by each member state is in charge of monitoring the implementation of the directive and collecting useful information to that effect<sup>20</sup>.

Mutual trust between national authorities has repeatedly been emphasised as the critical condition for success. When introducing the new system, the Commission argued that the envisaged procedures "would have only a limited effect and ultimately be of slight practical advantage to the citizens of Europe if its application were not based on the idea of reciprocal confidence"<sup>21</sup>. While this is true as a minimal condition, I would argue that the GSD places at least as much an emphasis on mutual monitoring through formal and informal ties as on mutual trust. Obviously the two are not mutually exclusive and may reinforce each other (mutual trust is based on mutual knowledge which needs to be constantly updated). But the introduction of compensatory requirements and the related need and right for national regulators to be able to probe into each other's system on an ongoing basis would seem to constitute a much greater factor for accepting mutual recognition than simply trusting each other's standards. As methods of training evolve, as new professions are introduced, as new requirements are added and old ones discarded, the public or private authorities

<sup>19</sup> Explanatory memorandum, Commission, Bulletin of the European Communities, es, Supplement 8/85, p7.

<sup>20</sup> Article 9, GSD. In addition, the Commission committed itself to step up its support for Community wide education data bases such as the information center on the academic recognition of diplomas and period of study established in 1976 by the Council.

<sup>21</sup> Explanatory memorandum, p7.

competent in regulating professional markets cannot assume that equivalence at some initial point in time will be sustained. This in turn speaks to the importance of extant and new institutional mechanisms as a crucial enabling factor for the adoption of mutual recognition.

*c. Beyond the GSD: the partial return of the sectoral logic*

The two GSDs have now been in force for several years, although the fact that Member States have used different techniques to transpose them into national laws has increased the uncertainties associated with the early phase of implementation<sup>22</sup>. Applications for cross-national recognition did increase slightly, especially at the beginning (professionals had been awaiting the implementation of the GSD) but seem to have leveled off. Concurrently, the negotiation agenda is not closed. One piece of the legislative agenda has been to expand the GSD to craft trades and other business services. Although requirements are on average less stringent in these areas, differences between member states are sometimes even greater than in the traditional professions. Old directives in the health sector have also been updated in the spirit of the GSD. The EU Commission now seeks to simplify the GSD itself, in particular to address the problem of professions falling under one directive in one country and under another in a different country, and to clarify the legitimate content of compensatory requirements.

Maybe most importantly, the GSD is far from having won unqualified approval from professional bodies. These bodies would have preferred to set criteria for equivalence on their own to be translated into sectoral directives rather than leaving such assessment to the “arbitrary” decisions of “state bureaucrats”. They feel that professional associations are best able to design and update the equivalence system. For instance, in 1986, FEANI, the European Association of Engineers representing one million engineers, created a “register commission” for engineers, hoping the initiative would serve as a basis for a sectoral directive. This commission proposed a complex numeric formula for differentially weighing years required for three components of engineering training.<sup>23</sup> Under this scheme, applicants for cross-border provision of services would have been granted various types of titles of certified FEANI engineers. These efforts were at least temporarily pre-empted by the implementation of the GSD in 1991.

In the legal arena, the GSD has been considered at best as only a stepping stone and at worst as a drawback in the close to two decade long pursuit of an adequate scheme by the profession itself. It is often argued that this is the profession where host country requirements are the most justified (and where corporatist patterns are most pronounced)<sup>24</sup>. Thus, this was the only profession to have obtained a derogation in the GSD for the host country to be able to impose an aptitude test on applicants. In the 2 years following the entry into force of the GSD, only a few dozen lawyers applied for recognition outside the bilateral flow between UK and Ireland. Professional bodies have consistently argued that the GSD did not serve their needs and that they needed their own directive. In 1997, after protracted negotiations between national bars and between member states, a new

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<sup>22</sup> Some states have chosen to adopt a general horizontal measure, transposing the GSD’s general principles and appointing competent authorities, with detailed rules for each professions awaiting secondary legislation; others have chosen to transpose vertically, profession by profession. See Economic Advisory Group, “The Impact and Effectiveness of the Single Market,” 30 October 1996, Communication from the Commission to the European Parliament and Council, European Commission, DGIII and accompanying background information in The 1996 Single Market Review, 15 November 1996.

<sup>23</sup> See Luis Orzack, “The General Systems Directive: Education and the Liberal Professions,” in Hurwitz and Lequesnes, eds, The State of the European Community, (Boulder: Lynne Rienner, 1991).

<sup>24</sup> For an extensive analysis, see Sydney Coyne, International Trade in Legal Services, Little, Brown and Company, 1996.

directive on the right of establishment for lawyers was adopted<sup>25</sup>. The establishment directive is supposed to fill the three main gaps in the GSD by: a) facilitating admission for experienced lawyers, where disagreements have focused on the exact conditions for waiving compensatory requirements; b) granting cross-border rights to law firms in addition to lawyers, where disagreements have focused on the fate of firms not controlled by EU lawyers; and c) allowing individual lawyers and law firms to practice throughout Europe under their home title, the most controversial issue (see discussion in IV.3 and V.5).

*d. Preliminary diagnosis*

It is fair to ask, at this most general level, whether the current European approach constitutes a first or second best when compared to the traditional approach focusing on the prior adoption of common standards. Clearly, in the short run, such an approach has a number of advantages:

1) expediency: it is a more effective way to achieve progressive liberalisation than seeking to bridge the structural differences between national systems;

2) coverage: it was designed to cover the broadest possible spectrum of training configurations found across member states and 2 by 2 differences found between national training systems;

c) standards: it maintains guarantees on qualifications through compensatory requirements. This in effect enabled parties to go through with an agreement that might otherwise have been held hostage to the least regulated European states. By replacing ex-ante harmonisation with conditional access and the reliance on mechanisms for ex-post cooperation, the EU achieved in three years what had not been achieved in the previous thirty years while at the same time alleviating -to some degree- member states' fears of sub-standard competition.

But many questions remain open under the GSD. For one, even when migrants do not encounter barriers to access after review of their application, the uncertainty is still there. Isn't the system bound to deter occasional or sporadic service provision? What will happen to the mandatory updating of professional standards and the continued training required in a number of countries? Should the mandatory character of retraining also be bypassed through recognition? What will happen with the emergence of new professional sectors? To what extent can a host state be challenged for raising the stringency of its compensatory measures either when it wishes to raise the professional standards applied to its own nationals (and a fortiori to non-nationals) or when a home country reduces its professional standards? In part, the answer to these questions will come from the behaviour of the host states themselves and how they interpret the provisions of the GSD.

The answers to these questions also lies with the ECJ as well as national Courts who will be called upon to uphold the rights of individuals in the face of potentially arbitrary requirements imposed by host states under the compensatory system. The drafters of the new system, however, were confident that it actually created new patterns of incentives for individual states that would progressively lead to an upward convergence of standards and therefore alleviate most of the potential conflicts that could be envisaged. Because they have acquired new rights, professionals are calling for more mobility in the EU. Yet, given the customised features of compensation measures, these theoretical rights amount to very different effective rights of access depending on the characteristics of home country standards. Professionals coming from low standards countries

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<sup>25</sup> Commission of the European Communities, "Proposal for a European Parliament and Council Directive to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained," COM (94) 572 final, Brussels, 21.12.1994, 94/0299 (COD); Amended Proposal, Com (96) 446 fin. For a description of the negotiations, see Coyne, *op cit*.

and facing higher compensation than their counterparts from other countries are starting to act to upgrade the reputation of their home country systems. Instead of a "race to the bottom" this type of "managed" regulatory competition is likely to create a "climb to the top". In short, the GSD created the conditions for an incremental loosening of host country compensatory requirements and therefore for a progressive expansion of the effectiveness and automaticity of mutual recognition.

#### **4. THE FOUR DIMENSIONS OF MANAGED MUTUAL RECOGNITION**

Drawing on the European experience as well as that of NAFTA, Australia-New Zealand and WTO - and extrapolating from these examples- it is possible to define and describe more precisely what I mean here by managed mutual recognition and which of its features may be most appropriate in different contexts. As table I illustrates, managed recognition is analyzed here with regards to professional services but can be generalized to other services sectors and products.

As an outcome, managed mutual recognition can be contrasted with "pure" mutual recognition in the same sense as managed trade can be contrasted with total free trade. Pure mutual recognition implies granting fully unconditional and open-ended rights of access. In contrast, mutual recognition in operational terms actually involves complex sets of rules and procedures, that may serve to reduce, if not eliminate, the open-endedness of mutual recognition.

I outline below the four main dimensions along which mutual recognition can be managed or fine-tuned, namely: a) prior conditions for equivalence; b) automaticity; c) scope; and d) ex-post guarantees. On this basis, managed mutual recognition can be viewed in a static or a dynamic manner. At a given point in time, variations along each of these dimensions can be seen to indicate how far parties have traveled down the road to full recognition. Dynamically, mutual recognition can be viewed as a process, involving trade-offs between these dimensions that may change over time.

#### **VARIATION IN PRIOR CONDITIONS FOR EQUIVALENCE BETWEEN NATIONAL SYSTEMS: IS HARMONIZATION NECESSARY?**

How similar must qualification and licensing requirements be before we can consider engaging in mutual recognition? How is such equivalence determined? To address this question, MRAs must first determine the level at which equivalence is to be assessed. There are two main functions in the regulation of the professions that may be the object of mutual recognition:

- 1) The assessment of qualification through education and training of professionals, which is itself based in part on systems of accreditation to education and training bodies.
- 2) Licensing, certification and/or registration of professionals granting the right to practice.

The type of bodies responsible for these regulatory functions and the character of their intervention change from one country to the other. Diplomas delivered by Universities can serve as sole licensing mechanisms, as a mandatory input, or as a non-mandatory input for licensing. Accreditation of professional schools by professional associations and other accreditation bodies can be mandatory or only serve as an input in determining the validity of a degree as a base for licensing. Licensing bodies range from ministries to purely private associations, although the latter generally deliver certificates rather than licenses. Registration in a professional association can replace or supplement licensing undergone under the authority of an examination board. It can itself be compulsory or mandatory. In order to simplify the daunting task of assessing equivalence between such potentially different systems it is necessary to first determine what part of the

regulatory chain or process does recognition extend to. Mutual recognition -like the regulations recognised- can apply to input (relied upon by the regulatory body to make its decision), determinations (agency decisions regarding the application of regulatory standards in particular instances) and legal results (ultimate decision resting on input or determination)<sup>26</sup>. In the professions, this means that recognition can be limited to the whole or part of the education and diploma obtained (input), the license or certification granted on this and other basis (determination), or the right to practice granted by the home country whatever the input and determination. Only under such recognition of results, is there direct effect of the home country rules on the territory of the host country and right to practice follows not only from positive regulation but also from a failure to regulate in the home country.

Once the level of recognition is determined, a second distinction comes into play between two fundamental aspects of regulatory systems to which recognition applies<sup>27</sup>:

- 1) Substantive requirements, (“professional standards”) that is the criteria for determining adequate professional qualification and for accrediting training institutions, including the content of studies and licensing examinations; and,
- 2) Qualification and licensing procedures that is the set of procedures by which individuals are made to conform and comply with these requirements, including through examination, and the process by which the institutions that certify them are themselves accredited.

Mutual recognition in the professions technically applies to the second category: it is the process by which a professional acquires a stamp (whether of qualification or license to practice) that is recognised as equivalent. Such recognition is in turn conditional on assessing whether the underlying requirements or criteria for qualification should themselves be unilaterally or mutually recognised or harmonised (and if the later to what extent). The GATS states explicitly that recognition may or may not be achieved through prior harmonisation of the content of the relevant measures (Article 7). Thus mutual recognition and harmonisation are neither mutually exclusive nor necessarily corollaries. The “test of equivalence” between systems that underpins recognition can be conducted concurrently or alternatively with regards to the explicit standards of education, training and licensing in and of themselves or between the procedures followed by licensing and accreditation bodies.

