CHAPTER ONE

THE UNILATERAL STRATEGY

I. Introduction

The main preoccupation of national competition authorities is to safeguard the competitive structure of their domestic markets from any possible distortions, included those brought about by the restrictive business practices carried out abroad. However, there do not exist either internationally applicable competition rules or supranational competition authorities on which it is possible to rely for the regulation of transnational restrictive business practices. Therefore a national competition authority which fears that a business practice may produce anti-competitive effects within its territory applies its own national competition laws to regulate such practice. When an alleged restrictive practice meets the statutory jurisdictional criteria of a given country, the competition authority of that country may be willing to exercise jurisdiction on such a practice, regardless of the place where it has been carried out. The application of national competition laws to transnational restrictive business practices will be labelled as the unilateral strategy.

This approach is not illegal per se, since it is a manifestation of national economic sovereignty, according to which countries have a legitimate interest as well as the right to regulate their economic interests and the structure of their home markets. However, recourse to the unilateral strategy may lead to some undesirable consequences. The regulating countries may apply their national competition laws beyond national borders and infringe the sovereignty of third countries.1 Such exercise of ‘extraterritorial’ jurisdiction may not be permitted by public international law. Moreover, it is questionable whether the unilateral strategy is a suitable response to global competition problems.

This chapter will examine and critically review the unilateral strategy. The structure of the chapter is as follows. The second section introduces readers to the concept of extraterritoriality. The third section analyses the different grounds of extraterritoriality developed under public international law. The fourth section examines the inbound and the outbound extraterritorial application of competition law under the unilateral strategy. The fifth section deals with extraterritorial application of US and EC competition laws.

---

The sixth section examines the issues of extraterritorial application of US and EC competition laws to merger cases. The seventh section explains why the unilateral strategy is unsuitable to effectively address global competition problems. The eighth section draws conclusions.

II. The concept of extraterritorial jurisdiction

The concept of extraterritorial jurisdiction was first developed at the end of the 19th century to address the problems created by the internationalisation of criminal activities. Extraterritoriality is still a valid instrument today to prosecute the authors of those activities which produce offensive effects in several countries. Equally, it can provide the legal basis for a country whose interests are harmed by a restrictive business practices carried out abroad to regulate that practice.

Extraterritoriality generally includes those situations where one of the stages of the process of the application of a legal rule takes place outside the territory of the enacting country. Legal scholars have attempted to further refine the concept of extraterritorial jurisdiction. The qualifying elements of extraterritoriality have variously been identified as “the exercise by a state of legislative and enforcement jurisdiction beyond its borders either over the citizens of other countries or over its own nationals”, or as “prescribing conducts which is outside the territory” and finally as the fact that the authorities of the country that has enacted the rule apply that rule to conducts carried out beyond its national borders.²

It is possible to set out the noyau dur of extraterritoriality, which consists of the projection of the legal rules of one country upon situations that occur outside the territory of that country. Only laws which intend to regulate conducts performed abroad and which produce effects in the territory of the enacting country are likely to infringe national sovereignty. The principle of national sovereignty, one of the tenets of public international law, empowers countries to exercise exclusive and absolute rights over their territory, the so-called “reserved domain.”³ As, under public international law, all countries

---
