

Maurer School of Law: Indiana University

Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1992

Competition Law and International Relations

David P. Fidler

Indiana University Maurer School of Law, dfidler@indiana.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>



Part of the [International Economics Commons](#), and the [International Law Commons](#)

Recommended Citation

Fidler, David P., "Competition Law and International Relations" (1992). *Articles by Maurer Faculty*. 2129.
<https://www.repository.law.indiana.edu/facpub/2129>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

COMPETITION LAW AND INTERNATIONAL RELATIONS

DAVID P. FIDLER*

I. INTRODUCTION

ONE of the most prominent features in the history of competition law in the United States and Europe in the past three decades has been the extent to which systems of competition law have had to adjust to international conditions and forces. The importance of the international market place and foreign competition is now considered obvious. This awakening to things international, however, has not been accompanied by much thinking about how competition law relates to the international environment in which it operates. Individual issues, like extraterritorial enforcement, have been discussed in some detail; but what is lacking is an attempt to relate competition law in a broader way to international relations. This article makes an initial and incomplete attempt to provide a wider framework in which to analyse the relationship between competition law and international relations.

Creating such a framework may, at first glance, seem to relate two spheres of activity and study that are vastly different. International relations, traditionally viewed, involves the interaction of States and international organisations within the international system. Competition law, on the other hand, addresses primarily the behaviour of private economic actors. Relating these two areas, however, is not to work at cross purposes because, as will be demonstrated throughout this article, the distinction between a *public* realm of competition transpiring between States and a *private* sphere of competition occurring between private entities is somewhat artificial. Private economic behaviour and its regulation directly affect how States and international organisations behave. Gilpin writes that "economic factors have played an important role in international relations throughout history" and that: "Events in the final years of the twentieth century are forcing students of international relations to focus their attention on the inevitable tensions and continuing interactions between economics and politics."¹ An increasing amount of business literature devotes attention to analysing economic competition within the international environment.² A similar awareness

* Associate in the London office of Sullivan & Cromwell. The author would like to thank Professor Richard Whish, King's College London, for his help on this article.

1. R. Gilpin, *Political Economy of International Relations* (1987), p.3.

2. See e.g. M. Porter, *Competitive Advantage of Nations* (1990) and K. Ohmae, *Borderless World: Power and Strategy in the Interlinked Economy* (1990).

of the impact of international relations on competition law among legal practitioners and commentators will enhance appreciation of competition law in its contemporary international milieu. The framework provided here, though basic and skeletal, can perhaps serve as a starting point, or at least a stimulation, for further thinking about this increasingly important relationship.

II. BUILDING THE FRAMEWORK

THE framework set out here builds on basic concepts from international relations theory: the State, the international system, and the international society.³ The analysis will examine how competition law relates to each of these levels of international relations. Once the composite picture of competition law as an aspect of international relations develops, the *international* features of competition law can be more clearly appreciated. Such appreciation will allow some tentative conclusions about dealing with competition law as a part of international relations.

A difficult feature of this approach is maintaining a workable definition of "competition law". In many ways, global economic contact and interdependence erase distinctions between competition, industrial, social and trade policies. Very different types of laws affect the conditions or environment of competition within and between States, which expands greatly the task of legal analysis. For example, as indicated by the inclusion of Articles 92-94 in the competition section of the Treaty of Rome, the European Community (EC) considers State aids as immediately relevant to competition policy and law. Similarly, Article 101 of the Treaty allows the European Commission to take measures to override national laws and regulations that distort "the conditions of competition". Such distortions of competition provide incentives for harmonisation of laws in such areas as financial services and environmental and consumer protection. "Competition law", therefore, potentially has very wide scope, encompassing all laws that effect the conditions of competition.

I have, however, employed a more limited meaning of competition law, for two reasons. First, the wide interpretation would expand this article beyond reasonable bounds. Second, the wide interpretation is analytically overinclusive as almost every law affects the conditions of competition in some way. The wide interpretation has no observable boundary that could give shape to legal analysis. "Competition law" as used in this article primarily refers to those laws and rules directed at the competitive *behaviour* of economic entities. As I hope to demonstrate, even this more limited (but workable) definition of competition law

3. See H. Bull, *Anarchical Society* (1977).

produces many interesting and complicated issues when analysed within the milieu of international relations.

III. COMPETITION LAW AND THE STATE

THE study of international relations is a vast and often controversial field of enquiry. Crudely speaking, international relations theory attempts to understand and explain human behaviour beyond the borders of the State. International relations theory also tries to address the impact of such behaviour on politics, economics and morality inside the State. Although many aspects of international relations theory remain topics of intense debate, virtually all commentators on the subject acknowledge the importance of the State. International theories, like Marxism-Leninism, that attempted to diminish the importance of the State and to elevate non-State forces to primary positions have failed to be realistic or normatively persuasive. The importance of the State in international relations, however, does not mean that non-State forces and actors play insignificant roles. When considering the international aspects of competition law, one must recognise that international organisations, multinational corporations and even individuals can influence events.⁴ The impact of such non-State actors, however, is largely filtered through the policies, ambitions and fears of States.

The EC provides interesting material on this very point. It is, of course, not a State in the traditional sense. The rules for competition set out in the Treaty of Rome and as interpreted by the European Commission and European Court of Justice provide, however, one example of how States have decided to deal with competition law at the international level. The European Commission, further, acts like a single State from the perspective of other States because it has quasi-sovereign power in the competition area that it exercises on behalf of the entire EC. EC competition law by itself contains rich material for examining competition law as an aspect of international relations.⁵

If a State adopts a system of competition law, that system can be characterised as a "national interest". To describe competition law as a national interest means that the State believes that competition and its

4. The story of the impact of one individual is told in S. Adams, *Roche versus Adams* (1984). Adams supplied the European Commission with information about his employer's (Hoffmann-La Roche) violations of EC competition law. A Swiss court convicted Adams *in absentia* of criminal espionage.

5. The European Commission's recent *De Havilland* decision is a good example of the international relations aspects of EC competition law: the Commission prohibited the acquisition of a Canadian subsidiary of a US corporation by a joint venture of Italian and French companies. This decision caused serious political controversy in France and Italy and was also condemned by the European Parliament. See "EC Legislature Assails Commission's Veto of Plane Deal", *International Herald Tribune*, 11 Oct. 1991, p.15, and "Brittan Defends Ban on European Takeover of De Havilland", *idem*, 14 Oct. 1991, p.2.

regulation serve values and interests deemed important to a polity for domestic and international reasons. The notion of competition law as a national interest corresponds with the growth of competition law systems in many liberal, democratic States. Competition law has become part of the capitalist ethos in many democratic societies, and serves as a national interest in a number of ways. First, it reflects or embodies many of a State's most basic principles and beliefs. Debates about the nature and purpose of US anti-trust legislation demonstrate how competition law can relate to a society's core values. As Fox and Sullivan argued: "The basic difference between Chicagoans and traditionalists is a difference of vision about what kind of society we are and should strive to be."⁶ The recurrent theme in US anti-trust literature, that anti-trust legislation supports the continued vibrancy and resilience of democratic institutions and processes, resonates with a deep sense of how important such laws are to the United States. As Pitofsky writes, "Congress has in its antitrust enactments . . . exhibited a clear concern that an economic order dominated by a few corporate giants could, during a time of domestic stress or disorder, facilitate the overthrow of democratic institutions and the installation of a totalitarian regime."⁷ Seeing competition law as a national interest extends beyond concerns about the make-up of domestic society. The fear of totalitarian exploitation of concentrated private economic power present in US anti-trust legislative history makes little sense without reference to fears about foreign States and ideologies. The fear is generated as much by international relations as by domestic concerns. This connection between domestic and international political concerns relating to competition law impressed itself on Franklin Roosevelt when he compared the US commitment to anti-trust with Nazi manipulation of industrial cartels: "cartels were utilised by the Nazis as governmental instrumentalities to achieve political ends . . . Defeat of the Nazi armies will have to be followed by the eradication of these weapons of economic warfare."⁸ The Nazi experience of Hitler's use of and support from German cartels also influences the nature and spirit of German competition law. Similarly, Articles 85 and 86 of the Treaty of Rome relate directly to the aspirations to create a united, peaceful Europe through economic integration.⁹ EC Commissioner Sir Leon Brittan

6. E. Fox and L. Sullivan, "Antitrust Retrospective and Prospective: Where Are We Coming From? Where Are We Going?" (1987) 62 N.Y.U. L.Rev. 957.

