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Globalization of Law, Politics, and Markets - Implications for Domestic Law - A European Perspective

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Globalization of Law, Politics, and Markets - Implications for Domestic Law - A European Perspective

Erratum

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The international system after the end of the Cold War has become vastly more complex in structure, tasks, and perceptions on the part of the old and the new international actors. Processes of globalization and internationalization as well as strong countervailing forces of old and new nationalisms are but three major facets of this new vexing complexity. If one sets out to assess the implications of the globalization of law, politics, and markets for domestic law and its adaptation to the new situation in the United States, in European countries or within the European Community (EC), one must have a rather precise picture of what globalization of the respective subjects actually means, where it happens, and to what extent. It is also necessary, however, to put the phenomenon of globalization into proper historic perspective in order to understand the causes and forces leading to processes of globalization within the international setting.

Thus this paper will deal with the new complexities of the international system and, specifically, with aspects of globalization, in three steps. Part one will elaborate on the notion of globalization and on the international setting in which it does or does not take place. Part two will describe and analyze some of the strategies, mechanisms, and instruments applied in the process of globalization in the areas of trade and the environment within the frameworks of the General Agreement on Tariffs and Trade (GATT), the Organization for Economic Cooperation and Development (OECD) and, of course, the EC. The third and final section will try to draw some conclusions from the preceding analysis. It will also try to give some
tentative answers as to where and how the process of globalization of law, politics, and markets asks for changes or reforms in the domestic legal orders and will ask for a modification of traditional nation-state centered perceptions of international political, economic, and legal transactions in the United States and EC Member States.

I. COUNTERVAILING FORCES: GLOBALIZATION, INTERNATIONALIZATION AND RENATIONALIZATION—THE INTERNATIONAL SETTING

A. Globalization Defined

For more than a century an increasing number of domestic or national matters have become "internationalized," i.e., made the subject of bi- or multilateral cooperation, mostly in an institutionalized framework, a process which, in a wider sense, could be called internationalization. In the more recent past, however, the term globalization has entered into the vocabulary of scholars as well as political practitioners. Although it seems, at times, as if the new term is rather carelessly used as a trendy synonym for the word "internationalization," such interpretation of the term "globalization" would fall short of its distinct meaning. For instance, certain serious threats to the environment such as ozone layer depletion or climate change caused by the so-called "greenhouse effect" are of global rather than international concern since they affect humankind everywhere, regardless of national boundaries. Similarly, today's financial markets are globalizing rather than internationalizing (which they did in earlier decades) since, for instance, the movement of capital has largely become independent of the sovereign control of state agencies. Thus, it seems that globalization as distinct from

2. This term in international law originally had a narrower meaning, see Rüdiger Wolfrum, Internationalization, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 268 (Rudolf Bernhardt et al. eds., 1987). For a historically-oriented account of the process of internationalization in the broader sense, see GEORG DAHM, JOST DELBRÜCK, AND RÜDIGER WOLFRUM, VÖLKERRECHT (1989).

3. As early as 1943, Wendell Willkie touched upon the notion of globalization in a farsighted book. WENDELL L. WILLKIE, ONE WORLD (1943). However, the term has become "common coin" after influential institutions such as the Club of Rome called attention to the global challenges posed by the ecological crisis. See, e.g., DENNIS L. MEADOWS, ET AL., THE LIMITS TO GROWTH; A REPORT FOR THE CLUB OF ROME'S PROJECT ON THE PREDICAMENT OF MANKIND (1972); GERALD O. BARNEY, COUNCIL ON ENVIRONMENTAL QUALITY AND THE DEPARTMENT OF STATE, THE GLOBAL 2000 REPORT TO THE PRESIDENT (1981). For a perceptive analysis of processes of globalization of international policies, see Dieter Senghaas, Weltinnenpolitik—Ansätze für ein Konzept, 47 EUROPA ARCHIV 643, 643-52 (1992).

4. Professor Bruce Markell pointedly observed this trend, Remarks at the Interdisciplinary
internationalization denotes a process of *denationalization* of clusters of political, economic and social activities. Internationalization, on the other hand, refers to cooperative activities of *national* actors, public or private, on a level beyond the nation-state but in the last resort under its control. Another difference between the two notions is that internationalization serves as a supplement to the nation-state's efforts to satisfy the needs of its people, i.e., the *national interest*. On the other hand, at least ideally, globalization is to serve the *common good of humankind*, e.g., the preservation of a viable environment or the provision of general economic and social welfare. In this sense, globalization is a normative concept since it is related to a value judgement, i.e., that the common good is to be served by measures that are to be subsumed under the notion of globalization. At the same time, one has to realize that globalization also signifies a factual process based on the dynamics of, for instance, the markets.

On the basis of the foregoing considerations, *globalization* as understood here may be defined as the process of denationalization of markets, laws and politics in the sense of interlacing peoples and individuals for the sake of the *common good*. *Internationalization*, on the other hand, may be defined as a means to enable nation-states to satisfy the *national interest* in areas where they are incapable of doing so on their own. A short survey of the evolution of the international system during the last century will show that the two processes can be identified as consecutive stages in the development of the international system. But such a survey will also reveal that globalization and internationalization are still met by strong countervailing forces of old and new nationalisms with the result that neither internationalization nor globalization may be understood as exclusive and dominant characteristics of the present international system. Particularly, globalization is neither a universal process nor is the concept universally applied. Nor is globalization involving all states and regions alike, nor is it global in the sense that all major aspects of political, economic, or social life are actually encompassed by the process.
B. Countervailing Forces: Renationalization vs. Internationalization

The international community has been witnessing one of the most profound upheavals in the international system since the breakdown of the old Eurocentric order after World War I. The seemingly stable bipolar power structure dominating the post-World War II order, reinforced by or based on the ideological division between the Soviet-led Socialist camp and the western world, has vanished. The apocalyptic threat of nuclear annihilation of most of the "civilized world" has become remote or even eliminated altogether. Yet the international system is far from entering the millenium of perpetual peace, general welfare, and universal observance of human rights. On the contrary, although a number of serious regional conflicts have been eased in the wake of the end of the Cold War, other grave conflicts, such as in the Near East, persist with unpredictable implications for international peace and security. In addition, a host of new, rather vicious conflicts have surfaced, e.g., ethnonationalist struggles for political and religious self-determination as in the former Soviet Union and in the former Yugoslavia, but not confined to these areas. The causes of these violent struggles have partially historical roots, but they are also indicative of a new phenomenon that will have a strong impact on the future development of the international, nation-state based system. Ethnonationalism has reemerged after the breakdown of the overarching power structures that suppressed long standing ethnonationalist antagonisms. But today's ethnonationalism has another, modern dimension to it. As people worldwide have become more politically conscious and, therefore, less ready to accept public authority as such, they are turning to measures of "self-help," violently if necessary, and to religiously (mostly fundamentalist) based group identification. As a result we see the international system confronted with a fast-growing diversity of political actors—new states and nations striving to become states—who are highly politicized and suspicious of public authority whether international or national. Tendencies of renationalization can also be observed even within

well-institutionalized frameworks of supranational cooperation such as the EC.\(^6\)

