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**Globalisation and Europeanisation
as Friends and Rivals:
European Union Law in Global Economic Networks**

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I

GLOBALISATION AND EUROPEANISATION

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FRANCIS SNYDER

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**GLOBALISATION AND EUROPEANISATION
AS FRIENDS AND RIVALS:
EUROPEAN UNION LAW IN GLOBAL ECONOMIC NETWORKS**

FRANCIS SNYDER*

1. Introduction

Globalisation and europeanisation are complementary, partly overlapping, mutually reinforcing, but also competing processes. This paper explores their dialectical relationship by examining some aspects of European Union (EU) law that are integral to global economic networks, especially but not only those linking the EU and China.

The purpose of the paper is two-fold. First, the paper seeks to bring out into the open various legal arrangements which create, channel, structure, or express some of the most important economic relations involved in globalisation. It focuses on selected aspects of EU law and certain types of global economic networks.¹ The

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¹ This paper is one of a series of related publications. See also: Francis Snyder, 'Legal Aspects of Trade between the European Union and China: Preliminary Reflections', in Nicholas Emiliou and David O'Keeffe (ed), *The European Union and World Trade Law after the GATT Uruguay Round* (John Wiley & Sons, Chichester, 1996), pp 363-377; Francis Snyder, *International*

aspects of EU law in question are highly technical rules of customs and international trade law known as inward processing and outward processing. They rarely see the light of day and are virtually unknown except within the business community, institutions of governance, and a handful of specialist lawyers. Global economic networks are more well-known, at least among economists and political scientists; but lawyers have so far paid them very little attention. This paper tries to make such material accessible and to pry open some of the broader issues it raises. It seeks to demonstrate that both the extremely technical customs rules and the international economic relations which have developed in conjunction with and around them are directly relevant to current debates about EU law. My basic argument is that we cannot understand the interests, structures, and processes involved in European integration today without taking global economic networks into account.

Second, and correlatively, the paper aims to introduce the theme of globalisation into current debates concerning the EU constitution. On the one hand, globalisation both reinforces and strengthens the demand for the constitutionalisation of EU decision-making, On the

Trade and Customs Law of the European Union (Butterworths, London, 1998), pp 594-600 and *passim* [hereafter Snyder, *International Trade*]; Francis Snyder, 'Global Economic Networks and Global Legal Pluralism', in George Bermann, Matthias Herdegen, and Peter Lindseth (eds), *Transatlantic Regulatory Co-operation* (Oxford University Press, 2000, in press) [hereafter Snyder, 'Global Legal Pluralism']; Francis Snyder, 'Governing Globalisation', (1999) 5 *European Law Journal*, Special Issue on 'Globalisation and Law', forthcoming [hereafter Snyder, 'Governing Globalisation']; Francis Snyder, 'Legal Issues in EU-China Trade Relations', *Wuhan University Law Review*, forthcoming 1999 [in Chinese]; and Francis

other hand, it tends to reconfigure economic relations and undercut potential political alliances which otherwise might encourage the constitutionalisation of Europe. I suggest that, on balance, globalisation tends to retard or even prevent the marriage of europeanisation and constitutionalisation, at least if we take 'constitutionalisation' to mean the elaboration, both legally and in terms of social practices, of a constitutional structure analogous to that of nation-states. For not only is it true that the development of global economic networks – a key economic aspect of globalisation - has, and will continue to have, a profound effect on the constitutionalisation of Europe. It is also the case, as this paper argues, that the form and content of the Europeanisation of law have stimulated and enhanced certain types of global economic relations which, though promoted by the EU and many of its Member States, tend to undercut the process of EU constitution-building.

Far from being a negative, destructive exercise, however, this opens up a space for and shows the necessity of a different constitutional imagination. The paper thus is a plea for a re-thinking and reorientation of EU constitutional law scholarship, one which takes fully into account the impact of globalisation. Or, to put it more positively, the argument of the paper takes place on two different levels. It is explicitly concerned with the role of EU law in global economic networks as part of the processes of globalisation and europeanisation. Its implicit message, however, is that we as legal scholars and citizens need to use our constitutional

imagination and envisage a distinctive EU constitution, one which takes these processes serious and thus differs significantly from the traditional model of the nation-state.

The remainder of the paper is divided into six main parts. Part 2 defines the concept of globalisation used here and sketches the main features of certain types of global economic networks. Parts 3 through 6 consider the basic arrangements in EU law which foster, structure, channel and seek to manage these economic relationships. Part 4 sets forth the basic legal framework of inward processing and outward processing. Part 5 discusses a selection of trade disputes involving inward processing or outward processing that have come before the European Court of Justice. Part 6 considers some aspects of the relationship between inward processing, outward processing, and anti-dumping. The general trade disputes are discussed first because they are easier to understand: they tend to be simpler than the anti-dumping disputes in terms of facts, legal concepts, and applicable law. This way of organising the material also presents the disputes involving inward processing and outward processing in roughly chronological order. It thus illustrates more clearly the development of inward processing and outward processing and their dramatic impact on EU law. The reader thus can appreciate easily the dialectical relationship between globalisation and europeanisation. A brief conclusion summarises the argument and its implications.

2. Globalisation and Global Economic Networks

What do we mean by 'globalisation'? By globalisation, I refer to an aggregate of multifaceted, uneven, often contradictory economic, political, social and cultural processes which are characteristic of our time.

In economic terms, the most salient features of globalisation, driven by multinational firms, are for the present purposes the development of international production networks (IPNs),² dispersion of production facilities among different countries, the technical and functional fragmentation of production, the fragmentation of ownership, the flexibility of the production process, worldwide sourcing, an increase in intra-firm trade, the interpenetration of international financial markets, the possibility of virtually instantaneous worldwide flows of information, changes in the nature of employment, and the emergence of new forms of work. Globalisation also has political, social, and cultural dimensions.³ Here, however, I focus on the economic dimension.

Among the key economic aspects of globalisation are global economic networks. These cross-national production networks involve 'the organization across national borders of research and development activities, procurement, distribution, product definition

² See e.g. Michael Borras and John Zysman, 'Globalisation with Borders: The Rise of Wintelism as the Future of Industrial Competition', in John Zysman and Andrew Schwartz (eds), *Enlarging Europe: The Industrial Foundations of a New Political Reality* (University of California at Berkeley, Berkeley, 1998), pp 27-59.

³ This is based on a more complete definition set forth in Francis Snyder,

and design, manufacturing, and support service'.⁴ Their basic features include the fragmentation of production, the dispersion of production facilities, worldwide sourcing, and intra-firm trade.

This paper focuses on the customs operations known in EU law as the inward processing procedure and the outward processing procedure. Put simply, the inward processing procedure allows firms to import into the EU materials for processing in the EU without paying custom duties. The outward processing procedure allows materials to be exported temporarily for processing and the resulting products to be re-imported with partial or total relief from duties. In this section of the paper, I consider these operations from the economic standpoint. I refer to these economic operations as 'inward processing traffic' (IPT) and 'outward processing traffic' (OPT), respectively, to distinguish them from the customs procedures. Viewed as economic relationships, IPT and OPT represent one of the organisational forms of international production networks; other forms are branch plant production, contract manufacture and original equipment manufacture, and vertical integration.⁵ Both in Central and Eastern Europe and in Asia, they

'Global Legal Pluralism'.

⁴ This definition has been elaborated in the publications of the Berkeley Roundtable on the International Economy (BRIE). See e.g. E.M. Doherty (ed) *Japanese Investment in Asia: International Production Strategies in a Rapidly Changing World* (University of California at Berkeley, -BRIE, 1995); John Zysman and Andrew Schwartz (eds), *Enlarging Europe: The Industrial Foundations of a New Political Reality* (University of California at Berkeley, 1998).

⁵ See T. Sturgeon, 'Does Manufacturing Still Matter?: The Organizational Delinking of Production from Innovation', BRIE Working Paper 92B, Berkeley Roundtable on the International Economy, University of California at Berkeley, 1997, and T. Sturgeon, 'The Rise of the Global Locality: Turnkey Production Networks in Electronics Manufacturing', University of California at

have often been a step leading toward the development of complex, capital-intensive cross-national production networks.⁶

International production networks increasingly involve not just inter-industry or inter-firm but also intra-industry and intra-firm trade. Neither intra-industry nor intra-firm trade is wholly new, at least between industrialised countries.⁷ In recent decades, however, both intra-industry and intra-firm trade have increased dramatically with the growth of multinational companies. According to recent estimates, intra-firm trade now accounts for approximately 60% of international trade. In fact, in its 1996 Communication on 'The Global Challenge of International Trade', the European Commission noted that globalisation and increased trade liberalisation imply increased networking among companies, increased intra-firm trade in manufactures, and global resourcing with regard to research, development, and production facilities. Furthermore, in its view, '[o]utward processing trade using local advantages for lowering production costs or the logistics of distribution systems is turning even medium-sized companies into global players'.⁸

Berkeley, forthcoming, 1998; both cited in John Zysman and Andrew Schwartz, 'Reunifying Europe in an Emerging World Economy: Economic Heterogeneity, New Industrial Options, and Political Choices', (1998) 36 *Journal of Common Market Studies* 405 at 410-411 [hereafter Zysman and Schwartz, 'Reunifying Europe'].

