

JAPANESE APPROACHES TO EXTRATERRITORIALITY IN COMPETITION LAW

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Abstract Extraterritorial application of domestic competition law is an important feature of the current regulatory framework governing anticompetitive conduct. Japan was initially hesitant to apply its Antimonopoly Act in such a manner. However, over the last two decades there has been a significant shift in its approach. Japan has gradually embraced extraterritoriality and the Japan Fair Trade Commission has actively enforced competition law in a purely offshore context. This article investigates this evolution and considered the most recent and controversial cases in which Japan has applied its laws in a distinctive fashion.

Keywords: Antimonopoly Act, competition law, effects doctrine, extraterritoriality, extraterritorial jurisdiction, Japan.

I. INTRODUCTION

The international community developed a range of legal frameworks to deal with various transnational or international phenomena. For example, the World Trade Organization was established to handle public restraints to trade. However, no multilateral solution has been adopted to deal with private anticompetitive conduct stretching beyond State borders. In effect, the harm arising from international cartels or transnational mergers often would have been left unaddressed if States did not apply their domestic competition laws extraterritorially.¹

Japan was initially hesitant to apply its competition law extraterritorially. Its approach was restrained, even within the conservative remits set by the well-established principles of international law. Moreover, for a long time Japan did not recognize extraterritoriality in cases involving only foreign conduct. In fact, it actively protested against US extraterritorial assertions in such cases. However, the Japanese position has evolved.

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¹ See M Martyniszyn, 'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law' (2012) 15(1) JIEL 181.

Over time, Japan not only embraced far-reaching jurisdictional assertions but it also moved into the vanguard, pushing the limits of extraterritorial jurisdiction in a manner hitherto unseen. The most recent developments could potentially cause international tension if they withstand legal challenge and become an accepted approach.

This article investigates Japan's evolving position on the extraterritorial application of domestic competition laws over two decades of significant change. This issue requires careful analysis given the importance of Japan's outward-focused economy and its integration in global supply chains.

The article proceeds by outlining the doctrinal context and the jurisdictional practice of the US and the EU in Part II. Part III presents the Japanese regulatory framework and its initially restrained approach. The evolution of Japan's position on the US reliance on extraterritoriality is analysed in Part IV. Part V focuses on changes implemented by Japan in the last two decades, showing a gradual but significant shift in the way Japan approaches transnational anticompetitive conduct. Japan has clearly demonstrated its willingness and capability to apply domestic competition law extraterritorially and to play an active role in this regard internationally. However, the article argues that most recent extraterritorial assertions are excessive and could create unnecessary international friction if not restrained.

II. DOCTRINAL CONTEXT AND THE PRACTICE OF THE US AND THE EU

International law recognizes jurisdictional principles which permit a State to regulate conduct beyond its borders—extraterritorially.² They emerged in response to the problems which would persist if jurisdiction was limited to the two traditional bases (territoriality and nationality).³ The most pertinent for the purposes of competition law is the principle of objective territoriality, formulated by the Permanent Court of International Justice in *Lotus* in 1927.⁴ It was held that a State may assert jurisdiction in a case when only part of the offence—one of its constituent elements—has been physically committed within its territory.⁵ The principle of objective territoriality enables authorities to deal with various types of transnational anticompetitive arrangements. However, it does not support jurisdiction in cases involving purely foreign conduct of foreign entities that lead to harm in the domestic market. Given the growing importance of international business, this inadequacy led to the formulation of the effects doctrine—a principle which allows States to apply laws extraterritorially by recognizing that the economic harm suffered in the forum is sufficient to provide the necessary nexus.

The effects doctrine was first formulated by a US federal court in 1945 in *Alcoa*, a case concerning an international output-regulating cartel.⁶ It was held that 'any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its

² These are subjective and objective territoriality, passive personality, security and universality principles. RY Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws' (1957) 33 *BYBIL* 153.

³ BH Oxman, 'Jurisdiction of States' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (online edn, OUP 2008) para 11.

⁴ *France v Turkey*, Ser A., No 10 (PCIJ 1927).

⁵ *ibid* 23.

⁶ *United States v Aluminium Company of America (Alcoa)*, 148 F.2d 416 (2nd Cir 1945).

borders that has consequences within its borders which the state reprehends'.⁷ Economic harm was recognized as a sufficiently close connection for jurisdictional purposes, enabling the US authorities to pursue foreign antitrust violators harming US markets.

The doctrine met with a fierce critique internationally because it supported potentially unlimited jurisdiction.⁸ Foreign governments including Japan⁹ repeatedly intervened with the US government or directly before US courts to protest against US assertion of the effects doctrine.¹⁰ However, over time, foreign States stopped protesting, implicitly and—at times—explicitly recognizing the doctrine's validity. Meanwhile, two tests encapsulating the effects doctrine have been formulated in the US. The first, incorporated in the 1982 Foreign Trade Antitrust Improvements Act (FTAIA), stipulates that in cases not dealing with imports, US antitrust law applies to those arrangements which have a direct, substantial and reasonably foreseeable effect on US commerce.¹¹ The second, formulated by the US Supreme Court in *Hartford Fire*, provides that US antitrust law applies 'to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States [citations omitted]'.¹² Both tests qualify the necessary effects, indicating that trivial harm does not meet the threshold.

Various iterations of the doctrine, often carrying various labels, were adopted in different jurisdictions.¹³ Germany¹⁴ and China¹⁵, for example, introduced statutory provisions explicitly providing for extraterritorial jurisdiction on the basis of domestic harm. Other regimes, for example the EU and ultimately also Japan, embraced the doctrine by interpreting existing provisions.