On the other hand, the network of international organizations that was set up in the late nineteenth century and that have continuously grown in numbers and scope of competence,\(^7\) has largely remained intact. In fact, the central international organization, the United Nations (U.N.), has been revitalized as a result of the end of the Cold War. It is well worth remembering that international organizations have their *raison d'être* in the fact that states realized their structural inability as independent entities to satisfy the economic and security needs of their societies in a time that was characterized by dramatic technological and social change.\(^6\) International organizations reflect the international community’s resolve to take on *international* responsibility for the maintenance of international peace and security, the protection of human rights, economic and social welfare, international communication in the widest sense,\(^9\) and cultural exchange. However, with the exception of the recent and so far unique phenomenon of supranational cooperation within the EC, exercising international responsibility in the fields named above remained, at least *de facto*, nation-state oriented. The decision-making rules continued to be based on the principle of sovereignty. Institutionalized international cooperation was perceived as an instrument to *supplement* national governments where they were unable to fulfill the domestic needs of their people, not as a means of serving the international community at large. States came to think internationally to a certain extent, but neither they nor nongovernmental actors had yet begun to think globally.

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6. The changed attitudes of the electorates in Denmark, France, and Germany toward greater integration of the EC into a union with a common currency are indicative of this trend of cherishing national sovereignty; see the report on the French referendum on the Maastricht Treaty and public opinion polls in the other states named, Craig R. Whitney, *Europe’s Muted Joy, and Its Misgivings*, N.Y. TIMES, September 21, 1992, at A1, A8. The Danish electorate, which has rejected ratification of the Maastricht Treaty by a small margin, may come out in favor of the Treaty after some modifications accommodating Danish anxieties, but the majority again will most likely be marginal.


8. *Id.* at 11-13.

C. Entering the Era of Globalization: Causes and Forces

However, the post-World War II era saw a gradual change. It is not by chance that the United Nations was empowered to take binding decisions against aggressor states under Chapter VII of the U.N. Charter, a rather dramatic move away from the pre-war credo of state sovereignty. The global experience of the devastating effects of modern warfare, including the first uses of atomic weapons, induced the international community to rethink the century-old concept of state sovereignty. The international community began to realize that international peace and security had become not only an international responsibility, but a universal or global responsibility and they limited the principle of state sovereignty accordingly. The East-West confrontation tended to cloud this historic shift of focus, but with the end of the Cold War the new perception has become more clearly visible. It has become reinforced for a number of reasons, which follow.

1. Global Threats to Peace and Security

Although the threat of nuclear annihilation as a result of a nuclear exchange between the Superpowers is remote today, universal peace and security are still in jeopardy. Some nuclear blackmail, that resulting from uncontrolled—and possibly uncontrollable—proliferation, grave environmental pollution as a means of warfare (the weapon of the world’s disenfranchised), and severe ethnonationalist conflicts, can no longer be perceived of in traditional terms of international security policies.

2. The Global Challenge of Underdevelopment and Poverty

The impoverishment of a large segment of the international community due to underdevelopment that had already been recognized in the so-called North-South dimension, has become a global problem of the first order.


After the breakdown of the Soviet empire, underdevelopment has now also become a West-East phenomenon. Underdevelopment and increasing impoverishment of a great number of peoples start right at the Eastern borders of Central Europe.

3. Global Threats to the Environment

With the overriding concern for the maintenance of international peace between the two major alliance systems under the leadership of the United States and the Soviet Union removed, the international community is gradually recognizing the existential threats to the survival of "Spaceship Earth" posed by the increasing destruction of the human environment. Ozone layer depletion, global warming, water pollution, soil and groundwater pollution, and vast land areas radiated by nuclear waste have reached dimensions that transcend the capabilities of not only individual states but also regional organizations to cope with these threats. The above problems pose global threats. The close interrelation of environmental destruction and underdevelopment adds to the global scope of these problems.

4. The Global Challenge of Mass Migration

As a result of impoverishment, environmental destruction, and in a great number of cases ethnonationalist conflicts, a fourth problem of global dimension has emerged—mass migration. Intracontinental and transcontinental migration have become worldwide phenomena that cannot be dealt with adequately in terms of refugee relief programs, granting asylum, or other traditional instruments of temporary applicability. Conservative estimates of the present migrations maintain that they are still only the proverbial tip of the iceberg.12

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12. On the phenomenon of the new mass migrations, see Eberhard Jahn, Migration Movements 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 377, 378-79 (Rudolf Bernhardt et al. eds., 1987) (with further references to earlier comprehensive works on the subject). For shorter accounts of recent developments in migration movements, see GLOBALE TRENDS. DATEN ZUR WELTENTWICKLUNG UND FRIEDEN (Stiftung zur Entwicklung und Frieden ed., 1991); Albert Mühlum, ARMUTSWANDERUNG, ASYL UND ABWEHRVERHALTEN. GLOBALE UND NATIONALE DILEMMATA, B/7 AUS POLITIK UND ZEITGESCHICHTE BEILAGE ZUR WOCHENZEITUNG DAS PARLAMENT 3 (1993); Clemens Geißler, Neue Völkerwanderungen in Europa, 47 EUROPA ARCHIV 566 (1993).
One certainly realizes that the preceding list of factors covers only the dark side of the matter. Despite, or rather because of this, the list enumerates factors that contribute strongly to a globalization of perceptions and that call for what E.v. Weizsäcker has termed "Erdpolitik" (earth policy), or what this author prefers to call "Weltinnenpolitik" (world interior policy), a term I borrowed from C.F.v. Weizsäcker. But it is also evident that the process of globalization with regard to the issues named largely occurs on the level of adhortation rather than in fact. Treated below are the instances where globalization in the areas named has already entered the stage of realization, e.g., in the form of conventional international law (climate convention, ozone layer protection convention, ecological trade regulation) and its impact on domestic law, politics, and markets.