⁶ 'Reunifying Europe' at 417.

⁷ See H G Grubel and P J Lloyd, *Intra-Industry Trade: The Theory and Measurement of International Trade in Differentiated Products* (London, Macmillan, 1975).

⁸ European Commission, 'The Global Challenge of International Trade: A Market Access Strategy for the European Union' (Communication to the Council, the European Parliament, the Economic and Social Committee, and the Committee of Regions), COM(96)53 final, 14.2.96, p 1 (para 4), available

The EU, its Member States, and firms based there are involved in a wide variety of IPT and OPT operations. From the EU standpoint, such links between the EU and other industrialised countries, such as the USA, involve mainly inward processing. In 1996 the European Commission published a report on inward processing.⁹ Table I indicates the increasing use of IPT between 1988 and 1994, the last year of available statistics.

on the Internet at website <<http://www.europa.eu.int/comm/dg01/en.htm>>

⁹ Commission Européenne, 'Rapport sur le Fonctionnement et l'Avenir du Regime Douanier Economique du Perfectionnement Actif' (Commission Européenne: DG XXI ,1996).

Table 1
Inward Processing in the EU, 1988-1994

| YEAR | TOTAL INWARD PROCESSING in 1000 ecu |
|--------------|--|
| 1988 | 20,959,603 |
| 1989 | 28,714,720 |
| 1990 | 27,725,170 |
| 1991 | 30,840,191 |
| 1992 | 21,467,345 |
| 1993 | 31,627,016 |
| 1994 | 36,997,799 |
| TOTAL | 198,331,845 |

Source: Commission Européenne, 'Rapport sur le fonctionnement et l'avenir du régime douanier économique du perfectionnement actif', XXX/1073/96-Fr., pp 13.

Trade between the EU and the Central and Eastern European countries (CEECs) frequently involves OPT. Most of the few existing empirical studies of EU IPT and OPT concern the use by EU firms of OPT in the CEECs.¹⁰ They have shown that OPT represents one type of international division of labour and that it frequently provides the basis for more complex forms of IPNs. They have also argued that the ways in which production facilities located in the CEECs are inserted into IPNs centred in the EU are likely to be of crucial importance to European regional integration.

We can add a further dimension by referring briefly to trade between the EU and China. Such trade often involves links between the EU and the Chinese Special Economic Zones (SEZs),¹¹ even though such zones are not yet standardized and apparently are not generally recognised by international law.¹² IPT and OPT are crucial for trade between Hong Kong and Chinese inland areas, and hence for re-exports from Hong Kong to the EU

¹⁰ See Julie Pellerin, *International Business and the European Integration Process: The Example of Outward Processing Traffic between the European Union and the Central and Eastern European Countries*, Unpublished PhD Thesis, Department of Social and Political Sciences, European University Institute, July 1997 [hereafter Pellegrin, *International Business*]; Zysman and Schwartz, 'Reunifying Europe'; John Zysman and Andrew Schwartz (eds), *Enlarging Europe: The Industrial Foundations of a New Political Reality* (University of California at Berkeley, Berkeley, 1998) [hereafter *Enlarging Europe*].

¹¹ See e.g. Nicholas R Lardy, *China in the World Economy* (Institute for International Economics, Washington, DC, 1994), pp 112-114 Dieter Loesch, 'Chinese Special Economic Zones at a Crossroads', HWWA-Institut fuer Wirtschaftsforschung-Hamburg, HWWA-Diskussionspapier Nr. 25, 1995.

¹² See Sun Xiuping, Chen Wen and Lei Xianseng, *New Progress in China's Special Economic Zones* (Foreign Languages Press, Beijing, 1997), p 54.

as well as for direct exports from mainland China to the EU.¹³ Special economic zones and other export processing zones are not of course unique to China. They exist in many other parts of the world, and there is even a World Export Processing Zones Association (WEPZA) with its own Internet website.¹⁴

In this instance, as in others, the most significant elements from the standpoint of EU strategic actors, which are usually the large firms, are where the production process starts and whether the company intends to export the product once the product is already in the EU. From the EU standpoint, inward processing means that production starts in the third country, the product is processed further in the EU, and the product then is exported to a third country, either where the production process started or another country. From the same EU standpoint, outward processing means that production starts in the EU, further processing takes place elsewhere, and the product is intended in principle for the EU market.¹⁵ To this perspective must be added the home country of the firms concerned, either in the EU or elsewhere, because this determines many of the other interests which affect and are affected by the operations of strategic actors.

¹³ As of the first quarter of 1997, 48% (US \$6.6 billion) of Hong Kong's total exports to Chinese inland areas were for outward processing. During the same period, outward processing contributed to 75% (US \$12.5 billion) of Hong Kong's imports from the inland areas. Also during this period, 85% (US \$15.6 billion) of Hong Kong's re-exports of origin from Chinese inland provinces were related to outward processing. (source: Press Releases on Statistical Data, Statistics on Trade Involving Outward Processing in China, <http://www.info.gov.hk/censtatd/hkstat/press/t7idx.htm>.)

¹⁴ WEPZA is based in Flagstaff, Arizona, USA. See its website at <http://www.wepza.com>.

¹⁵ I am grateful to Candido Garcia Molyneux for these points.

IPT and OPT are often associated with intra-industry trade (IIT). Intra-industry trade now dominates North-North trade, or trade between industrialised countries. However, there are few studies of IIT with respect to economies in transition and relatively little easily accessible information on China.¹⁶ This represents a striking lacunae in view of the significance of OPT/IPT in EU-China trade and the fact that these economic relationships are involved in many of the numerous EU anti-dumping actions against China.

One recent study, however, deals with intra-industry trade (IIT) between China and the OECD countries, including but not limited to the EU.¹⁷ It concluded, first, that IIT between China and OECD countries increased moderately during the 1980s and rapidly thereafter. By the late 1980s it was approximately 20% of total PRC-OECD trade.

Second, IIT is most important in certain product groups, such as chemicals and related products, manufactured goods, and machinery and transport equipment. It is of less importance in respect of miscellaneous manufactured goods. For this product

¹⁶ But see, e.g., Chung H. Lee and Helmut Reisen (eds), *From Reform to Growth: China and Other Countries in Transition in Asia and Central and Eastern Europe* (OECD Development Centre Documents, Organisation for Economic Co-operation and Development, Paris, 1994); Françoise Lemoine, 'Trade Policy and Trade Patterns during Transition: A Comparison between China and the CEECs', Centre d'Etudes Prospectives et d'Informations Internationales (CEPII), Document de Travail No. 96-02, février 1996.

¹⁷ Lisbeth Hellvin, 'Vertical Intra-Industry Trade between China and the OECD Countries', OECD Development Centre, Technical Papers No. 114, July 1996 [hereafter Hellvin, 'Vertical Intra-Industry Trade'].

group, it accounts for only about 4% of trade,¹⁸ even though the product group accounts for about 67% of total manufacturing exports from China (but only about 5% of total manufacturing imports, part because of high tariffs).¹⁹

Third, IIT between China and OECD countries is primarily vertical in nature, while IIT among OECD countries is mainly horizontal in nature.²⁰ In other words, China tends to export lower quality varieties in exchange for higher quality varieties in a large share of the PRC-OECD IIT volume.²¹ This is consistent with recent reports on the structure of traded goods between the EU and China. Figures for 1994 show that 60% of EU imports from China consist of textiles and clothing (20%), mechanical/electrical machinery (30%), and toys, leather goods and footwear (20%), while 60% of EU exports to China consist of mechanical/electrical machinery, transport equipment, and nuclear reactors.²²

¹⁸ Hellvin, 'Vertical Intra-Industry Trade', p 28.

¹⁹ Hellvin, 'Vertical Intra-Industry Trade', p 15.

²⁰ 'Horizontal intra-industry trade is trade in varieties of a product characterised by different attributes, while vertical intra-industry trade is trade in varieties of a product characterised by different qualities'. The former typically occurs between countries with high and similar per capita incomes, while the latter typically occurs between countries at different levels of per capita income: Hellvin, 'Vertical Intra-Industry Trade', p 18.

²¹ Note that the study used unit price as a proxy for quality differences: Hellvin, 'Vertical Intra-Industry Trade', p 22. This is based however on the assumption of the 'open economy macroeconomic model' which presumes that international prices apply (or should apply) in China. For a critique of this assumption, see Willem van der Geest, 'Bringing China into the Concert of Nations: An Analysis of its Accession to the WTO', (1998) 32 *Journal of World Trade* 99 at 105-106.