7. R. Pitofsky, "The Political Content of Antitrust" (1979) 127 U. Penn. L.Rev. 1053-1054.

8. Quoted in J. Davidow, "The Seeking of a World Competition Code", in O. Schacter and R. Hellawell (Eds), *Competition in International Business* (1981), p.362.

9. The Schuman Declaration of May 1950, which is the genesis document of the EC, stated that European federation was vital for future European peace, which makes competition law an integral component in a profound vision of European society.

recently expressed the EC's perception of the importance of competition law to free market democracy in Europe: "We have to provide an example for the fragile democracies and even more vulnerable economies of Eastern Europe. When they look at what binds the twelve member-States together in a Community, they notice that at the heart of its successful market economy lies a sound competition policy."¹⁰

Second, competition law directly touches on issues relating to a State's economic well-being and power, which are clearly matters pertinent to the national interest. US, British and European authorities have at different times shown concern at the way in which competition law affects the economic power and competitiveness of their respective economic players. Part of the success of Chicago school anti-trust thinking during the Reagan administration could be found in the message that traditional anti-trust thinking weakened the ability of US companies to compete effectively with foreign challengers. Section 84 of the British Fair Trading Act 1973 specifically lists as one key factor in evaluating the "public interest" how British companies are faring in the international market place.¹¹ Part of the motivation for some of the European Commission's decisions in the early 1980s on joint venture agreements relates to fears that European industry was falling behind American and Japanese competitors.¹² In its criticisms of the recent *De Havilland* decision, the European Parliament "called for a revision of the European Community's competition law to force the Commission to consider global competitiveness of EC industry and jobs when reviewing such transactions".¹³

Third, competition law converges with other important national interests. Competition law, for example, sometimes includes national security as one of its objectives. National security concerns in competition law appear in two contexts: in purely domestic situations and in those involving foreign elements. A purely domestic example in the United Kingdom can be found in GEC's proposed takeover of Plessey. GEC wanted to create a unified British telecommunications and defence electronics firm

10. Speech of Commissioner Sir Leon Brittan to the EC Chamber of Commerce in New York on 26 Mar. 1990. Extracted in [1990] 4 C.M.L.R. 324.

11. S.84 of the Fair Trading Act states that the MMC should take into account in determining the public interest the desirability "of maintaining and promoting competitive activity in markets outside the United Kingdom on the part of producers of goods, and of suppliers of goods and services, in the United Kingdom".

12. See e.g. the Commission's 13th Annual Report on Competition Policy (1983) and *Optical Fibres* (1986) O.J. L236/30, *Mitchell Cotts/Sofiltra* [1988] 4 C.M.L.R. 111, *Konsortium ECR* (1990) O.J. L228/31, and *ODIN* (1990) O.J. L209/15.

13. "EC Legislature . . .", *loc. cit. supra* n.5. The *De Havilland* case has increased interest and concern over EC merger control procedures. See "Bangemann Proposes Changes to EC Merger Review Procedures", 1992: *The External Impact of European Unification*, 18 Oct. 1991, p.1.

that could compete more effectively in the increasingly competitive international electronics markets. In its report under the merger provisions of the Fair Trading Act, the Monopolies and Mergers Commission ("Monopolies Commission") concluded that the proposed merger would operate against the public interest because, *inter alia*, it would reduce competition in the domestic defence electronics industry, which would hurt British national security.¹⁴ National security, therefore, was an important part of the "public interest" the Fair Trading Act was meant to protect.

More frequently, the objective of national security arises in situations where foreign firms seek to take over or control major national economic interests. The United States, for example, has been nervous about foreign ownership of American high-technology companies because of the defence and strategic interests involved.¹⁵ High technology, however, is not the only area where the national security concern appears. Looking again at the British Fair Trading Act, the Monopolies Commission declared that the merger situation created by the Kuwait Investment Office's stake in British Petroleum operated against the public interest because it placed a vital strategic resource under threat from a foreign government with conflicting oil interests.¹⁶ Further, the so-called Lilley doctrine of referring takeovers of British firms by foreign State-owned enterprises involves the notion that foreign public ownership is harmful to competition in the United Kingdom. The EC's Merger Control Regulation also displays the marks of States' concerns with national security. Under Article 21 of EC Regulation 4064/89, member States are empowered to protect "legitimate interests" in merger situations, which include concerns about "public security".¹⁷

Fourth, competition law represents a national interest as well because it supports notions of national identity and image. In the United States, the term "antitrust" is laden with many political and social overtones that connect it to aspects of the national character. The anti-trust concept

14. See *GEC/Plessey* Cmnd.9867 (1986).

15. Gilpin, *op. cit. supra* n.1, at p.201.

16. See *Kuwait Investment Office/BP* Cm.477 (1988). National security, however, has not been an objective of EC competition law because the EC institutions have no competence in the security, defence and foreign policy areas. Arms procurement, for example, is exempted from EC competition rules. If the EC moves closer to a unified defence policy, EC competition law will face the question of European national security as well. Apparently, the issue of competition in the defence area is becoming a focus of attention as NATO has formulated proposals to promote freer arms trade among its member States (see "NATO Considers Allied Cost-Cutting", *International Herald Tribune*, 13 May 1991, p.6); and EC Competition Commissioner Brittan has threatened scrutiny of European defence industries under competition rules to catch protection of dual-use production of products that have primarily civilian uses (see "Brittan Targets Defense", *International Herald Tribune*, 31 Oct. 1991, p.11).

17. See Art.21 of EC Reg.4064/89 (1989) O.J. 395/1, corrected version at (1990) O.J. L257/13.

contains the belief in free enterprise, an economic populism, and concern about the arbitrary use of private and public power. Legislative histories of the various anti-trust statutes bear these observations out.¹⁸ The prudential and discretionary features of much of British competition law remind one of the perceived pragmatism of the British national character. Germany also closely associates its competition law with its national identity, as the presence of the "German clause" in EC Regulation 4064/89 indicates; the clause provides for a special process to deal with concentrations affecting competition on "distinct" national markets.¹⁹ The clause is what remains of the German effort to preserve the jurisdiction of the Bundeskartellamt in merger matters, which suggests how strongly the Germans are attached to their vigorous system of competition law.²⁰ Similarly, the European Commission realises the importance of EC competition law in building a sense of European-ness among the member States and in demonstrating to non-EC States and companies that the European Community is not a figment of the imagination. Many of the seminal cases in EC competition law arose when the Commission went after large non-EC undertakings.²¹ The unspoken part of the purpose for doing so was to impress upon outsiders the reality of the EC as a force to be reckoned with.