The EU applied its competition laws extraterritorially almost from its inception. Beginning in the 1960s, the European Commission—the EU's law enforcer—interpreted the relevant provisions of EU law, which were mute on their scope of application, as being applicable to all arrangements affecting competition in the EU.¹⁶ The European Court of Justice (ECJ) endorsed asserting jurisdiction on the basis of the effects doctrine only in 1988, in *Woodpulp*, a case involving a foreign cartel.¹⁷ The Court formulated its own jurisdictional test, noting that a prohibited agreement is composed of two elements: its formation and its implementation, with the location of the latter being the decisive factor (the implementation test).¹⁸ It was understood that implementation requires some affirmative act, such as direct sales to an EU purchaser.¹⁹ Moreover, in *Gencor*, a merger case, the Court of First Instance explained that the EU's rules apply extraterritorially whenever 'it is foreseeable that a

⁷ *ibid* 443.

⁸ See, for example, Jennings (n 2) 160.

⁹ See discussion in Part IV.

¹⁰ Some States went further and introduced legislation hindering US enforcement. See M Martyniszyn, 'Legislation Blocking Antitrust Investigations and the September 2012 Russian Executive Order' (2014) 37(1) *World Competition* 103.

¹² *Hartford Fire Insurance Co. v California*, 509 U.S. 764, 796 (1993).

¹³ See discussion in M Martyniszyn, 'On Extraterritoriality and the Gazprom Case' (2015) 36(7) *ECLR* 291.

¹⁵ Art 2 of the Antimonopoly Law.

¹⁶ European Commission, 64/233/CEE, Decision on an Application for Negative Clearance submitted under art 2 of Council Regulation No 17, V/A-00061- Grosfillex/Fillistorf, OJ L58, 915–916 (1969).

¹⁷ *Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, A. Ahlström Osakeyhtiö and others v Commission* [1988] ECR 5193.

¹⁹ DGF Lange and JB Sandage, 'The Wood Pulp Decision and its Implications for the Scope of EC Competition Law' (1989) 26 *CMLRev* 159.

proposed concentration will have an immediate and substantial effect' in the EU.²⁰ Most recently, in *Intel*, a case dealing with abuse of a dominant position by a non-EU firm, the General Court clarified that a direct sale is only one means of implementing an agreement.²¹

Overall, the EU's tests require showing some non-negligible economic harm in order to support an extraterritorial assertion. That is a common requirement among jurisdictions applying their competition laws extraterritorially. Extraterritoriality in competition law is now a well-entrenched feature of the global regulatory framework governing transnational business. What differs among regimes is the degree of clarity relating to the jurisdictional tests, substantive differences in domestic laws and the scope of actual enforcement.

III. THE JAPANESE FRAMEWORK AND THE RESTRAINED APPROACH

The Japanese Antimonopoly Act was introduced in 1947²² during the Allied occupation of Japan in an effort to prevent a resurgence of the pre-war structures of industry (so-called *zaibatsu*).²³ The Act was based on US antitrust law and modelled on the US administrative enforcement system, with the Federal Trade Commission, vested with investigatory and quasi-judicial powers, at the apex.

Confusingly, the Antimonopoly Act has two potentially overlapping provisions. Article 3 prohibits firms from engaging in unreasonable restraints of trade, whereas Article 6 forbids entering into 'an international agreement or an international contract which contains such matters as fall under unreasonable restraint of trade or unfair trade practices'. The latter provision can be read as preventing firms from entering into any anticompetitive agreements, even if operationalized and affecting only foreign markets; whereas the former deals with only domestic conduct. Another interpretation suggests that the prohibition of Article 6 would apply prior to the actual implementation of any practice, being aimed at preventing violations of Article 3. Article 6 can be viewed as a legislative error,²⁴ although legislative history suggests a different answer.²⁵ Moreover, prior to the 1997 Amendment of the Act firms were required, under the now abolished Article 6(2), to notify the Japan Fair Trade Commission (JFTC) of any international agreements or contracts they entered into.

The Act does not address the question of its jurisdictional reach. It neither provides an explicit textual basis for extraterritoriality, nor does it set any territorial limits. Older

²⁰ *Case T-102/96, Gencor Ltd v Commission*, [1999] ECR II-753, para 90.

²¹ *Case T-286/09, Intel Corp v Commission*, paras 302–307.

²² Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No 54 of 14 April 1947.

²³ M Matsushita, *International Trade and Competition Law in Japan* (OUP 1993) 76–86.

²⁴ See discussion in M Matsushita, 'The Antimonopoly Act of Japan and International Transactions' (1970) 14 *JapAnnInt'IL* 8–9.

²⁵ Article 6 was adopted from the Imperial Ordinance No 33 promulgated in January 1946, which required persons who were participating in any international cartels to notify the authorities and also to withdraw from such agreements. It also prohibited entering into any such arrangements. The Ordinance was promulgated in response to a Memorandum on Dissolution of Holding Companies issued in November 1945 by the Supreme Commander for the Allied Powers. See Y Ohara, 'International Application of the Japanese Antimonopoly Act' (1986) 10(3) *Swiss Review of International Competition Law* 8–9.

Japanese legislation which was intended to apply to foreign activities typically included explicit provisions to that effect.²⁶ However, in Japanese law there is no general presumption against extraterritoriality. The relevant guiding rule can be found in the Japanese Constitution, which imposes a general requirement to follow the rules of international law.²⁷

Hence, this is a matter to be determined by the practice of the JFTC, subject to judicial review. So far, the Courts have played a very limited role in the development of the doctrine, mostly due to the fact that the JFTC's decisions were rarely challenged. Moreover, private enforcement of the Antimonopoly Law was limited.