The question remains where else and to what extent globalization has entered the real world of actual implementation. A fifth set of factors has contributed to a process of actual globalization, i.e., to the establishment of international and to some extent global (or denationalized) markets.

5. Globalizing Forces in the Markets

The grand vision of an international economic order based on the principles of nondiscrimination and free trade backed by the foundation of an International Trade Organization, as enunciated at the Bretton Woods Conference, was never realized. However, the pragmatic implementation of the General Agreement on Tariffs and Trade (GATT) together with the establishment of the World Bank, the International Monetary Fund

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14. See Carl Friedrich Freiherr von Weizsäcker, Das ethische Problem der modernen Strategie, 24 Europa Archiv 183 (1969); see also Senghaas, supra note 5.
15. See discussion infra part II.C.
16. For a summary account of the history of the Bretton Woods system and GATT, see Wolfgang Benedek, GATT—Allgemeines Zoll- und Handelsabkommen, in Handbuch der Vereinten Nationen 201-02, (Rüdiger Wolfrum ed. 1991); see also Günther Jaenicke, General Agreement on Tariffs and Trade, in 5 Encyclopedia of Public International Law 20 (Rudolf Bernhardt et al. eds., 1987).
(IMF),\textsuperscript{19} and the Organization for Economic Cooperation and Development (OECD)\textsuperscript{20} has contributed to the foundations of an international economic order. This order now also forms the basis of the ongoing globalization of the economic order.\textsuperscript{21} But besides the basic framework of a nondiscriminatory and free-trade oriented economic order, additional factors were necessary to start the process of globalization of markets, politics, and law. These factors are to be found in the technological evolution, or rather, revolution, of transnational communication. The rapid advancement of air traffic has brought the economic community closer together than ever before. But much more importantly, the telecommunications revolution has truly globalized international markets, particularly financial markets. What happens at the Tokyo stock market is of instantaneous relevance in Frankfurt, London, and—with little delay—in New York. The movement of capital, once a matter of weeks or days, occurs in a matter of seconds today. A domestic decision on interest rates in many cases immediately affects trade policies worldwide. This momentous acceleration of market transactions does not only amount to quantitative time savings; it is actually changing the market and the agents’ behavior qualitatively. A third factor contributing to the globalization of markets, closely linked to the high international mobility of capital, goods, and services, is constituted by the emergence of transnational corporations.

However, here a caveat is necessary. One has to remember that globalization is confined to the “sunny side of the globe.” It is the globalization of markets within the framework of GATT, OECD, and to some extent the EC. The rest of the world is either only loosely linked to the world of globalizing economies or left out altogether. The EC is a special case in this context. Certainly, the European Community constitutes a prime example of transcending the parochial perspective of narrow national markets. The completion of the internal market has created an


\textsuperscript{21} For a concise account of the role and function of GATT, OECD, the International Bank for Reconstruction and Development [hereinafter IBRD] and IMF for development of the international economic order into an at least partially globalizing one, see Ursula Heinz, Weltwirtschaftsordnung, in \textit{Handbuch der Vereinten Nationen}, supra note 16, at 1080 \textit{passim}. 
extensive zone without internal tariffs and other barriers to free trade. In this sense, the EC could be perceived of as the result of "regional" globalization if one could create such a paradoxical term. However, the EC, particularly if the Maastricht Treaty\textsuperscript{22} enters into force, is more than a "globalized market" and may eventually become something quite different. Although there is not yet a clear consensus with regard to what the status of the European Union is to be,\textsuperscript{23} it cannot be denied that the Union in many ways has traits of a federal entity.\textsuperscript{24} Union citizenship, obligatory judiciary, binding legislative powers by majority vote, and supremacy of EC law over domestic law are the major characteristics of this new supranational organization.\textsuperscript{25} A common foreign and security policy—if it ever comes to be—added to the picture may force one to recognize that the EC is, to say the least, an ambivalent example of what one may understand by globalization. The "Fortress Europe" perception of the EC by observers from the outside world is evidence of not totally unfounded anxieties that the "globalized European market" may turn into a large but domestic market.\textsuperscript{26}

In summary, one may conclude that the international system is complex and that it is necessary to approach the issue of globalization of law, politics, and markets rather carefully in the light of its limited actual scope and in the face of the various countervailing forces. Particularly, the

\textsuperscript{22} For the English text of the treaty, see Treaty on European Union, 32 I.L.M. 253.

\textsuperscript{23} The President of the EC Commission, Jacques Delors, in a recent statement on the Maastricht Treaty has observed, those favoring a federated European state entity could feel comfortable with the Treaty and the goal of a European Union as provided for in the Treaty, but that those opposed to any kind of federated Europe could find themselves encouraged by the Treaty as well. See Jacques Delors, Entwicklungsperspektiven der Europäischen Gemeinschaft, B1/93 AUS POLITIK UND ZEITGESCHICHTE—BEILAGE ZUR WOCHENZEITUNG DAS PARLAMENT 3, 4 (1993).

\textsuperscript{24} For a thorough discussion of the various options of the further development of the EC under the Maastricht Treaty and the present legal and political status of the EC, see STAATWERDUNG EUROPAS? OPTIONEN FÜR EINE EUROPÄISCHE UNION (Rudolf Wildenmann ed., 1991).

\textsuperscript{25} Union citizenship was created by Article B of the Maastricht Treaty and regulated in more detail in Articles 8-8d of the EC Treaty revised. For a concise analysis of the other elements mentioned in the text, see William J. Davey, European Integration: Reflections on Its Limits and Effects, 1 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 185.

\textsuperscript{26} A related example is the recent introduction of new import tariffs on bananas from outside the EC which contradicts the free trade attitude claimed by the EC. See Europäische Zeitschrift für Wirtschaftsrecht (EuZW), 75 (1993). For a discussion of the future political and trade posture of the EC and the "Fortress Europe" issue, see Robert Zadra, Towards a European Identity, in TOWARDS A NEW PARTNERSHIP—U.S.-EUROPEAN RELATIONS IN THE POST-COLD WAR ERA 55 (Nanette Gantz & John Roper eds., 1993); James B. Steinberg, The Case for a New Partnership, id. at 105; Juan de Luis, Economic Aspects, id. at 147.
ambivalent nature of the EC has to be realized. Yet, there is enough
evidence to allow discussion about globalization, i.e., the denationalization
of markets, relevant laws, and politics in the sense of interlacing peoples and
individuals for the sake of the common good, not the mere enhancement of
national interests. And in light of the evidence at hand, one is able to draw
upon the experiences in the various areas where globalization has been
realized beyond the mere adhortative level in assessing the impact of these
processes on domestic legal orders, politics, and markets.

