ESF/SCSS Exploratory Workshop

'The Strategic Use of European Law and Its Implications for Labour Market Relations in the EU and China: A Comparison of Transnational Companies, International Production Networks and SMEs

Scientific Report

Professor Francis Snyder

1. Executive Summary

The European Science Foundation Committee for the Social Sciences sponsored an Exploratory Workshop on 'The Strategic Use of European Law and Its Implications for Labour Market Relations in the EU and China", which was held on 12-13 December 2003 at the London School of Economics. Professor Francis Snyder was the principal organizer. The LSE Law Department and the LSE European Institute acted as the hosts for the Workshop. Participants included academic and practicing lawyers, European Commission staff, economists and political scientists specialized in European Union and/or China, and a number of LSE postgraduate research students interested in the subject.

The Workshop stemmed from research carried out by Professor Snyder to analyze, both quantitatively and qualitatively, all EC anti-dumping cases against China since 1979. This research suggested a correlation between the size and type of companies, legal strategies, and effects on the labour markets in the exporting and importing countries. The Workshop sought to explore this proposed correlation in detail in the specific context of trade between the European Union and China.

The Workshop took as its starting point a series of hypotheses which derived from this earlier research. First, European Union law provides legal resources which companies use as part of their business strategies in international trade between the EU and China. Second, different types of business organizations use different aspects of EU law. Earlier research suggested that transnational companies and international production networks make proactive use of inward processing and outward processing customs procedures, while small- and medium-sized enterprises, through trade associations, use anti-dumping law as a defensive instrument. The third hypothesis was that these different legal strategies had different effects on the labour markets in the EU and China. The Workshop was intended to explore these hypotheses in an informal, open-ended and interdisciplinary way. It was also intended to be the first step in the establishment of a network or other form of continuing collaboration which could form the basis for scholarly cooperation and research on international trade between

the EU and China in the future.

The Workshop consisted of five sessions, comprising the presentation of papers, comments by a discussant and open discussion among all participants. The first session introduced the basic legal instruments which businesses can use in developing their international trade strategies. Papers dealt with (a) the European Community customs procedures known as outward processing and inward processing and (b) anti-dumping and strategic behaviour. The second and third sessions dealt with different types of companies and company stratgies. Papers dealt with (a) multinational companies and the concept of 'placing on the market' in EU regulatory law [second session] and (b) the strategic use of European law in trade with China: two case studies and (c) EU transnational companies and their legal strategies in WTO trade disputes. The fourth and fifth sessions concerned labour market effects in the EU and China. Papers dealt with (a) corporate governance and labour market relations in the European Union, (b) foreign direct investment, trade and the Chinese labour market and (c) unemployment inflow and outflow in urban China.

The combination of wide-ranging hypotheses, interdisciplinary composition of the group, highly focused papers and open-ended discussion proved extremely fruitful. There was a general consensus that the basic hypotheses which served as guidelines for the organization of the Workshop and the discussion were very stimulating. Based on our knowledge so far, however, it would seem that the hypotheses needed to be separated into two groups. One group concerns the size of firms and legal strategies. The papers and the discussion provided only weak support for this hypothesis: firms of various sizes and types may use the same legal strategies. A second group concerns the relationship between legal strategies and labour market effects. There was stronger support for this hypothesis: the use of anti-dumping law or various customs procedures have different effects on the labour markets in the EU and China. To confirm or infirm these hypotheses definitively, we need more research than was possible in this exploratory Workshop. The Workshop succeeded however in showing that, in order to understand the impact and labour market effects of the legal strategies adopted by companies involved in international trade, we need to go beyond our traditional understanding of anti-dumping law and customs law. We need to take account of both sets of governments, companies and employees in anti-dumping cases and in the use of various customs procedures. companies' legal strategies. The Workshop also demonstrated the scope for fruitful cooperation in the future.

For the success of the Workshop, thanks are due to the European Science Foundation, especially Philippa Rowe; the London School of Economics, especially Professor Robert Reiner (then Convenor of the Law Department), Professor Paul Taylor (Director of the European Institute until recently), Nerys Evans (Law Department Manager) and Elizabeth Durant (Administrator of the LSE LLM Programme). Wu Qianlan, (Chinese Academy of Social Science and LSE PhD student) served efficiently as coordinator.