These various manifestations of competition law as a national interest demonstrate that it can be very important to States that adopt it. It must be kept in mind, however, that the *absence* of competition law in most States in the world represents definite national interests as well. States that do not partake of the competition ethos of capitalist countries often express their national interests in ways hostile to economic competition. The socialist perspective adopted by Communist States and many developing countries discouraged or oppressed competition on the political and economic level and opted for centralisation and monopolisation of political and economic power. Consensus on the value of competition law, however, can suffer without taking into account States with radically different ideological assumptions. The fact that two capitalist States consider competition law important does not mean that the content of

18. See e.g. the legislative history of the Robinson-Patman Act (15 USC, s.13), which is filled with the desire to protect small shop owners from large retailers.

19. See Art.9(2) of EC Reg.4064/89.

20. T. Stahl, "Competition-Oriented Merger Control: A Tool for Unifying the European Community", *International Merger Law*, Oct. 1991, pp.16-17. In relation to Reg.4064/89, Brittan has said: "As far as Germany is concerned, we even put in a special clause insuring the right to maintain a vigorous competition policy of their own. That was protected at their insistence": see "Brittan Defends . . .", *loc. cit. supra* n.5.

21. See e.g. *ICI v. Commission* [1972] C.M.L.R. 557, *Continental Can* [1973] C.M.L.R. 199, *United Brands v. Commission* [1978] I C.M.L.R. 429, *Hoffmann-La Roche* [1979] 3 C.M.L.R. 211 and *Tetra Pak* (1991) O.J. L290/35.

their respective “national interests” in competition law converges. Finally, peculiar cases complicate the picture even more. Japan, for example, clearly values capitalism; but the contrast between Japanese and US treatment of domestic cartels is dramatic. The absence of a strong system of competition law in Japan represents uniquely Japanese attitudes about capitalism. The example of Japan reinforces earlier observations: the regulation (or lack thereof) of economic competition by a State reflects the complex set of beliefs and objectives that create a national interest. As a result, when competition law becomes an issue beyond the State, a whole host of national beliefs, assumptions and fears go along to complicate matters even more.

IV. COMPETITION LAW AND THE INTERNATIONAL SYSTEM

THE international system is a system of States “founded when two or more states have sufficient contact between them, and have sufficient impact on one another’s decisions, to cause them to behave—at least in some measure—as parts of a whole”.²² Such contact, impact and interaction between States occur in a system characterised by the lack of a supreme authority. There is no “command of the sovereign” to keep States in line as governments keep citizens within the law. A kind of anarchy always lurks within the international system. The anarchy is often frustrating and sometimes dangerous, and its presence colours all behaviour within the international system. The damage to nations that such anarchy can wreak greatly stimulated the European project that continues to unfold today.

Commerce and trade constitute one of the characteristic features of the international system as States constantly interact economically.²³ International relations theory has focused on the meaning and effects of economic interaction within and upon the international system. In order to understand how competition law relates to the international system, I will first briefly look at some of the major arguments about the nature of economic intercourse in the international system. I will then examine if competition law exhibits any of the characteristics described by the different traditions of thought on international economic interaction.

The first tradition of thought, realism, stresses that economic interaction between States should be viewed as part of the pattern of power politics that characterises international relations. Rousseau, one of the deepest realists, argued that trade and commerce between States fostered

22. Bull. *op. cit. supra* n.3, at pp.9–10.

23. “Trade is the oldest and most important economic nexus among nations. Indeed, trade along with war has been central to the evolution of international relations”: Gilpin, *op. cit. supra* n.1, at p.171.

and created conflict, turmoil and violence in the international system.²⁴ Economic interaction, therefore, resembles a struggle for advantage, position and power.²⁵ In contrast to realism, the liberal tradition of thought maintains that economic contact between States encourages political, economic and moral interdependence that can act as a tempering force in relations between States. Trade and commerce ameliorate the harshness of the international system by building ties and contacts between private citizens of different States; and by creating between States concrete mutual interests that require co-operation to preserve. In the liberal perspective as expounded by Kant, for example, economic interdependence slowly forces States to require peace in order to pursue their interests.²⁶ Trade and commerce transform the nature of power politics so that international relations no longer seems like a zero-sum game. The pursuit of advantage ranks below the need for co-operation. The liberal perspective includes a place for international law and international organisations to assist the process begun by economic interdependence.²⁷ The third major tradition of thought, socialism, takes a still different approach to economic interaction in the international system. The socialist perspective holds that patterns of trade and commerce reflect the exploitative prerogative of capitalist States. The dynamics of an international system driven by capitalist forces creates injustice as the system subordinates the welfare of many peoples to the affluence and hegemony of the few capitalist powers. Economic interaction *per se* is not evil; rather, the socialist perspective targets a particular way of organising such interaction. The solution to the injustice is to change radically the patterns and assumptions about trade and commerce maintained by capitalism.²⁸

The interaction between competition law and the international system reveals aspects of all three traditions of thought about economic behaviour in international relations. This is not to argue that systems of competition law expressly appeal to these traditions of thought; rather, it is to suggest that competition law relates to the international system in a very complex way, which will now be outlined in more detail.

24. See "Introduction", in S. Hoffmann and D. P. Fidler (Eds), *Rousseau on International Relations* (1991), p.xlvi.

25. The realist perspective is sometimes called the nationalist perspective. For a more detailed analysis of this perspective, see Gilpin, *op. cit. supra* n.1, at pp.31-34, 46-50.

26. On Kant's international relations thinking, see K. Waltz, "Kant, Liberalism, and War" (1962) 56 *Am. Pol. Science Rev.* 331-340; F. H. Hinsley, "Kant", in his *Power and the Pursuit of Peace* (1967), pp.62-80; and A. Hurrell, "Kant and the Kantian Paradigm in International Relations" (1990) 16 *Rev. Int. Studies* 183-205.

27. For a more detailed examination of the liberal perspective, see Gilpin, *op. cit. supra* n.1, at pp.26-31, 43-46.

28. For a more detailed account of the socialist perspective, see *idem*, pp.34-41, 51-54, 270-290, 298-301.

A. Competition Law and National Power

Systems of competition law have proved to be very aware of features of the international system emphasised by realism. First, almost every major system of competition law contains an explicit or implicit acknowledgement that economic behaviour which would be intolerable within the borders of the State is acceptable beyond those borders. The United States, for example, explicitly sanctions export cartels that would not survive anti-trust legislation if implemented domestically.²⁹ Schedule 3(6) to the British Restrictive Trade Practices Act 1976 exempts horizontal export cartels from the strictures of registrability. More subtly, the drafters of the Treaty of Rome limited the prohibitions in Articles 85 and 86 to restrictions on competition that affect trade between member States. Restrictions on competition that affect only non-EC trade are presumably legal under EC competition law.

Such provisions clearly indicate that States consider competition within and beyond the State to be governed by very different rules. The nature of the international system, therefore, influences how States view competition law. In the international system, economic competition between private undertakings takes place against background concerns for national wealth and power. States, as a result, allow their national undertakings to take full advantage of the licence provided by the international system. These export cartel provisions remind one of the realist tenet that economic power is political power in the international system. What Roosevelt condemned as “weapons of economic warfare” are permitted to exist internationally by systems of competition law.

Second, competition law systems exhibit concerns about national power by using competition law to protect domestic autonomy from foreign influences. Since the international system encourages raw forms of economic activity, States, including those without a competition law, maintain vigilant watch over the practices of foreign undertakings. Developing countries’ problems with multinational corporations illustrate this phenomenon.³⁰ But States with a competition law keep watch as well, and sometimes use competition rules to control the power of foreigners in the domestic economy. The issue often arises in the context of mergers, where foreign companies attempt to take over or gain control of domestic undertakings.³¹ Mention has already been made of the concerns of competition law authorities in the United States and United Kingdom about foreign control of economic assets deemed important to national security. The UK competition law authorities have expressed concerns

29. Webb-Pomerane Act, 15 USC, ss.61–66.

30. Discussion of the role of multinational corporations in international economics can be found in Gilpin, *op. cit. supra* n.1, at pp.231–262.