II. STRATEGIES, MECHANISMS, AND INSTRUMENTS OF
GLOBALIZATION: EXPERIENCES FROM GATT, OECD, AND THE EC

A. The Means of Globalization

The spectrum of strategies, mechanisms, and instruments of
globalization extends from the establishment of international authorities with
ex ante “legislative” and ex post “repressive,” liability enforcement
powers,27 to consensual coordination of globalization efforts and to
decentralized market-oriented approaches. Basically, one may identify
preferences for these means of globalization with two opposing credos:
first, the belief in centralized planning or interventionist strategies and
mechanisms, and second, reliance on decentralized, liberal market oriented
strategies or mechanisms. The propagation and application of these two
basic approaches and a pragmatic mix of both means of globalization can
be identified on the different levels of globalization as well as in different
subject areas. But we can also observe that market oriented strategies,
mechanisms, and instruments tend to be applied where the globalization of
trade as a means of maximizing economic welfare for the greatest number
constitutes the policy goal.28 Intervention into the market is accepted only
when there is market failure. Five areas of market failure can be identified:
1) supply of public goods (public infrastructure such as parks, swimming
pools, etc.); 2) use of common resources (air, water, soil, etc.) in case of

27. For a discussion of the merits or disadvantages of ex ante harmonization by regulatory
interventions and ex post measures as well as the positive results of “institutional competition,” see
28. For a strong argument advocating moderate market-oriented strategy for the integration of
the EC—a potentially “Schumpeterian event, an institutional innovation,” see id. at 13.
negative externalities (abuse of common resources at the expense of the community); 3) increasing returns to scale (increased production, reduced prices leading to a natural monopoly); 4) lack of future markets because of moral hazards; and 5) general problems of income distribution, social security, etc., where political, not market, determination is considered necessary. But where other considerations such as the protection of the environment or underdevelopment dominate the determination of policy goals, the choice of means seems to tend towards interventionist concepts. Thus, international approaches to a restructuring of the world economic order with a view to overcoming underdevelopment—the New International Economic Order (NIEO)—were basically nonmarket oriented.

There are several reasons for this difference in choice and preference of globalization means. First of all, the market model meets with a fair amount of distrust when it comes to the problem of securing social values attached to what traditionally is considered a “public good” in contrast to securing “private goods.” Free trade conditions are widely accepted as advantageous to secure the provision of private goods for adequate prices, but not for “public goods.”

Similar considerations apply to “common resources” like clean air, water, and soil, that are conceived of as nonmarketable goods because access to them is traditionally considered to be free, i.e., they do not have to be paid for. Free access to common resources, however, leads to overexploitation and thereby to negative externalities, i.e., the costs of overexploitation are burdening the taxpayer, not the beneficiaries, of overexploitation. Central regulation to achieve the preservation and thereby the further availability of common resources is considered the adequate means. A second reason is that in view of the overwhelming dimension of the perceived threats to common resources such as the environment, the market-model approach would appear not to guarantee swift and effective

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30. For this kind of approach, see Brun-Otto Bryde, Von der Notwendigkeit einer neuen Weltwirtschaftsordnung, in Neuordnung der Weltwirtschaft 29 (Brun-Otto Bryde et al. eds., 1986); for a market-oriented approach in the same context, see, Thomas Oppermann, Über die Grundlagen der heutigen Weltwirtschaftsordnung, in id. at 11.
31. For a pertinent discussion of the notions of “public” and “private” goods in the context of environmental policies, see Gerhard Prosi, Statische und dynamische Effizienz der Umweltpolitik, 66 Bayerisches Landwirtschaftliches Jahrbuch 259 (1989).
32. Id.
33. Id.
redress; the decentralized decision-making process of the market is believed to be unable to provide for the needed uniformity of concerted efforts necessary to cope with transborder and, even more so, global threats of the destruction of common resources. These arguments contend that in the area of common resources there is, *per definitionem*, no market mechanism which could be set to work. However, from the point of view of pure economic theory, this is false.\(^{34}\) According to one school of thought, the fallacy of considering common resources as untradeable lies in the fact that it is not the public good, e.g., clean air, which is at issue, but the right to use it. This right, once allocated to a user for an adequate price, becomes a private good and the costs for it become “internalized.”\(^{35}\) Under conditions of market competition, the user of a common resource comes under pressure to reduce the amount of internalized cost, i.e., to reduce the use of the resource. This reduction of the use of the common resource turns into a reduction of, for instance, air pollution. As an additional advantage, the user provides for technological innovation as a means of reducing the costs for the use of a common resource—a typical achievement of the laws of the market.\(^{36}\) Another, probably more realistic, school of thought does not deny the necessity of certain regulatory measures but is inclined to accept a decentralized scheme of regulation.\(^{37}\)

For instance, if states are left free to set their own standards of environmental protection, a process of “institutional” competition would still ensue. Although under the principle of origin, goods with lower environmental quality remain freely tradeable, the level of environmental standards will still improve because, given the acceptance of an improved environment as a high social value, the goods conforming to higher standards of environmental quality will be more competitive.\(^{38}\) Rigid central *ex ante* regulations, on the other hand, will not provide for incentives to strive for improved environmental standards and respective innovative technology.\(^{39}\) But even more importantly, in an international environment

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34. See SIEBERT, *supra* note 27, at 32, who discusses a market oriented approach to a European environmental policy that is based on the concept of institutional competition; see also Prosi, *supra* note 31, *passim.*


36. *Id.* at 269.

37. For a clear example on point, see SIEBERT, *supra* note 27, at 32.

38. *Id.* at 32.

lacking a central legislative authority, the achievement of maximum or optimum regulations does not seem a realistic assumption.

The theoretical dispute over the validity of these and similar strategies cannot be pursued here any further. Instead, experiences at the different levels and subject areas of globalization processes will be considered: first, the globalization of markets in the area of free trade; second, the strategies and instruments used by international organizations like the GATT and the OECD, on one hand, and the EC, on the other.

B. Globalizing Markets in the Free Trade Area

1. The Case of GATT

Viewed from the perspective of the original concept of GATT, this treaty embodies the core principles of liberal market theory. The "most favored nation" principle, the reduction of customs tariffs, the principle of nondiscrimination, and removal of non tariff trade barriers are to be implemented with the ultimate goal of increasing the world trade volume, raising the standard of living, and providing for full employment. The scope of GATT, that applies de jure to well over 100 states and de facto to roughly another 30 states, is restricted to trade in goods. Services and movement of capital are not covered by the Agreement, and negotiations on questions of transborder services are carried out formally outside the GATT. But even recognizing these limitations on the scope of GATT, its global reach is without question. This point is also borne out by recent trade statistics which show that about eighty-five percent of world trade takes place within the realm of GATT.