2. Scientific Content of the Event

The idea for this Workshop originated in a major research project currently being carried out by Professor Francis Snyder on EC anti-dumping actions against China from the beginning of Chinese opening-up in 1979 until the present. EC anti-dumping actions against China have increased steadily since 1979, corresponding roughly with the main periods of Chinese economic reforms. On the EU side, the complainants seem to be mainly small- and medium-sized enterprises (SMEs), acting through their trade associations. By contrast, as noted by the European Commission, SMEs do not often use the EC customs procedures known as outward processing and inward processing. Outward processing (OPT) consists in exporting EU products for further processing abroad before being re-imported into the EU. Inward processing (IPT) consists in importing products from abroad for further processing in the EU before being exported to third countries. The preliminary phases of this research project suggested that there was a possible correlation between the size and type of companies, their legal strategies in using different aspects of EC international trade and customs law as part of their operations, and the effects on the labour markets in the EU and China. The Workshop was designed to explore this possible correlation and to extend it by examining the effects of the different legal strategies on employment, that is, on the labour market in the EU and China.

Two hypotheses based on this earlier (and continuing) research provided the basis for the Workshop. Francis Snyder set them out in his Introduction. First, EU companies use different legal arrangements in their trade with China. Based on research so far, we can hypothesise that transnational companies and international production networks, including some SMEs, make proactive use of outward processing and inward processing customs procedures. These procedures are meant to allow firms to have products processed in other countries or to bring products into the EU for processing without having to pay customs duties that might otherwise be due. They help to create international links between EU firms and firms of other countries; the term 'EU firms' of course includes firms whose home base may be outside the EU, including China. The policy of the European Commission has been to encourage this strategy in order to foster the globalisation of EU industry. In contrast, most SMEs are only internationalized only weakly, if at all. Consequently, they do not use these customs procedures proactively in their business strategy. This could be either an effect or a cause of their weak internationalisation, or both. Instead they use EC antidumping actions defensively, based on complaints by their trade associations, to cope with imports from China. Thus there is a two-fold contrast between MNEs and IPNs, on the one hand, and SMEs, on the other hand: first, they use different parts of EC law, and second, they differ as to whether their business strategy involves the use of EC law proactively or reactively.

A second hypothesis was that each of these legal strategies has different effects on the labour market and labour market relations in the EU and China. EC laws about OPT and IPT are based on legal requirements intended partly to minimise labour market effects, especially unemployment, in the EC. They potentially foster links between EU firms and Chinese firms that, again potentially, permit labour market effects to be taken into account by both sides. But the two procedures are roughly mirror images of each other. OPT is sometimes called 'délocalisation', or exporting jobs. If this is correct, it would tend to decrease employment in the EU and increase employment in China. IPT may have a more positive effect on the EU labour market, but with negative effects on the Chinese labour market. In contrast, anti-dumping is a protectionist, usually defensive instrument. It seems to be used by weaker firms, by means of their trade associations, in order to gain time for adjusting or restructuring, or simply more or less long term protection, for example in the face of imports from China. Used by EU companies, it may have positive effects on the EU labour market, at least in the short run, and negative effects on the Chinese labour market, notably by depriving Chinese companies of access to the EU market. Anti-dumping is more visible and well-known to the public than either OPT or IPT. Perhaps partly for this reason, it is controversial, notably because of its implications for consumers.

The Introduction identified another pertinent element. The differences between anti-dumping and customs procedures are also of concern to governments. Different EU Member States, for example, may have quite different interests, with regard to the use and impact of these legal strategies. So too may the EU and China. It may be hypothesized that these differences may be sharpened in future as EU-China trade increases. An assessment of relations between types of firms, legal strategies and labour market relations can make an important contribution to the debate. The Workshop discussion alluded to this topic.

These hypotheses cut across disciplinary boundaries. Exploring them seriously requires knowledge of different fields which no single person could master. The Workshop thus was interdisciplinary, bringing together specialists in law, economics and political science, as well as from law practice and European Commission staff. Each was an expert in parts of the puzzle. The Workshop was designed to show that, with regard to this topic, interdisciplinary cooperation is more than the sum of the parts.