²² See the Internet homepage of the European Commission Delegation in China at <http://www.ecd.org.cn>.

Fourth, there is a wide variation in IIT shares among different OECD countries. If we consider only the EU Member States, the order in 1992 was UK, Italy, Germany, France, Netherlands, Benelux, Ireland, Spain, Sweden, Austria, Denmark, Portugal and Greece.²³

Fifth, tariff barriers in China tend to reduce the IIT component of its trade with OECD countries.

These findings suggest that, with increased market opening, increased foreign direct investment (FDI), and increased per capita income, there is likely to be an increase in intra-industry trade, and in particular horizontal intra-industry trade, between China and the OECD countries. This would be consistent with Cantwell's presentation (see Table 2) of the evolution of international production and the development of intra-firm trade and intra-industry trade.

²³ Lisbeth Hellvin, 'Vertical Intra-Industry Trade', p 16, Table 2.

Table 2

***The Evolution of International Production
and the Development of Intra-Firm and Intra-Industry Trade***

| <i>TYPE OF INTERNATIONAL PRODUCTION</i> | <i>COMPOSITION OF MNC TRADE</i> |
|---|---------------------------------------|
| Resource-based production | Intra-firm, inter-industry trade |
| Local market-oriented production | Some intra-firm, intra-industry trade |
| Internationally integrated production | Intra-firm and intra-industry trade |

Source: John Cantwell, 'The Relationship between International Trade and International Production', in David Greenaway and L. Alan Winters (eds) *Surveys in International Trade*, Blackwell, Oxford, 1994), pp 303-328 at p 308, Table 11.1.

These forms of globalisation do not have equal effects on all EU Member States. As shown in Table 3, some Member States made much more use of inward processing than others.

Table 3
Use of Inward Processing by Member State (EC-11), 1966-1994

| <i>MEMBER STATE</i> | <i>TOTAL USE, 1988-1994, in 1000 ecu</i> |
|---------------------------|--|
| Belgium and Luxembourg | 10,538,146 |
| Denmark | 3,919,567 |
| France | 43,642,981 |
| Germany | 32,773,550 |
| Greece | 2,348,185 |
| Ireland | 6,630,856 |
| Italy | 20,374,496 |
| Netherlands | 22,872,909 |
| Portugal | 1,941,987 |
| Spain | 9,819,675 |
| United Kingdom | 43,469,493 |

Source: Commission Européenne, 'Rapport sur le fonctionnement et l'avenir du régime douanier économique du perfectionnement actif', XXX/1073/96-Fr., pp 14-15.

We may complete the picture, at least for the present purposes, by noting that the volume of trade with China, both imports and exports, varies widely from one EU Member State to another. Table 4 gives statistics for January-December 1995, the most recent annual figures available.

Table 4
Trade between the EU and its Member States and China,
January-December 1995
(in millions of ECU)

| | <i>Imports from China</i> | <i>Exports to China</i> | <i>Balance</i> |
|-----------------------------------|-------------------------------|-----------------------------|----------------|
| <i>France</i> | 3094 | 2028 | -1066 |
| <i>Belgium and Luxembourg</i> | 1516 | 674 | -842 |
| <i>Netherlands</i> | 1908 | 635 | -1273 |
| <i>Germany</i> | 8966 | 5699 | -2367 |
| <i>Ireland</i> | 3044 | 2061 | 943 |
| <i>United Kingdom</i> | 4551 | 957 | -3594 |
| <i>Ireland</i> | 207 | 28 | -179 |
| <i>Denmark</i> | 567 | 200 | -367 |
| <i>Greece</i> | 288 | 13 | -275 |
| <i>Portugal</i> | 151 | 26 | -125 |
| <i>Spain</i> | 1454 | 658 | -796 |
| <i>Sweden</i> | 827 | 852 | +25 |
| <i>Finland</i> | 250 | 440 | +190 |
| <i>Austria</i> | 450 | 331 | -119 |
| <i>EU-15</i> | 26333 | 14602 | -11731 |

Source: Home Page of the European Commission Delegation in China,
<http://www.ecd.org.cn/ecd/trad/> , as of 14.1.99, based on Eurostat.

It is true that, as Cantwell argues, '[t]he major regions are becoming linked to one another more by international production than by trade.'²⁴ However, it is also the case that, once we examine these economic relations in national (or even local) rather than regional terms, there is a great diversity and unevenness in the extent to which particular EU Member States (and localities) are linked to other regions and sub-regional areas through international production as well as trade.

An even more differentiated picture emerges if we consider these links in terms of firms rather than in terms of the territories which we usually associate with state governance structures, and consequently with the classical view of international [inter-national] trade. For example, the Commission report on inward processing shows that inward processing procedure is used mainly by large firms, not small and medium-sized enterprises (SMEs). This is the case even though the latter comprise 93% of all EU firms and account for one-third of all employees. SMEs thus are extremely important in the EU economy as compared to the USA, where enterprises with fewer than 20 employees account for only 20% of employees, and large firms employ 61% of the work force and account for 61% of business turnover.²⁵ Yet they occupy a disproportionately small role in the global economic networks of IPT and OPT.

²⁴ John Cantwell, 'The Relationship between International Trade and International Production', in David Greenaway and L. Alan Winters (eds) *Surveys in International Trade*, Blackwell, Oxford, 1994), pp 303-328 at p 320 [hereafter Cantwell, 'The Relationship'].

As a working hypothesis, it may therefore be suggested that the interests of SMEs thus lie frequently in protecting their domestic markets, if necessary by anti-dumping duties. The interests of large firms involved in global economic networks, however, lie in maintaining inward processing procedures and outward processing procedures as unfettered as possible. Seen from this perspective, anti-dumping on the one hand and IPT and OPT on the other hand deal with two distinct channels of imports. They compete with each other, partly because each tends to be occupied by firms that differ in their degree of participation in global economic networks. The resulting two groups of firms, and the EU Member States which defend them, thus have conflicting interests with regard to EU trade policy and the deployment of trade policy instruments. These hypotheses remain to be tested by further research.

3. Globalisation, Europeanisation, and EU Law

EC law on inward processing and outward processing bears a complex relationship to the processes of Europeanisation and globalisation. Both are different responses to trade barriers. If there were no trade barriers, such as tariffs or quotas, there would be no demand or need for IPT or OPT, in the sense of specific legal customs regimes.

National legislation permitting OPT preceded EC legislation. Originally OPT was 'a national response to the globalisation of

²⁵ Cantwell, 'The Relationship', p 38, including note 1.

production activity in certain sectors'.²⁶ It was stimulated by the search by firms for lower production costs, in particular for labour. Certain national governments responded to the demands of firms by creating a specific customs regime that favoured the internationalisation of production.

Subsequently, the europeanisation of the OPT regime was 'a response to the internationalisation of firms' strategies adopted by national governments in order to recapture political control over growing economic interdependence'.²⁷ The EC (mainly the Commission) sought to capture political control of the internationalisation of production via OPT by means of the law. By pushing for the creation the customs categories of inward processing and outward processing in EC law, it sought to europeanise the legal control of OPT, in other words, to shift the locus of control of globalising firms and the development of global economic networks from the Member States to the European Community.

The europeanisation of IPT and OPT, which in this case meant EC legal harmonisation, is relatively recent. If we take the case of OPT, there have long been two types of OPT, one providing partial or total suspension of quotas and involving mainly textiles and clothing (economic OPT), and the other providing partial or total suspension of tariffs and concerning other sectors (tariff OPT). Initially the former was managed by the Member States and the latter by the

²⁶ Pellegrin, *International Business*, p 157.

²⁷ Pellegrin, *International Business*, p 11.

Community. A 1975 EC directive²⁸ applied to both. The first Community regulation on OPT²⁹ applied only to tariff OPT, and the more controversial economic OPT was first regulated by the Community only in 1982.³⁰ The latter and a subsequent 1994 regulation, which is currently in force, were both attempts to harmonise the national OPT regimes. Today, in addition, IPT and OPT are exempted from quotas, for example for imports into the EU of textiles from China.³¹

As institutional strategy and economic policy, however, the europeanisation of law in these matters has not been straightforward or free from conflict. For the European institutions, as for certain national governments, the creation and control of these customs procedures was an institutional and organisational response to globalisation. The EU and the Member States (despite conflicts between Member States) were frequently competitors. Both sought to govern, through their respective laws, the global economic networks which were developing as part of (and indeed stimulated) the process of globalisation. Just as demands for these customs procedures were a response, mainly by large firms, to economic globalisation in the face of trade barriers, so the law establishing and regulating these procedures represented attempts by different, and often competing, systems of governance to

²⁸ Council Directive 76/119, OJ 30.1.76 L24/1.