In the first decades following the enactment of the Antimonopoly Act, the prevailing view, also held by the JFTC, was that the Act applied to all entities carrying on business in Japan.²⁸ In 1965, the Japanese Committee of the International Law Association found that 'only one rule is unanimously accepted; A country does not have regulatory jurisdiction over foreigners acting in a foreign country, even though the act eventually brings economic injury to the former country'.²⁹

Japan's first transnational case was the 1949 investigation of the conduct of numerous foreign shipping operators, which allegedly fixed cargo rates. Partly due to the protest of the UK government, shortly afterwards the 1949 Marine Transport Act was enacted,³⁰ excluding, under certain conditions, agreements among shippers from the scope of the Antimonopoly Act. Ultimately, the case was resolved in favour of the shipping firms.³¹

In 1964 the JFTC brought a similar case against the Japan Homeward Freight Conference, involving Japanese and foreign shipping companies. The foreign defendants challenged the JFTC's action, arguing that since the agreement was concluded in London and was not implemented in Japan, the JFTC lacked jurisdiction on the matter.³² The agency took the view that the agreement was illegal, finding that the cartelists engaged in business activities in Japan. The restrictive terms agreed abroad were forced upon the Japanese customers, hence key elements of the conduct were operationalized in Japan. The JFTC did not find the overreaching London agreement illegal, but only the subsequent contracts with parties in Japan which implemented it. The initial decision was successfully challenged on the grounds of invalidity of service of process, which had been made on the foreign entities' Japanese agents, who did not have the authority to accept service. After some reconsideration, in 1972 the JFTC issued a new decision addressed to a number of foreign entities who had branch offices in Japan or who were actively conducting business in Japan, thus allowing the JFTC to overcome its inability to serve process abroad.³³

²⁶ For example, art 2 of the Japanese Penal Code provides a list of crimes in relation to which the Code applies even though they were committed outside the territory of Japan. See Penal Code, Act No 45 of 1907.

²⁷ Art 98(2) provides that '(t)he treaties concluded by Japan and established laws of nations shall be faithfully observed'.

²⁸ M Yazawa, 'Interim Report by the Committee on the Extraterritorial Effects of Trade Regulation' (1965) 9 *JapAnnInt'IL* 176. ²⁹ *ibid* 177. ³⁰ In this vein Ohara (n 25) 21.

³¹ JFTC decision, 10 KTS 51 (1959). See also Yazawa (n 28) 176.

³² M Yazawa, 'Interim Report by the Committee on the Extraterritorial Effects of Trade Regulation' (1966) 10 *JapAnnInt'IL* 103; M Yazawa, 'Interim Report by the Committee on the Extraterritorial Effects of Trade Regulation' (1968) 12 *JapAnnInt'IL* 72.

³³ Ohara (n 25) 23, 37–8.

These early shipping conferences cases demonstrate the Japanese adherence to the doctrine of objective territoriality, requiring some conduct in Japan before Japanese law can be applied to foreign entities.³⁴ However, the JFTC's later approach was even more restrained. The agency went on challenging transnational anticompetitive arrangements, but typically only Japanese participants were addressees of any orders.³⁵ It is unclear to what extent this was a projection of the Japanese view regarding how transnational conduct should be regulated in the fragmented global regulatory system and to what extent it was a result of procedural and practical difficulties faced by the JFTC.

For example, in the late 1960s the JFTC investigated an exclusive distributorship agreement between a Japanese distributor, Novo, and a Danish pharmaceutical firm, Amano. It ordered the elimination of anticompetitive clauses in the agreement, but the only addressee of the decision was the Japanese firm.³⁶ The Danish firm attempted to challenge the decision, but the Tokyo High Court found that the firm lacked standing.³⁷ In effect, although Japanese law was not applied extraterritorially (in the sense that the decision was not addressed to a foreign entity), it negatively affected a foreign firm's operations. Hence, the decision was extraterritorial in nature.³⁸

IV. OPPOSITION TO THE US RELIANCE ON THE EFFECTS DOCTRINE

The gradual change in Japan's position on extraterritoriality in competition law can be traced through the formal positions communicated by the Japanese government to US authorities. Such communications typically addressed significant US policy changes and particular enforcement efforts.

For example, in 1988 the US Department of Justice (DoJ) issued Antitrust Enforcement Guidelines for International Operations.³⁹ The Guidelines clarified that although US antitrust law is considered to apply to all conduct having direct, substantial and reasonably foreseeable effects on US commerce, the US authorities will focus its enforcement efforts only on those arrangements which harm US consumers. But in 1992 the DoJ declared a significant change in its policy, announcing that it would also challenge those foreign arrangements which harm US exports, regardless of whether the conduct in question directly harms US consumers.⁴⁰ This met with criticism from foreign authorities, including Japan. The Japanese

³⁴ 'Dumping Regulations and Competition Policy, Extraterritorial Application of the Antimonopoly Act: Report of the Study Group of the Antimonopoly Act on External Affairs Issues (Summary)' *FTC/Japan views*, No 9 (July 1990) 27.

³⁵ E Kameoka, *Competition Law and Policy in Japan and the EU* (Edward Elgar 2014) 193.

³⁶ JFTC Decision of 12 January 1970, 16 KTS 138.

³⁷ Decision of the Tokyo High Court, 19 May 1971; upheld on appeal—Decision of the Supreme Court, 20 June 1976, Supreme Court Civil Cases Reporter, vol 29, 1976, 1592ff.

³⁸ Matsushita talks about the decision having 'some indirect extraterritorial effect'. Matsushita (n 24) 15.

³⁹ *Department of Justice, Antitrust Enforcement Guidelines for International Operations (1988)*, 55 Antitrust & Trade Reg. Rep. (BNA) No 1391.

⁴⁰ US Department of Justice, 'Justice Department Will Challenge Foreign Restraints on U.S. Exports under Antitrust Laws' (3 April 1992) at <https://www.justice.gov/archive/atr/public/press_releases/1992/211137.htm>.

government expressed its concerns, observing that such expansive extraterritorial assertions were not permitted under international law.⁴¹

The Japanese government also used amicus curiae briefs to present its views in individual antitrust cases pending before US courts.⁴² Such submissions of foreign governments are rare.⁴³ Japan submitted amicus briefs in at least seven antitrust cases in the US.⁴⁴ In five of these cases Japan opposed US extraterritorial jurisdictional assertions either in general or as sought by the plaintiffs.⁴⁵ These amicus interventions demonstrate how the Japanese position on the issue of extraterritoriality has shifted over time.