Among the specific questions put to the Workshop participants were:

- Is there a close relationship between (a) types of companies, (b) legal strategies and (c) labour market effects, in both the EU and China?
- What effects do different legal strategies used by business in international trade have on domestic labour market relationships?
- What constraints exist on business choice of legal strategies?
- To what extent do EU international trade and customs law play different mediating roles in the connection between different types of companies, on the

one hand, and labour market relationships, on the other hand?

- If different legal frameworks permit the use of different legal strategies by different types of companies, how are these legal frameworks related to the broader economic, social and political objectives of the EU as a whole?

The organisation of the Workshop was designed to illuminate different aspects of the basic hypotheses.

- Session I on European international trade and customs law introduced the basic legal framework and some preliminary hypotheses about how it is used by firms.
- Session II on different types of companies was intended to focus on how multinational companies use the law, and in particular on the concept of 'placing on the market'.
- Session III on company strategies and the law concentrated on how different types of companies use EC trade and customs law, in particular in their trade with China.
- Session IV on effects on the EU labour market asked how the legal strategies of different companies affects the labour market in the EU.
- Session V on effects on the Chinese labour market asked how the legal strategies of different companies affects the labour market in China.
- The concluding session aimed to bring these different facets together, draw some preliminary conclusions and identify themes for future research.

The Workshop was exploratory, deliberately limited in the number of participants and intended to be informal. The format was meant to maximise the time for discussion. Each paper-giver had 20 minutes to present the paper, each discussant had 10 minutes for comments, and each session had approximately 40 minutes for discussion.

In Session I on 'European trade law and China', Michael Lux of the European Commission gave an overview of EC customs procedures, in particular outward processing (OPT) and inward processing (IPT). His remarks dealt with the Common Customs Tariff, rules of origin, valuation and processing procedures (OPT and IPT). In each case he described the relationship of the relevant rules to anti-dumping duties. Applications for IPT require a viable commercial operation and hence are sometimes rejected, whereas applications for OPT are almost never rejected. Applications for anti-dumping investigation may sometimes be followed by informal contacts, instead of getting into the net of anti-dumping regulation.

The following paper by Peter Holmes of the University of Sussex provided an economist's view of anti-dumping and strategic behaviour. Economists define behaviour as strategic if its main benefits come from the incentive given to others to change their behaviour. Competitive or monopolistic firms do not usually need to use strategic behaviour in this sense. This conception differs fundamentally from the lawyer's view, according to which behaviour is strategic if it forms part of a strategy, in other words is intentionally oriented within a broader framework toward the

achievement of a specific objective. Economics also consider anti-dumping law to be always negative in its effects on employment, as well as in its welfare effects. Nevertheless, a law may be designed to achieve a strategic purpose, administrative authorities may make strategic use of discretion and firms may use law as a strategic device. An example of the last is the threat of a complaint of dumping to induce a formal or informal price undertaking or to encourage foreign direct investment in the potential complainant's domestic market. Thus, while starting from a different initial conception of strategic behaviour, the economist may nevertheless reach empirical conceptions very similar to those reached by lawyers.

Sessions II and III focused on different types of companies and their legal strategies. The paper by Candido Garcia Molyneux analyzed the concept of 'placing on the market' in EC regulatory law. It concentrated on large transnational companies. The concept of 'placing on the market' concerns for example production, re-use and resale, and distribution. It pits global business versus national regulatory authorities and national regulatory discretion. The regulator asserts its jurisdiction, and the company is concerned about potential liability. The concept of 'placing on the market' has no single meaning. Legal definitions provide guidelines, which differ according to context. From this standpoint, there is no single EU market. One can also ask whether the EU definition really matters. If business is global, EU standards become global standards, and transnational firms, though not legally liable, are likely to take responsibility for their products.