²⁹ Council Regulation 2473/86, OJ 2.8.86 L212/1.

³⁰ Council Regulation 636/82, OJ 20.3.82 L76/1.

³¹ See Agreement on trade in textile products covered by the MFA Agreement, arts. 4(1), 4(4), OJ 31.12.88 L380/2 (MFA textiles); Agreement on trade in textile products not covered by the MFA bilateral agreement, arts. 4(1), 4(4), OJ 6.5.95 L104/2 (non-MFA textiles, especially silk and linen). See further Snyder, *International Trade*, pp 417-419, 596-599.

regulate the economic relations and capture the political benefits of globalisation.³²

Furthermore, the political attempts to govern these economic aspects of globalisation through law has involved conflicts both between the EC and the Member States as a group and among the Member States themselves. Both the demand for and the use of these customs procedures has varied among firms and thus from one Member State to another. These factors played a fundamental role in shaping conflicts regarding the creation of these customs procedures, first by national law, and then by EC legislation. The conflicts regarding EC law concerned not only the details of legislation, but also the very process of the europeanisation of this body of law, which harmonised, often transformed, and always replaced the previous national legislation.

It is not surprising, therefore, that the europeanisation of law concerning inward processing and outward processing has not been entirely successful, at least if the main criterion for judging success is the degree of effective control over global economic networks. Member States, largely at the instigation of firms, were able, as Pellegrin shows, to negotiate the bits and pieces of EC OPT legislation so as largely to preserve the interests of these firms. The process of europeanisation in the sense of the harmonisation of national legislation thus was uneven, and the governance of OPT was not very effectively centralised.³³ As this example suggests, the europeanisation of law is rarely

³² See also Pellegrin, *International Business*, *passim*.

straightforward, and it is also not always entirely successful, whether measured in terms of centralisation or or harmonisation.

In addition, the contribution of IPT and OPT to the process of europeanisation in ways other than the elaboration of legislation has also been uneven. The basic assumption, as Pellegrin emphasises with regard to OPT between the EU and the CEECs, was that territory, political competence, governance, and economic activity were congruent. EC OPT law thus represented 'an attempt to transpose the national model of market management at the Community level'.³⁴ In fact, however, the contribution of OPT to regional integration has varied a great deal, not only according to sector but also according to the production network involved.³⁵

The governance of globalisation in this instance tends to refract in a complex way the internal EU constitution. The EC law on inward processing and outward processing mirrors to some extent the division of power between the Member States and the EC. Rarely, however, does law reflect politics directly. In this instance EC law was a product of a specific process of europeanisation, occurring over a period of time and involving particular interests and specific relations between firms, states, and EC institutions. The governance through law of globalisation in this sense shifted in form from the Member States to the Community. But many of the pre-existing conflicts remained, and were represented and even crystallised in the details of the legislation. The different interests of

³³ Pellegrin, *International Business*, *passim*.

³⁴ Pellegrin, *International Business*, p 8.

³⁵ See also Zysman and Schwartz (eds), *Enlarging Europe*.

the Member States, and in turn those of the firms which they represented to some extent in the legislative process, have been articulated in terms of Community law. They were partly preserved in the substance, though not in the form, of Community law.³⁶

One may also hypothesise that europeanisation of IPT and OPT law, in the sense of a shift in the locus of decision-making and law-making, tended to strengthen the ties between each Member State and the firms based, or located principally, within its territory. Such ties may have been more loose, and subject to other pressures, when the applicable law was national law. It is likely that the process and the results of the europeanisation of IPT and OPT law sharpened conflicts of interest between Member States.

4. Inward Processing and Outward Processing in EU Law

The fragmentation of production, the dispersion of production facilities, worldwide sourcing, and intra-firm trade thus have developed in a symbiotic relationship with certain legal categories and concepts. IPT and OPT are intimately linked to the EC customs procedures of inward processing and outward processing. The same terms (IPT and OPT), or virtually the same terms (inward processing traffic [IPT] and outward processing traffic [OPT]; inward processing procedure and outward processing procedure), refer at one and the same time to economic relationships and to the legal

³⁶ For a similar example, see Francis Snyder, *New Directions in European Community Law* (Weidenfeld & Nicolson, London, 1990), pp.146-176, especially 171.

labels, pigeonholes or customs devices which facilitate their creation and maintenance. This economic dimension of globalisation and these legal categories of customs law are symbiotic: each owes its existence to some extent to the other, and each feeds on and thrives to some extent because of the other. This section and the following two sections of the paper consider inward processing and outward processing from the standpoint of EC law.

In terms of current EC law,³⁷ inward processing is the system whereby imported goods may be processed in the EC customs territory without giving rise to liability for payment of customs duties, or other commercial policy measures, if the goods are intended for export outside the customs territory of the Community in the form of compensating products.³⁸ Use of the procedure is subject to certain conditions, which in principle are designed to ensure that IPT does not harm unduly the interests of EU-based producers. This arrangement is designed to promote exports from EU firms and foster the international division of labour, but without adversely affecting the essential interests of Community producers.³⁹

³⁷ For further detail, see Snyder, *International Trade*, Chapter 5.

³⁸ Council Regulation 2913/92, Art 114(1), O.J. 19.10.92 L302/1). As to the processing operations allowed under the inward processing procedure, see *ibid*, Article 114 (2)(c). The implementing Commission Regulation (EEC) 2454/93, OJ 11.10.93 L253/1, defines the main compensating products in Article 549(a) and the secondary compensating products in Art. 549(b). Losses and operators are defined in Arts. 549(c) and 549(e), respectively, of this Commission Regulation. The following discussion presents only a skeleton outline of inward processing.

³⁹ See Case 260/78, *Maggi GmbH v Hauptzollamt Munster*, [1979] ECR 2693.

There are two basic procedures. Under the suspension system, non-EU goods intended for re-export from the EU in the form of compensating products may be imported duty-free: customs duties are suspended. Use of this system can be authorised only if the applicant actually intends to re-export the main compensating products from the EU customs territory. Under the drawback system, normal customs duties are paid but then the exporter can request their repayment or remission if the imported products are re-exported in the form of compensating products. Authorisation to use the drawback system is granted only where opportunities exist for export of the main compensating products from the EU customs territory. Export duties may be exempted under the suspension system but not under the drawback system.

The basic theme of inward processing is also subject to four more complex variations. The first variation concerns processing operations outside the Community customs territory. Imported goods in their unaltered state, or their compensating goods, can be exported temporarily for the purpose of further processing outside the customs territory of the Community.⁴⁰ This is possible only, however, after the customs authorities grant authorisation in accordance with the rules provided for outward processing.⁴¹ Under the drawback system, the temporary exportation of compensating products will not be considered as exportation for the purposes of repayment or remission of the import duties initially paid except

⁴⁰ Council Regulation 2913/92, Art 123, O.J. 19.10.92 L302/1.

⁴¹ *Ibid* Art 86; see also *ibid* Art 123. As to outward processing, see below.

where the products are not reimported into the Community within the period prescribed.⁴²

The second variation is equivalent compensation. Under special conditions, the compensating products intended to be exported may be obtained from equivalent Community goods instead of import goods.⁴³ As an exception to the general rules on inward processing, this is interpreted restrictively.⁴⁴ The equivalent goods must be of the same quality, have the same technical characteristics as the import goods and fall within the same eight-digit subheading of the combined nomenclature code.⁴⁵ Exceptionally, however, equivalent goods may be at a more advanced stage of manufacture than the import goods, provided that the essential part of the processing to which the equivalent goods are subject is carried out in the undertaking of the holder of the authorisation or in the undertaking where the operation is being carried out on its behalf.⁴⁶

⁴² *Ibid* Art 127.

⁴³ Council Regulation (EC) 2913/92, Art 115(1)(a), O.J. 19.10.92 L302/1 . See also *ibid* Art 114(2)(e).

⁴⁴ Case C-103/96, *Directeur Général des Douanes et Droits Indirects v Eridiania Beghin-Say SA*, [1997] ECR I-1453.

⁴⁵ Council Regulation 2913/92, Art 115(2), OJ 19.10.92 L302/1. See also Commission Regulation 2454/93, Art 569(1), O.J. 11.10.93 L335/1, as amended by Commission Regulation 3665/93, O.J. 31.12.93, L 335/1, which adds the requirement that the goods must fall within the same eight-digit subheading of the combined nomenclature. This requirement was upheld by the Court of Justice in Case C-103/96, *Directeur Général des Douanes et Droits Indirects v Eridiania Beghin-Say SA*, [1997] ECR I-1453. Special provisions laid out in Annex 78 may apply to goods included in this Annex: see Commission Regulation 2454/93, Art 569(2), O.J. 11.10.93 L253/1.

⁴⁶ Council Regulation 2913/92, Art 115(2), O.J. 19.10.92 L302/1. See also Commission Regulation 2454/93, Art 570(1), O.J. 11.10.93 L335/1.