In 1985 in *Matsushita*,⁴⁶ a case dealing with alleged predatory pricing of Japanese exports to the US, the Japanese government noted that ‘the exercise of a state’s sovereignty involves only control of the activity of its own nationals within its territory with respect to its own export trade, foreign courts should not question or punish such activity’.⁴⁷ A rather similar position was expressed by Japan in 1996, in *Nippon Paper*,⁴⁸ a case involving price-fixing among Japanese producers of fax paper. It was the first case in which the US asserted extraterritorial jurisdiction for the purposes of imposing criminal sanctions on foreign defendants. The products in question were sold to unaffiliated trading houses in Japan on the condition that they charge the inflated prices when reselling in the US. In this case the Japanese position was very clear: ‘The Government of Japan, like many other industrialized Nations, holds the view that the extraterritorial application of the Sherman Act to the conduct of those who are not United States citizens or nationals is invalid under international law.’⁴⁹ Japan considered that the application of US competition laws to the Japanese activities of Japanese firms was invalid given the absence of a substantial link between the conduct at stake and the forum asserting jurisdiction. The economic effects of the challenged conduct were not considered a sufficient link. Hence, both in *Matsushita* and *Nippon Paper* Japan opposed extraterritorial assertions made on the basis of the effects doctrine.

⁴¹ See the Comment of the Government of Japan on the 1994 Draft Guidelines quoted in T Kojima, *International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy* Weatherhead Center for International Affairs at Harvard University, Fellows’ Papers 2001–2002 at <<http://www.wcfia.harvard.edu/fellows/papers/2001-02/>>.

⁴² Amicus briefs are submissions by entities who are not a party to a lawsuit, but who petition the court because they have a strong interest in the subject matter of the case. BA Garner *et al.* (eds), *Black’s Law Dictionary* (9th edn, West Group 2009) 98.

⁴³ For analysis of, see M Martyniszyn, ‘Foreign States’ Amicus Curiae Participation in U.S. Antitrust Cases’ (2016) 61(4) *Antitrust Bulletin* 611.

⁴⁴ *Matsushita Electric Industrial Co. v Zenith Radio Corp.*, 475 U.S. 574 (1986); *U.S. v Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir 1997); *F. Hoffmann-La Roche Ltd v Empagran SA*, 542 U.S. 155 (2004); *In re Monosodium Glutamate Antitrust Litigation*, 477 F.3d 535 (8th Cir 2007); *Goss Intern. Corp. v Man Roland Druckmaschinen AG*, 491 F.3d 355 (8th Cir 2007); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2011 WL 723571 (N.D. California 2011); *Motorola Mobility LLC v AU Optronics Corp.*, 775 F.3d 816 (7th Cir 2015).

⁴⁵ In two cases Japanese amicus interventions dealt with non-jurisdictional issues.

⁴⁶ *Matsushita* (n 44).

⁴⁷ *Motion for Leave to File Brief Amicus Curiae and Brief for the Government of Japan as Amicus Curiae in Support of Petitioners, Matsushita Electric Industrial Co. v Zenith Radio Corp.*, 1985 WL 669664, 6 (U.S. 1985).

⁴⁸ *Nippon Paper* (n 44).

⁴⁹ *Brief of Amicus Curiae the Government of Japan, U.S. v Nippon Paper Industries Co.*, 1996 WL 33659179, 12 (1st Cir 1996).

In three later cases Japan no longer challenged US reliance on the effects doctrine as such. In particular, in *Empagran* (a private action brought by US and foreign purchasers of vitamins against a number of foreign vitamins manufacturers, including a Japanese firm), in its brief before the US Supreme Court, Japan opposed any further expansion of then established extraterritorial reach of US laws.⁵⁰ On remand, in 2005, Japan submitted another amicus jointly with the governments of Germany, UK, Switzerland and the Netherlands.⁵¹ It was asserted that extraterritorial jurisdiction should be limited 'to those rare situations where the foreign conduct creates a domestic effect that is directly and inextricably bound to the foreign harm. Merely identifying a domestic effect or proclaiming it to be a byproduct of the anticompetitive conduct is not sufficient. Otherwise, U.S. court jurisdiction over foreign-based claims would be unlimited (...).'⁵² In 2007 these representations were brought to the court's attention in *In re Monosodium Glutamate*, a case involving another foreign price-fixing cartel involving Japanese firms, which was unsuccessfully challenged in the US in relation to the harm suffered in non-US markets by non-US plaintiffs.⁵³

Finally, in *Motorola Mobility*,⁵⁴ the question was again whether a US plaintiff could sue to recover damages with respect to harm suffered by its foreign subsidiaries which purchased the cartel-affected products outside the US that were incorporated into final products and subsequently sold by the plaintiff in the US. A number of foreign governments intervened in order to oppose Motorola's claim. In its brief the Japanese Ministry of Economy, Trade and Industry (METI) underlined that the Japanese Government 'strongly opposes assertion of extraterritorial jurisdiction that would unreasonably interfere with sovereign authority and violate fundamental principles of international law', directing the court's attention to the Japanese submissions in *Empagran*.⁵⁵ In its second brief, METI explicitly recognized 'the necessity of the extraterritorial application of competition law of each country to the extent that anti-competitive activities affect their own market'.⁵⁶ However, it opposed excessive extraterritorial assertions, such as in the case at hand, involving claims arising from foreign purchases of cartel-affected goods by foreign subsidiaries of US firms.⁵⁷ Notably, this latter METI view is different from the position taken by the JFTC, which at that stage had asserted jurisdiction in a case involving foreign violators in an even more far-reaching manner.⁵⁸

The analysis of representations made before US courts in competition cases shows that the Japanese position in relation to extraterritoriality evolved. Initially Japan was actively opposing extraterritorial assertions based on the effects doctrine, considering them

⁵⁰ *Brief for the Government of Japan as Amicus Curiae in Support of Petitioners, F. Hoffmann-La Roche Ltd v Empagran SA*, 2004 WL 226390 (U.S. 2004).

⁵¹ *Brief of the Federal Republic of Germany, United Kingdom of Great Britain and Northern Ireland, Japan, the Swiss Confederation, and the Kingdom of the Netherlands as Amici Curiae in Support of Defendants-Appellees in F. Hoffmann-La Roche Ltd v Empagran SA*, 2005 WL 3873712 (C.A.D.C. 2005). ⁵² *ibid* 6. ⁵³ *In re Monosodium Glutamate* (n 44).