31. R. Whish, *Competition Law* (2nd edn, 1989), p.699.

about domestic autonomy in areas other than defence technology. In *BMC/Pressed Steel* the Monopolies Commission "did not condemn the backward integration of BMC . . . since the alternative might be a foreign take-over of Pressed Steel".³² In *Shanghai Banking Corporation/Royal Bank of Scotland* it rejected the foreign takeover bid of a Scottish bank because it was concerned about foreign control over national financial institutions.³³ *Kuwait Investment Office, BMC/Pressed Steel* and *Shanghai Banking* illustrate that the Commission closely protects the domestic control of important strategic economic assets like oil, steel and banking. The political concerns or phobias about foreign influence, however, often find expression in economic sectors that cannot be considered strategic industries, as the political fuss over Nestlé's takeover of Rowntree³⁴ and the Lilley doctrine demonstrate. Another way in which the Commission has expressed concerns about national power in merger policy is by finding against proposed mergers that would negatively affect the UK balance of payments by decreasing exports or increasing imports.³⁵ The concern about domestic autonomy and national competitiveness has also recently appeared in the United States in calls for intelligence efforts against foreign economic and corporate espionage in the United States.³⁶

Third, States take vigorous action to protect their economies and competitiveness from "unfair" foreign competition. For example, both the United States and the EC have well-developed anti-dumping rules and procedures, which are used to punish foreign undertakings that dump goods on to US or EC markets.³⁷ Although the basis for anti-dumping legislation and similar rules is protection of domestic industry from "unfair" foreign competition, the use of such laws often creates problems because enforcement seems like protection from vigorous, rather than demonstrably unfair, foreign competition. The "screwdriver" provision of Regulation 2423/88, for example, has been criticised for creating a *de facto* local content requirement.³⁸ More obviously, US law provides protection for US industries threatened even by fair foreign competition.³⁹

32. *Idem*, p.730. See *BMC/Pressed Steel* H.C.P. (1965-66) 46.

33. See *Shanghai Banking Corporation/Royal Bank of Scotland* Cmnd.8472 (1982).

34. Whish, *op. cit. supra* n.31, at p.731.

35. See *Davy/Rollmakers* H.C.P. (1974) 67, *Rockware Glass/Redfearn National Glass* H.C.P. (1977-78) 431, *Hiram Walker/Highland Distilleries* H.C.P. (1979-80) 743, *Enserch/Davy International* Cmnd.8360 (1981), *Hepworth Ceramic Holdings/Streetly* Cmnd. 9164 (1984), and *GKN/AE* Cmnd.9199 (1984). Generally, see Whish, *idem*, pp.729-730.

36. The former CIA director William Webster "advocated collecting more intelligence on foreign threats to the US economy, such as companies that steal US trade secrets and governments that use espionage to learn about US economic strategies": see "Webster's CIA: Orderly Ship with No Destination", *International Herald Tribune*, 10 May 1991, p.3.

37. See 19 USC, s.1677 and EC Reg.2423/88 (1988) O.J. L209/1.

38. A. Winter *et al.*, *Europe Without Frontiers: A Lawyer's Guide* (1989), pp.102-104.

39. See s.201 of the Tariff Act of 1974, 19 USC, s.2253.

Fourth, systems of competition law demonstrate national worries about economic power by using competition law to permit actions otherwise questionable from other competition perspectives. The European Commission, for example, has been adept at shaping its interpretation of Article 85 to allow major European undertakings either to regroup in tough economic times or to appropriate foreign technology. The European Commission has granted Article 85(3) exemptions to so-called "crisis cartels" between major European petrochemical producers.⁴⁰ Korah has noted that the European Commission seems to exempt automatically any agreement that transfers foreign technology to EC undertakings.⁴¹ The European Parliament, France and Italy, however, criticised the European Commission's *De Havilland* decision because the Commission failed to use Regulation 4064/89 to promote European economic power.⁴² In the United States concerns about the competitiveness of American firms at home and abroad has led many leading commentators of opposing anti-trust schools to downgrade protection of the small business person as an anti-trust objective from the importance given to that objective by the original legislators. Chicago school anti-trust analysis deals with the small business person rather ruthlessly;⁴³ but, interestingly, such staunch anti-Chicago commentators as Fox and Pitofsky place much less emphasis on protecting the small business person.⁴⁴ The realist, of course, would approve of this shift in US anti-trust thinking because it would be foolish to comfort oneself about the loss of national competitiveness with the knowledge that the State had many small shopkeepers.

Fifth, systems of competition law can project national power in the international system through extraterritorial enforcement. The diplomatic controversies and problems generated by the extraterritorial enforcement of US anti-trust legislation are well known.⁴⁵ The British reaction to such US extraterritorial enforcement illustrates that the issue does rise to the level of power politics. The British Protection of Trading Interests Act 1980 revealed that the UK government considered extraterritorial

40. See *ENI/Montedison* [1988] 4 C.M.L.R. 444, and *ICI/Enichem* [1989] 4 C.M.L.R. 54.

41. V. Korah, "Critical Comments on the Commission's Recent Decisions Exempting Joint Ventures to Exploit Research that Needs Further Development" (1987) *Eur. L.Rev.* 18. See cases *Optical Fibres* (1986) O.J. L236/30, *BP/Kellogg* [1986] 2 C.M.L.R. 619, *Iveco/Ford* [1989] 4 C.M.L.R. 40, and *Olivetti/Canon* [1990] 4 C.M.L.R. 940.

42. The European Parliament said that the Commission "focused on 'technical aspects' at the expense of 'the political aspect of the Community's general interest'": "EC Legislation . . .", *loc. cit. supra* n.5.

43. Whish, *op. cit. supra* n.31, at p.18.

44. See E. Fox, "The Modernization of Antitrust: A New Equilibrium" (1981) 66 *Cornell L.Rev.* 1182, and Pitofsky, *op. cit. supra* n.7, at p.1058.

45. See A. Lowe, *Extraterritorial Jurisdiction* (1983) and A. Neale and M. Stephens, *International Business and National Jurisdiction* (1988).

enforcement of US anti-trust law to constitute a direct threat to UK "trading interests". The Act has been described as part of the "legal warfare" that transpired between the British and Americans on this problem.⁴⁶ The British have not been alone in expressing a concern about the projection of US power through extraterritorial enforcement: other States have passed so-called "blocking statutes" to blunt US attempts to enforce anti-trust laws extraterritorially.⁴⁷ The Department of Justice, however, is not the only competition law authority to experiment with projecting its power in the international system through extraterritorial enforcement. The European Commission, as is well known, has been eager to apply EC competition law to foreign firms on the basis of an effects doctrine alone.⁴⁸ Although the European Court has not embraced the full-blooded effects doctrine, Commission extraterritorial enforcement under the *Wood Pulp* "implementation doctrine" still represents a formidable weapon.⁴⁹ Extraterritorial enforcement of EC competition law is probably very important in the Commission's thinking as it is a clear way to impress upon foreign undertakings and governments that the EC has economic power in the international system.

B. *Competition Law and International Co-operation*

Largely because of the problems created by the affinity of competition law with concerns over national power, States that share the competition ethos have in various ways made competition law issues an area in which to improve international co-operation. Since most of the States that have competition law are liberal democracies, it is not surprising that problems produced by competition law in the international system have been addressed through the liberal perspective on economic interaction. Efforts, therefore, have been made to reduce the friction competition law can cause in economic interdependence.