The third variation is prior exportation. The Customs Code allows compensating goods to be exported from the Community before the importation of the import goods.⁴⁷ This is not possible however under the drawback system,⁴⁸ nor for authorisations to be issued on the basis of certain economic conditions.⁴⁹

The fourth variation is triangular traffic. As part of the prior exportation system the customs authorities may allow the triangular traffic system.⁵⁰ This system allows the import goods to be entered for the inward processing procedure in the Community at a customs office other than the one at which the prior exportation of the compensating products took place.⁵¹

⁴⁷ Council Regulation 2913/92, Art 115(1)(b), O.J. 19.10.92 L302/1. The customs authorities shall indicate the period within which the non-Community goods must be declared for the procedure taking account of the time required for the procurement and transport to the Community of the import goods. See *ibid* Art 118(3); see also Commission Regulation 2454/93, Art 561(1), O.J. 11.10.93 L253/1. As a general rule this period must not exceed six months, but it may be extended if the holder of the authorisation submits a reasoned request, provided that the total period does not exceed twelve months. See *ibid* Art 561(2). Special rules apply to specific products, such as goods subject to a price regulating mechanism (Art 561(2)) and raw sugar (Art 561(2)).

⁴⁸ *Ibid* Art 126.

⁴⁹ Commission Regulation 2454/93, Art 572(1), OJ 11.10.93 L253/1, as amended by Commission Regulation 3665/93, O.J. 31.12.93, L 335/1. As to the economic conditions which do not allow for the possibility of prior exportation under the suspension system, see Commission Regulation 2454/93, Art 552, OJ 11.10.93 L253/1, as amended.

⁵⁰ Commission Regulation 2454/93, Art 600, OJ 11.10.93 L253/1. Triangular traffic system is only possible as part of the prior exportation system.

⁵¹ *Ibid*, Art 549(i). As to the details of the triangular traffic system, see *ibid*, Art 575(3); see also *ibid* Article 601, as amended by Commission Regulation 3665/93, O.J. 31.12.93, L 335/1. See also Commission Regulation 2454/93, Arts 602-605, OJ 11.10.93 L253/1. Art 603 has been amended by Commission Regulation (EC) No 2193/94, O.J. 9.9.94 L235/6.

Outward processing, as defined in EC law, is the system whereby Community goods may be exported temporarily from the customs territory of the Community in order to undergo processing operations and the compensating products resulting from those operations be released for free circulation with total or partial relief from import duties and non-tariff common commercial policy measures.⁵² The purpose of this mechanism is to avoid the levying of customs duty on goods exported from the Community for processing.⁵³ This procedure may apply to all Community goods other than those whose export gives rise to repayment or remission of import duties, or which prior to export were released for free circulation with total relief from import duties by virtue of end use, for as long as the conditions from granting such relief continue to apply, or whose export gives rise to the granting of export refunds or in respect of which a financial advantage other than such refunds

⁵² Article 145(1) Council Regulation (EC) 2913/92, O. J. 19.10.92 L302/1; See also Article 160 *Ibid.* See also Case 49/82 *Commission of the European Communities v. Kingdom of the Netherlands* [1983] ECR 1195. As to the specific conditions for the application of economic outward processing arrangements to textiles and clothing listed in Chapters 50 to 63 of the Combined Nomenclature and resulting from outward processing operations, see Council Regulation (EC) No 3036/94, O.J. 15.12. 94 L322/1. See also Council Regulation (EC) No 1385/94, O.J. 18.6.94 L152/4 (opening and providing for the administration of Community tariff quotas for frozen hake fillets and for processing work in respect of certain textile products under Community outward processing arrangements). Allowed processing operations under the outward processing procedure are: a) the working of goods, including erecting or assembling them or fitting them to other goods; b) the processing of goods; 3) the repair of goods, including restoring them and putting them in order. See Article 145(3)(b) Council Regulation 2913/92, OJ 19.10.92 L302/1; see also Article 114(2)(c) *Ibid.*

⁵³ See Case C-16/91, *Wacker Werke GmbH & Co. KG v. Hauptzollamt Munchen-West*, [1992] ECR I-6821.

is granted under the common agricultural policy by virtue of the export of the said goods.⁵⁴

The EC inward processing arrangements (and, one assumes, outward processing arrangements) are themselves subject to international agreements, such as the International Dairy Agreement, concluded by the Community as part of the GATT.⁵⁵

Both inward processing and outward processing are also governed by the International Convention on the Simplification and Harmonization of Customs Procedures, signed at Kyoto on 18 May 1973.⁵⁶ The Convention entered into force for the EC on 26 September 1974. Annex E.6 of the Convention concerns temporary admission for inward processing. It entered into force on 6 December 1977, and, subject to certain reservations, it entered into force for the EEC on the same date. Annex E.8 deals with temporary exportation for outward processing. It entered into force for the EEC, with certain reservations, on 20 April 1978. It may be noted that China is a signatory to the International Convention on

⁵⁴ Article 146 Council Regulation 2913/92, OJ 19.10.92 L302/1.

⁵⁵ Products brought into the Community under the inward processing arrangement are considered to be imported and exported for the purposes of the International Dairy Agreement (IDA) or any international trade agreement. Consequently, Community legislation does not allow authorisations for products for inward processing at a value below the minimum prices set by the IDA: see Case C-61/94 *Commission of the European Communities v Federal Republic of Germany*, [1996] ECR I-3989, paragraphs 22-27.

⁵⁶ See World Customs Organization, Handbook: International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto, 18 May 1973), 1st edition October 1975, Amending Supplement No. 13, January 1993 available on the internet at the website <<http://www.wcoomd.org/frmpublic.htm>>.

the Simplification and Harmonization of Customs Procedures signed at Kyoto, but has not yet accepted the Annexes.⁵⁷

5. IPT and OPT in the European Court of Justice

Global economic networks do not correspond in their geographical reach to national or EC political and legal boundaries. Partly as a result, they tend to generate disputes which sometimes take the form of very complex litigation. Before examining some such anti-dumping cases, however, this section focuses on a selection of relatively simple cases before the European Court of Justice (ECJ). They provide a useful introduction to IPT/OPT disputes, because they suggest what types of disputes arise, illustrate the basic legal concepts, and show how the ECJ has dealt, explicitly or implicitly, with global economic networks.

In Case 49/82 *Commission v Netherlands*,⁵⁸ the Commission brought an Article 169 action against the Netherlands for authorising the packing in small packages of butter imported from third countries and stored in customs warehouses. It argued, in essence, that this kind of packing was not the simple operation of a 'usual form of handling' as required for the use of the customs warehousing procedure. The customs warehousing procedure provides for the storage in a customs warehouse in the EU of

⁵⁷ The Convention entered into force for China on 9 August 1988. China has accepted only Annex E.3 concerning customs warehouses and Annex F.5 concerning urgent consignments.

⁵⁸ [1983] ECR 1195.

goods, either from the EU or from a third country, free of customs duty. The Commission considered that the operation in this case called instead for the use of the inward processing procedure. Goods imported under the inward processing procedure were reserved solely for export, were subject to more stringent controls to protect Community producers, and had to comply with more formal requirements. In addition, during the period in question the use of the inward processing procedure had been temporarily suspended in order to encourage EC processors of butter for export to use surplus EC butter rather than third country butter. Even in normal circumstances, therefore, customs warehousing would have given the importer or processor greater commercial freedom of choice and would have been lower in cost. But in the specific circumstances of the case, the authorisation by the Netherlands of the customs warehousing procedure also enabled Dutch processing enterprises to avoid an agricultural levy payable on the release for consumption of butter imported from third countries.

Detailed harmonised rules concerning inward processing were then not yet in force in the Community, and the Netherlands had in fact followed its previous national practice. Advocate-General Slynn pointed out, however, that

'[t]he dividing line [between customs warehousing and inward processing] is not entirely clear. None the less it seems to me that where the goods are shown to have been brought into the Community with the intention that they may be processed, and then re-exported, rather

than for the essential purpose of storage with incidental handling, they ought to be dealt with under the inward processing system'.⁵⁹

He also identified a need for harmonisation because of the existence of different national provisions as to what operations were regarded as inward processing or as customs warehousing.⁶⁰

The European Court of Justice, following its Advocate-General, held that the operation in question did not come within the scope of the customs warehousing procedure and was therefore covered by the inward processing procedure, as defined in Article 2 of Council Directive 69/73 on the harmonisation of provisions laid down by law, regulation or administrative action in respect of inward processing.⁶¹ The judgment implicitly affirmed the power of the ECJ to decide on the classification of such import transactions. Harmonisation by the judiciary could substitute at least provisionally for harmonisation by the legislator. Such judicial empowerment itself was part of the europeanisation of law, in both the institutional and normative terms. In its judgment the ECJ also re-affirmed the pre-eminence of EC law, which was then being elaborated. Diverse national practices could not be allowed to undermine common EC policies, such as the Common Agricultural Policy, or impede the eventual development of harmonised EC customs law. In normative terms, the case also clarified the distinction between customs warehousing and inward processing. Customs warehousing could

⁵⁹ [1983] ECR 1195 at 1213.