#### *a. Equivalence of professional standards*

At one extreme, parties may simply decide that their systems pass an “equivalence test” as is without the need to spell out common standards and requirements for training professionals. This is the approach taken by the EU and ANZCERTA. Generally, establishing equivalence involves a prior agreement on common professional requirements between parties which in turn may involve the upgrading of their domestic ones by at least some of the parties to the agreement. In general, the first step in most mutual recognition negotiations has been to set in motion procedures to develop such mutually acceptable standards. In accountancy -the first profession to be examined under the GATS- technical bodies outside the WTO have been busy designing international technical accounting standards (related to the characteristics of the services themselves) while the GATS has provided a framework for assessing equivalence of qualification standards per se. When standards concern educational requirements, experts in training and licensing for the profession first need to find ways to express common standards in the text of an agreement. The degree of specificity and

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<sup>26</sup> See David Leebron in OECD Proceedings, Regulatory reform and International Market Openness, 1996.

<sup>27</sup> These correspond to technical standards and conformity assessment procedures for goods.

detail of such criteria for equivalence may vary to include length of study, fields covered, types and content of courses required, etc. Standardisation efforts involve assessing whether the scope of the profession is comparable among parties as well as whether the training undergone for similar activities is equivalent. This specificity reflects an understanding between parties as to the degree of acceptable differences between them.

There is a growing number of initiatives among the professions themselves aimed at developing common minimal standards across borders. As one example, the Assembly of the International Union of Architects (UIA) adopted an accord on standards of professionalism for architects in July of 1996 after 2 years of intensive discussions.<sup>28</sup> There are speculations that this text will serve as a model for other professions. The text defines principles of professionalism including expertise, autonomy, commitment, and accountability; it defines an “architect” and the “practice of architecture” as well as the scope of such practice (a difficult issue). It adopts the list of fundamental requirements for registration, licensing and/or certification of an architect developed in the EU directive for architects, but adds more specific points on standards for education, accreditation, experience, examination, licensing and certification, procurement, ethics and conduct. The protocol is presented as a step towards “inter-recognition” of national standards but does not in itself establish procedures for assessing national conformity to these standards. It constitutes a “basic policy framework” to be further developed into detailed guidelines that will allow flexibility for establishing principle of equivalency, “so that requirements reflecting local conditions ...can be readily added.” The model developed here is most promising in that it sets in place a process rather than a rigid framework and creates a dynamic of increased mutual familiarity between professional bodies. Those involved are driven by a will to “influence the political process shaping international trade in services” presumably to ensure that diplomats do not bypass professional bodies as negotiations unfold. If there is a risk that the professions might insist on too narrow an interpretation of standards at the cost of mobility, this will be tested in the next stage of equivalence determination.

A major effort at developing criteria for equivalence of qualifications is currently being conducted under the UNESCO Convention on the Recognition of Diplomas in the Europe Region, which established a working group to contribute to a better assessment of credentials from both sides of the Atlantic.<sup>29</sup> In 1996, the Working Group adopted a series of general guidelines to help promote the mutual recognition of qualifications between Europe and the US. These include greater respective participation by the parties in each other’s placement and recognition processes, giving a chance to home country specialists to review placement decisions made for applicants qualified under their system. The recommendations also expand on what types of tests should be considered as equivalent and state that “an individual US student's record (including the diploma for an intermediate associates degree) should be analysed on a course-by-course basis to determine which courses completed are appropriate for meeting certain requirements of European higher education ...due consideration should be given to the quality of the program studied, the grades obtained, and

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<sup>28</sup> “UIA Accord on International Recommended Standards of Professionalism in Architectural Practice,” adopted by the UIA Assembly in Barcelona, Spain, 9 July 1996. The agreement builds on an accord between the US and Canada, first signed in 1978 and expanded in the annex on Architecture in the US-Canada Free Trade agreement. The FTA established the need for common standard on accreditation without spelling out these standards specifically. A process of recognition under the FTA has actually been set in motion between the National Council of Architectural Registration board and the Commission of Canadian Architectural Council.

<sup>29</sup> The convention was signed between UNESCO (CEPES), the Council of Europe, and the European Union, through their respective national information networks on academic recognition, such as the European National Information Centres on Academic Recognition and Mobility (ENIC). See “Guidelines and Recommendations From the Working Group On Europe-U.S.A.: Mutual Recognition of Qualifications,” by Stamenka Uvalic-Trumbic, CEPES-UNESCO, 1996.

the relevance of courses.” The approach recommended here requires very detailed assessments and may need to be specified if it is to serve as a basis for MRA-based commitments.

*b. Equivalence of accreditation and licensing procedures and inter-recognition between competent bodies*

In addition to the standards for qualification themselves, the equivalence test can be based on recognition of equivalence between accredited bodies, accreditation and licensing bodies. At the level of accreditation, this may be done in conjunction with the setting of education standards whereby experts from the respective parties may or may not feel the need to satisfy themselves that the common criteria are actually adhered to effectively in each of the parties. The only way to verify this for accredited institutions and training programs is often through on going interaction, field trips and on-site investigations<sup>30</sup>. An extreme version of this approach would be to actually require joint accreditation of educational institutions as a precondition for eligibility under MRAs.

More generally, the question that arises is whether parties ought to recognise as equivalent the bodies awarding diploma or licenses (universities or licensing bodies, boards, etc.). Public and private authority is allocated differently in different countries and professional cultures. Often in the professions, and especially in the Anglo-Saxon context, states have devolved regulatory authority to statutory bodies or association (self-regulation), or to independent agencies as opposed to direct government oversight, or to hybrid forms of "self regulation within a statutory framework". MRAs need to specify authorised "regulatory" bodies. This can be done in one of three ways:

- 1) Full mutual recognition involves recognising that any body duly accredited by a home country government is recognised as competent by the host country government. This amounts to transitivity of mutual recognition from horizontal (among states) to vertical (within states) recognition: transnational recognition takes sub-national recognition as a given. Thus, if a home state chooses to delegate the regulation of a profession, the host state must recognise such a delegation even if it does not conform to its own regulatory culture. This is the core of the GSD approach<sup>31</sup>.
- 2) Recognition may be based on an enumeration procedure, both at the moment of signing of the MRA and on an ongoing basis. In this way the host country can retain some control over accreditation in the home country, from minimal (through simple notification) -- to maximal -- (through a collective process of screening and accrediting such bodies). The procedure may be used when there are worries that alternative training routes may be abused by potential claimants, leading to a multiplication of channels of access to the benefits of recognition. In the EU, the issue arose because in the United Kingdom and Ireland, professional licensing is mainly granted by private bodies based on professional training courses rather than University degree titles. This was very much at odds with the continental culture which formed the basis for the original proposal to restrict recognition to diploma and other evidence of qualifications awarded by universities or higher education establishments, thus limiting access to the continent for British professionals while allowing professional practice by foreigners in Britain who would not fall under the authority of the associations. Ultimately, the GSD included in the definition of regulated professional activities those "pursued by the members of an association or organisation, the purpose of which is, in particular, to promote and maintain a high standard in the professional field concerned and which, to achieve that purpose is recognised in a special form by a member

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<sup>30</sup> In the current discussions towards a possible MRA in architecture between Mexico, US and Canada, teams of experts from each country have been given the task of visiting Schools in Mexico. They will then meet to go over the results and assess whether the schools are actually up to standards.

<sup>31</sup> When there is no further precision and specific provisions are mentioned the term GSD refers to the first directive.

state (Art 1.d)" In order to qualify, these associations needed to award a diploma to their members and enforce rules of professional conduct. But while all other countries fell under a generic recognition of national accreditation, the GSD listed the bodies entitled to award diploma in the UK and Ireland<sup>32</sup>.

- 3) Finally, equivalence can be attested by the accreditation and/or licensing bodies themselves who can enter into direct inter-recognition agreements. This may be done in the absence of agreements on mutual recognition/harmonisation of standards between the respective countries (although it may involve agreement directly between these bodies themselves on common accreditation standards); or it may complement a general mutual recognition agreement in order to improve on it. Thus for instance, the association of European bars (CCBE -- Conseil des Barreaux de la Communauté Européenne) has encouraged its members to enter into inter-bar agreement that would provide for the possibility of all or part of country' aptitude test in favour of applicants for the professional associations that are party to the agreement (The Brussels Bar has recently concluded such agreements with the Paris and Italian Bars).

#### **VARIATION IN AUTOMATICITY: WHAT IS RECOGNISED AT THE INDIVIDUAL LEVEL?**

Mutual recognition is necessarily based on an "equivalence test" between national systems. So the degree of automaticity of access granted is first a function of the level of recognition sought as discussed above. But the question arises whether only national systems as a whole must pass such an equivalence test or whether, given some broad equivalence at the macro-level, professionals still ought to be subjected to some residual equivalence test at the individual level. Given that equivalence is so hard to establish at the macro level, most MRAs are unlikely to automatically extend the right of professionals from one country to practice in another. This is true whether or not agreement has been reached on common minimal standards. Thus MRAs need to establish procedures to deal with variations and gaps between qualification systems and must design means to bridge these differences.

MRAs vary according to the degree of automaticity of recognition which they afford and as a result, the ease with which access will be granted to applicants. First, we need to consider minimal interface requirements. Fully automatic recognition means in effect, setting a system of "international licensing" whereby any national stamp from a country that is part of the system provides automatic access to the rest of the system, without local requirements. For example, the Trans-Tasman MRA provides for automatic recognition, whereby registration boards automatically license professionals registered under each other's jurisdiction<sup>33</sup>. Once registered under the TTMRA individuals carry their occupation in the same way as anyone else registered in the destination

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<sup>32</sup> To ensure that the system would not be abused the United Kingdom added an explanatory statement that the associations and organizations recognized in a special form were those which are incorporated under Royal Charter (statement 9). The lists provided by Ireland and the UK includes Institutes and Chartered bodies supervising Accountants, Loss Adjusters, Management Accountants, Chartered Secretaries and Administrators, Insurance, Actuaries, Bankers, Surveyors, Planning, Physiotherapy, Chemistry, Psychology, Libraries, Foresters, Building, Engineering (structural, civil, mining, electrical, gas, mechanical, chemical, production, Marine), Energy, naval Architects, Aeronautical Society, the Institute of Metals, the Institute of Measurement and Control, the British Computer Society.

<sup>33</sup> In land surveying and pharmacy they have done so for 100 years! Architects have automatic registration since 1990. Automatic cross registration is currently being implemented for teachers, veterinary sciences and dentistry and is under way for radiography. See "A proposal for the Trans-Tasman Mutual Recognition of Standards for Goods and the Professions: A discussion paper circulated by the Council of Australian Governments and the Government of New Zealand," Australian Government publishing services, April 1995.

countries (which may imply reregistration every year if this is the condition imposed in the host country). The professional need not interact with host state authorities at all if the home state is only required to notify these authorities directly that the person in question is duly licensed and thus authorised to operate in its territory. Or verification may be limited to producing simple proofs issued by the home country. In this case, specific host country authorities must be empowered to attest to the validity of diploma obtained in the home state. Attempts must be made at this level to minimise bureaucratic impediments (in a number of EU countries, a high percentage of applications warranting automatic recognition was delayed on the basis of “incomplete documentation”).