⁵⁴ *Motorola Mobility* (n 44).

⁵⁵ *Brief of the Ministry of Economy, Trade and Industry of Japan as Amicus Curiae in Support of Defendants' Motion for Reconsideration, Motorola Mobility LLC v AU Optronics Corp.*, 2013 WL 7098182 (N. D. Ill. 2013).

⁵⁶ *Brief of the Ministry of Economy, Trade and Industry of Japan as Amicus Curiae in Support of Defendants' Motion for Reconsideration, Motorola Mobility LLC v AU Optronics Corp.*, 2014 WL 5422011, 3 (7th Cir. 2014). ⁵⁷ *ibid* 1. ⁵⁸ See (nn 84–89) and accompanying text.

illegitimate under international law. However, these protests were not sustained. Later cases show explicit recognition of the validity of extraterritorial assertions, which Japan considered legitimate when the foreign anticompetitive conduct directly causes harm in the forum. This recognition is noteworthy, given that Japan was repeatedly at the receiving end of enforcement—Japanese firms and individuals were facing sanctions for their anticompetitive conduct harming other markets, principally in the US and in the EU.

V. THE SHIFT IN THE JAPANESE POSITION

This part of the article analyses legislative and policy-oriented steps taken in Japan, which show a gradual, but significant shift in the Japanese approach to extraterritoriality. The majority of these developments occurred in the last two decades. They indicate piecemeal approach to regulatory reform, undertaken to enable the JFTC to deal with transnational competitive harm.

A. The 1990 Study Group Report

Both the practical and symbolic turning point in the Japanese approach to extraterritoriality in competition law dates back to 1990, when a Study Group convened by the JFTC opined in favour of embracing the effects doctrine.⁵⁹ The Study Group report was influential and it continues to be referred to by multilateral bodies.⁶⁰ It concluded that whenever foreign firms engage in activities such as exporting to Japan and the said activities are sufficient to constitute a violation of the Antimonopoly Act, then the Act applies.⁶¹ By recognizing exporting to Japan as a sufficient jurisdictional link the Group embraced a form of the effects doctrine,⁶² similar in scope to that by then recognized by the ECJ in the EU.⁶³ At the same time it was acknowledged that, in its actual practice, the JFTC remained faithful to the principle of objective territoriality, which partly explained the procedural difficulties of serving notice on entities not based in Japan. The report recommended amending or interpreting the law so as to facilitate service of process in a more flexible manner.

The Group also offered a position on the issue of possible friction between States in relation to extraterritorial enforcement. It took the view that, prior to enforcement, the authorities should consider whether the conduct in question had caused a material

⁵⁹ Dumping Regulations and Competition Policy, Extraterritorial Application of the Antimonopoly Act: Report of the Study Group (n 34). For discussion see J Tamura, 'US Extraterritorial Application of Antitrust Law to Japanese Keiretsu' (1992) 25 NYUJInt'lLaw&Pol 393–6.

⁶⁰ See, for example, OECD, Working Party No 3 on Co-operation and Enforcement: Roundtable on Cartel Jurisdiction Issues, including the Effects Doctrine: Japan, DAF/COMP/WP3/WD(2008) 88 (21 October 2008) 5–7.

⁶¹ Dumping Regulations and Competition Policy, Extraterritorial Application of the Antimonopoly Act: Report of the Study Group (n 34) 27.

⁶² In this vein also Matsushita, who served as a member of the Group. See M Matsushita, 'Application of the Japanese Antimonopoly Law to International Transactions' in M Bronckers and R Quick (eds), *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (Kluwer Law International 2000) 563–4.

⁶³ See (nn 17–19) and accompanying text.

effect in the Japanese market. Should the answer be positive, it should still be considered whether enforcement should not be abstained from 'out of consideration for easing confrontations with the country involved'.⁶⁴ Hence, while recognizing a possibly broad extraterritorial application of domestic law, the Group recommended restraining enforcement in certain cases as a matter of comity, not on the basis of any legal obligation. Moreover, by underlining the necessity of a material effect in the Japanese market, it proposed an important qualification of the effects necessary to validate Japanese jurisdiction, in line with prevailing international practice.

The *Nordion* case, decided in 1998, is often considered to be the first instance of the JFTC's reliance on the effects doctrine. The Canadian firm Nordion agreed to supply a particular product (a radioactive isotope used in medical procedures) to Japanese firms under the condition that they would not purchase it from any other sources. Nordion did not have any presence in Japan, but it sold goods to Japan and the agreement at stake was concluded in Japan. The JFTC ordered Nordion to stop its restrictive practices in the Japanese market.⁶⁵ The JFTC did not clarify the jurisdictional basis it relied on. It might have indeed embraced the effects doctrine. However, the fact that the underlying agreement was concluded and executed in Japan may be seen as a sufficient, albeit not particularly strong, link allowing for reliance on the principle of objective territoriality. Nevertheless, the case demonstrates the new attitude of the JFTC and its willingness to reach beyond Japan's borders in the enforcement of domestic competition rules.

B. Reform of Merger Review

From a transnational perspective, some important changes to Japanese merger review came into force in January 1999. Under the old regime review was limited in scope to transactions taking place 'in Japan'. At least one of the parties to a proposed transaction must have been Japanese in order to trigger the applicability of the Antimonopoly Law. That is why the JFTC was unable to review, for example, the 1997 Boeing–McDonnell Douglas merger, despite a Japanese airline being a major purchaser of passenger planes produced by the parties and even though the Japanese market was to be significantly affected.⁶⁶ The 1998 Amendment removed the territorial nexus, making it possible to review foreign transactions.⁶⁷ The triggering factor is sales in Japan of a specified magnitude.