The first type of effort in this direction has been unilateral restraint. The diplomatic problems created by extraterritorial enforcement of anti-trust laws were not completely lost on US courts, which developed a somewhat more sensitive doctrine of extraterritorial enforcement.⁵⁰ The European Court's hesitancy in *Wood Pulp* to embrace the Commission's

46. Cheshire and North, *Private International Law* (11th edn. 1987), p.375.

47. See L. Collins, "Blocking and Clawback Statutes" (1986) *J. Bus. L.* 372, 452.

48. See *Wood Pulp* [1985] 3 C.M.L.R. 474.

49. On *Wood Pulp* see D. Lange and J. Sandage, "The *Wood Pulp* Decision" (1989) 26 C.M.L.Rev. 137. Extraterritorial enforcement of competition law remains very much a hot topic. See "Reaching Across Borders", *Financial Times*, 21 Mar. 1991, p.25.

50. Compare *US v. ICI* 105 F.Supp. 215 (1952) with *Timberlane Lumber Co. v. Bank of America* 549 F.2d 597 (1976) and *Mannington Mills v. Congoleum Corporation* 595 F.2d 1287 (1979).

effects doctrine suggests a desire to place some limits on the extraterritorial effect of EC competition law. The Court was at pains to demonstrate that the "implementation doctrine" conformed to the public international law principle of territoriality. Of course, the strict territorial enforcement of British competition law provides the best example of unilateral restraint.⁵¹ The benefits such unilateral restraints generate in the international system, however, should not be exaggerated. They are often reactions to political damage already done. If extraterritorial enforcement has provoked States to enact blocking statutes like the British Protection of Trading Interests Act 1980, judicial moderation after the fact seems rather like a tardy admission that the initial policy was wrong. Further, unilateral restraint might be a rather uncomfortable attitude in an international system populated by export cartels and characterised by rough international economic competition.

A second type of effort at international co-operation is more substantive; it involves bilateral diplomacy and agreements between States to reduce the friction caused by competition law. Such agreements bring competition law into the realm of public international law. Enforcement of competition law has been a fertile ground for bilateral diplomacy. The United States, for example, has concluded agreements with Canada, Australia and Germany concerning co-operation in the enforcement of competition law.⁵² The EC concluded an agreement on competition law matters with EFTA that governs the reciprocal enforcement of EC and EFTA competition rules against nationals of the other community.⁵³ Association agreements between the EC and non-member States also include provisions dealing with competition. Such bilateral diplomacy also occurs on specific competition law matters. The United States and the EC, for example, have entered into an agreement under which EC steel exports to the United States are regulated.⁵⁴

A very interesting recent development in the area of international co-operation on competition law matters is the Agreement between the European Commission and the United States Regarding the Application of Their Competition Laws signed on 23 September 1991. The United States and European Commission agreed to notify the competition authorities of the other as soon as they "become aware that their enforce-

51. See Whish, *op. cit. supra* n.31, at pp.383-387.

52. *Idem.* p.383.

53. In *Wood Pulp* [1988] 4 C.M.L.R. 901, the ECJ addressed itself to this agreement when the Finnish wood pulp producers fined by the Commission claimed that their situation was covered by the EC-EFTA agreement. The ECJ rejected the argument, stating that the situation before it fell outside the scope of that agreement.

54. See F. Benyon and J. Bourgeois, "The European Community-United States Steel Arrangement" (1984) C.M.L.Rev. 305. The ECJ has interpreted the effects of this agreement in *Hoesch AG v. Bergrohr* [1991] 1 C.M.L.R. 383.

ment activities may affect important interests of the other Party".⁵⁵ The parties also agree to "render assistance to the competition authorities of the other Party in their enforcement activities".⁵⁶ Although this agreement does not divide jurisdiction or change existing law, the hope is that the notification and consultation process will reduce and minimise competition law problems between the parties. Competition Commissioner Brittan, further, has expressed a desire to conclude similar agreements with Canada and Japan. Behind such efforts is a scheme to create a multilateral competition law process to lessen the difficulties national competition law systems cause in international relations.⁵⁷

Such diplomacy and agreements on competition law issues allow States within the competition tradition to pursue the benefits of economic interdependence while reducing specific sources of friction. This diplomatic activity demonstrates that States that value economic interdependence do not engage one another in the international system on strictly realist terms. Democratic States obviously do not believe that economic interaction is but a base struggle for power. A concern to preserve the mutual benefits of economic interdependence qualifies the approval of national power apparent in competition law systems. This qualification indicates that States within the competition tradition perceive power in the international system in a complex and sophisticated way. In keeping with the liberal perspective, fears and concerns produced by the international system in competition law matters can be reduced by framing rules to regulate State behaviour.

A third type of effort at international co-operation seeks to extend the public international law of competition beyond a patchwork of bilateral, *ad hoc* agreements. An example can be found in regional systems of competition law. EC competition law is a regional system of public international competition law monitored by an international organisation. Similarly, EFTA has treaty law on competition matters in Articles 13–17 of the Stockholm Convention.⁵⁸ The EC and EFTA have very recently negotiated a fusion of their regional competition law systems as part of the draft treaty on the European Economic Area. Under this draft treaty, the EC and EFTA have established a common set of competition principles and procedures. The seven EFTA States will "adopt most of

55. Art.II(1).

56. Art.IV(1).

57. Commissioner Brittan stated that the Agreement is a "first step" to "prevent trouble rather than deal with trouble" and to "avoid conflict rather than resolve conflict". Quoted in D. L. Fox, "US-EC Antitrust Cooperation Accord", *International Merger Law*, Oct. 1991, p.20.

58. See R. Middleton, *Negotiating on Non-Tariff Distortions of Trade* (1975), pp.39–91 for a discussion of the EFTA treaty rules on competition.

the EC's competition rules".⁵⁹ A separate EFTA authority, however, will be established with powers mirroring the European Commission's to deal with competition "complaints about companies which generate more than 33 per cent of their combined turnover in Efta countries".⁶⁰ Mergers triggering the EC's Merger Control Regulation will, however, be handled by the European Commission.⁶¹

It is important to remember, however, that such regional systems of public international competition law exist only as part of much wider regional economic objectives. Regional public international competition law, therefore, plays an integral part in attempts to achieve such ambitious goals as a free trade zone or economic union through integration. The attachment of regional competition law to other political and economic goals may go a long way to explain the success of the EC and EFTA systems and their future fusion. I will return to this point in the later section on competition law and the international society.

Another example of the effort to push the public international law of competition beyond bilateral agreements and regional arrangements has been the endeavour to formulate a world code of competition law binding on all States. Philosophically, the foundations for a concept of a world competition code can be found in the ideas of the great Enlightenment liberal thinker Kant, who posited that free trade could help tame the international system under the influence of a Cosmopolitan Law that allowed individuals to trade in foreign lands without persecution or discrimination.⁶² Kant had abstractly envisaged an international system in which private individuals and undertakings from different States competed with one another on what in modern parlance is called a level playing field. Historically, the impetus for efforts at a world code came from the United States during the Second World War. As already noted, Roosevelt believed that German cartels were part of the evil system that produced Hitler. In 1944 Roosevelt suggested that control of cartel behaviour might be "achieved only through collaborative action by the United Nations".⁶³ Roosevelt's idea was a radical one: it appears that he suggested subjecting cartel behaviour not only in the international system but also within States to United Nations authority. Such an idea clearly intended that both private and public competition behaviour be regulated by an international organisation.