In almost all cases, MRAs fall short of setting up single passports for professionals. Rather, they constitute agreed mechanisms whereby the host country “takes into account” the qualification obtained in the home country, and where foreign professionals are granted “adequate opportunity for recognition”. The current EU approach has been referred to as “semi-automatic” recognition<sup>34</sup>. Such lack of automaticity implies lack of predictability and remaining room for arbitrary behaviour of the part of the host country. Nevertheless, MRAs provide greater transparency and above all standardised criteria for building bridges across professional licensing systems.

To simplify, automaticity depends on two sets of factors: the first has to do with conditions for migrants to be eligible for recognition in the first place; the second has to do with compensatory requirements that the host country can impose on migrants as a condition for granting recognition. In order to highlight the potential for negotiation, it is important to distinguish between these two dimensions analytically even if they may overlap in practice. For instance, crafters of MRAs may choose to cast a broad net through generous clauses on eligibility if they need to accommodate very different systems; this may in turn call for greater compensatory allowance; or they may choose to narrow down eligibility and leave little room for compensation if they do not have enough resources to manage the recognition mechanism.

*a. Eligibility: recognition of professional experience and competence.*

Guidelines for determining eligibility of migrants have to do with determinations of equivalence of systems (IV.1.) and the specific characteristics of the migrant himself. On this second count, MRAs need to specify both what host country authorities must take into account and what they are allowed to require from the migrant. A major step towards greater automaticity of recognition is to require the host country to determine eligibility on the basis of a broadened range of inputs, assessing equivalence qualitatively rather than quantitatively and taking into account all evidence of professional competence beyond strict professional qualification. This is key when a profession is not regulated or when the granting of “diplomas” is not a condition for licensing in some of the parties to the agreement. That is when there is neither license nor qualifications to recognise. Competence can be defined as the proven ability to provide a service, through experience and the “work credentials” acquired in the process. In the Anglo-Saxon culture where learning is supposed to occur on the job more than in the classroom, such acquired skills are much more important than formal studies. Should evidence of experience and training compensate for lack of required education credentials? The EU adopted a broadly liberal approach in this regard, basing recognition on requirements of formal qualification in other fields and professional experience in the home country (some form of qualification was necessary nevertheless). The debate was carried over to NAFTA where professional services were ultimately defined as “services whose provision requires specialised post-secondary education, or equivalent experience and training, and for which the right to practice is granted or restricted by a Party”. In some cases, it may be relevant to also take into account experience acquired in the host country before application for recognition, either that connected to a similar but different profession or in the same profession but under reduced

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<sup>34</sup> Jean-Eric de Cockborne, OECD Documents, 1995, op. cit.

scope of recognition (see IV.3). MRAs may also allow host countries to require professional experience and must specify under which circumstances. The European GSD allows host countries to require a number of years of experience in the home country when the latter does not regulate the profession and the migrant is self-trained (3 years), or has acquired some other qualifications (2 years), or has itself recognised a diploma issued by a non-EU third country (2 to 3 years), or requires training at least one year shorter than that of the host country.

In either case, how should the relevant “competence” or “experience” be determined? The simplest approach is in terms of number of years of experience. Other variables include: a) how far back can the experience have been obtained (ten years for the GSD) b) the profession where competence was obtained (the GSD specifies that it must have a number of activities in common with that for which recognition is sought); c) whether the experience must have been acquired after having obtained a diploma in the profession to be recognised; d) the type of organisations/firms and other specified conditions of prior experience; e) qualitative evidence of competence, such as letters from previous collaborators or employers in the home country; and f) interviews on work premises in the home country. The second GSD had introduced the concept of “regulated training” in the home country, that is training with specific requirements to ensure competence at the end of the training period (this can serve to ease the professional requirements for Irish applicants). Such a notion might be generalised to cover all professions. Here again, the search for flexible equivalents is key to progressive liberalisation.

#### *b. Compensatory requirements*

##### Defining deficits justifying compensation

If an MRA is to adopt the “semi-automatic” route taken by the GSD, it needs to specify under what conditions the host country is allowed to impose compensation requirements unto the migrant, in view of her fulfilment of eligibility criteria. These conditions amount to identifying deficits or gaps in qualification between host and home countries, after eligibility requirements have been accounted for. In the EU, compensatory requirements can be imposed:

- where education undergone by the migrant is at least one year shorter than that required in the host state,
- where the matters covered by the education and training [in the respective countries] differ substantially,
- where the professions regulated in the host state comprises one or more professional activities which are not in the profession regulated in the home state, and that difference corresponds to specific education and training required in the host state.

While differences in lengths of studies are precisely specified here, assessing when differences in the content of training or the scope of the professions matter is left to the host country. Conceivably, MRAs could also allow for compensations when certain deviations from commonly agreed standards are observed, when a host state has obtained specific derogations, or when training (as opposed to education) conditions differ significantly.

##### Facilitated examination and aptitude test

Professional qualification is traditionally assessed through written examination, including both by educational bodies and by licensing authorities. A minimal form of “input recognition” (often taken unilaterally) consists in recognising the equivalence of training between parties and allowing

foreign professionals to take host country licensing exams directly without having to go through a course of study.

The next step is to limit these exams to the differences between the foreign applicant's training and that required in the host country. The GSD's aptitude test, for instance, is designed on a case-by-case basis and is limited to matters that are not adequately covered by the system of education in the applicant's home country and to the host state's rules of conduct. How such differences are determined is obviously key. Can experience be taken into account? How important must such differences be before warranting examination? What are "substantial" differences in the European or other contexts? The GSD provisions leaves ample room for interpretation on the part of the host country<sup>35</sup>. There seems to be somewhat of a consensus that the host country should be allowed to test for objective gaps in technical knowledge that is specific to its regulatory, natural or economic environment (e.g. rules of construction for engineers or architects; anti-seismic construction rules for some jurisdiction; local law for lawyers; local diseases for doctors). It is harder to justify testing the skills of the applicants through an examination, that almost by definition cannot capture such skills (the GSD makes it possible to test for practical skills as well as theoretical knowledge). One vexing issue is whether the host country ought to be allowed to test for competency in its language (as with the use of the TOEFL in the US) as a precondition for recognition. While this is clearly an instance where, in general, the clients ought to be able to assess the skills of the professionals themselves, there may be a case for a test when local clients do not have a choice of service providers (teachers, doctors) or when provision of the service in a foreign language may decrease its quality unbeknown to the client<sup>36</sup>.

Whatever the test, the very fact of having to take exams -even if facilitated- does constitute a major limitation on mutual recognition. Professionals with twenty years of practice may have forgotten the fine points of examinations, especially if they originate from a culture that emphasised on the job training over academic studies. Customised compensatory tests are bound to discourage episodic provision of services. As a matter of fact, the introduction of the aptitude test was a very controversial element of the GSD negotiations opposed by most in the EU Commission. The fear is that through such a test, the requirement to adapt to host country standards could be reintroduced through the back door, potentially emptying mutual recognition from its substance. One small step towards greater automaticity is to allow the applicant to take the test in her home country, in a familiar environment and according to local procedures. But ultimately, a key to increasing automaticity is to seek alternatives to examination altogether.

#### Local professional experience and adaptation period

Maybe the most promising option for reducing the automaticity of recognition in the least cumbersome way is to make it conditional on a transitional period of local practice for a specified length of time, under what could be called a "pre-recognition status". The rationale for such a requirement can be seen as twofold:

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<sup>35</sup> An element of clarification was attempted in the statement 15 added to the directive: "the Council and the Commission agree that matters differ substantially ...where the activities in question cannot be pursued satisfactorily in the host member state unless they have been mastered."

<sup>36</sup> This was a controversial point in the GSD negotiations. Ultimately, the right was not included in the directive but the object of an informal understanding under statement 3, "the Council and the Commission agree that applicants must possess the linguistic knowledge necessary for the pursuit of their profession." How far member states could go in enforcing language requirements was thus left unclear and subject to ECJ review. In a well publicized case regarding a foreign teacher in Ireland, the Court did allow for language requirements on the grounds of preserving national identity.

- 1) training: to provide a mechanism to help the candidate for recognition fill the deficits in his training while still granting him some kind of access;
- 2) quality control: to enhance the quality guarantees of the service provided -- and thus seek to ensure consumer protection -- in this interim period. Indeed the quality of any service does not depend uniquely on the specific competence of the service provider but also on the organisational infrastructure and the complementary skills that characterise the local environment in which he is asked to perform.

Two basic categories of transitional requirements can be envisaged. One entails independent local practice under some reduction in scope of access, such as the use of local titles or the scope of activities (see IV.3). This approach is currently envisaged for EU lawyers. The other category consists in requiring collaboration with local professionals in a more or less subordinate capacity (from stagiaire to partner). In the EU, the approach taken for the adaptation period is that of a stage (e.g. exercise of the profession under the responsibility of a locally qualified professional) not exceeding three years. In some professions, like law, apprenticeship is part of the culture; in others it may be harder to introduce. In cases where the candidate for recognition is a senior professional, local collaboration on an equal footing may be more appropriate (note that local partnership may itself be restricted in some countries in that it entails local ownership). If this second option is chosen however, it is crucial to determine as specifically as possible what mutual obligations are entailed. Under the 1977 directive on cross-border services for lawyers, for instance, the host state had been allowed to require visiting lawyers “to work in conjunction with a [local] lawyer” when the cross-border service involved litigation<sup>37</sup>. France and Germany chose to interpret “in conjunction with” so as to put the foreign professional and the services rendered under the effective control of local lawyers and were found to impose excessive requirements by European Court of Justice. At the same time, the host state must be satisfied that the migrant does not use a token local collaborator to bypass the compensation provisions.

MRAs must also specify the extent to which local authorities can dictate what the applicant must actually do during the adaptation period and the process by which local authorities determine whether to grant recognition at the end of the period. Procedures for conducting the evaluation must be spelled out as well as options in case of failure.<sup>38</sup> Miscellaneous concurrent activities to the local practice itself can also be taken into account for the final evaluation, such as short periods of education, or attendance at courses or seminars relevant to identified deficits in qualification. These may be required or be used by the migrant to shorten the adaptation period.

In some cases, professional experience in the home country or in any country other than the host country can also be used as a compensatory requirement -- in addition to a means to determine eligibility. In the EU for instance, it can serve to compensate specifically for at least a one year shortfall of length of study (not the other 2 determinants of deficit) and cannot exceed 4 years or twice the shortfall in duration of education<sup>39</sup>. Note that professional experience and competence can be introduced as means to limit or increase automaticity, at the stage of eligibility or at the stage of compensation. Taking into account prior professional experience can make admission automatic when it previously wasn't. At the same time, requiring additional professional experience when a

<sup>37</sup> Council Directive of 22 March 1977, OJ No 78, 26.3. 1977.

<sup>38</sup> At this stage it is important to ensure that the host country does not reintroduce an entry test through the backdoor. Under statement 11 of the GSD, for instance, the adaptation period is the object of an assessment on the part of host country regulators, provided that this assessment only pertains to the activities under supervision and "in no case" takes the form of a formal written or oral test.

<sup>39</sup> The formula is actually more complex, with X and Y as respectively lengths of studies in home / host countries (years), T as years of training, C as years of controlled practice, P as maximum years of professional experience which can be required as a compensatory measure:  $Y=X+aT \Rightarrow P=2x(a)$ ;  $Y=X+bC \Rightarrow P=b$

diploma is considered sufficient in the home country can be more restrictive than a straightforward recognition of home licensing.