In the next paper, Francis Snyder analyzed two case studies of the strategic use of EU law by European firms engaged in trade with China. In this context, ‘legal strategy’ refers to the deliberate, strategic use by a company of law and legal institutions in order to enhance or protect its continuing business activities. One case study involved both anti-dumping and customs law, and the other concerned only anti-dumping law. Is there a correlation between company size, legal strategy and effects on the labour market? These two cases shed some light on this question. *Handbags* shows how SMEs use anti-dumping law defensively, and how they are contested by international production networks (IPNs) using OPT to supply the Community market. *Calcium Metal* demonstrates the intricate relationship between anti-dumping action as a means of protection against companies who use both regular (dumped) imports and OPT. It also illustrates the view of the European Commission, the Council and the Court of First Instance with regard to OPT in this context, even though it is difficult to avoid the suspicion that the particular finding here was influenced by the fact that the Community producer was a nationalized industry in an important ‘swing’ State. The two cases are informative, but by themselves, they are too limited a sample to disprove, or prove, the hypothesis that SMEs tend to use anti-dumping duties whereas IPNs and MNEs use IPT or OPT. Nor do they disprove or prove the hypotheses concerning the labour market effects of anti-dumping duties, OPT and IPT. Further research is required.

The following paper by Jens Mortensen shed light on another aspects of companies' legal strategies by analyzing EU transnational companies and their legal strategies in WTO trade disputes. It emphasized the close link between transnational companies and their home State. It also stressed the need to look at TNCs in their own right. From the latter perspective, legal strategy is a subset of commercial diplomacy. Both viewpoints are useful. The paper then gave examples of WTO cases in which EU firms had used the WTO dispute settlement system and sought to explain why. Cases included *GM*Os, *Bananas*, *Fujitsu*, *FSC* and the *Automobile* case.

Candido Garcia Molyneux, Richard Hyman and Peter Holmes acting as discussants, and other participants in the general discussion during the first three sessions, remarked on the political uses of anti-dumping law and the economic and political interests underlying legal concepts and procedures. They also identified out-of-date concepts as an obstacle to refining the basic hypotheses. Several stressed that lawyers and economists used different conceptions of 'strategic behaviour'. Another difference between people in the two disciplines is that economics are more likely to say that anti-dumping actions have harmful effects on labour markets everywhere. From the economist's standpoint, it is difficult to conceive of anti-dumping as a way of transferring jobs. Nevertheless, we need to distinguish between real effects and actors' perceptions; the latter are important in social action, even though they may not reflect what happens in practice as a result of their actions.

Some participants also pointed out that anti-dumping and OPT and IPT were not really alternatives; they operated in different spheres. Processing under customs control was another important customs procedure which deserved attention. The beginning hypotheses are too general. For example, big firms often use anti-dumping. We need to look at concrete situations and at individual firms and try to understand their legal strategies. The legal lens needs to differentiate more clearly between different types of cases. We also need to study failures to obtain anti-dumping duties and cases which are not brought to the WTO: these examples can teach us much about who uses law and why. For example, most transnational companies avoid the WTO; they prefer to deal with disputes out of the public eye because of public relations problems and go to the WTO only as a last resort.

Sessions IV and V dealt with effects on the EU labour market and effects on the Chinese labour market respectively. Diamond Ashiagbor's paper discussed corporate governance and labour market relations in the EU. The main focus was the role of the labour market and employment in preserving the EU social model. The paper emphasised the role of soft law, corporate social responsibility and deregulation orientation in EU policy. It concluded that in company restructuring and labour market relations, ownership structure was important but not necessarily decisive in the emergence of partnership between employers and employees. The paper draw clear links to the international trade context.

Acting as discussant, Hugh Collins identified a number of links between EU social policy and company law policy on the one hand and trade law and customs law on the other hand. They include concerns about social dumping and the existence of alternative market strategies. He also identified three periods in the history of EC thinking about company strategies and labour markets, including the most recent period in which, on the whole, the EU aims to position itself at the high end of the world economy so avoids anti-dumping measures and concentrates on products which cannot be produced elsewhere. Collins also concluded that it is difficult to find evidence of a coherent EU strategy about the relation betwen company size and social policy. In labour law, for example, company size is not an important factor, even though it may be significant in economic sociology for example.

Discussion criticised the idea of an EU social model and the assertation that high levels of social provision undermined international competitiveness. The EU had multiple discourses about companies and social protection. It seemed to make sense however to talk about mutual learning among companies and among governments and the EU.