The new rules were applied for the first time in 1999 to the proposed merger between Exxon and Mobil, two US entities. Following the review, the JFTC cleared the transaction.⁶⁸ Similarly, in 2005 the JFTC analysed the proposed acquisition of Guidant by Johnson & Johnson—another transaction involving two US firms. The JFTC cleared the transaction, satisfied with remedies imposed by foreign

⁶⁴ Dumping Regulations and Competition Policy, Extraterritorial Application of the Antimonopoly Act: Report of the Study Group (n 34) 29–30.

⁶⁵ JFTC Decision of 8 August 1998, 45 *Shinketsushu* 148.

⁶⁶ Kameoka (n 35) 194.

⁶⁷ For discussion see K Yamaguchi, 'Extra-Territorial Application of Japanese Anti-Monopoly Law to Pure Non-Japanese M&As' (1999) 5(4) *IntTLR* 100.

⁶⁸ JFTC, Press Release (18 October 1999).

counterparts.⁶⁹ Although in both cases the firms were foreign, they had subsidiaries in Japan. Hence these were not purely offshore transactions.

The first case in which the new merger regime was applied in a foreign-to-foreign context was the proposed transaction between BHP Billiton and Rio Tinto, in 2008. Neither of the firms had any presence in Japan, hence the JFTC must have relied on the effects doctrine when it considered reviewing the proposed deal. The investigation did not culminate in any decision as the deal was abandoned in anticipation of the negative outcome of the review.⁷⁰ The firms attempted to merge again in 2010 and again they withdrew their notification after the JFTC informed them of its objections.⁷¹ The abandoned BHP Billiton/Rio Tinto merger provides a precedent that the Japanese merger review applies to all transactions which meet the prescribed thresholds, regardless of the firms' actual presence in Japan.

C. Changes in the Rules Governing Service of Process

The changes to merger review necessitated adjustment of the rules governing service of process, which did not—at that time—allow for the delivery of documents to persons located overseas. In particular, Article 69(2) of the Antimonopoly Act incorporated, by reference, certain provisions of the Civil Procedure Code dealing with the service of process. However, the provisions dealing with service of process abroad were not included. This shortcoming had already been identified by the Study Group in 1990.⁷² However, it remained unaddressed until the 2002 Amendment of the Antimonopoly Law.

This important procedural issue significantly limited the JFTC's enforcement capabilities. The agency was able to investigate conduct of a foreign entity only when the firm had Japanese agents who were authorized to receive service. That was the case, for example, in *Nordion*.⁷³ The only other possibility for opening proceedings would have been if a foreign entity voluntarily submitted itself to the JFTC's jurisdiction. The lack of a duly authorized agent in Japan allowed foreign firms to avoid the JFTC's scrutiny, as demonstrated by one of the early shipping conferences cases.⁷⁴

The 2002 Amendment successfully rectified that deficiency. It made the provisions of the Code of Civil Procedure, dealing with service abroad, apply *mutatis mutandis* in the competition law context. Service of process can be now performed by Japanese consular

⁶⁹ JFTC, The Proposed Acquisition of the Stock of Guidant Corporation by Johnson & Johnson (9 December 2005) at <http://www.jftc.go.jp/en/pressreleases/yearly_2005/dec/2005_dec_9.html>.

⁷⁰ N Ohkubo and Z Shishido, 'Cooperation, Comity, and Competition Policy: Japan' in AT Guzman (ed), *Cooperation, Comity, and Competition Policy* (OUP 2011) 88–9.

⁷¹ JFTC, Press Release regarding the proposed transaction between Rio Tinto and BHP Billiton (18 October 2010) at <<http://www.jftc.go.jp/houdou/pressrelease/h22/oct/10101802.html>>. Compare A Goto, 'Cross-Border Merger Control in Japan' (OECD Global Forum on Competition, 17 February 2011) at <http://www.jftc.go.jp/en/policy_enforcement/speeches/2011/110217.files/Cross_border_merger_control_in_Japan.pdf>.

⁷² See (nn 59–63) and accompanying text.

⁷³ See (n 65) and accompanying text.

⁷⁴ See (n 33) and accompanying text.

staff abroad. Moreover, the JFTC can make service by publication.⁷⁵ In the BHP Billiton and Rio Tinto merger review⁷⁶, service abroad was commissioned to the Japanese consul in Melbourne.⁷⁷ BHP Billiton refused to accept service and the JFTC made it effective by publication.⁷⁸

D. Pursuing International Cartels

The JFTC began challenging international cartels at the turn of the new millennium. It tried to investigate the *Graphite Electrode* cartel (in 1999) and *Vitamins* cartel (in 2001). Both cartels included Japanese firms and both were successfully investigated in the US and in the EU. However the JFTC failed to pursue its challenge, reportedly for want of evidence.⁷⁹ In effect, the JFTC only issued ‘warnings’; non-binding administrative guidance to the cartelists.⁸⁰

In 2003 the JFTC investigated an international cartel of producers of impact modifiers’ (plastic additives used in production of various plastic goods). The investigation was closely coordinated—for the first time—with counterparts in the US, the EU and Canada. In this case the JFTC was successful. However, it issued its Recommendation only to two Japanese members of the cartel.⁸¹

In 2008, for the first time, the JFTC investigated a cartel involving foreign firms that did not have any subsidiaries or agents in Japan. The *Marine Hose* case involved five firms, four foreign and one Japanese. Following the investigation, the JFTC issued cease-and-desist orders against several foreign entities. However, foreign firms which did not supply Japanese customers were not fined. The Antimonopoly Law provides that when calculating fines the JFTC should use as a benchmark ‘the amount of sales from the relevant goods or services’, without any further guidance.⁸² The JFTC defined the relevant market as the domestic market. Therefore, firms which did not generate any local turnover avoided penalties. As a result, only the Japanese Bridgestone Corporation was fined.⁸³

If there was any remaining doubt as to the Japanese stance on extraterritoriality in competition law, it was resolved by the JFTC’s *Cathode Ray Tubes (CRT)* decisions.

⁷⁵ Per art 70-8(1)(iii) the JFTC may do so ‘if, after the lapse of six months from the date on which a competent foreign government agency was commissioned to make service ... documents certifying that service was made are not received’.