The globalization of markets by a basically deregulatory approach in the fields of customs tariffs, non tariff trade barriers, and nondiscrimination has, however, been modified over the decades in favor of strengthening the global reach of GATT. Although not in conformity with the basic market philosophy of GATT, exceptions to the "most favored nation" principle have

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40. For a summary description of the basic GATT principles, see Jaenicke, supra note 16, at 22-6; Benedek, supra note 16, at 203-07.
42. Benedek, supra note 16, at 205.
43. Id. at 202; Oppermann, supra note 30, at 13, (speaks of only 80 percent).
been granted for member states entering customs unions, free trade areas, or regional arrangements of a similar kind but falling short of the strict regimes of the former.\textsuperscript{44} Parties to such arrangements are not obliged to extend the internal advantages to third states. Another exception to the "most favored nation" principle is the acceptance of preferential treatment, e.g., for underdeveloped countries.\textsuperscript{45}

These regulatory deviations from the pure free market philosophy are being justified by reason of their directly beneficial effects upon the countries or regions concerned and their indirect promotion of world trade at large by strengthening the economies of the privileged states.\textsuperscript{46} It may be noted here, however, that the establishment of the EC did not meet with the unanimous consensus of the GATT community. It was not formally privileged under the exception to the most favored nation principle mentioned before. GATT members only took \textit{de facto} notice of the EC, which has not become a member of GATT. In practice, however, the EC represents its member states in the GATT decision-making process.\textsuperscript{47} Other deviations from the free market concept are temporarily allowed under the so-called "escape clause"\textsuperscript{48}—a bow to the principle of sovereignty in that states are accorded the right in cases of necessity to give priority to national interests over GATT obligations.\textsuperscript{49} The general regulatory inroads made on the free market concept by reason of environmental concerns will be dealt with in the next subsection.\textsuperscript{50}

2. \textit{The Case of the OECD}

The OECD presents a similar picture. Its policies, or strategies, are defined in Article 1 of the OECD Convention. According to this provision, OECD's policies are designed to "achieve the highest sustainable economic

\textsuperscript{44} For more details, see Jaenicke, \textit{supra} note 16, at 23; Benedek, \textit{supra} note 16, at 206.

\textsuperscript{45} These preferences are granted by the industrialized countries under the Generalized System of Preferences. \textit{See} Jaenicke, \textit{supra} note 16, at 23; Benedek, \textit{supra} note 16, at 206.

\textsuperscript{46} With regard to this preferential treatment see Oppermann, \textit{supra} note 30, at 18, 19. Oppermann takes a positive view of the underlying policy determination but emphasizes that the preferential treatment should be seen as a temporary exception to the basic market-oriented philosophy of GATT, not as a structural change toward a new international economic order.


\textsuperscript{48} General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XIX, 55 U.N.T.S. 308.

\textsuperscript{49} \textit{See} Jaenicke, \textit{supra} note 16, at 23.

\textsuperscript{50} \textit{See infra} part II.C.
growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy." Its global aspirations are particularly evident from the wording of Article 1, paragraphs b and c, that require the OECD's policies "to contribute to sound economic expansion in member as well as non-member [sic] countries in the process of development" and "to contribute to the expansion of world trade on a multilateral, nondiscriminatory basis in accordance with international obligations." In implementing these policies the OECD has engaged in a sweeping program of liberalizing trade by dismantling quantitative restrictions, but it has also included the liberalization of capital movements and invisible transactions. A major focus of the OECD's activities has been to mitigate adverse effects on member and nonmember states' economies and free trade on account of the energy (oil) crisis. Thus the OECD's scope of activities ratione materiae is broader than that of GATT, but it is more limited than GATT ratione personae. It comprises nineteen Northern, Western and Southern European countries and five non-European countries (the United States, Canada, Japan, Australia, and New Zealand). The OECD thus comprises the core of the industrialized countries which also form the backbone of industrialized countries in GATT. The EC is not formally a member of the OECD, but together with EFTA participates in the work of the OECD on the basis of an express provision of the OECD Convention (Article 13), Supplementary Protocol Number 1 to the Convention (EC) and by a Ministerial Resolution (EFTA). The characteristic feature of OECD's work is that it is predominantly based on consensual coordination of the sovereign member and nonmember states' policies. Lawmaking and strict enforcement by the organization have played a decreasing role. Yet the achievements in the field of trade liberalization have been many. It is no exaggeration that the work of OECD has made a considerable contribution to the globalization of markets. The

52. Id. at 183; see also Hugo J. Hahn, Organization for Economic Cooperation and Development, 5 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, supra note 16, at 214, 214-15.
53. Hahn, supra note 52, at 218.
54. Id. at 214.
55. Id. at 221.
special issue of trade and the environment under the auspices of the OECD will be treated below.\textsuperscript{56}

3. The Case of the EC

The overall goal of the European Community is a high degree of economic and ultimately political integration. The preamble and Article 2 of the EEC treaty\textsuperscript{57} contain a rather long list of goals and tasks set for the organization. The Single European Act\textsuperscript{58} and the Maastricht Treaty\textsuperscript{59} have added even more tasks and competences, for that matter, all aiming at the dynamic integration of the member states. Because of the dynamics built into the integration process, the EC has potentially comprehensive jurisdiction over all areas of economic, social, and cultural activities within the EC territory.\textsuperscript{60}

The overall aims for establishing first, the common, and second, the internal, market, are specified in the so-called “four freedoms.” These four freedoms are the freedom of movement of goods, services, persons, and capital. Also, in the provisions on the removal of customs barriers, free competition, and the observance of nondiscrimination are overriding principles applicable in the process of implementation of the other basic goals. The complex goals and principles of the EC, like those of the GATT and the OECD, again constitute the core credo of a market-oriented strategy. But this complex of goals and principles is much larger in scope than that of the other organizations, or it may even be unlimited in scope.