### Consumer protection schemes

Finally, market-based compensation requirements can involve an obligation for the beneficiary of recognition to adopt various kinds of consumer protection schemes taking into account the specific features of cross-border service provision. To start with, labelling as a minimalist form of compensation for recognition was systematically advocated by the ECJ for trade in goods and was systematised through EU regulations on "adequate labelling" for products: is it legitimate to transfer this approach to people? Foreign service providers can simply be required to provide potential customers with substantive information on the quality of their product in a more systematic way than required of local professionals, through various kinds of disclosures, including on past practice. Migrant professionals could be required to ensure that prospective clients be aware not only of the quality of her service, but also of where they obtained their qualifications and the implied differences in qualification guarantees (this is akin to the obligation for purchasers of insurance policies falling under the EU mutual recognition scheme to sign a declaration acknowledging their awareness of foreign origin). Such an obligation might constitute a least restrictive functional equivalent to requiring the use of home country title (see IV.3.), although it may be vulnerable to projectionist abuses (buy local campaigns).

Beyond information-based consumer protection, discussions held at OECD have highlighted the importance of ex-post guarantees, based on establishing a right to redress across borders. This can be done through required professional indemnity and liability insurance schemes or client restitution funds. As a note of caution, compensation schemes based on improving consumers' capacity to assess the quality of a professional service and to insure against risk are unlikely to be very effective without increased public involvement in the making of professional policy in the first place<sup>40</sup>.

#### *c. Issues raised by compensation provisions*

Several issues arise in designing systems of compensatory requirements. First, are they cumulative or alternative requirements? It seems to make sense to allow the combination of consumer protection requirements with any of the other one. While the aptitude test, adaptation period and professional experience (as compensation) are alternatives in the EU, they could be cumulative in other contexts. Parties may consider that alternative compensatory requirements serve different functions and that they can make up for different kinds of deficits. "Cumul" may even be more desirable from the applicant's viewpoint (who can equalise the marginal cost of alternative requirements) if it is possible to submit to the least cumbersome part of each requirement. Lawyers in the EU for instance would like to see some host country experience entitle them to dispense with at least part of the aptitude test. MRAs then need to specify "equivalency criteria" between compensatory requirements (how many years or what kind of local experience for what share of the test). For instance, as a way to placate the French who are very attached to the aptitude test, the legal profession agreed in 1995 that host country practice of European law should not count as host country law and thus qualify as a basis to be exonerated from the aptitude test (although European law is often directly transposed into national law)<sup>41</sup>.

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<sup>40</sup> See notably contributions by Ursula Knapp, James Murray, "Liberalisation and the consumer," and Jenny in OECD Documents, 1996, op. cit.

<sup>41</sup> See Coyne, op cit.

Second, if compensatory requirements are alternatives, is the choice between them up to the applicant or up to the host country regulators? The EU solution has been to leave choice to the professional himself as a base rule (except for lawyers), while countries can be allowed derogations on a sectoral basis<sup>42</sup>. Leaving the decisions up to the host country almost unavoidably leads to the imposition of an examination (as demonstrated by the treatment of lawyers under the GSD)<sup>43</sup>. Conversely, candidates are unlikely to choose a test over an adaptation period. Freedom of choice is all the more valuable to the applicant for recognition if some of the alternatives are redundant with market requirements. Architects for instance, often consider it a necessity to have a local partner familiar with the local context anyway. Nevertheless, they may still be restricted by the precise division of labour imposed by the official requirements. Moreover, as trade in services becomes increasingly possible through communication networks, requirements involving local presence may become truly restrictive. Home country experience or even examination may become the preferred alternative.

Third, can compensatory requirements serve to curb the potential for abuse of mutual recognition? In the first years of implementation of the GSD, national authorities have observed individuals using the system to circumvent their own national training requirements. The only case subject to an appeal in Ireland has been that of an Irish barrister who became a solicitor in England and Wales and who returned to Ireland as a solicitor on the basis of the British diploma. The applicant appealed the Irish decision to impose an aptitude test. Although the decision was repealed in light of the applicant's experience and the ECJ decision in *Vlassopoulou*, the designated authorities retained their basic objection arguing that the applicant used the directive for a purpose to which it was not intended with the objective of circumventing national rules governing movement between the two branches of the legal profession in Ireland<sup>44</sup>. While such cases are rare, criteria might need to be spelled out to differentiate between circumvention and mobility.

Finally, when are the "compensatory" conditions so rigorous as to significantly deter entry, making non-automatic recognition into an oxymoron? Given the case-by-case nature of such requirements they obviously leave room for continued restrictions on mobility through arbitrary individual decisions. Parties may vary widely in their decisions to have recourse to compensation in the first place<sup>45</sup>. They may also determine the content of these requirements very differently<sup>46</sup>. Such a margin of manoeuvre is obviously useful when MRAs include many parties. But in some cases, the differences might be so great that the freedom of manoeuvre of the host country might have to be

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<sup>42</sup> EU member states are allowed to derogate from the right to choose: i) for the legal profession; ii) "for professions whose practice requires precise knowledge of national law in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity (article 4);" iii) for all professions, subject to a notification procedure with the Commission (art 10). France for instance asked for a derogation in tourism and professions requiring a detailed knowledge of national law (e.g. industrial property consultant). See directive 89/48/EEC, Article 11 Reports (1991/1992), Member States reports.

<sup>43</sup> See Article 11 Reports, *op cit*.

<sup>44</sup> *Ibid*, Ireland Report. The French report also cites French nationals trained as psychotherapists in Belgium.

<sup>45</sup> This is evident in the EU Member States reports on the implementation of the GSD which are due every two years after the implementation of the GSD on 6 January 1991. In the first two years, the rate of automatic acceptance varied greatly across pairs of countries and professions. Even between the UK and Ireland where there is probably the highest flow, the automaticity rate ranged from 96% for solicitors, to a third for secondary school teachers. The UK's rate of 75% automatic acceptance was the highest reported.

<sup>46</sup> A good example can be found with the legal profession in Europe. In Germany the test consists in two written exams covering respectively a compulsory topic and a topic in an area selected by the candidate, and an oral on professional rules. In France the National Bar council reviews each applicant's qualification and in light thereof requires the applicant to take from one to 3 oral exams, sometimes complemented with a four hour written exam. In the UK the Aptitude test consists of two three hour written exams on property law and litigation, and short exams on professional conduct and account, and principles of the common law.

moderated. In general MRAs should clearly include a proportionality clause.<sup>47</sup> Moreover, parties may decide that the detailed rules governing compensatory requirements should not be left under the sole competent authority of the host state (with judicial review as in the EU) but instead be decided by joint commissions. MRAs must at least strive to mandate strictly defined ceilings for such requirements. Residual powers of host states need to be circumscribed by agreed upon procedural guarantees for examining applications (home state certificate must be considered as sufficient evidence, the host state bears the burden of proof regarding difference, it must give a ruling within four months of each application and give reasons for its decision) and applicants must be able to seek legal redress against host country decisions with national or supranational courts.

#### **VARIATION IN SCOPE: ACCESS TO WHAT?**

Mutual recognition can also be characterised in terms of its scope, e.g. what is the range, mode and object of practice to which professionals benefiting from recognition actually have access. Scope can be a most controversial issue simply because modalities of access to a given market can vary from one country to the next for the locally qualified professionals themselves. Even when this is not the case, limiting scope during the initial phase of a mutual recognition process can be seen as an opportunity to create a laboratory to test the impact of liberalisation. Steps towards full mutual recognition can be achieved through the progressive expansion of scope. In the meanwhile, some beneficiaries of recognition might be satisfied with performing only some activities, for some period of time, as reduction in scope calls for.

Below are six ways in which the scope of access falling under mutual recognition can be circumscribed. Some of these distinctions may overlap or even be redundant but they nevertheless reflect alternative rationales that may or may not be relevant in different contexts.

##### *a. Right to practice vs Title*

The first basic way to limit the scope of recognition is to grant foreign professionals the right to practice certain activities in the host territory without the right to use the corresponding local professional title.<sup>48</sup> The title signals to the potential client that the professional is a licensed or certified “architect,” “lawyer” or “accountant” with credentials equivalent to those of local practitioners and is therefore the ultimate evidence of recognition. It means in effect that the applicant has been admitted to the host country profession. The option to withhold such a right of access to the professional label and other modes of practice has a different significance depending on the regulatory approach prevalent in the host country. In particular, countries can rely on titles as mechanisms for licensing -e.g. a mandatory condition- or certification. In the first case, a country regulates a specific professional activity and the conditions under which it can be exercised, including the holding of a title. In the second case, only the use of a title is regulated, not the professional practice itself, and is usually predicated on the holding of a diploma<sup>49</sup>. The role of titles

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<sup>47</sup> See for instance statement 15 of the GSD: "The Council and the Commission agree that neither the adaptation period nor the aptitude test should constitute a disguised means of imposing upon applicants a more stringent requirement than is necessary".

<sup>48</sup> More generally, regulations and therefore rights of access can apply to the activity per se or to certain modes of practice ( in addition these include the use of titles, the reimbursement of professional acts in the field of health or right to added compensation, such as a government subsidy due to a collective agreement). Access to these other modes of practice can be a precondition for local practice or simply an added bonus.

<sup>49</sup> The distinction may be more or less important to different countries. In architecture for instance there is a great difference of culture between the napoleonic tradition of granting a title as a precondition for professional practice and the anglo-saxon culture where the title is protected by law but not the practice. In the UK many bodies carry out the function of architect under other professional labels such as engineers; quantity surveyor and building surveyor and technicians.

as signalling devices is usually more important in the latter case. In cases where some parties to an MRA have title requirements for entry into a profession and others not, the agreement may have to include a differentiated approach (e.g. in Europe, Italy and Luxembourg are the only states who require an engineer title for all engineering activities). Title recognition may be an easier proposition in countries with two-tiered systems where a generic title is protected under the general state-enforced system while specific versions of the title may be under the purview of private bodies (“chartered architects” as awarded by the Royal Institute of Architecture in the UK).

Requiring the use of the home title for certain beneficiaries of recognition is a useful device when the scope of activities or the mechanism for certification differ strongly between parties<sup>50</sup>. Under the GSD for instance, professionals regulated by private associations in the home country were only allowed to use the professional title or designatory letters conferred by that organisation rather than the host country title<sup>51</sup>. This is functionally equivalent to requiring labels of origin and turns the right to use a host country title from a licensing (exclusive rights) to a certification method. How restrictive granting access to a right of practice is short of a access to a right to use a national title depends on the characteristic of each professional market. It may even be the case that the use of host country title become a restrictive requirement rather than a sought after right (see IV.5. for a discussion on lawyers).

*b. Scope of permissible activity*

An MRA must specify the activities that correspond to a right to practice or a given title. But the scope of activities permissible under a single professional practice or allowed under a given title may vary across national systems (e.g. "barristers" and "solicitors" in the United Kingdom vs generic "lawyers" or "avocat" on the continent; engineers vs architects in different countries)<sup>52</sup>. In theory, mutual recognition ought to imply that permissible activities are those practised by the professional in the home country (this is how recognition has been implemented in financial services in the EU for instance). Most commonly however, the scope of recognition is reduced to activities allowed in the host country under the given professional label. It can even be reduced further to exclude regulated activities that are at the core of the profession in the host country, e.g. recognising only foreign lawyers' right to advice on matters of foreign law<sup>53</sup>. The greater the

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<sup>50</sup> The use of titles as signaling devices was introduced in the EU 1975 medical directives, where host states were allowed to require use of home state title followed by the name and location of the establishment or examining board which awarded it; in cases where the home title "may be confused" with a host state title, implying training which the person concerned had not undergone, the host state could require adaptation of the title through the introduction of "suitable wording." In addition, formal certificates of training were to be used only in the language of the member state of origin.

<sup>51</sup> Other beneficiaries can use both the professional title of the host member state or the academic title of the home state. In the latter case the host state may require the applicant's title to be followed "by the name and location of the establishment or examining board which awarded it".