Roosevelt's idea, however, suffered from serious theoretical and practical problems, namely the principles of sovereignty and non-intervention

59. A. Hill, "Twin Pillars to Govern Competition Policy", *Financial Times*, 23 Oct. 1991, p.2.

60. *Ibid.*

61. *Ibid.*

62. See sources cited *supra* n.26.

63. Quoted in Davidow, *loc. cit. supra* n.8.

in the internal affairs of States. Any hope of formulating a world code would have to proceed by getting States to agree to standard internal competition rules and to co-operate in inter-State agreements on implementation and enforcement. This is how the process developed. In 1948 the Charter of the International Trade Organisation engineered by the United States and United Kingdom contained a section condemning restrictive business practices. A similar list of restrictive business practices was drafted into a UN document in 1952 which also recommended creating a UN body to facilitate international anti-trust consultation between States and to investigate complaints by member States. As political tensions and changes in the international system permeated the United Nations in the 1950s and 1960s, however, the country that had played the leading role in pushing for a world competition code, the United States, concluded that the concept of an international anti-trust regime simply could not be achieved. Corwin Edwards, an American who "devoted his career to supporting and spreading antitrust doctrine",⁶⁴ concluded in 1967 that "a global agreement was impractical because many states used restraints of trade as a weapon against other countries and rejected private enterprise as the optimum form for economic activity".⁶⁵

The United States and other Western countries, however, did not completely end their participation in multilateral efforts to increase international co-operation on competition law matters. Western States have focused attention, for example, on competition law issues within the Organisation for Economic Cooperation and Development (OECD). OECD work on reducing the friction caused by competition law in the international system has focused on three areas. First, OECD serves as a valuable source of information and analysis on national competition laws and policies. Second, it has "established consultation and conciliation procedures whereby national governments can meet to reconcile conflicts created by the extra-territorial application of national anti-trust policies".⁶⁶ Third, OECD has formulated a set of voluntary Guidelines for Multinational Enterprises, which includes a competition section encouraging private undertakings to "refrain from actions which adversely affect competition in the relevant market by abusing a dominant position of market power".⁶⁷

Efforts at multilateral co-operation on international competition law matters have also taken place within the United Nations Conference on

64. *Idem.* p.361.

65. *Idem.* p.364.

66. T. Brewer, "International Regulation of Restrictive Business Practices" (1982) 16 J. World Trade Law 113-115.

67. *Ibid.*

Trade and Development (UNCTAD). UNCTAD's efforts comprise four main areas of activity. First, UNCTAD has served as a central collection point for information and competition policies and practices throughout the world. Second, it has made attempts to draft a model national competition law mainly for the benefit of those newer States wishing to adopt the system. Third, it has facilitated the negotiation of multilateral agreements on specific economic areas. An UNCTAD-sponsored agreement, for example, regulates competition in the liner trade.⁶⁸ Fourth, it exerted much energy in the 1970s in preparing an international code on restrictive business practices. In 1980 the General Assembly endorsed UNCTAD's Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.⁶⁹

UNCTAD's efforts, however, have not produced anything more than voluntary guidelines for States. In no sense can the UNCTAD Set of Equitable Principles qualify as rules of public international law on competition. The only public international law on competition issues remains the rules contained in bilateral, regional and area-specific multilateral agreements. In fact, as we shall see in the next section, the UNCTAD effort to formulate an international competition code succeeded best in highlighting the dramatic gaps that separated States on the issue of private economic competition and its regulation.

The examples of unilateral restraint by States, bilateral diplomacy and agreements, regional treaty regimes, and attempts at creating more universal rules for competition illustrate the extent to which States have sensed the need to respond constructively to the problems caused by national competition law in the international system. International co-operation and co-ordination find a place on the agenda of States concerned with matters of competition law. To some extent this fact both balances the worries over national power and competitiveness and also remains in tension with those worries. Such attempts at reducing the friction created by competition law in economic interdependence through self-imposed or negotiated rules illustrate the close affinity that competition law States have with the liberal perspective on international relations.

C. Competition Law and International Economic Justice

Competition law's interaction with the international system has also

68. See UNCTAD Convention on a Code of Conduct for Liner Conferences 1974, UN Doc.TD/RBP/CONF/10 (Apr. 1980). This Convention is implemented in the UK in the Merchant Shipping (Liner Conferences) Act 1982. For a detailed examination of how this Convention relates to EC competition law, see the judgment of the ECJ in *Re Algerian Shipping* [1991] 1 C.M.L.R. 586.

69. Brewer, *op. cit. supra* n.66, at pp.109-112.

exhibited aspects of the third major tradition on economic behaviour in international relations, socialism, which propounds that the pattern of economic relations set by capitalism produced injustice and had to be transformed radically. Competition law concepts became part of the arsenal of the developing countries' efforts in the 1970s to create a New International Economic Order (NIEO). As noted earlier, by the late 1960s the leading Western States had lost interest in fashioning a world competition code. Developing countries, however, picked up the notion of international rules for restrictive trade practices and refashioned it for use in their drive for international economic justice. As Davidow writes, "Developing countries' pressure for international RBP rules was undoubtedly the primary factor in rejuvenating UN activity in this field."⁷⁰ As a result, formulating international restrictive business practices rules remained on the UNCTAD agenda throughout the 1970s. The pressure from developing States culminated in the 1980 Set of Equitable Principles endorsed by the General Assembly.

The ideas held by developing countries in the UNCTAD negotiations were indeed radical, not to mention confrontational. Davidow states that developing countries "sought international endorsement of the concept that all corporate conduct that was injurious to, or not positively helpful for, their development should be branded as restrictive and altered to their specification".⁷¹ The chief corporate villain was the multinational corporation. Although the developing countries' position was seen as outside "traditional" competition law thinking, the previous sections on competition law and the State and the international system demonstrate that what developing countries were in fact doing was laying bare their perception that capitalist notions of "competition" between private undertakings in reality worked as mechanisms of power politics used to weaken the abilities of some States to challenge the status quo. When developing States "redefined" the concept of restrictive trade practices, their emphasis was on the restrictions they perceived capitalist forms of competition placed on their economic development and on power inequalities between States to the exclusion of "traditional" competition law concerns about horizontal concentrations or dominant positions of private undertakings. The UNCTAD programme on restrictive business practices thus mirrored the larger political objectives contained in the NIEO movement: changing the hierarchy and patterns of power in the international system.⁷² A world competition code under this perspective

70. Davidow, *op. cit. supra* n.8, at p.365.

71. *Idem.* p.366.

72. See R. W. Tucker, *Inequality of Nations* (1977) for an analysis of developing countries' general demands for economic justice as an attempt to alter the power structure of international relations.

could represent nothing less than a complete reorganisation of the international system on egalitarian lines. "Competition law" could have no other function than achieving international economic justice.

Developed States worked in UNCTAD throughout the 1970s to turn the quest for international rules of competition back towards more familiar notions of competition and its regulation. Some of the ideological heat between the Western States and the developing countries decreased when the highly politicised issue of technology transfer became the focus of a parallel set of UNCTAD negotiations.⁷³ Western delegations succeeded in diluting the radicalism of the developing countries' initial perspective on restrictive trade practices so that the Set of Equitable Principles reads in many places like rules from the major competition law systems of developed States. Aspects of the negotiations, however, still remained very difficult and controversial. Developing and socialist States, for example, sought to prohibit export cartels in the international rules. Western States wanted to permit national export cartels but prohibit international cartel agreements between different national export cartels. No consensus could be reached on this issue, meaning that the Set of Equitable Principles did not include any provision on export cartels.