The process of implementation of the four freedoms may properly be called one of “globalization” in a figurative sense; the formerly domestic markets are becoming global \textit{ratione personae} and \textit{materiae}. The EC has also engaged in enhancing the globalization of markets—much in line with GATT and OECD—in that it has opened the EC market to third states, at least to a certain extent. The several Lomé Conventions\textsuperscript{61} have granted

\begin{footnotesize}
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\item[	extsuperscript{56}] See infra part II.C.2.
\item[	extsuperscript{58}] Single European Act, February 17-28, 1986, 25 I.L.M. 506.
\item[	extsuperscript{60}] See Davey, supra note 25.
\item[	extsuperscript{61}] European Economic Community—African, Caribbean and Pacific Countries Convention of Lomé, February 28, 1975, 14 I.L.M. 595 [hereinafter Lomé I]; European Economic Community—African,
preferential treatment to former dependent areas of member states. Recent agreements with former member states of COMECON, e.g., Poland, the Czech and Slovak Republics, and Hungary, have granted these states access to the EC market. Although not in line with pure market theory, these accords and agreements tend to strengthen the future full participation of these countries in a global market—universal or regional. The policy of globalization is also followed in the EC by the establishment of the European Economic Area, i.e., the extension of most of the liberal trade regime of the EC to the EFTA area except for Switzerland.

However, the EC did not solely rely on the mechanisms of a liberalized market in achieving the goals of the Community. It used its broad legislative regulatory powers, on the one hand, to enhance and accelerate the harmonization of the laws within the EC, not leaving it to "institutional competition." On the other hand, it legislated in order to set common standards to secure unimpaired conditions of free competition or to further technological development in the EC as, for instance, in the area of telecommunications and in other fields. While legislative intervention aimed at maintaining fair conditions for competition is clearly in line with modern market theories, regulations (mainly directives, but also programs of subsidies) to further the technological or other industrial capabilities of the EC are clearly of a central authority-backed, interventionist nature.

A complete deviation from the principles of market-oriented globalization of the domestic markets of the member states has taken place in the area of agriculture. The agricultural “market” is actually a nonmarket system that is highly regulated. It is neither globalized nor based on the


62. For the text of these agreements which have entered into force as of March 1, 1992, see 1992 O.J. (L 114, 115, 116) 1 et seq.


64. See Archiv der Gegenwart (AdG), 37394 A (1992).

65. On “institutional competition” as a means of harmonization of the legal orders of the EC members see SIEBERT, supra note 27, at 15.


67. The example of the EC measures adopted to introduce and promote the MAC/HDTV standard is telling in this regard. See supra note 66.
principles of free-market theory. It is a "rent-seeking" and protectionist subsystem of the EC.68 The regulatory powers have also been extensively used in the case of environmental protection—an area to be covered further below.69

The overall picture of the process of globalization within the framework of the EC shows that both the mechanisms of a free market and the instruments of central regulation, backed by central enforcement authorities (Commission and Court), have been applied. In this regard, the EC differs from the other organizations mentioned, particularly from the OECD, in the way it has strived for the globalization of intracommunity commerce. In some areas it has acted more like an emerging domestic market than an open globalizing one. On the other hand, the steps taken to widen the scope of the EC market with regard to developing countries, some former Socialist countries and to EFTA, is evidence of the globalizing thrust of the EC enterprise.

C. Globalization of Markets and Environmental Protection

In the first section of this paper, it was pointed out that problems of genuinely global dimension have emerged in the field of environmental protection. The international community has come to realize that the abuse of the natural resources of the globe (the atmosphere, air, water, soil, the rain forests, and the living resources, to name but the most important elements of the environment) has reached a level where protective activities by individual States are not commensurate with the existential threats to the survival of "Spaceship Earth." Production and consumption of goods necessarily draw on the natural resources and thus have a negative effect on the environment.70 This is of no concern as long as these resources are amply available or are renewable. But once these resources, particularly fresh air and clean water, become scarce because of exploitation, production of, trade with, and consumption of these goods becomes a matter of public concern. Exploitation of common resources results from the fact that their

68. See Ernst Ulrich Petersmann, Umweltschutz und Welthandelsordnung im GATT, OECD- und EWG-Rahmen, 47 EUROPA ARCHIV 257, 258.
69. See infra part II.C.3.
70. See Petersmann, supra note 68, at 257.
use traditionally has been considered to be necessarily free. Common resources, as mentioned above, are not held to be marketable goods. In principle, it is possible to privatize their use and thereby subject them to the laws of the market, i.e., to set an adequate price for their use and thus internalize the costs at the producer or consumer level. However, practice shows that for whatever reasons, states as well as the international community at large tend to intervene in the market and bring protectionist regulation to bear. These measures are protectionist in a double sense: domestic environmental measures are used literally to protect the environment, but they are sometimes also used as unilateral measures to enforce national standards of environmental protection on third states to the effect that trade with those third states may be impaired in favor of domestic goods. In other words, domestic environmental regulations can and often do collide with the laws of a free market. Yet economic theory teaches us that discriminatory domestic protective measures, even for the high goal of environmental protection as a rule do not result in optimum solutions. Based on the premise that environmental protection and international commerce are not necessarily antagonistic goals, GATT, OECD, and the EC have tried to work out regulatory regimes for their respective realms either by a trial-and-error settlement of the conflicting interests or by relevant laws or conventions. The principal instruments and regulatory principles applied are the “polluter pays” principle and the imposition of nondiscriminatory charges, taxes, and various economic incentives to induce producers and consumers to abide by environmental standards and to utilize innovative technology to reduce the use of scarce natural resources.

71. See Prosi, supra note 31, at 259.
73. See Petersmann, supra note 68, at 258.
74. See Prosi, supra note 31, at 272.
75. See Petersmann, supra note 68, at 262.
77. On these instruments and principles, see Petersmann, supra note 68, at 257; Petersmann, International Trade Law and Environmental Law, supra note 72, passim; see also Eliza Patterson, GATT and the Environment—Rules Changes to Minimize Adverse Trade and Environmental Effects, 26 J. WORLD TRADE 1992, at 99; James H. Mathis, Trade Related Environmental Measures in the GATT,
1. The Case of GATT

Based on a number of rulings rendered in dispute settlement proceedings, the GATT has established a clear distinction between permissible national environmental regulations, (nonprotectionist or nondiscriminatory unilateral measures) and impermissible regulations (protectionist discriminatory measures). The essence of these rulings is that as long as national environmental protection measures (penalties, charges, taxes, etc.) are applied equally to domestic and imported goods, such measures are not considered to impede free trade. The legal basis for these rulings is Article III of GATT. The rationale of the rulings in related cases, e.g., the US/Mexico Tuna case, the US/Canada Herring case, the EC, Canada, Mexico/US Super Fund Act case, has also been applied to the problem of reconciling implementation of the 170 or so conventions on environmental protection concluded outside the GATT. The goals pursued by these conventions were held by the GATT to be beneficial for both the exporting and the importing country. As long as the obligations ensuing from the conventions are realized in a nondiscriminatory way and the means and ends are proportionate, respective measures are deemed to be compatible with the GATT. Furthermore, GATT encouraged mutual recognition of technical standards of equivalent efficiency. Subsidies for strictly environmental purposes were accepted as permissible. Thus GATT has set an example of reconciling environmental concerns with the principles of free trade, at least in principle, and has added a dimension of global environmental responsibility to its global aspirations in the field of commerce.