<sup>52</sup> One of the traditional purposes of regulating professions has been to establish constraints on which activities could be exercised by whom. Compartmentalising functions and services serves to limit professionals' capacity to prescribe their own services. Different professions are designated to provide specific services where there may be conflict of interest (e.g. accounting and legal services). It also allows the imposition of different degrees of regulation which may lead to higher controls in some countries. Thus law counselling (solicitors) is more regulated in common law countries. Similarly, the right to represent clients is distinguished from the task of recording acts in many countries, and the right to request construction permits reserved to architects not surveyors or engineers. See Steven Nelson, OECD Documents, 1996, op. cit.

<sup>53</sup> See Ehlermann-Cache and Ursula Knapp, OECD Documents, 1996, op. cit. The scope of “foreign law” can itself be a matter of interpretation. According to USTR, lawyers with an office in the EU ought to be allowed to practice EU law since it is part of European law. Europeans countered that EU law often takes effect as the domestic law of member states.

asymmetries between permissible activities between parties (including when some do not regulate this aspect at all) the more likely the use of this option for limiting scope, at least during an interim period<sup>54</sup>.

*c. Rules of conduct and enforcement*

One of the least common domains where home country modes of practice is likely to apply concerns rules of professional conduct, including codes of ethics, privacy issues, and advertising rules. This can be attributed to a host of factors: these rules constitute lesser impediments to the mobility of professionals (easier to adapt to), equivalence may be harder to demonstrate when ethics and therefore absolutes are involved, consumers more routinely expect their own local standards to apply, and different rights for foreigners and locals may unequivocally result in unfair competition (advertising and rights to solicit clients). In addition to retaining control over the content of the rules (often reflected by an examination on the subject), the host country generally retains at least residual powers of enforcement in case of breach of compliance both because it is likely to be better able to identify such breaches and in order to guard against moral hazard problems (the fact that the home country may have less incentives than the host in punishing a breach that would not affect its own citizens). One configuration of mutual recognition that can be envisaged in the longer run is home country enforcement of host country standards. Note that even when host country codes of conduct apply, cross-jurisdictional recognition of judgement passed on professional conduct ought to apply on an on-going basis. As a result, proof of validity of home license can be time-bound, or complemented by certificates of good repute, to ensure that recognition was granted to a service provider's current status: if a certified professional has been sanctioned in his home country for professional misconduct he should not be able to claim recognition for a right to practice which is no longer valid. Thus, MRAs may require that registration be renewed every year for certain professions.

*d. Cross-border supply vs establishment*

Limiting the scope of mutual recognition by limiting the choice between mode of delivery has sometimes been used as a mechanism for partial recognition, although under two different rationales. Under one rationale, recognition for the purpose of cross-border provision of services ("trade") has been deemed less problematic and requiring less preconditions, since the cross-border nature of the service itself makes it clear to the client that the professional is not a "local". In this vein, the first mutual recognition directive issued in the EU that required no preliminary harmonisation was that related to free cross-border service provision of a temporary nature for lawyers (see discussion under compensatory requirements above). Similarly, barristers in the EU are subject to a specific directive on free provision which makes access more automatic than under the GSD framework if their activity in the host country does not involve establishment (host countries are obliged to recognise as a barristers anyone authorised to practice under this title in the home country). More generally, establishment simply gives access to a bigger market and is therefore a bigger concession from a protectionist viewpoint. Yet, under a different rationale, mutual recognition may only apply to establishment, or at least involve local presence or residency requirements (short of establishment). This approach is justified as a means to ensure that local law can be enforced (in particular on rules of conduct) and that professionals are available for redress<sup>55</sup>.

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<sup>54</sup> There are countries where titles serve as evidence of a level of training and allow for even more differentiated access, such as Germany. Certain types of organizations are free to reserve certain activities to "doctorate engineers" rather than "graduate engineers". In this case, full recognition implies that such distinctions cannot apply to foreign engineers.

<sup>55</sup> In another vein, lawyers traditionally needed to be accessible to the court and thus it was normal that they maintain an establishment within its territory. Steven Nelson, OECD Documents, 1996, op. cit.

As shown by the European experience, it may not always be easy to distinguish between cross border offices established in support of occasional cross-border rendering of services and establishment itself<sup>56</sup>. MRAs that employ this scope option need to specify where service trade ends and where establishment begins.

In either case, the trade-impeding impact of restricting mutual recognition to a specified mode of delivery is a function of corollary market characteristics. The need for close and on-going relations with clients as well as for in depth knowledge of local markets constitute autonomous incentives for local establishment. When this is true, restricting mutual recognition to locally established professionals may not seriously impair professional mobility. On the other hand, rights of cross-border provision are especially relevant for activities that rely on information networks and economies of scale. Initial steps towards mutual recognition may differentiate between different activities within a given profession based on these technical constraints<sup>57</sup>. Ultimately, freedom to chose between modes of delivery is one of the clearest guiding principles that has emerged from global negotiations on services in the last few years and mutual recognition needs to be extended to all modes of delivery<sup>58</sup>. Both the right of local presence and the right of non-establishment are enshrined in the NAFTA (as well as in the GATS for the former while only partially for the latter). As a next step, they must be upheld in combination with mutual recognition.

*e. Temporary vs permanent right of access*

A closely related distinction bearing on the scope of mutual recognition is that between temporary and permanent access (temporary rights are usually associated with cross-border provision but not vice versa). In theory, recognition can be granted temporarily, in order to allow for the provision of a specific service at or until a given point in time. NAFTA specifically encourages, when possible, the development of temporary licensing regimes. Under an agreement signed in 1995, engineers licensed to practice in one country have the right to obtain a temporary license in any other country. Temporary recognition may be an effective first step to full recognition in professions and/or contexts where professional reputation plays an important role or where individuals are identified with specific niches. Since temporary service provision usually involves collaboration with local professionals this also increases the quality guarantees associated with the right. Clauses can be included that facilitate graduation to permanent recognition.

*f. Consumer type*

Finally, the professions may borrow from an interesting approach used for the liberalisation of insurance services in the EU, where mutual recognition was initially granted for the purpose of accessing specific types of customers and not others, as a function of a client's capacity to discriminate between foreign professionals. An MRA can initially allow professionals to serve clients who may be deemed sophisticated enough to be able to assess their qualification -clients with "investigative capacity"- such as firms, hospitals, etc. By the same token, informed consumers could be identified through self-selection by limiting recognition to dealings with "active"

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<sup>56</sup> In the *Gebhard* case, the ECJ denied that the 1977 directive on cross-border provision allowed a German Rechtsanwalt to keep an office in Milan, to service nationals of the host country. "on a stable and continuous basis." Case c-55/94, European Court of Justice Judgement of Nov 30 1995.

<sup>57</sup> An interesting example is the combination of an obligation to establish for audit while cross border provision is accepted for book keeping. See Ursula Knapp, "Inventory of measures affecting Trade in Professional Services," OECD Documents, 1996, op. cit.

<sup>58</sup> For a discussion of the importance of this idea in the context of the Uruguay Round, see William Drake and Kalypso Nicolaïdis, "Ideas, Interests and Institutionalization: "Trade in Services" and the Uruguay Round," in *International Organization* 46, no.1 (Winter 1992): 37-100.

consumers who initiate contact with foreign professionals not established in their state, or to dealings with existing clients originating from the home country. Barring a professional from seeking out new clients in the host country would eliminate the risk of involuntary exposure to professionals with foreign credentials.

#### **VARIATION IN EX-POST GUARANTEES: ALTERNATIVES TO HOST COUNTRY CONTROL.**

Finally, in addition to the degree of automaticity of the recognition extended or its scope, MRAs may give different emphasis to the setting up of cooperative mechanisms between parties in order to compensate for loss of host country control. The aim is to increase the confidence that parties have in the mutual recognition process and therefore the legitimacy and sustainability of the agreement<sup>59</sup>. But control mechanisms are not costless, and their development is therefore itself an object of negotiation. These mechanisms include:

##### *a. Mutual monitoring*

Parties need to be confident that the others abide by the letter and spirit of the agreement. Such confidence is based on the initial familiarisation and continued involvement with the foreign system, including through: obligations of transparency of regulatory systems, decision making process, and change in such systems through the continued exchange of information between licensing, registration and certification bodies; rights of regulatory oversight and mutual monitoring that allows for the continued assessment of technical competence, capabilities, and efficiency.

##### *b. Collaboration*

The loss of host country control can also be compensated by the development of extant cooperative networks among parties to collectively "manage" the implementation of mutual recognition. In this way they can help each other abide by the terms and spirit of the agreement in particular by supporting the upgrading of standards where they are lagging (many in Mexico have expressed their aim to use MRAs as means of upgrading their professional standards). This can also include collaboration on accreditation procedures and support for inspection and evaluation that may progressively lead to a common culture on licensing standards. In this sense, MRAs should be seen as much as frameworks for mutual technical assistance and more optimal division of labour than as templates for regulatory competition. Host countries can also help home countries enforce compliance with rules of conduct by readily transferring relevant information. Transnational mechanisms for consumer protection in particular require a high degree of cooperation between host and home countries to ensure that professionals of bad repute cannot take advantage of loopholes.

##### *c. Reversibility*

In order to increase the incentive for parties to the agreement to enforce high level standards of training and certification, MRAs must be designed more explicitly as contingent agreements that can be terminated should the situation change in a country that fails to produce the required professional standards. These are in effect measures against regulatory dumping. MRAs could include trial periods, periodic reviews, safeguard provisions for the temporary lifting of obligations vis-à-vis one or several parties, and reversibility clauses allowing parties to nullify the agreement altogether. The credibility of the system depends on: a) the possibility to observe and interpret "the

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<sup>59</sup> This line of thinking can be presented under the general category of "securing insecure contracts". For a discussion, see Nicolaïdis, OECD, op.cit, p18-20. Section IV.4 draws heavily on this chapter.

state of the world" that is the soundness of home licensing and accreditation; b) the existence of procedures to impose safeguards under commonly agreed circumstances; c) the capacity of parties to reverse their initial concession in case of non-compliance, including by reverting to traditional entry procedures for licensing bodies and terminating inter-recognition of accreditation. On all these counts, reversibility itself must be the object of cooperation between regulators including under conditions of crisis. It must not be an end in itself, however, and must be embedded in a reappraisal and renegotiation process. When the 1972 US-UK bilateral agreement on architectural training was terminated, no procedures had been designed to cope with the crisis and the whole cooperation process was allowed to lapse.

*d. Competition law and dispute resolution mechanisms*

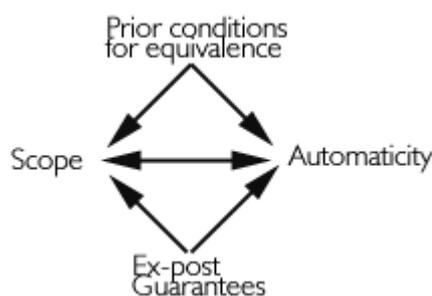
Finally, parties must invest resources in dealing with external factors that might emerge and would unduly nullify the agreement. For example, the access provided by mutual recognition may be incomplete as private anti-competitive behaviour replaces previous requirements. Private companies may continue to require local diploma or professional registration bodies may refuse to abide by the letter of an MRA. Domestic rules restricting consumers' right to change suppliers may impede openness in spite of recognition. Cooperation in competition law must act as a supplementary lever on market openness where market forces would not take care of these problems alone. Finally, if the host country is granted the right to impose compensatory requirements, this must be subject to the proportionality principle and overseen by effective dispute resolution mechanisms. In order to make such commitment acceptable to public opinion, political, regulatory and professional accountability must be explicitly and publicly shared between home and host countries.