⁶⁰ [1983] ECR 1195 at 1212.

⁶¹ OJ Eng. Spec.Ed. 1969, (I), p 75.

be used only for very simple procedures, whereas certain types of packaging, as well as more complex procedures, required the use of inward processing.

Seen from a broader perspective, the case demonstrated that the boundary between inward processing and customs warehousing would in the last instance be policed, if necessary, by the ECJ. Patrolling this boundary represented a way of managing the complex relationship between globalisation and europeanisation. In the specific circumstances of the case, the ECJ gave priority to protecting the EC's financial interests and EC producers; these may be some meanings of europeanisation, though certainly not the only ones. At the same time, it urged the EC legislator, that is, the Member States, to adopt harmonised rules to manage on a more coherent, less *ad hoc* and more long-term basis the problematic relationship between europeanisation and globalisation: in other words, to adopt a europeanised solution to certain problems posed by economic globalisation.

Outward processing has been the subject of several ECJ judgments. Most involve German companies, which should not be surprising in view of the early internationalisation of German firms and the importance of OPT between Germany and central and eastern European countries. An early case was Case 118/79 *Gebrueder Knauf Westdeutsche Gipswerke v Hauptzollamt Hamburg-Jonas*.⁶² It concerned exports of maize starch authorised under German OPT legislation, and reimported into the EC as

⁶² [1980] ECR 1183.

compensating products manufactured from that starch and intended for the building sector. At the time there was no EC OPT legislation. For this reason, OPT was not subject to permanent customs supervision. In other words, there was no system of Community control ensuring the re-importation of the products exported under national outward processing arrangements. As pointed out by the Commission in the case, OPT was attractive for EC enterprises because of the lower production costs of third country undertakings⁶³ but in the absence of EC control of re-imports, this could result in disturbance of the markets of third countries and also led to shortages on EC markets.

The Court of Justice was asked to interpret the concept of 'export' within the meaning of Article 7(2) of Regulation (EEC) 1132/74 on production refunds in the cereals and rice sectors.⁶⁴ It held that this concept must be interpreted to mean that any levy which may be introduced in pursuance of that provision must also be imposed on the exportation of the products in question when they are exported under outward processing arrangements and later re-imported as compensating products. In other words, products exported for OPT under national law remained subject to export levies imposed by Community law.

As a result of this judgment, not only did EC law complement national law; the footprint of EC law left its mark on national law. Even in the absence of EC OPT legislation, Member States'

⁶³ [1980] ECR 1183 at 1187.

⁶⁴ See Council Regulation 1132/74, OJ 10.5.74 L128/24.

attempts to control and capture the fruits of economic globalisation could not escape the financial consequences of europeanisation, even though europeanisation had occurred in other spheres and not yet with regard to OPT. In this case, EC export levies served as an *ex ante* substitute for the *ex post* controls which would have been available under EC OPT legislation. The case illustrates the overlap and conflict of different national and EC legislation in the period before the europeanisation of the outward processing procedure. The ECJ was the arbiter of competition between the EC and the Member States about who should govern economic globalisation and to what extent.

A second OPT case was Case C-292/91 *Gebrueder Weis GmbH v Hauptzollamt Wuerzburg*.⁶⁵ It concerned the post-clearance recovery of customs duties on import. Fabrics originating *inter alia* in Portugal had been sent to Yugoslavia for the production of men's outer garments and then returned to the Community. Article 15 of the 1980 EEC-Yugoslavia Cooperation Agreement⁶⁶ provided *inter alia* that industrial products originating in Yugoslavia '...shall be imported into the Community free of quantitative restrictions and measures having equivalent effect, and of customs duties and charges having equivalent effect'. Article 30 of the Agreement provided that 'products originating in the Community' are to be considered 'products originating in Yugoslavia' on condition that they have undergone in Yugoslavia working or processing which is not 'insufficient' within the meaning of Article 3(3) of Protocol 3 of

⁶⁵ [1993] ECR I-2219.

⁶⁶ OJ 14.2.83 1983 L41/2.

the Agreement. The defendant customs authority decided to levy customs duties on the ground that, in the context of the transitional scheme applicable to products originating in Portugal, according to which goods traded between Portugal and the other Member States were subject to residual customs duties, the fabrics in question were not to be regarded as 'originating in the Community'.

The Court of Justice held, however, that such customs duties were not recoverable where the importer had observed all the applicable provisions as regards the customs declaration and where any error as regards the categorisation as Community goods or not of goods originating in Portugal would have been far from detectable from a mere reading of the provisions in force by a normally experienced trader. In other words, the ECJ reaffirmed its institutional interpretative role, it applied a test of reasonableness, and in economic terms it gave the trader the benefit of the doubt. The ECJ favoured the market by allowing traders in these circumstances to rely on their business experience. *Lex mercatoria* prevailed, and money accrued neither to the EC as own resources, nor to the national customs administration which would otherwise have received 10% of the duties to cover the cost of collection. The judgment also favoured economic globalisation by lowering the operating costs of transnational economic networks and OPT.

Case C-16/91 *Wacker Werke GmbH & Co KG v Hauptzollamt Muenchen-West*⁶⁷ exemplified the connection between inward processing and outward processing and the potential for abuse of

⁶⁷ [1992] ECR I-6821.

the system. The case was an Article 177 reference for a preliminary ruling on the interpretation of Council Regulation 2473/86 on outward processing relief arrangements and the standard exchange system.⁶⁸ The proceedings concerned the value for customs purposes of certain products imported by the applicant Wacker Werke between 1986 and 1988. Wacker Werke had purchased the products from Wacker Corporation, established in the USA, with which it had financial links.

Wacker Werke manufactured petrol engines and purchased diesel engines from other undertakings in Germany. It then sold these two types of engine to Wacker Corporation. The engines were exported as temporary export goods under an authorisation issued on the basis of the regulation on outward processing. When Wacker Werke sold the engines to Wacker Corporation, it added, by way of general expenses and profit margin, 25% of the cost of manufacturing its petrol engines and 5% to the purchase price of the diesel engines it purchased from other German undertakings. Wacker Corporation incorporated these engines into vibration plates, vibro-compacters and hydraulic pumps. It then sold these products, partly on the American and European markets directly, and partly to Wacker Werke, which reimported them into the Community as compensating products under the outward processing arrangements. Wacker Werke bought these compensating products from Wacker Corporation at the prices shown in the latter's price list for the American markets less a reduction of 45%.

⁶⁸ Council Regulation 2473/86, OJ 2.8.86 L212/1.

The dispute between Wacker Werke and the German customs authority concerned the valuation of the temporary export goods. The OPT regulation allowed compensating products in an OPT transaction to benefit on their release from free circulation in the EC from partial or total relief from customs duties. Relief was to be calculated by deducting from the amount of import duties applicable to the compensating products [here, vibration plates, vibro-compacters and hydraulic pumps] the amount of import duties that would have been applicable to the temporary export goods [petrol and diesel engines] if they were imported into the Community from the country in which they underwent the processing operation or last such operation.

The essential issue was whether the 25% and 5% 'uplift' or supplements added by the applicant should be taken into account. The German national court, which referred the case to the ECJ, stated that there was no evidence that the prices charged by Wacker Werke for the temporary export goods, or those charged by Wacker Corporation for the compensating products, were influenced by the links between the two companies.⁶⁹ However, the German Government argued that 'all these factors [regarding pricing] suggest a deliberate intention to set as high a value as possible for the temporary export goods in order to keep the

⁶⁹ [1992] ECR I-6821 at I-6839 (para 6).

differential duty payable at a moderate level'.⁷⁰ The essential problem, in its view, was the evasion of duty by transfer pricing.⁷¹

The European Court of Justice held in this case, known as *Wacker Werke I*, that the value of the temporary export goods corresponded to the difference between the customs value of the compensating products and the processing costs determined by reasonable means, such as taking account of the transaction value of the goods in question. As in Case 118/79 *Gipswerke* case, it adopted a reasonableness test, gave the benefit of doubt to the company, and respected the decision of the market. In other words, the applicant company won. The judgment also facilitated OPT by lowering its costs and encouraged the use of the outward processing procedure as part of the calculations of a transatlantic economic network. Following the ECJ ruling, the Finanzgericht upheld Wacker Werke's application.

The German customs authority appealed the judgment. It argued that the judgment conferred unjustified customs advantages on the trader. The case was then again referred for a preliminary ruling to the ECJ as Case C-142/96 *Hauptzollamt Muenchen v Wacker Werke GmbH & Co KG [Wacker Werke II]*.⁷² The European Court of Justice, once again following Advocate-General Tesouro held that reference to the transaction value of the temporary import

⁷⁰ See the Report for the Hearing, [1992] ECR I-6821 at I-6829.