78. See Petersmann, supra note 68, at 258 et seq.
82. See Petersmann, supra note 68, at 262.
83. See Petersmann, supra note 68, at 258.
2. The Case of OECD

The OECD has followed basically the same policies. After lengthy deliberations, in 1991 the OECD Council of Ministers adopted a Joint Report on Commerce and Development, which recommended a revision of the 1972 Guidelines for the Protection of the Environment and an Open Trade System. OECD relies on the principles of “polluter pays” and environmental damage prevention, charges, taxes, and incentives to further the cause of environmental protection and at the same time to preserve an open market. But it also holds against protectionist measures intended to make up for disadvantages ensuing from particularly high environmental standards that impair competitiveness, a course not quite in line with a pure environmental stance since it “punishes” states upholding particularly high standards of environmental protection.

3. The Case of the EC

In the field of environmental protection the EC faces the same basic problems of reconciling environmental goals and free trade aspirations as do the GATT and the OECD. However, the EC’s approach to the problem has been (and still is) a very different one. In every sense of the word, the global scope of environmental threats is evidently perceived as being so overwhelming that neither pure market mechanisms, such as competition over the environmentally best products fueled by consumer preferences, nor national regulation as the basis for “institutional” competition between the different legal systems, is considered adequate to cope with the environmental threat effectively. A rather illuminating statement of the regulatory credo of the EC is found in a recent article by a lawyer of the Commission of the EC, who unequivocally states:

There are transnational environmental problems. Pollution of the Atlantic Ocean, the North, the Baltic, or the Mediterranean Seas, air pollution, the disappearance of fauna and flora species, and or other environmental problems cannot be resolved by national or regional activity alone. International conventions are not fully enforced; they

84. Id. at 264-65.
85. Id. at 264.
lack the necessary legal authority on the one hand and effective enforcement procedures on the other.  

One could hardly imagine a more appropriate paraphrase of the EC's philosophy (which does not only apply to the environment): globalization the EC way is the only effective means to solve imminent problems. In the environmental field, international and national approaches are dismissed, and so are economic instruments such as the "polluter pays" principle. Although referred to in the Treaty in one instance (Article 130r, paragraph 2), "the principle [as it] stands at present . . . is, without concrete measures indicating what shall be paid for, a political guideline." Economic instruments may be applied by the Member States, and they encouraged to do so, but these instruments are of no concern to the EC as such.

The body of environmental law is contained in the Treaty, in international conventions to which the EC is a party, and in a host of secondary laws (regulations and directives). As EC law, these rules and regulations take precedence over national law of the Member States, but national law is allowed to set higher standards of environmental protection as long as these are compatible with the Treaty, i.e., as long as the principles of nondiscrimination and free trade are observed. However, the free trade principle has been handled restrictively by the ECJ in favor of environmental protection. The ECJ found the Danish national law restricting the import of nonreturnable containers (bottles in this case) to constitute a trade impediment under Article 30. Yet, the Court upheld the Danish ban on such bottles because of overriding environmental concerns,

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86. Krämer, supra note 76, at 151 (emphasis added).
87. Id. at 162.
88. On the foregoing, see id. at 161-62.
89. See E.C. Treaty, supra note 57.
90. See Krämer, supra note 76, at 153, who emphasizes those areas of EC activity which, in the understanding of globalization assumed in this paper, show a distinct global dimension.
91. In this respect EC environmental law follows the general principles governing the relationship between EC law and domestic law as enunciated by the ECJ in a leading case, Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 585 [hereinafter Costa]; see also Krämer, supra note 76, at 163.
92. Setting higher domestic standards, as a rule, requires authorization by Community legislation, which it normally provides. In exceptional cases more stringent domestic standards may also be promulgated without prior authorization provided that they are compatible with the higher EC law. See Krämer, supra note 76, at 164.
and because the measure in itself was nondiscriminatory, proportionate, and not arbitrary.94

As in the case of the geographic extension of the EC’s trade laws to nonmember states in the cause of globalization, the EC’s environmental laws aim at globalization in two ways. They are aimed not only at preventing and reducing environmental damages within the EC, but they are also directed towards global goals like stopping the depletion of the ozone layer and other environmental hazards of global dimensions.95 Furthermore, EC law provides the possibility for individuals to resort to national courts and ultimately to the European Court of Justice (for instance, via Article 177) in cases where directives are not properly transposed or not complied with otherwise.96 Thus, individuals and other economic agents are directly involved in the enforcement of environmental rules and standards irrespective of national borders and national status. This is a major difference from the GATT system, that gives primary consideration to producer interests in a rather mercantilist manner, while the EC recognizes that the principles of free trade and environmental protection create rights for consumers and EC market citizens which have to be protected by the national courts and by the ECJ if called upon by the national courts under Article 177 of the EC Treaty. The EC deals with the environmental problems predominantly in a regulatory way. The role of the domestic legal orders and domestic economic approaches to environmental protection are largely reduced to a supplementary role. The EC strongly believes in central lawmaking and central enforcement by the authority of the Commission and ultimately the ECJ. The principles of free trade, although also upheld in principle in the field of environmental protection, have suffered major modifications, environmental protection having been given priority in a number of major cases.97 This fact certainly has ramifications for the external commercial relations of the EC but also for the national economic orders of the Member States. From this perspective, the EC is globalizing in the environmental field internally as well, but with the further result of

94. See Petersmann, supra note 68, at 266.
95. See Krämer, supra note 76, at 153.
96. On enforcement of EC environmental law, particularly on rights of individuals to participate in the enforcement process, see Krämer, supra note 76, at 168.
97. For a conspicuous example, see Danish Bottle Case, supra note 93.
behaving more like an emerging large domestic market of a federal entity than as a globalizing agent of an open, free, world market.