#### **TRADEOFFS BETWEEN FEATURES OF MUTUAL RECOGNITION**

Every MRA needs to include provisions that pertain to the licensing, certification, and accreditation system on one hand and to the individual professionals seeking to be recognised on the other hand. At the level of the systems, MRAs are based on prior harmonisation and/or criteria for equivalence and cooperative mechanisms to make up for loss of host country control once the agreement is in place. The individual candidate for recognition will be affected by the provisions on how automatically and on what basis the recognition is granted, and the scope of recognition set out in the MRA, that is the range and mode of practice accessible to the beneficiary of recognition. These various dimensions are obviously connected. How confident the parties are on the degree of equivalence between their systems will determine how automatically they are ready to grant recognition. How broad a scope for access is envisaged will also determine automaticity. The need for spelling out prior conditions of equivalence may be reduced if there are good prospect for sustaining a high level of cooperation after the agreement and if reversibility is a plausible option of last resort.

In short, whether implicitly or explicitly, trade-offs can be exploited among the features of an MRA. The more parties are aware of these potential trade-offs, the higher the likelihood that they will reach agreement and devise solutions acceptable to all. In some cases, it may be more appropriate to relax prior conditions of equivalence and concentrate on fine-tuning automaticity (EU). In others, reducing initial scope may be considered as a way to test the grounds (NAFTA). From a dynamic viewpoint, scope and automaticity can be reduced initially to accommodate insufficient prior equivalence and expanded later on in light of ex-post cooperation. Some of these core trade-offs are briefly discussed below.

**Figure 2. Trading off between features of mutual recognition**



### Prior conditions vs ex-post guarantees

Parties need to decide how quickly they want the agreement to come into effect and how many resources they will be able to devote to managing its implementation. This means deciding whether the regulatory cooperation that must necessarily accompany mutual recognition needs to bear fruit before the agreement is actually implemented. Although regulatory assurances are necessary before and after liberalisation, if there is a sense of urgency, they can focus on ex-post guarantees. On the other hand, when resources may be insufficient to manage the guarantee mechanism ex-post facto, it may be wiser to seek high thresholds of equivalence earlier in the process. One of the central “twists” that allowed Europeans to respect (more or less) their 1993 deadline for the internal market is the resort to a shift from mandatory and extensive ex-ante cooperation and harmonisation to on-going ex-post cooperation. This does not mean that the scheme ought to be reproduced everywhere, especially where no prior culture of regulatory cooperation exists.

### Prior conditions vs automaticity and scope of access

If they are able to reach a high degree of prior harmonisation -as with accounting under GATS- parties can aim for an ambitious and immediate full scope recognition. Alternatively, parties can also exploit the potential for customised automaticity and reduced scope, to design a step by step approach to mutual recognition through incremental extension of automaticity and scope conditional on increased confidence between parties after the MRA comes into force. The choice hinges on the particular professional culture, whether harmonisation is feasible, the characteristics of the customers of this particular service, whether the degree of regulation varies significantly between parties, etc.

It is also important to ask whether less than full recognition makes a significant difference in a particular context. Hence, the scope of recognition did not extend to statutory definition of functional separation and permissible activities in the EU. A French “avocat” is usually not able to perform in the UK the services provided alternatively by solicitors or barristers; a foreign engineer is restricted to a specific category in Germany and a psychologist authorised to prescribe medicine in Spain but not in Italy. Such restrictions would be considered much more significant limitations in the financial sector, than in the professional realm where comparative advantage has more to do with the how than with the what of service provision. That host country rules of local conduct, including on liability, deontology or advertising generally continued to apply also appears to have little restrictive effect.

### Reconciling different valuation of scope and automaticity

There is a rich set of possible trade-offs between automaticity and scope of recognition for which the various solutions alternatively envisaged regarding the treatment of lawyers in the EU provide a

textbook example. The main controversy regarding the establishment directive has involved the right to practice under home country title, precisely because it is associated with more automatic entry. The debate pits French and Anglo-American philosophies. According to the former, lawyers that practice in a country and advise on issues that include a component of host-country law ought to be treated as local lawyers with all the rights (host country title) and the obligations (test of local knowledge and conditions for joining the local bar) that go along with it. The position is motivated in part by the fear to see the French legal system overtaken by the English one and to create a precedent that might extend to US lawyers. The British and American position on the other hand is to seek as extensive and unconditional rights as possible for bearers of home country titles; for the British, operating in their capacity as “solicitor” is not a hindrance since their comparative advantage is based on their transnational character and their specific reputation.

The crust of the debate for the last decade has been what ought to be the quid pro quo for introducing automatic rights of access for lawyers using their own (home country) title. Scope limitation other than access to title can be twofold: a) in terms of scope of practice (excluding advice on host country law). Already, under the 1977 directive, the scope of practice under automatic rights of access was restricted to giving advice on the law of the host or home country and on international and community law, whereas litigation was subject to compensatory requirements; b) in terms of time limit, e.g. temporary access under home title followed by an obligation to undergo host title requirements. The British position is obviously against time limits. But on the premise that some scope reduction might be a necessary concession, the British ask that experience acquired through local practice under home country title be taken into account in devising the mandatory aptitude test required at the end of the time limit (through partial or total exemption). The draft directive proposed by the Commission in 1994 provided for automatic admission to the local bar/title after three years of experience in the host country, if the experience has led to sufficient familiarity with host country law. At the same time, it included a requirement to switch to host title or else leave the country. This “up-or-down” approach was expectedly opposed by the British who persuaded the European professional association to counter with a proposal for an indefinite right to practice under home country title even as requirements for the local bar would be made harder. The so-called “Fontaine report” of the European parliament issued in 1996 proposed a compromise whereby a requirement to join after 3 years could be bypassed at the cost of being confined to advising on all law except host country law (automaticity maintained in exchange for reduced scope). This formed the basis for the directive.

The issues raised by mutual recognition for lawyers in Europe have an exemplary character. The negotiations pit a position favouring greater automaticity with reduced scope (UK) against lesser automaticity with full scope (France). The compromises proposed draw on the possibility for sequencing these options, adding restrictions with time as an incentive for local adaptation (scope of practice) and relying on local experience as the sole condition for scope expansion in terms of title. Whether it is realistic to reduce rights of access after a given period of time -that is in effect granting non renewable temporary access for a subset of activities- is open to debate.

## **5. OPTIONS AND GUIDELINES FOR NEGOTIATING MRAS**

Mutual recognition must be thought of as a dynamic process and the signing of an MRA as only one phase in this process. Decades can be fruitfully spent on analysing convergence between national education and training systems; but nothing can replace the virtues of learning by doing. This in turn requires that the “doing” accommodate the various interests in place without letting any of them stall the process. As stressed by a player in the NAFTA process, “the key is to get the professions to embark on the road to mutual recognition, an objective that is more likely to be

achieved-and hence generate useful demonstration effects-if the system design remains flexible.”<sup>60</sup> I have sketched above a framework for designing flexible MRAs to fit alternative needs and priorities. I now turn to the broader context to consider some of the options available to enter the process of recognition.

#### **CREATING “MUTUAL RECOGNITION-FRIENDLY” NATIONAL ENVIRONMENTS.**

One of the core implications of globalisation is that some if not all actors concerned have to adapt to the changes required by the new competitive environment. “Who adapts?” is therefore a key question in considering the prospect for MRAs. Systems, that is licensing, accreditation and education systems, including the organisations who shape and run them, will need to adapt in particular by becoming more compatible with their counterparts in other countries. Mobile professionals wishing to practice across borders bore the burden of adaptation prior to mutual recognition. In a mutual recognition environment, less adaptation to various national systems will be required (the whole point of MR), but they will have to adapt to new requirements, including for purposes of greater consumer protection. Local professionals obviously will have to adapt to the new competition. Finally, consumers, previously shielded from having to adapt to foreign professional practices, will now often need to invest in a greater capacity to responsibly exercise their freedom of choice between professionals presenting diverse credentials. Various versions of managed mutual recognition demand different degree of adaptation from each of these categories of actors. There may be a great level of asymmetry among countries and among actors within countries in the adaptation required. So part of the preparatory process involved in creating national environments that are mutual recognition-friendly is to enforce adaptation progressively and in the appropriate sequence.

In particular, the question of who adapts and how raises some important sequencing issues between domestic regulatory reform and the adoption of MRAs. On one hand, MRAs will certainly be easier to negotiate for parties who have moved far enough down the road of domestic reform. The implementation of mutual recognition between states or provinces in federal systems where professions are regulated at the sub-national level can greatly facilitate international recognition. Similarly, the application of competition law to domestic circumstances where professional associations or registration boards may unduly control (through quotas for instance) entry in the profession will encourage these parties to adapt to greater competition from abroad. Minimal steps towards unilateral recognition may also prepare the ground for mutual recognition. It can start by simply increasing transparency and setting explicit standards for licensing of foreign professionals. It can include the validation of qualifications obtained abroad by nationals (this was the first step taken by the Japanese national registration and accreditation board). Unilateral recognition can be far reaching if conducted in a broader context of domestic regulatory reform. Moreover, it can be more acceptable to certain regulatory cultures. Countries can also pre-empt the need for adaptation in case of mutual recognition when they develop regulatory systems from scratch by systematically incorporating foreign and international standards and including direct provisions for recognition of foreign accreditors.

On the other hand, in cases where there is significant internal resistance to regulatory reform, the prospect of recognition or the actual negotiation of an MRA may be seen as a necessary lever for change. As both the need for mobile professionals and as the competitive edge of professionals benefiting from recognition increase, a specific demand for engaging into mutual recognition may arise, in turn pushing for domestic reform. Some sub-national units, professions or specific bodies

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<sup>60</sup> Pierre Sauvé, “The Long and Winding Road: NAFTA and the Professions,” in OECD Documents, 1995, op. cit.

within the professions may be more ready than others to engage in the recognition process, and by doing so may then create demonstration effects for the rest of the system.

## **THE RESPECTIVE ROLE OF EDUCATION, ACCREDITATION AND LICENSING ORGANISATIONS**

Participants in mutual recognition negotiations can be governments, organisations representing the professions, or private bodies with delegated authority. Ultimately, all the actors involved in the regulation of the profession at the domestic level need to be involved in some way in the recognition process. The first step towards MRAs -that can last for years- is for all of the relevant parties to enter exploratory discussions to familiarise themselves with their respective educational systems, training, examination, certification and licensing requirements, methods of consumer protection, definition an scope of practice, etc. On this basis, they need to assess the benefits and changes associated with mutual recognition and develop a greater awareness of the multiple options for “managing” mutual recognition. But who ought to take the lead in the MRA negotiations themselves?

Under one vision prevalent in the European context, it is governmental bodies -e.g., the Commission and the committee of permanent national representatives- who are responsible for designing and enforcing MRAs with more or less co-optation of the professions in the process. Under the US lead, NAFTA proposes another vision where it is considered the task of the experts themselves (professional and licensing bodies) “to arrive at mutually acceptable provisions given the special features of the particular profession”<sup>61</sup>. One of the core objectives of NAFTA in the area of professional services was to develop blueprints of rules, principles and procedural mechanisms to encourage the professions themselves to conclude MRAs (architects, lawyers and engineers). Under ANZCERTA, MRAs are largely left to professional associations to negotiate<sup>62</sup>. Even under this second vision, it can be argued that it is essential for governments to be able to lean on the relevant professional bodies engaged in the work of mutual recognition in instances where negotiations may have reached a stalemate<sup>63</sup>.

The most promising scenario may be to combine both recognition routes. Professional association and non-governmental regulatory bodies can negotiate recognition agreements among themselves which can then serve as a basis for government agreements that will provide official mechanisms for enforcing rights and obligations. Another option is to first negotiate government-to-government MRAs in order to create frameworks and floors for recognition, and then encourage MRAs between non-governmental bodies to supplement and enhance the governmental agreement. Obviously as discussed earlier there are many possible configurations in terms of participants and functional levels of recognition. Accredited institutions (e.g.. schools and universities) can enter into recognition agreements that can serve as an input to recognition of accreditation as well as to the recognition of licensing or certification. Professional registration bodies can enter inter-recognition agreements which can increase automaticity of access to different degrees depending on the place of registration in the host country system.