The effort by developing States to remake notions of competition law in the international system constituted a bold if unsuccessful attempt to attach competition law to a non-liberal conception of international economic justice. Many factors must be considered in explaining the failure at radical change, but one of the most important has to be the distribution of economic power in the international system. The economic clout of the developed States meant that any effort to change the patterns of economic interaction in the international system would not succeed without their consent. This fact somewhat supports the complaint of the developing States about the international status quo. Yet it also points to a major weakness in the developing countries' effort to transform competition law in the international system. Arguments from "justice" rarely prove strong enough to persuade States to relinquish power in an international system that lacks a common sovereign and is marked by a dangerous political anarchy. Phrasing some of those justice arguments in the language of competition law did nothing to change the dynamics of power in the international system.

V. COMPETITION LAW AND INTERNATIONAL SOCIETY

THE last element of the framework developed in this article comprises the relationship between competition law and international society. An

73. Davidow, *op. cit. supra* n.8, at pp.369-370.

international society "exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions".⁷⁴ An international system and international society are not the same thing. While an international society presupposes the presence of an international system, an international system can operate without an international society. Common interests and values that characterise the general international society include the preservation of the system and society of States, maintaining the independence and sovereignty of States, the limitation of violence, keeping promises and peace.⁷⁵ International relations theorists like Hedley Bull have argued that a general international society of States does exist even if in a most minimal sense.⁷⁶

The first question that should be asked about competition law and international society is whether the former in any way constitutes an element of the latter. The heterogeneous attitudes towards capitalism, competition and their regulation that exist in the international system suggest that competition law does not represent a common interest, value or institution of the general international society. Davidow argued that the history of international efforts to develop an international code of competition law from Roosevelt to UNCTAD indicates that "controlling restrictive business practices has been accepted as an international goal".⁷⁷ This conclusion, however, exaggerates the achievement represented by the non-binding UNCTAD Set of Equitable Principles. Davidow himself doubts whether the UNCTAD rules will have any normative effect,⁷⁸ which strongly suggests that such international charters of competition law will remain somewhat hollow in an international society where the majority of States do not share the competition tradition of the capitalist West. This was a major reason why Corwin Edwards concluded in 1967 that an international agreement on restrictive business practices would not succeed:⁷⁹

It cannot succeed if it includes countries that are widely divergent in their legal and political systems or in the place that they give to private enterprise . . . It cannot succeed if the participating states do not have a substantial degree of common experience as to the nature of business enterprises and of business practices.

74. Bull, *op. cit. supra* n.3, at p.13.

75. *Idem.*, pp.16–20.

76. *See idem.*, p.41.

77. Davidow, *op. cit. supra* n.8, at p.391.

78. *Idem.*, p.372.

79. Quoted in *idem.*, pp.364–365.

The general international society does not exhibit any common interest or value in competition and its regulation in relation either to the importance of competition within States or to the role of competition in the international system and society.

Competition law and the control of its effects in the international system are shared interests of only a small part of the wider international society. In this sense, it represents a common interest of a specific international society composed of the developed capitalist democracies.⁸⁰ When competition law ventures beyond this select democratic international society, the results highlight the heterogeneity of the wider international society. Two European Commission decisions illustrate this point. In *Aluminium Products* it rejected sovereign immunity arguments and applied Article 85 to Eastern European aluminium producers despite the fact that under socialist law these producers were organs of their respective States.⁸¹ In *Colombian Coffee* it imposed Community law on the export practices of a Colombian national coffee federation.⁸² Both decisions reveal the philosophical and political gap between the liberal commitment to private economic competition and other forms of political and economic organisation and behaviour. In situations where one State does not share another's competition ethos, the application of competition law to its economic practices might appear not only as intervention in the affairs of other States but also as the exercise of economic hegemony or neo-colonialism.

Within the much smaller democratic international society, competition law can be considered as a common interest and value in a number of ways. First, it directly relates to a shared interest in the process of economic interdependence. Second, it supports the belief that economic competition itself is an important common value. Sir Leon Brittan appealed to both these considerations when he stated that the EC shares with the United States "a commitment to competition as the driving force of the market economy and to competition policy as the principal policy response to structural changes in the market place".⁸³ Third, competition

80. The dramatic political and economic changes in Eastern Europe represent a potential widening of the specific international society of developed capitalist democracies. Some of these emerging capitalist democracies have already included competition law as one of their new national interests. See Bulgaria's Protection of Competition Act, Czechoslovakia's Law on the Protection of Economic Competition, Hungary's Act LXXXVI of 1990 on Prohibition of Unfair Market Practices, and Poland's Anti-Monopoly Act. Also see "Antitrust: One Important Component of the Transformation of Eastern Europe". *International Merger Law*, Nov. 1991, pp. 18-19. Further, as part of free trade and economic agreements with the EC, Czechoslovakia, Hungary and Poland have agreed to adopt EC competition law: see "Three Eastern European Countries to Adopt Key EC Antitrust Rules" *EC Competition Law Report*, 9 Dec. 1991, p. 4.

81. See *Aluminium Products* [1987] 3 C.M.L.R. 813.

82. See *Colombian Coffee* [1983] 1 C.M.L.R. 703.

83. [1990] 4 C.M.L.R. 324.

law has become part of the substantive work of common institutions, as illustrated by the work of OECD.

Although the democratic international society does seem to include competition law as part of the societal fabric, the pattern of the weave is not necessarily clear. First, as noted before, competition law can act as a divisive mechanism as well as a shared international societal value. The close association of competition law with issues of national power and competitiveness creates tensions in the shared values of competition and economic interdependence. Liberal States measure their national competitiveness against one another, which can produce friction in international economic relations. The strength of the common interest in competition between free market States depends greatly on perceptions of reciprocity. One reason "national competitiveness" remains a problem is that some States sense that economic relations do not function on a reciprocal basis. Such perceptions of "them" and "us" among free market States weaken the fabric of democratic international society. One result of this weakened fabric is what Gilpin sees as the "rise of economic regionalism" where "loose regional blocs" form, creating fissures in the liberal economic order.⁸⁴ American trade difficulties with Japan and fears about "fortress Europe" play an important part in the Bush administration's efforts at creating a North American free trade zone. The fact that many liberal democracies have systems of competition law does not translate automatically into international relations free from problems related to competition and its regulation.

Second, the closer one looks at particular systems of competition law the harder it becomes to detect much agreement between liberal States about what competition law is supposed to do. As illustrated by the debate between the Chicago school and traditionalists in the United States, finding consensus within a single State about the function of competition law can be difficult. Similar internal debates have arisen in the United Kingdom and the EC. In the United Kingdom the Conservative government developed plans to replace the Restrictive Trade Practices Act with a system modelled on Article 85 of the Treaty of Rome because the latter was, *inter alia*, perceived to be more favourable to the government's emphasis on competition.⁸⁵ Critics of the European Commission's interpretation of Articles 85 and 86 reveal that the purposes of EC competition law remain a controversial topic. Those urging the development of a European "rule of reason" contrast distinctly with those who believe that the Commission must continue to maintain a firm grip on the competition law process. At the heart of this debate are strong differences about the proper role of a system of competition law. If

84. Gilpin, *op. cit. supra* n.1, at pp.396-397.

85. See *Opening Markets: New Policy on Restrictive Trade Practices* Cm.727 (1989).

competition law is a shared value within certain democratic societies, it is often difficult to define exactly what the value means. This difficulty makes the task of identifying the content of a democratic international societal value of competition law very hard.