III. IMPLICATIONS OF DIFFERENT PROCESSES OF GLOBALIZATION FOR DOMESTIC LAW AND POLICY CHOICES.

Processes of globalization have taken place and are still in progress. The strategies, mechanisms, and instruments applied on the different levels of globalization are market oriented to different degrees, mainly depending on the subject area being globalized and on the political feasibility of replacing market-induced strategies of globalization by central lawmaking and enforcement. From the preceding overview and analysis of the experiences of GATT, OECD, and the EC it seems quite obvious that on all levels but the EC level a mix of market-oriented strategies and consensual coordination of efforts with some regulatory/interventionist touches dominates. While this is also true with regard to the EC in the area of trade, a heavy reliance on the regulatory approach can be observed in the area of the protection of the environment with clear repercussions for the principles of free trade and their implementation EC-wide and beyond, as well as domestically. Before examining the implications of these general findings for preferences of policy choices, the purely legal implications of the two basic approaches to globalization for the domestic law of the states concerned shall be considered.

A. Effects of Globalization of Laws on Domestic Law

The GATT and OECD approaches, hereafter referred to as the international model, rely on the globalization, i.e., harmonization and denationalization of the domestic legal orders, through international agreements that oblige the states to transpose the international legal obligations into domestic law. This means that the actual process of globalization is left to the sovereign decision-making authority of the states or their respective legal provisions on the relationship between international law and the domestic legal order. In addition, the globalization is left to

98. On this approach according to the dualist concept of the relationship between international and domestic law, see Dahm, Delbrück & Wolfrum, supra note 2, at 98; Partsch, International Law and Municipal Law, in Encyclopedia of Public International Law 238 (Rudolf Bernhardt et al.)
the market agents whose commercial practices under the international regime mold the emerging global order. In particular, international arbitral dispute settlements under the terms of the international and/or nationalized rules of international commerce (GATT rules, OECD rules, UNCITRAL, Codes of Conduct, etc.) and environmental protection contribute to the growth of a global *lex mercatoria* that is mainly informed by the interests and needs of the actual participants in the economic transactions.  

Thus, there is no immediate effect on the domestic law by international rule making and standard setting under the auspices of the international model. However, the process of globalization is less assured, since state sovereignty remains an incalculable intervening variable.  

Under the EC or supranational model, the effect of globalizing lawmaking is an immediate one, in line with a monistic approach to the relationship between international/supranational and domestic law.  

The principle of the supremacy of EC law means that domestic law is set aside or, in the case of directives, domestic lawmaking is predetermined by the binding goals set by the directives. Thus, there is, with regard to the goals, no room for discretion on the part of the domestic lawmakers. 

The immediate effect of the supranational law as the globalizing agent is independent of the sovereign will of the Member States and is backed up by the enforcement powers of the ECJ. Of course, the picture drawn in the preceding considerations is rather idealistic, because there is some influence by the Member States on these immediate effects of EC lawmaking as a tool of globalization. Namely, the lawmaking ultimately rests on the consent of the Member States’ representatives to the Council of Ministers. This influence is mitigated, however, once again by the fact that according to the provisions of the Single European Act (for instance, Article 100a), decisions can be made by majority vote. In essence, the harmonization or

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99. See Ernst A. Krämer, *Globalisierung der Wirtschaft—Internationalisierung des Privaten Wirtschaftsrechts*, ÖSTERREICHISCHES BANKARCHIV (ÖBA) 9/91, at 621 et seq., pointing out the various methods of unifying domestic law; on the emerging new *lex mercatoria*, id., at 625 with further references.  

100. The relationship between the law of supranational organizations such as the EC and the internal law of the member states, because such organizations and their respective law are considered to be of a different kind than international law, must be recognized to also be based on international treaty law, the status of which within the internal legal order of the parties to the founding treaty has to be determined, and this is done so, in the case of the EC, along the lines of a monistic approach: at least part of the law of the EC is directly applicable in the Member States. See Costa, *supra* note 91, at 585.
globalization-denationalization of the market, law, and politics within the EC is a swift and effective process, particularly in the area of environmental protection. But it is unique in terms of the necessary political preparedness needed by the Member States to accept the supranational authority wielded by the EC.

B. Policy Choices for Globalization

When it comes to the question of choices, i.e., what course of action is preferable, the supranational approach or the international model, a number of political decisions must be made. First, it has to be decided that globalization is a desirable end. Considering the urgency of resolving the vexing problems mentioned in the first part of this paper, it appears that a global approach to the serious world problems of our time is without real alternatives. Second, it has to be decided which means of achieving the necessary degree of globalization of problem perception and of problem-solving capabilities are preferable. Are slightly modified market-oriented strategies preferable over central interventionist ones? The answer is difficult. There are persuasive arguments, particularly on the part of economic theory, in favor of a modified market approach. Reliance on \textit{ex ante} central lawmaking has to rely on the assumption that the central authorities, the politicians, possess better quality, insight, and knowledge to legislate properly or to reach better solutions than the decentralized market process would render. Economic theory provides serious evidence that central regulation in the long run arrives at less than pareto-optimal solutions despite possible short-term higher efficiency.\textsuperscript{101}

Second, the supranational approach, with its inherent inclination towards using \textit{ex ante} regulation as the tool of globalization, presupposes a degree of political homogeneity and basic consensus that is not the rule in the international system at large. Thus, it seems a tenable position that in the long run a market-oriented approach along the lines of what is called in Europe, particularly in Germany, the social-ecological market economy, is the best choice. But this is so only if certain political conditions are met. First, states have to be ready to transpose international obligations faithfully into the domestic legal orders. Second, states have to forego the option of

\textsuperscript{101} See BROADWAY \& WILDAVIN, \textit{supra} note 29, at 5.
unilateralism, whether with regard for protectionist temptations or overzealous goals of enforcing free trade or standards of environmental protection beyond their domestic realms. Third, states have to gear their domestic legal orders to a swift and effective reception of the norms of international, or rather, of the emerging, global law, and particularly courts must be bound to have due regard for the norms of international/global law. Fourth, states have to ensure that globalization of markets, law, and politics becomes effective for societies and individuals at large, not only for specific market agents.

In order to be met, the latter condition probably requires the most important and difficult adaptation of the domestic legal order and domestic politics because it demands nothing less than an exchange of the basic paradigms of traditionally market-oriented (capitalist, if one wants to call it that) societies. To think and act globally means to focus on societies as a whole, not some powerful interest groups. A lasting cooperative relationship between the United States and the EC (and Japan as well) seems to depend on whether these powerful actors in the emerging global order will be able to achieve this resetting of the leading paradigms of their respective value systems. Whether the EC will really become “Fortress Europe,” as has been suggested by some political observers, is an open question. Whether the United States will grow into the role of a truly global leader rather than remaining an international hegemonic power (wholesome as the existence of at least one powerful pillar of the international system actually is) is a question just as open.