⁷⁶ See (nn 70–71) and accompanying text.

⁷⁷ Per art 70-7 of the Antimonopoly Act referring to art 108 of the Code of the Civil Procedure.

⁷⁸ Ohkubo and Shishido (n 70) 93.

⁷⁹ For analysis of the challenges related to accessing foreign-based evidence in competition law enforcement see M Martyniszyn, ‘Inter-Agency Evidence Sharing in Competition Law Enforcement’ (2015) 19(1) *International Journal of Evidence and Proof* 11.

⁸⁰ K Funahashi, ‘International Cooperation to Crack International Cartels: Japanese Successes and Failures’ (Cracking Cartels; International and Australian Developments Conference, Sydney, 24 November 2004) at <<https://www.accc.gov.au/system/files/Session%204%20-%20Kazuyuki%20Funahashi.rtf>>.

⁸¹ JFTC, A Recommendation to Producers of Modifiers that Conducted Price-hike Cartel Activity (11 December 2003) at <http://www.jftc.go.jp/en/pressreleases/yearly_2003/dec/2003_dec_11.files/2003-Dec-11.pdf>.

⁸² Art 7-2 of the Antimonopoly Act.
⁸³ JFTC, Cease-and-Desist Order and Surcharge Payment Order against Marine Hose Manufacturers (22 February 2008) at <http://www.jftc.go.jp/en/pressreleases/yearly-2008/feb/individual_000147.files/2008-Feb-22.pdf>.

In 2009 and 2010, the JFTC fined a number of foreign firms (including foreign subsidiaries of Japanese firms) involved in a cartel fixing prices of cathode ray tubes.⁸⁴ Such products are a key input used in the production of televisions. The case involved no cartel conduct in Japan and no direct sales of cartel-affected inputs to Japan. Foreign subsidiaries of Japanese purchased the cartel-affected products from the cartelists outside Japan. These inputs were incorporated into final products in Southeast Asian countries by subsidiaries of Japanese firms. Subsequently, the majority of the final products (that is, TVs incorporating the cartel-affected inputs) were sold in various markets outside Japan.⁸⁵ Cartelists themselves did not sell any final products in Japan. In fact, it is unclear—and the JFTC did not reveal—to what extent the final products were sold in Japan. The JFTC's decisions were reaffirmed following a request to reconsider.⁸⁶ It is worth noting that the JFTC served process by publication.⁸⁷

The *CRT* case illustrates not only Japanese reliance on the effects doctrine, but also possibly one of the furthest-reaching extraterritorial assertions the international community has witnessed to date. The cartel-affected inputs were not sold in Japan. Some of the products incorporating the cartel-affected inputs were possibly (this matter is not clear) brought to and sold in Japan by foreign subsidiaries of Japanese firms. This particular context makes the JFTC's extraterritorial assertion unique. No other competition authority has decided to take a similar step. The JFTC considered it legitimate to assert jurisdiction when the contracts for the supply of the cartel-affected products to Japanese subsidiaries outside Japan were negotiated directly between the foreign cartelists and Japanese parent companies. Such an approach significantly extends the reach of domestic laws. While it can be seen as a possibly inevitable step in the fight against transnational anticompetitive conduct,⁸⁸ it constitutes a departure from the recognized jurisdictional principles and practice of other States. It may be difficult, if not impossible, to reconcile the position of the JFTC with the representations made by the Japanese METI before a US court in *Motorola Mobility*. In that case, in a similar context, the Japanese ministry protested against what it called an excessive extraterritorial assertion.⁸⁹

⁸⁴ JFTC, Cease-and-Desist Order and Surcharge Payment Orders against Manufacturers of Cathode Ray Tubes for Televisions (7 October 2009) at <<http://www.jftc.go.jp/en/pressreleases/yearly-2009/oct/individual-000037.html>>; JFTC, Cease-and-Desist Order and Surcharge Payment Orders against Manufacturers of Cathode Ray Tubes for Televisions (follow-up report) (29 March 2010) at <<http://www.jftc.go.jp/en/pressreleases/yearly-2010/mar/individual-000136.html>>.

⁸⁵ T Takigawa, 'Putting Limits on Extra-Territorial Coverage of Competition Laws in the Age of Global Supply Chains: Comparison of the US and Japan' in M Matsushita and T Shoenbaum (eds), *Emerging Issues in Sustainable Development* (Springer 2016) 245.

⁸⁶ JFTC, Decision against Five Companies including MT Picture Display Co Ltd—Price Cartel Case Involving Manufacturers/Distributors of Television Cathode-Ray Tubes (22 May 2015) at <<http://www.jftc.go.jp/en/pressreleases/yearly-2015/May/150529.files/150529.pdf>>.

⁸⁷ In line with the 2002 Amendment to Antimonopoly Law (see nn 72–78 and the accompanying text), the JFTC attempted to serve process abroad through the Japanese consular staff in Korea and Malaysia. However, both States refused to grant the necessary permission and the JFTC moved to serve process by publication.

⁸⁸ For discussion see M Martyniszyn, 'How High (and Far) Can You Go? On Setting Fines in Cartel Cases Involving Vertically-Integrated Undertakings and Foreign Sales' (2016) 37(3) ECLR 105.

⁸⁹ See (nn 54–57) and accompanying text.

In the *CRT* case the JFTC considered that the foreign subsidiaries of Japanese firms and their Japanese parent companies constituted single economic entities for the purposes of the application of the Antimonopoly Act. If the parent companies have a decisive influence over the subsidiaries, such an assertion is justifiable. Indeed, in this case the parents negotiated the supply contracts with the foreign cartelists. However, the fact that Japanese firms suffered harm due to anticompetitive conduct does not—in the eyes of international law—automatically grant the JFTC competence to apply domestic laws to the underlying conduct. The effects doctrine allows for jurisdictional assertions only when some non-trivial harm was suffered in the domestic market. In *CRT* the cartel-affected products were not sold in Japan. If the final products incorporating them were sold outside Japan, that is, if none of them reached Japan, there is no direct economic harm in the Japanese market to address. The fact that Japanese firms suffered harm, on its own, is of little relevance. What matters is the location of the harm. In a similar manner Japanese tort law would not apply in a case arising from a car accident in Europe and in which a Japanese national suffered an injury due to a driver's negligence.