Third, despite the fact that democratic countries have entered into bilateral agreements to resolve competition law problems and have co-ordinated information-sharing and conciliation services within OECD, there appears to be little consensus on or even consideration of the proper role of competition law in a liberal international society. At present, its role seems to be to create brush fires in the liberal international society that have to be extinguished in an *ad hoc* fashion. The strategy pursued by the United States in the late 1940s and early 1950s was an attempt to create a constructive *international* role for competition law. The strategy, however, contained two flaws that rendered it impotent. First, it attempted to include States that were outside or even hostile to the competition ethos. Second, the strategy projected domestic concepts of competition law on to a radically different political environment. Defining a role for competition law in the international system, if only between liberal States, must still take account of the basic realities of international relations. The question remains open whether such an international role even within the liberal international society can go beyond the mechanical services of information provision and facilitation of dispute settlement provided by OECD to include something more substantive. The EC and EFTA might be held up as examples of how competition law can play such a substantive role between liberal States. But, as indicated earlier, the EC and EFTA rules on competition only form parts of much larger endeavours. Would it be possible to create a substantive international role for competition law between the EC and the United States, for example, without the grander vision of economic integration leading to political union? I seriously doubt it.⁸⁶ The recent European Commission-US Agreement mentioned earlier might be seen as an initial step towards a more substantive international role for competition law, but the agreement itself promises no such role. It specifically states in Article IX that it shall not affect or change the existing competition law of the parties. The potential remains for consultation and co-operation to break down because separate national interests prove stronger than the desire for co-ordination.⁸⁷

86. Sir Leon Brittan entertains no such doubts as he has proposed that worldwide competition law rules should be formulated within the GATT. Sir Leon's proposals contain echoes of the earlier unsuccessful effort at universalising competition law: see "Brittan Urges Role for GATT in Competition Regulation", *Financial Times*, 3 Feb. 1992, p. 1.

87. The co-operation function of the Agreement is itself limited significantly by Art. VIII's restriction on the exchange of information considered confidential under the respective systems of competition law. If the US Antitrust Division and the European Commission merely exchange publicly available information, the substantive value of the pact must be

Finally, although liberal States do constitute a unique international community, their susceptibility to the pressures of international politics should not be forgotten. As Rousseau predicted, the international system forces a democratic State to compare itself with other States in order to know itself.⁸⁸ This process of comparison is not restricted to matters of military strength. In the latter part of the 1980s, Paul Kennedy's *Rise and Fall of the Great Powers* catalysed a growing sense of political *angst* in the United States about its decline relative to Japan and the EC.⁸⁹ The book voiced fears that had been growing for some time about the United States' "national competitiveness". Even those who fundamentally disagree with the idea of US decline admit that the United States is in danger of losing its competitive edge in technology, industry and education.⁹⁰ A similar process has occurred in the United Kingdom as it struggles to come to grips with the momentum for European economic and political union. Does it risk becoming the European outsider, unwilling or unable to compete within the Community, for the sake of the principle of Parliament's sovereignty? Signs of "nationalism" can also be detected in the pace at which the European Commission seeks to achieve economic union. Commissioners are well aware of the economic power that a united Europe could wield in the international system. Not all aspects of European nationalism, however, are so positive. The collapse of the Soviet empire in Eastern Europe threatens to increase the already considerable list of States wanting to join the EC. The promise of a strong European State stands in stark contrast to an EC diluted and overstretched in its efforts to welcome other States into the fold. There may be growing worries in this area and pressures to preserve the EC only for certain Europeans. These pressures could affect EC competition law, in relation to whose future Frazer writes: "A tension between free competition and protectionism may therefore emerge as a new Community problem."⁹¹

The forces of international relations that compel liberal States to return in fear or in pride to self-interest work against those interests and values that make up the liberal international society. Competition law in both its domestic and international contexts can show the effects of the operation of these forces. Therefore, the focus of competition law can narrow and become more nationalistic instead of widening to provide support for the international society of liberal States. The spectre of protectionism and

questioned since the two parties presumably will be consulting about matters already known under substantive laws that are not changed.

88. Rousseau, "The State of War", in Hoffmann and Fidler, *op. cit. supra* n.24, at p.38.

89. See P. Kennedy, *Rise and Fall of the Great Powers* (1988).

90. See J. Nye, *Bound to Lead: The Changing Nature of American Power* (1990).

91. T. Frazer, "Competition Policy after 1992: The Next Step" (1990) 53 M.L.R. 623.

the use of competition law against foreign competitors lurk dangerously close to the surface of liberal international society.⁹²

VI. CONCLUSION

IN this article I have attempted to take some tentative steps in understanding the theoretical and practical relationship between competition law and international relations. At the heart of the relationship is the uneasy conjunction of systems of policy and law promoting economic competition between private enterprises in many countries and of a system reflecting competition among States. As we have seen, the realist does not believe that the two spheres of private and public competition can remain distinct; competition between States will inevitably come to dominate and harness private competition for purposes of State power. The liberal perspective, on the other hand, hopes that private economic competition and its regulation can reduce tensions in the international system by creating strong international societal values and interests. Under such a perspective, the competition between States reduces in importance as co-operation replaces wary co-existence as the mode of diplomatic activity. Reality, of course, mirrors neither of these views exactly.

As part of the liberal belief in economic interdependence, the competition ethos has contributed to a diffusion and transformation of power in the international system. Power has been diffused through the development of many areas of economic success (North America, Europe and Asia). Economic power so dispersed helps maintain a balance of power and a strong interest in all States engaged to maintain this balance and the relative and mutual benefits that flow from it. Furthermore, it is inconceivable (as it was not in the seventeenth century)⁹³ that the economic powers of today (the United States, Japan and the EC) will resort to violence and force to resolve controversies that arise from trade, commerce and international economic competition. The competition ethos, as predicted by the liberal perspective, has helped influence the nature of international relations.

As the tenacity of the idea of "national competitiveness" shows, however, old ways of thinking about competition of any kind in international relations survive. While such fears will not lead to mercantile

92. Calls in the US for protectionist legislation and to target Japanese companies for more rigorous anti-trust action exemplify this lurking danger. See T. Boone Pickens, "The Japanese Need to Hear About Antitrust Laws", *International Herald Tribune*, 29 Apr. 1991, p.4. Also see the editorial "Try Trade Negotiations", *International Herald Tribune*, 26 Feb. 1992, p.6, criticising suggestions made by US Attorney General William Barr that extraterritorial enforcement of American anti-trust law should be used to fight perceived unfair foreign competition.

93. On the wars of the merchants, see M. Howard, *War in European History* (1976), pp.38-53.

wars, they could produce mercantile policies that might damage the competition ethos shared by the liberal international society. Such realist concerns can erode the reciprocity of behaviour that underpins much of the interdependence of competition in the international system. "State competition" can still come to dominate or overshadow in people's minds the process of private economic competition.

The reality of the situation, therefore, is that for better or for worse competition and competition law intertwine with many forces at all levels of international relations. The major trends in competition today—globalisation of markets and increasing concerns over national competitiveness—require a sophisticated understanding of the complex interdependence between the competition ethos, the complicated structure of international relations and the powerful attitudes alive in international political life. Such an understanding should be desired not only for the sake of academic interest but also for the prudent handling of the competition ethos in future years. Addressing the future of the general international order, Hedley Bull concluded that the international system could remain viable only "if the element in it of international society is preserved and strengthened".⁹⁴ Similarly, the prospects for the competition ethos in the international system depend upon the strength of competition and its regulation as a common interest and value between the major economic powers. Competition law, to conclude, must be addressed to this challenge of international society.

94. Bull, *op. cit. supra* n.3, at p.315.