The paper by Leila Fernandez-Stembridge concerned the relations between foreign direct investment, trade and the Chinese labour market. It first discussed China's dependence on the external economy and the redefinition of China's comparative advantage. A second part traced the macroeconomic evolution of China's economy. The final part of the paper dealt with the social web in China. The WTO was already part of Chinese economic reforms, and domestic economic reform has been a predictable path of internal readjustment. In the long term, domestic reforms are required. Job creation was crucial. The maintenance of China's low labour cost comparative advantage is likely to be important for the next 40-50 years.

Shujie Yao's paper dealt with unemployment inflow and outflow in urban China. It analysed the meaning of 'unemployed' in Chinese statistics and the changes in industrial structure and ownership structure. The paper put forward two hypotheses. First, urban employment is due to high wages, rural migration and population pressure. Second, ownership diversification and industrial structural change can lead to more employment or a reduction in employment. One can ask what role the law does and might potentially play in these processes.With regard to international trade effects, the correlation between international trade, openness and increasing employment is simply a hypothesis. Many exports are based on processing. EU trade barriers may have a positive effect in requiring the Chinese government to take restructuring measures. But up to now international trade and FDI have been given too much attention. Priority needs to be given to rural employment. International trade can be useful if it leads to increased competitiveness.

In his comments on these papers, Willem van der Geest made the point that comparative advantage is a key factor: the problem was a scarcity of skills. He also

stated that trade should increase employment, so remained important. Further discussion focused on the Chinese theory of 'three represents', the main importance of which lay in the increased role of entrepreneurs. Non-tariff barriers within China remain problematic. But the domestic market is more important than the external market for China. Recent increases in trade have not been translated into employment. The mindset today differs from that in the past. China has a culture of hard work and high saving, which are more important than low labour costs.

In conclusion, Francis Snyder summarised the discussion by noting the different conceptions of lawyers and economics of strategic behaviour/company strategy, on the one hand, and of the perceived and actual effects of anti-dumping law, on the other hand. He also distinguished between the beginining hypotheses of the Workshop by identifying two strands. One strand concerned the relationship between company size or type and legal strategy. The other strand concerned the relationship between legal strategy and labour market effects. Putting the two strands together so as to link three variables proved to be not only unwieldy but also difficult to sustain analytically. Future research should focus on other strand or the other, at least in the short run. Later work, both quantitative and qualitative, might then try to see if the three variables were actually related. The conclusion to the Workshop also pointed to the many benefits to be gained through interdisciplinary cooperation. The collaboration of lawyers, economists and political sciences proved extremely fruitful. All participants agreed that steps should be taken to ensure that they could continue to work together on issues concerning different types of companies, legal strategies and labour markets, as well as more generally with regard to international trade between the EU and China. All expressed their thanks to the European Science Foundation for making possible this very stimulating, exploratory Workshop.

3. Final Programme

ESF/SCSS EXPLORATORY WORKSHOP

The Strategic Use of European Law and Its Implications for Labour Market Relations in the EU and China:

Transnational Companies, International Production Networks and SMEs

Organised under the aegis of
the Law Department and the European Institute,
London School of Economics

12-13 December 2003

FRIDAY 12 December **(Building D of LSE, Clement House, Room 202)**

14:00-15:00 Opening

Welcome - *Robert Reiner* (Convenor, Law Department, LSE)
Representative of European Science Foundation [PowerPoint]

Introduction - *Francis Snyder* (Aix-Marseille, LSE)

15:00-16:30 Session I - European trade law and China

Chair *Willem van der Geest* (EIAS, Brussels)

Paper EC customs procedures: OPT and IPT
Michel Lux (European Commission, Brussels)

Paper EC Anti-Dumping Law and EU-China Trade
Peter Holmes (Sussex)

Discussant *Candido Garcia Molyneux* (Covington & Burling, Brussels, College of Europe (Natolin)

16:30-17:00 Break

17:00-18:15 Session II <u>Different types of companies</u>

Chair Michael Lux (European Commission)

Paper Multinational companies and the concept of placing on the 'market'
Candido Garcia Molyneux (Covington & Burling, Brussels, College of Europe (Natolin))