⁷¹ As to transfer pricing as a regulatory issue, see Sol Picciotto, 'Transfer Pricing and the Antinomies of Corporate Regulation', in Joseph McCahery, Sol Picciotto, and Colin Scott (eds), *Corporate Control and Accountability: Changing Structures and the Dynamics of Regulation* (Clarendon Press, Oxford, 1993), pp 375-405.

goods was a reasonable means of determining processing costs. In determining the transaction value, reference could be made to the purchase price, inclusive of uplifts, even if this resulted in a higher rate of duty for the unprocessed goods than for the compensating products.⁷³

With regard to the possibility of transfer pricing, the ECJ stated that the possibility of 'tariff anomalies', and the consequent financial advantages for traders, were risks that were inherent in the outward processing procedure. These risks were outweighed, however, by the benefits of OPT. The ECJ held that the merits or demerits of individual cases had to be accepted, provided that there was no evidence to indicate the inter-firm prices were influenced by their business links, or even by the fact that the 'inter-firm' prices were even 'intra-firm' in the sense of belonging to a single, tightly knit global economic network.⁷⁴ Such an approach might seem to give more weight to legal form than to economic reality in the sense of the practical operation of economic networks. But the ECJ judgment also entailed that the existence of transfer pricing among related enterprises was a question of fact to be decided by the national court. National judges therefore have the task of evaluating and supervising the financial arrangements of firms which litigate before them. Such a norm itself, though perhaps continuing previous national practices, is a form of europeanisation: it represents a jurisdiction marker between different courts that is laid down by the ECJ. In the absence of any such finding, the ECJ

⁷² [1997] ECR I-4649.

⁷³ [1997] ECR I-4649 at 4668 [paragraph 22].

⁷⁴ [1997] ECR I-4969 at 4649 [paragraph 21].

judgment also signalled a policy preference for encouraging OPT and creating economic incentives for the development of global economic networks.

Another case involving IPT and OPT was Case C-103/96 *Eridania Beghin-Say*.⁷⁵ The ECJ was asked to give a preliminary ruling on the validity of a regulation that made recourse to inward processing arrangements with equivalent compensation subject to the condition that the equivalent goods must fall within the same subheading of the Common Customs Tariff as the imported goods. The basic issue was the compatibility of the regulation with the basic EC law principles of legitimate expectations and legal certainty. The ECJ concluded that, in the circumstances of the case, a trader could not have any legitimate expectation other than being able to have recourse to equivalent compensation where the goods concerned fall within the same subheading under the nomenclature in force at the material time. This was because the availability of equivalent compensation depended on a criterion forming part of another set of rules, namely the tariff classification of specific goods, which were liable to vary as a result of periodic changes. The possibility of such changes was foreseeable. This fact barred the creation of a legitimate expectation with regard to the inward processing procedure.

The case illustrates the interconnection and hierarchy between different sets of customs rules. The ECJ subordinated those

⁷⁵ [1997] ECR I-1453.

concerning inward processing to those concerning tariff classification; classification, valuation, and origin, which constitute the basic skeleton of all EU customs law.⁷⁶ The inward processing procedure makes sense only within this normative framework. Its existence, as already noted, is due precisely to such normative trade barriers, whether in the EU or elsewhere. In more general terms, the ECJ judgment reaffirmed the primacy of europeanisation over globalisation. In so far as inward processing may be seen to represent globalisation, the ECJ considered that, for EU-based traders, it could only take place within the normative framework of EC law. Globalisation, in other words, was subject to European integration.

6. IPT, OPT and Anti-Dumping

The interrelationship between IPT, OPT, and anti-dumping involves more complicated disputes and exemplifies the increasingly complex - and increasingly problematic - relationship between globalisation and europeanisation. IPT and OPT is frequently involved in EC anti-dumping investigations and litigation concerning global economic networks. It may in fact be suggested that the development of global economic networks is an important factor in recent changes in EU anti-dumping law and practice,⁷⁷ though this hypothesis remains to be tested.⁷⁸ Here it is not possible to present a full picture of the intersection of IPT, OPT, and anti-dumping; a thorough substantive analysis must wait until later. The following

⁷⁶ See further Snyder, *International Trade*, Part I.

⁷⁷ See further Snyder, *International Trade*, Chapter 13, 'Dumping and Subsidies'.

⁷⁸ These recent changes are among the main themes in my current research

paragraphs are intended simply to indicate some of the different scenarios that have arisen in practice.

In many anti-dumping cases, downstream EU users of the allegedly dumped imports argue that the imposition of anti-dumping duties will threaten their exports from the EU to third countries so should not be imposed. They appeal in this way not only to commercial rationality but also to virtually patriotic (in a double sense) notions of enhancing EC trade, or at least not damaging the EC balance of payments. Such arguments, however, are rarely successful. Instead, anti-dumping duties are imposed, and the downstream users are required to source materials to produce their exports by using the more restricted inward processing procedure.

The *Extramet* saga concerned imports of calcium metal from China and the then Soviet Union. In January 1988 the *Chambre Syndicale de l'Electrométallurgie et de l'Electrochimie* made a complaint on behalf of the sole Community producer, namely *Péchiney Electrométallurgie*, which accounted for the entire EC calcium metal production. *Extramet Industrie* was the main EC importer. Its activity consisted partly in granulating calcium metal. It accounted for between 62% and 97% of aggregate imports of calcium metal from China and Russia into the EC. The Chinese exporter was the *China Nuclear Energy Industry Corporation (CNEIC)*, the trading arm of the sole producer of calcium metal in China, *China National Nuclear Corporation (CNNC)*. *Extramet* argued that it had no source of supply other than China and Russia, because the sole EC

on EU anti-dumping actions regarding China.

manufacturer either had high prices or refused to supply.

The Commission investigation led eventually to the imposition of definitive anti-dumping duties.⁷⁹ Extramet's application of interim measures was dismissed.⁸⁰ However, its action for annulment was declared admissible,⁸¹ and subsequently the ECJ declared the anti-dumping measure void.⁸² Subsequent complaints led to a new investigation. This resulted in turn in the imposition of a new provisional anti-dumping duty⁸³ and then a new definitive anti-dumping duty.⁸⁴ Once again Extramet, now trading as Industries des Poudres Sphériques (IPS) brought an application for interim measures. As before, the action was unsuccessful.⁸⁵

In evaluating the results of its investigation, the Commission assessed the possible impact of eventual measures on primary users. They included processors such as IPS, and user industries, such as the lead and ferro-alloy industry and the steel industry. The latter argued that the imposition of anti-dumping duties would disrupt their exports. However, the Commission concluded, *inter alia*, that for their sales of processed calcium metal outside the EC, these firms could continue to derive their inputs from Russia or

⁷⁹ *Calcium Metal Originating in the People's Republic of China and the Soviet Union*, OJ 20.9.89 L271/1 (definitive).

⁸⁰ Case C-358/89R *Extramet Industrie v Council* [1990] ECR I-431.

⁸¹ Case C-358/89 *Extramet Industrie v Council* [1991] ECR 2501.

⁸² Case C-358/89 *Extramet Industrie v Council* [1992] ECR I-3813.

⁸³ *Calcium Metal Originating in the People's Republic of China and Russia*, OJ 23.4.94 L104/5 (provisional).

⁸⁴ *Calcium Metal Originating in the People's Republic of China and Russia*, OJ 21.10.94 L270/27 (definitive).

⁸⁵ Case T-2/95R *Industrie des Poudres spheriques v Council of the European Union* [1995] ECR II-485; see also Case T-2/95 *Industrie des Poudres*

China under the inward processing arrangements without paying any duty.

Similarly, when IPS applied for interim measures, the Council argued that, if interim measures were adopted, they should be conditional, *inter alia*, on the establishment of a mechanism to prevent IPS from reselling the goods imported from China and Russia without processing in the EU. This was intended to ensure that, if IPS were granted interim measures in respect of anti-dumping, it did not also circumvent the restrictions on IPT which were intended to protect EU producers. This demand raises several larger issues which, for reasons of space, can only be mooted here. For example, what is the relationship between IPT and anti-dumping? What are their respective roles in the international division of labour and the restructuring of industry? To what extent are domestic EU producers protected by anti-dumping measures if their competitors have recourse to IPT? Are anti-dumping measures and IPT to some extent contradictory? What contribution, if any, does each make to the building of the EU in the age of globalisation? In this case, the ECJ dismissed the IPS application.

A second example concerns imports of silicon metal from China.⁸⁶ China was by far the world's biggest supplier of silicon metal. The main EU users of the imports were producers of aluminium. In 1995 the Comité de Liaison des Industries de Ferro-Alliages (CLIFA) lodged a request for a review on behalf of four Community

spheriques v Council of the European Union [1998] ECR II-3939.