MRAs between accreditation bodies in particular are likely to become one of the most important building blocks in recognition systems<sup>64</sup>. As mentioned earlier, inter-recognition agreements

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<sup>61</sup> See Ascher, *op. cit.*, p. 7.

<sup>62</sup> See Rhonda Piggott in OECD Documents, 1996, *op. cit.*

<sup>63</sup> Under the NAFTA model, the NAFTA Commission, meeting at the ministerial level, is supposed to review and monitor progress. See Sauv e, OECD Documents, 1995, *op. cit.*

<sup>64</sup> See Ascher, *op cit.*, p. 8 and discussion in IV.1.b. above.

between bar associations are developing in Europe. Another interesting model is provided by the so-called Washington Accord signed in 1989 by professional engineering accreditation bodies from the US, Canada, Australia, UK, Ireland and New Zealand which have agreed to the mutual recognition of their respective accrediting programs. This gives the migrant recognition of her home educational qualification for purposes of registration; it also serves as the basis for recommendations made by the member accrediting bodies to their respective licensing authorities to treat training in the other member countries as equivalent (but migrant engineers are still subject to host country testing for licensing purposes). Accreditation bodies could also accredit directly educational institutions from abroad. This may sometimes involve the revision of their charters and certainly may require increased accreditation fees, but there seem to be few obstacles in principle. Another possible route is to accredit schools in foreign countries to train professionals to host state standards. This half-way-house is currently the dominant approach to mutual recognition in the realm of products, but is unlikely to become significant in the professions.

There are risks involved in relying on accreditation bodies to provide the first building block of recognition. First, as pointed out by Bernard Ascher, this could in itself become a basis for restriction, if foreign schools are not afforded adequate opportunity for accreditation and if accreditation standards discriminate against them. Accusation of discriminatory treatment is a staple of the accreditation world at the purely domestic level. The same types of solutions are therefore called internationally as domestically: as with the domestic level, there may be appeals procedures regarding accreditation determination, accredited institutions may not have a monopoly in producing candidates for licensing, accreditation bodies can have specific mandates to allow for accreditation at the national of institutions that do not meet their conventional standards of accreditation in order to encourage diversity provided the institution carries out the purpose of the accreditation.<sup>65</sup> In addition, there may be technical assistance programs set up internationally to help candidates to be recognised abroad, including in paying accreditation fees.

A parallel question may be whether accreditation bodies that are part of mutual recognition pacts and/or start accreditation abroad are likely to enter into a competition amongst themselves to widen their market and whether such competition is likely to lead to a lowering of accreditation standards or to the hegemony of some national standards. Mutual confidence and incentives for quality reputation, as well as collective guarantees of quality control backed up by peer enforcement, will help guard against these developments. Nevertheless, because of the risks of discriminatory accreditation and competitive accreditation, extraterritorial accreditation should be pursued with caution and mutual recognition of accreditation should be the preferred option.

## **HORIZONTAL VS SECTORAL APPROACHES TO RECOGNITION**

Turning to a more macro-level, which bodies are involved may in turn depend on whether the approach taken to recognition is horizontal or sectoral. The horizontal approach has been adopted in the EU and in the Australia-New Zealand context in order to ensure full sectoral coverage -even if at the cost of automaticity in the case of the EU. Sectoral recognition agreements, because they either involve some degree of co-ordination of education and training or can spell out criteria for recognition tailored to the sector in question have the potential to lead to more automatic recognition for qualified professionals. In Europe, the first generation of recognition directives in the health sector and the architect's directive of 1985 constitute illustrations of these two variants of sectoral approach. NAFTA has also adopted a sectoral approach to mutual recognition, although under a broad horizontal legal umbrella to cover the range of issues relevant to liberalisation of

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<sup>65</sup> For instance, the American Bar Association that accredits Law schools in the US adopted such a waiver. See ABA, Standards for Approval of Law School and Interpretations, Standard 802 (October 1991), (ex.18).

professional services<sup>66</sup>. Under such a “universal sectoral approach” one question is where to start. It may be easier for instance to start with the technical professions that are often less regulated or where regulations tend to be expressed in terms of technical norms (engineering, architecture, health). Engineering has been the first sector tackled under NAFTA.

The two approaches are not exclusive. In the EU, the second has followed the first due to the progressive realisation of the cumbersome nature of the process. When this lesson has been transferred, others have skipped the first step altogether as with the case of Australia-New Zealand. But sectoral approaches can also complement horizontal approaches. Thus, the European Commission did not exclude the possibility of negotiating sectoral directives after the GSD was put in place, stating three conditions for doing so: a) the agreement of the profession concerned; b) wide consensus among the member states; c) an advantage for using this approach rather than the GSD.

This third condition is where the Commission, with its exclusive right of initiative, possesses the greatest margin of action and can develop objective criteria. Sectoral complements could be warranted when: a) the level of obligation set by the horizontal agreement is too vague or too low; b) the implementation of progressive liberalisation under the horizontal may have led to convergence between national systems that may be codified in order to increase the automaticity of the rights of access; c) conversely, the horizontal approach has led to too many instances of entry of “sub-standard” professionals from other members, showing the insufficiency of generic compensation mechanisms.

## **MULTILATERAL GUIDELINES FOR SECTORAL MRAs**

One of the most important obstacles to the negotiation of MRAs is their apparent complexity. In a few rare cases, bilateral MRAs have been negotiated *ex-nihilo*. But generally, MRAs will likely follow from two prior steps: a) adoption of framework agreements calling for MRAs; b) the crafting of detailed work programs, roadmaps and guidelines for designing MRAs which can provide a precious basis for learning from precedents. NAFTA’s professional annexes constitute a first attempt at doing so by fine tuning and expanding the range of criteria to be considered for adoption in MRAs (see Arkell, 1993; Clark 1996).

The discussions in the WTO on accountancy have provided a first forum for exploring mutual recognition at the multilateral level. In 1996, in order to support these and other incipient efforts to negotiate MRAs, followed by the European Union, USTR submitted a proposal<sup>67</sup> for multilateral MRA guidelines. Multilateral guidelines for an MRA in accounting were adopted in 1997. This was to pave the way for a pledge by WTO Members that the same formats and procedures be adhered to in all MRA negotiations, leading to an open and transparent negotiating system for such agreements. To ensure this result, these multilateral guidelines should be designed to be workable (not too onerous to discourage participation), broad (compatible with different regulatory systems), and open and flexible (enabling expansion)<sup>68</sup>. At this stage of discussions, it is important to safeguard the voluntary nature of the guidelines and clearly separate out the mandatory provisions related to the treatment of third parties stemming from Article 7 of GATS (see discussion in part VI). More generally, the guidelines should encourage parties to view MRAs as a dynamic process and include provisions to that effect. These can be related to the purpose (to set in place a process

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<sup>66</sup> See Pierre Sauvé, OECD Documents, 1995, *op. cit.*

<sup>67</sup> United States Trade Representative Office, “Multilateral Guidelines for Mutual Recognition Agreements on Professional Services,” draft proposal introduced by USTR, March 4 1996.

<sup>68</sup> Bernard Ascher, *op cit*, p. 7.

for the progressive enhancement of the understanding with the ultimate goal of full mutual recognition); the combination of different mechanisms for recognition within a single MRA; indications as to how automaticity may progressively increase; maximizing the range of choice regarding compensatory requirements; drawing explicit connection between variation in scope of access (activities, title, timeframe, mode of delivery) and automaticity; and the inclusion of a reversibility clause.

## 6. PROSPECTS FOR GLOBAL MUTUAL RECOGNITION

What is the prospect for world-wide mutual recognition in the professions? Mutual recognition is clearly a contagious principle.<sup>69</sup> MRAs in the field of products are currently initiated in every region of the world. Recognition for the professions is likely to take more time but the same dynamics are at play. Following on the examples of the EU and Australia-New Zealand, other regional arrangements are likely to encourage their professional associations to explore the issue. There is also going to be a demonstration effect across regions as well as across professions. Part of the role of the WTO ought to be to magnify and manage the contagion effect of MRAs. In its Article 7 on mutual recognition, GATS encourages signatories to adopt measures, by way of bilateral agreements or "autonomously," "to recognise the education or experience obtained, requirements met, or licenses or certification obtained in a particular country." It has now gone one step further by supporting the development of guidelines on the form and content of MRA as discussed above.

But WTO Members need to address squarely the potential contradictions between mutual recognition and the core tenets of the multilateral trading system -unconditional most-favoured-nation treatment (treating all trading partners equally) and diffuse reciprocity (seeking broadly equivalent concessions but not on a quid pro quo basis). Bilateral or plurilateral mutual recognition deals cannot be "multilateralized", simply because concessions based on assessing current and future equivalence of regulatory systems are not fungible. Hence, under recognition, extending MFN treatment is indeed conditional, not on some symmetrical lowering of trade barriers, but on actual compatibility of rules or equivalence of procedures of the other party. To be sure, the MFN obligation requires countries to treat service providers of any other WTO Member no less favourably than it treats service providers of any other country in like circumstances. "Like circumstances" means that treating an unqualified professional differently is legitimate. In short, since the extent to which foreign professionals meet domestic standards varies, recognition can be said to be compatible with the letter of the MFN obligation.

Nevertheless, in order to uphold the spirit of multilateralism and MFN, the WTO needs to ensure that the adoption of a web of MRAs around the world does not lead to greater fragmentation of international professional practice. This involves at least three types of tasks. Clarifying the line between unilateral obligations and the option to enter into MRAs, ensuring the transparency and openness of individual bilateral or regional MRAs; providing a normative framework for resolving issues of transitivity and compatibility between these disparate agreements with the aim of eventually integrating them under a global decentralised framework<sup>70</sup>.

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<sup>69</sup> For an early discussion, see Nicolaïdis, "Mutual Recognition: The Next Frontier of Multilateralism?," Project Prometheus Perspectives, July 1989. See also Nicolaïdis, OECD, 1996, op. cit.

<sup>70</sup> This section draws extensively from Nicolaïdis, OECD, 1996, op cit.

## FROM NON-DISCRIMINATION TO MUTUAL RECOGNITION: ARTICLES 6.4 AND 7 OF GATS

In 1995, the GATS Council established a Working Party on Professional Services whose main mission is to set out guidelines for how to ensure inter alia that licensing and certification requirements do not constitute unnecessary barriers to trade but are based on objective and transparent criteria, as mandated by Article 6.4 of the GATS on Domestic Regulation<sup>71</sup>. This is paramount to asking what should be the legal obligations of the parties to GATS short of mutual recognition?