Discussant *Richard Hyman* (LSE)

SATURDAY 13 December (**Vera Anstey Room of the Main Building of LSE)**

09:00-10:30 Session III <u>Company strategies and the law</u>

Chair *Jacques Bourrinet* (Aix-Marseille)

Paper Company strategies, Anti-dumping, OPT and IPT
Francis Snyder (Aix-Marseille/LSE)

Paper Multinational companies and legal strategies
Jens Mortensen (Aarhus)

Discussant *Peter Holmes* (Sussex)

10:30-11:00 Break

11:00-12:15 Session IV <u>Effects on the EU labour market</u>

Chair David Marsden (LSE)

Paper Company size, trade and labour market relations
Diamond Ashiagbor (Oxford)

Discussant *Hugh Collins* (LSE)

12:15-14:00 Lunch

14:00-16:00 Session V <u>Effects on the Chinese labour market</u>

Chair Diamond Ashiagbor (Oxford)

Paper Trade, FDI and the Chinese labour market
Leila Fernandez Stembridge (Madrid)

Paper	Urban unemployment inflow and outflow *Shujie Yao* (Middlesex, London)
Discussant	*Willem van der Geest (EIAS Brussels)*

16:00-16:30 Break

16 :30-17 00 Conclusions Francis Snyder (Aix-Marseille/LSE)

4. Assessment of the Results

All participants in the Workshop gave a positive assessment of the Workshop from two standpoints. First, from the research standpoint the Workshop helped to advance our thinking about the hypotheses with which the Workshop began. It demonstrated the variety of relationships between company size and type on one hand and legal strategies on the other hand. It also showed the multiplicity and complexity of labour market effects which might conceivably be traced partly to different legal strategies. The Workshop helped to clarify the basic hypotheses by requiring us to distinguish two different strands: (a) the relation between company size and type and legal strategies, and (b) the relation between legal strategies and labour market effects. It showed that both are promising lines of research, while at the same time it demonstrated the necessity for further studies of specific contexts, for example particular firms or specific sectors or even more specific legal cases as part of a broader research methodology of case studies.

Second, with regard to interdisciplinary cooperation, the Workshop was extremely helpful in revealing and clarifying certain fundamental differences of approach and definition among lawyers and economists. The political scientists present tended to hold views similar to those of lawyers. The open and detailed discussions at the Workshop were also helpful however in demonstrating that lawyers, economics and political scientists share a number of interests, approaches and bodies of data and, once the initial differences of view are canvassed and recognised, they can work together very fruitfully.

The Workshop thus made a very useful, indeed important contribution to the development of the field. Its contribution was recognised recently by the fact that the UK Economic and Social Research Council awarded a grant to Professor Francis Snyder to establish an ESRC EU-China-WTO Research Seminar Network, based at the London School of Economics, and consisting of six seminars over a period of two years. The core participants of the Research Seminar Network are drawn from the

participants in the ESF Exploratory Workshop. The basic model is also similar, because the ESRC Research Seminar Network is interdisciplinary, and involves academics, practising lawyers, officials from government, the EU and the WTO and civil society organisations, and is international with participants from the EU and China. The establishment of the ESRC EU-China-WTO Research Seminar Network, starting in early 2005, is intended to build on the results of the ESF Exploratory Workshop.

5. Final List of Participants

(see also Separate Document)

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6. Statistical Information on Participants

The Workshop include a wide range of participants: senior academics and EC officials, middle and junior academics, postdoctoral students, and doctoral students. Senior academics included Bourrinet (now emeritus professor), Collins, Hyman, Palmer, Reiner, Snyder and Van der Geest. Middle and junior academics included Fernandez-Stembridge, Holmes, Marsden, Mortensen and Yao. Garcia Molyneux is a young practising lawyer. Lux is a senior EC official. Ashiagbor was then a postdoctoral fellow and is currently (2004) a young academic. Wu is a postgraduate PhD student. A number of other LSE PhD students participated informally in the Workshop. Participants came from a variety of countries: Belgium, China, France, Spain, United Kingdom. In addition to law practice and government service, they were drawn from law, economics, industrial relations and political science.