⁸⁶ *Silicon Metal Originating in the People's Republic of China*, O.J. 28.7.90 L198/57 (definitive).

producers, which allegedly represented a major proportion of the total EU silicon metal production. The Commission then initiated an expiry review of the anti-dumping measures that were then in place on silicon metal from China. Five Chinese exporters replied to the questionnaire sent as part of the Commission investigation. All were represented by the China Chamber of Commerce for Import and Export of Metals, Minerals & Chemicals (CCCMC). During the investigation it emerged that some of the main Community importers might be related to the exporters, as part of State-controlled 'Minemetals' import and export network.

In the past more than two-thirds of China's silicon metal exports had usually gone to Japan. As Japanese and other Asian markets became saturated, Chinese production declined. With the lapse of the EC and USA anti-dumping measures then in force, or at least so EC producers argued in this case, Chinese producers could regain the previous high level of production and increase exports to the EU. On the contrary, a UK aluminium producers association argued that anti-dumping measures would damage the international competitive position of EC products. The Commission accepted the former argument. It dismissed the latter on the ground that silicon metal used for the production in the EU of aluminium for export could enter the EU without duty under the inward processing procedure. In 1997 the Council imposed a definitive anti-dumping duty.⁸⁷

⁸⁷ *Silicon Metal Originating in the People's Republic of China*, OJ 16.12.97 L345/1 (definitive)

A third example concerns ferro-silico-manganese (FeSiMn) from China. FeSiMn is used in the steel industry for deoxidization and as an alloy. It is mainly produced from manganese ore and silicon, which are mixed together and brought to fusion temperatures in a furnace. The main downstream user is the steel industry. The original complaint, which also concerned other importing countries, came from EuroAlliages, the association representing the Community producers of ferro-silico-manganese; the latter were located in Belgium, France, Spain, and Italy. On the other side, the Commission received comments from two user associations and one user.

The users stated that the imposition of an anti-dumping duty would cause a significant increase in the cost of production of steel products. They also argued that it could also endanger the competitiveness of the EC stainless steel industry on the world market. However, the Commission concluded that FeSiMn needed for the production of exports could enter the EU under the inward processing regime without any duty; one user was in fact using this regime to import FeSiMn from South Africa. The Council in 1998 imposed a definitive anti-dumping duty on imports of Chinese FeSiMn.⁸⁸

The EU institutions were concerned here to maintain the integrity both of anti-dumping measures to protect certain EU producers and of inward processing as a separate but restricted channel for imports for processing for export by other EU producers. The case

illustrates, thus, the potentially contradictory roles of anti-dumping and the inward processing procedure. It also exemplifies the different roles assumed by each procedure concerning the role of the EU in global economic networks. The assumption underlying regular imports and anti-dumping measures is that the EU is the final destination of the products. Under IPT, however, the EU serves as simply a node in a global economic network or as a processing site.

To what extent are these different assumptions compatible, at least to the extent to which the firms using each import channel compete? The issue arose with regard to handbags from China. Large European firms control the major designs and thus access to the market. Subcontractors do the work of producing handbags, which is labour-intensive. Chinese and EU producers tend to compete for the contracts. In China handbags are produced under Chinese inward processing arrangements, and thus under outward processing arrangements as seen from the EU. These IPT/OPT arrangements involve global economic networks; large EU firms may establish a Hong Kong subsidiary, which rents factory space and hires workers for production in China. In the EU handbags are produced mainly by SMEs, especially from the southern Member States. Chinese producers dominate the EU market for plastic handbags. The fiercest competition thus concerns contracts for the production of leather handbags.

⁸⁸ *Ferro-Silico-Manganese Originating in the People's Republic of China, Ukraine, Brazil, South Africa and Russia*, OJ 3.3.98 L62/1 (definitive).

In 1997 the Commission imposed a provisional anti-dumping duty on plastic and leather handbags from China.⁸⁹ Indonesia was chosen as an analogue country. In calculating normal value, the Commission considered that, with regard to raw materials, there were no significant differences between Indonesian producers and the Chinese producers that co-operated in the investigation. Both obtained most of their raw material on the international market under inward processing arrangements. The Commission also considered that the imposition of anti-dumping duties would not harm the exports of handbags by EU firms to China, since such exports were minimal due to the high Chinese customs duties. It should be noted, however, that global economic networks operated mainly outside this channel of trade and instead through OPT and IPT arrangements, in both the EU and China.

The Commission investigation revealed that a number of EC manufacturers had already moved part of their production to China. These manufacturers, which did not cooperate in the investigation, argued that the imposition of anti-dumping measures would reduce employment in their EC factories. Such measures would make it impossible to cross-subsidise the manufacture of low- volume, high-priced handbags in the EC with high-volume, low-priced imports of handbags from China. Some producers, mainly in Germany and the UK, were in fact able to maintain a small EC production by achieving higher profit margins on handbags imported from China. The Commission pointed out that, even if anti-dumping duties were imposed, these firms would still be able to

⁸⁹ *Certain Handbags Originating in the People's Republic of China*, OJ 4.2.97

source handbags from China. The Commission also considered whether the imposition of anti-dumping duties would hinder EC exports of raw materials for handbags to be produced in China. It concluded, however, that the majority of Chinese manufacturers sourced the accessories in Asia, mostly in China itself, but also in Taiwan and Korea. It is worth noting that all of sampled EC producers visited by the Commission in the anti-dumping investigation purchased their raw materials and accessories from EC suppliers.

In 1997 the Council imposed a definite anti-dumping duty on leather handbags alone.⁹⁰ This was a compromise, especially between the northern and the southern Member States. Viewed in general terms, these two groups reflected the interests of global economic networks and EU SMEs, respectively. The Council compromise recognised the dominance of global economic networks, including Chinese producers, in the EU market for plastic handbags. It also served, at least provisionally, to protect the mainly SME EU producers of leather handbags. This EU institutional strategy aims to manage the conflicts and contradictions between globalisation and europeanisation by separating global and domestic markets, and trying to insulate each from the other, at least temporarily and so far as possible. Whether it is feasible, and for how long, remains to be seen.

L33/11 (provisional).

⁹⁰ *Certain Handbags Originating in the People's Republic of China*, OJ 1997 L208//31 (definitive).

7. Conclusion

Europeanisation and globalisation are both friends and rivals. EU law is an expression, a means, and an outcome of europeanisation. At the same time certain aspects of EU law, such as the inward processing and outward processing customs procedures, respond to and encourage the development of global economic networks, which are among the basic features of economic globalisation. EU law thus is an integral part of global economic networks. But these networks have contradictory effects on the EU and its Member States, tending both to strengthen and to fragment and partly restructure them as political organisations and polities. Europeanisation and globalisation thus are complementary, partly overlapping, mutually reinforcing, but also competing processes.

This paper has emphasised the symbiotic development of global economic networks and EU international trade and customs law. It has also pointed to some present or eventual contradictions between the two. But the implications of the argument are not limited to external relations or trade. The demand for the constitutionalisation of governance in the EU stems partly from the impact and implications of globalisation; this is exemplified by economic and monetary union.⁹¹ At the same time globalisation sustains and creates interests and relationships which undercut traditional constitutionalism as a mode of EU governance. The

⁹¹ See Francis Snyder, 'EMU Revisited: Are We Making A Constitution? What Constitution are We Making?', in P. Craig and G. de Burca (eds), *The Evolution of EU Law* (Oxford University Press, Oxford, 1999), 471-477.

ECJ Opinion 1/94 *WTO*⁹² and its judgment in *Hermès*⁹³ can be used to support both of these points.

EU law thus is at war with itself. It embodies and reflects conflicting interests and thus, partly for this reason, comprises contradictory strands. This is more true of the EU than the Member States' legal systems because of the dimension of scale. Its implications are more far-reaching for the EU than for a Member State (though for Member States the implications of globalisation are also profound), in particular because the EU is relatively new, lacking in legitimacy, and in search of its basic values. Certain aspects of EU law, which are oriented to and foster globalisation, tend to undercut the influence of other aspects of EU law, which might otherwise lead to a stronger, more coherent process of europeanisation. This gives the processes of globalisation and europeanisation an especially complex character. These assertions may seem surprising if our reading of reality is limited only to processes and consequently neglects the interests and structures which underlie them. An understanding of these interests and structures is essential, however, if we are to grasp the complex interaction of globalisation and europeanisation. It is even more important if we wish to imagine a different way of constitutionalising EU governance in the age of global economic networks and other forms of globalisation.

⁹² Opinion 1/94 *World Trade Organization*, [1994] ECR I-5267.

⁹³ Case C-53/96 *Hermès International v FHT Marketing Choice BV*, [1998] ECR I-3603.