The answer to this question obviously changes the incentives for negotiating over MRAs in the first place. There are arguments on both sides. On one hand, a broad interpretation and strict enforcement of policed national treatment (even to the point of enforcing unilateral recognition) ensures a minimal level of liberalisation and may constitute an incentive for MRAs. Given their purely voluntary nature (WTO simply “encourages”), countries (or their regulatory bodies) may simply refuse to negotiate MRAs with those that approach them for fear of competition once mutual recognition is in place. It is not even clear that WTO Members are obliged to give reasons for refusing to respond to requests for MRA negotiations. In such cases, the stringency of alternative obligations must make it clear that the country cannot simply get away with it. This is the goal of the provisions under GATS Article 6 regarding non-discriminatory regulations. They include familiar obligations to use least restrictive means, proportionality criteria, and the like that go beyond the traditional interpretation of national treatment. But the question of whether given domestic standards and regulations conform to these obligations is likely to be extremely difficult to answer. How far is it possible in the WTO context to follow the path of the EU? There, the adoption of an ambitious approach to mutual recognition followed a progressive reinterpretation of what constitutes a “barrier to trade” and of the extent to which member states were directly obligated by the Treaty of Rome to provide cross-border access to people and product. In effect, mutual recognition constituted a reinterpretation and a broadening of the traditional principle of national treatment. At one extreme, some of the “conditions” of entry into national markets applied in the form of non-discriminatory obligations to both national and foreigners can come to be considered as “restrictions,” and thus become the object of a legal obligation of recognition. In overcoming regulatory barriers to trade, where does enforcement of liberalisation as a legal obligation end, and where does the need for harmonisation/recognition as a political option start? The current task of “Article 6.4” working groups needs to be pursued in order to push the frontier of these obligations as far as possible without compromising service quality, even while some members already resort to the more ambitious MRA approach.

At the same time, a fundamental tension exists between legal and political mutual recognition. Such attempts at strengthening unilateral obligations should not overlook the fact that recognition is above all a process of mutual adaptation. Granting too much ground for imposing recognition through broad-based GATS clauses, e.g. judicial fiat at the multilateral level, endangers the legitimacy of the system as a whole and foregoes the benefits of regulatory cooperation that go along with recognition. The fact that even in the EU judicial activism has created resistance and that WTO’s dispute settlement mechanism is a main target for the political exploitation of the “sovereignty argument” against trade liberalisation ought to suggest caution. It would seem to be wiser to enforce openness to the greatest extent possible of the MRAs themselves and to resolve emerging disputes through renewed political negotiations.

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<sup>71</sup> The same language appears in the FTA (Article 1403: Licensing and Certification), NAFTA (Article 1210: Licensing and Certification).

Even when unilateral recognition is voluntary, the prospect of falling under MFN obligations enforceable by dispute settlement bodies may discourage parties to extend unilateral recognition in the first place. This is true for GATS where the granting of national treatment is voluntary but could theoretically result in unilateral recognition. The very fact that MFN was not made conditional on the compatibility between regulatory regimes for concessions made in national schedules has greatly decreased their utility as mechanisms for addressing regulatory barriers to trade. The obligation of unilateral recognition that may emerge from the application of Article 6.4 and of national treatment when applicable should not be carried too far. Mutual recognition needs to remain a political contract.

## **DEVELOPING GUIDELINES FOR MRAs: INTERNATIONAL OBLIGATIONS AND RESPONSIBILITIES**

How can the broad notion of non-discrimination be salvaged in the negotiation and implementation of the MRAs themselves? While the drafters of GATS have sought to ensure procedural if not actual non-discrimination in the wording of Article 7, these attempts may be insufficient to ensure that customised rights of access granted through recognition do not become a means of discrimination between countries based on non-regulatory criteria. Three types of guarantees follow from GATS which need to be fine-tuned and reinforced on a case-by-case basis. Further efforts through the WTO need to ensure that these guarantees are enforced and eventually codified through more specific obligations under an amended multilateral treaty:

- 1) Transparency: In theory, parties to MRAs are subject to a notification and reporting requirement to be submitted to the WTO Secretariat “as far in advance as possible” of recognition negotiations and when the agreement is concluded. Concretely, USTR has suggested that parties must notify their intent to enter into discussion, the entities involved, the dates and place of the meeting. In practice, however, the degree of transparency of MRA discussions is hard to ensure when involving highly sensitive sectors, where multilateral criteria do not pre-exist and when there is great asymmetry between regulatory practices and cultures involved. There is also the vexing question of when do negotiations actually begin. Preliminary talks can last many years and shift progressively into negotiations. At the other end of the spectrum, when is an agreement an agreement? Is it when it has been adopted by at least one party (even if this might be a sub-national jurisdiction) or when it is implemented? Given the still ad hoc nature of the process, the best that might be hoped for is greater post hoc transparency, in particular through requirements to establish contact points where details on the substance of the agreement can be obtained by third parties. These contact points should preferably involve the same people as those managing the agreement;
- 2) Openness: Under GATS, members who grant recognition must “afford adequate opportunity” for other interested members “to negotiate their accession” to existing or future bilateral or multilateral MRAs. Who decides that adequate opportunity has been granted? How extensive are these obligations? How should we distinguish between obligations to respond, an obligation to “talk”, and an obligation to negotiate? The central issue here is that negotiating over recognition is highly resource intensive, at least when it involves thorough evaluation of equivalence and detailed mechanisms for bridging remaining differences. When discussions are conducted by private organisations they do it at their own expense and every additional partner spells additional drain on resources. Technically, it may also be much easier to proceed incrementally rather than try to involve too many parties at once. In this light, MRAs should specify procedures for granting opportunity of access to the agreement, while taking account of these constraints. Parties need to specify where and how requests to join should be forwarded; what information is required of the applicants; what are the alternative options for demonstrating equivalence and/or for “graduating” into the agreement. Openness can be progressive and granted step-by-step using the same differentiated approach as with initial

parties to the agreement. This might involve concrete steps for including third parties as observers in joint evaluation or accreditation missions, field trips and meetings and in all other discussions that can help them master the conditions for their eventual inclusion. In this regard, the OECD could contribute to more proactive non-discrimination by providing technical support on the conditions for entry into MRAs. Formally, MRAs could include a special category of “associate parties” who are not considered to have met equivalence criteria and thus would only be granted restricted benefits in terms of automaticity and scope but would be full participants in the MRA cooperation networks.

- 3) Equitable Treatment: If third parties have been given the opportunity to apply to MRAs but do not pass the minimal equivalence test, the GATS specifies that a member must not use mutual recognition as a means of discrimination between countries (e.g. the “ins” and the “outs”) in the application of its regulations or constitute a disguised restriction on trade in services. But obviously, it is allowed to treat professionals of different origins (covered or not by recognition) differently. Equitable treatment should therefore be conceived more proactively to mean that MRAs should include clauses specifying the “bridges” available to third country applicants. In this sense procedures for progressive openness and equitable treatment should be thought of as on a continuum.

Exploring the concrete obligations entailed by the requirement of openness associated with multilateralism raises the traditional problems associated with sub-national delegation of authority which need to be addressed in a coherent manner. For the moment, commitments to least restrictive approaches and liberalisation are often cast in terms of “best endeavours”, reflecting the fact that governments have often delegated jurisdiction over the professions to sub-national governments (or federations), who themselves often grant self-regulatory authority to professional bodies. How should obligations contracted by governments be transferred to region and especially private bodies with delegated public authority? In an area where liberalisation entails extensive cooperation, information gathering and analysis, asking private bodies to accede indiscriminately to the demands of any of the potential hundreds of mutual recognition partners around the world would obviously be excessive and inoperative. At the same time, their statutory power entails obligations, including those contracted by their government internationally. Why should architects from Argentina be favoured over architects from Uruguay with the same qualifications simply because the US based association of architects has not yet had time to attend to the later? International organisations, including UNCTAD and the OECD need to devote resources to address this issue.

## **ENCOURAGING EXPANSION AND ENFORCING TRANSITIVITY**

Finally, the practice and legal basis for MRAs ought to be progressively incorporated in the WTO framework, first by developing guidelines to enable expansion of country coverage and eventual multilateralization. According to the drafters of the current proposal, “MRAs on a given profession should be able to fit together and be expanded into a multilateral system”. In applying this principle, WTO Members need to strike a balance between flexibility and consistency. In particular, the expansion from individual recognition agreement into a multilateral system could be accelerated by enforcing more systematically the principle of transitivity. If parties A and B as well as B and C have a recognition agreement, should A and C be under consistent recognition obligations? More generally, if A enters a mutual recognition with B, and B is part of a federation or a regional trade agreement, should A be under an obligation to negotiate recognition with all the other parties connected to B? How far should GATS go in this regard?

It may be best to leave the greatest flexibility possible to parties engaging into mutual recognition. Under NAFTA, for instance any configuration of mutual recognition agreement is conceivable in

theory, in order to give parties as much flexibility as possible so as not to discourage recognition initiatives. An MRA between engineers from specific states or provinces in Canada and the US does not need to be extended to the rest of the country, let alone Mexico. Moreover, NAFTA starts from the premise that even parties who are part of the same regional arrangements may have greater differences among themselves than with some outside third parties. The benefits of mutual recognition negotiated by one or two parties with a third party (say between the United States and the EU) need not automatically extend to other NAFTA signatories.

Transitivity applies in principle in the EU although the issue as to whether training obtained outside the EU by EU nationals benefits from recognition was not an easy one to resolve. Here, the GSD adopted a very liberal approach under pressure from the UK, Ireland, Luxembourg and Greece whose nationals often pursue their professional training abroad. It states that, if an EU state has recognised a foreign diploma, such recognition will apply throughout the EU, provided the applicant has acquired three years of professional experience. The same logic has not been extended to non-EU nationals<sup>72</sup>.

The most important issue for WTO is whether there should be a presumption of transitivity across bilateral or regional MRAs: if the US negotiates an MRA with the EU and with some APEC countries, to what extent are the EU and the concerned APEC countries obliged to recognise each other's regulations? Transitivity would preclude the need for "rules of origin" in mutual recognition zones and increase the consistency between such zones. Parties may be allowed to object to transitivity because the actual access benefits may not be balanced under the new configuration or the compounded regulatory differentials through chain recognition may surpass their threshold of "acceptable" differences. But in this case, asymmetries in trade benefits and regulations must be significant and the burden of proof should be born by opponents of transitivity. This should not preclude the use of safeguards and allowance for generous confidence-building periods to allow regulators to set up networks for mutual monitoring. By enforcing such transitivity the WTO could help decrease the closed nature of MRAs, "plurilateralize" bilateral agreements, and thus prepare the ground for eventual world-wide mutual recognition.

#### **TRANSATLANTIC COOPERATION AS A STEPPING STONE FOR MULTILATERALIZED MUTUAL RECOGNITION**

The adoption, implementation and enforcement of MRAs in the professional sector requires overcoming a host of obstacles. If it is based on sustaining the quality of services provided and current levels of consumer protection -even as the definitions and regulation of professions change at a growing pace- the process of recognition is likely to be highly resource-intensive. MRAs cannot be crafted overnight or follow some grand design. They need to be adapted to the requirements of the particular professions and countries involved. At the same time, they need to be consistent with one another. Ensuring such consistency while spearheading faster and more efficient negotiations of mutual recognition agreements worldwide could be the object of new transatlantic action. Regulatory cooperation between the US and the EU regarding professional services could serve as a stepping stone in the context of the Doha Round by demonstrating the potential for open MRAs.

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<sup>72</sup> In the field of law for instance, the US requested that the EU grant US lawyers the same treatment accorded to English solicitors (e.g. right to advice) on behalf of all non-EU lawyers. US negotiators may have been ill-advised to make such a universal demand, for this was seized upon by the EU to refuse to consider the request. Under the draft establishment directive for lawyers, non-EU lawyers who qualify as English solicitors by passing the English Qualified Lawyers Test (e.g. from Canada, the US or Australia) or as Avocat by passing the French Special Exam would not be entitled to the benefits of the directive unless they were EU nationals. See Coynes, op cit

More generally, transatlantic cooperation can contribute in creating a culture of mutual recognition whereby the professions themselves become increasingly aware of the benefits that can be had through recognition as well as the many ways in which recognition can be “managed” to alleviate their concerns over a general lowering of professional standards in their respective countries. Such a culture of mutual recognition would underscore the notion that recognition is a process not an outcome, and that it needs to be continually updated, reinforced and reappraised. Ultimately however, and in spite of all the possible caveats and refinements explored here, mutual recognition is a leap of faith.

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