Moreover, in the *CRT* case the JFTC for the first time imposed fines on foreign cartelists. When calculating fines the JFTC did not rely simply on the value of the cartel-affected components incorporated in the final products imported to Japan by foreign subsidiaries of Japanese firms. Instead, the JFTC used as the benchmark all sales of cartel-affected components to foreign subsidiaries of Japanese firms, regardless of whether the final products incorporating them entered the Japanese market. In this regard the JFTC departed from its earlier practice and interpretation of the relevant provisions of the Antimonopoly Act.⁹⁰ In effect, the JFTC sanctioned the foreign cartelists also for the harm which was not inflicted on the Japanese market. Takigawa correctly points out that the inclusion of such sales for the purposes of calculation of fines was an error.⁹¹ While foreign subsidiaries of Japanese firms might have suffered harm due to the foreign price-fixing, any such harm was not suffered in Japan. The present global regulatory framework suggests that the JFTC should have abstained from assuming competence to address such overall harm.

The JFTC's Commissioner Odagiri wrote a supplementary opinion to the JFTC's decision following the request to reconsider.⁹² It is particularly noteworthy because the JFTC's Commissioners rarely issue separate opinions. Although Commissioner Odagiri ultimately supported the majority, his opinion reads like, and should be seen as, a clear dissent. Commissioner Odagiri argued that the Antimonopoly Act should be applied extraterritorially only when purchasers of the cartel-affected products are in Japan, or alternatively—if the Act were to apply in other cases—any fines imposed should relate to the value of the cartel-affected products incorporated in final products sold in Japan. In Commissioner Odagiri's view, the adopted fining methodology was excessive. He noted that such an approach could lead to conflicting outcomes and over-enforcement if more jurisdictions were to follow it. What seems to have convinced Commissioner Odagiri to ultimately side with the majority was the fact that competition authorities in the relevant Southeast Asian jurisdictions (where the Japanese subsidiaries which purchased the cartel-affected products were located) did not take any

⁹⁰ See (nn 82–83) and accompanying text.

⁹¹ Takigawa (n 85).

⁹² JFTC, Decision against Five Companies including MT Picture Display Co Ltd (n 86).

action against the cartelists. This, however, is not a consideration which legitimizes far-reaching extraterritorial assertions or validates a fining policy.

The foreign defendants appealed the JFTC decisions. In early 2016 the Tokyo High Court issued three judgments, delivered by different judicial panels, upholding the JFTC's jurisdiction.⁹³ In essence, the Court found that the foreign price-fixing agreement was intended to harm Japanese customers-purchasers, in this context Japanese parent companies.⁹⁴ The appeal is currently pending before the Supreme Court.

In *CRT* the JFTC sent a clear signal to the international community that it will no longer shy away from enforcing domestic competition law extraterritorially in an expansive manner. However, the approach taken in relation to both jurisdiction and calculation of fines goes significantly beyond the remits established by international practice.⁹⁵ If followed, the Antimonopoly Act could be applied to any conduct prohibited by the Act whenever it affects Japanese firms, regardless of whether they operate in Japan or elsewhere. Moreover, fines can be imposed in relation to sales of the cartel-affected goods even if they took place outside Japan and the products at stake did not reach Japanese consumers, be it directly or through transformed products. Such an approach is likely to generate tensions with other States, as Commissioner Odagiri rightly noted in his opinion.

The new attitude of the JFTC in relation to transnational violations is reflected also in organizational developments in the agency. In particular, in 2010 the JFTC created a separate International Cartels Investigation Unit to deal with such cases.⁹⁶

VI. CONCLUSION

While initially hesitant about extraterritoriality in competition law enforcement, Japan gradually embraced it and began dealing with transnational anticompetitive conduct. Around the turn of the new millennium Japan recognized the effects doctrine to support jurisdiction in cases involving offshore conduct causing in-bound competitive harm. That step might have been informed by the growing reliance on the doctrine by other jurisdictions and, in general, more active enforcement globally. The evolution of Japan's stance carried a promise of enabling better safeguarding of competition in the Japanese market and therefore it should be welcomed. A process of regulatory reform followed to facilitate the JFTC taking an active role in the fight against transnational anticompetitive conduct. However, the reform is piecemeal and reactive in nature, not comprehensive. For example, the relevant rules dealing with the service of process were amended three years after the review of offshore mergers was first formally enabled. Similarly, around 2000 the JFTC started showing eagerness to pursue international cartels, yet it took it a few years to actually bring a case against foreign cartelists.

⁹³ Judgments delivered on 29 January, 14 April and 22 April 2016.

⁹⁴ See also T Shiraishi, 'Customer Location and the International Reach of National Competition Laws' (2017) 59 Japanese Yearbook of International Law 202.

⁹⁵ In a similar vein Murakami, former director of the JFTC, quoted in Y Nagano, 'Ruling in Japan CRT Cartel Case Draws Criticism – Analysis', PaRR (2 February 2016) at <<https://app.parr-global.com/intelligence/view/1358737>>.

⁹⁶ T Nambu, 'International Cartel Enforcement of the JFTC – Developments and Future' (Beijing 2013) 3, at <http://www.americanbar.org/content/dam/aba/events/international_law/2013/09/china_inside_andout/CartelEnforcementJFTC.pptx>.

The regulatory reform is ongoing. The recent *CRT* case shows that Japan is only now formulating the jurisdictional standards applicable in cases involving purely foreign conduct, in a learning-by-doing exercise. In this context, it seems that Japan has moved into the vanguard of those pushing the outer limits of extraterritoriality in a manner hitherto unseen. The Antimonopoly Act has been applied to the foreign conduct of foreign firms when the significance and the very presence of the harm in Japanese markets was unclear. The consistency of this approach with international law is questionable. It potentially undermines competition legislation in the affected foreign States. Moreover, in *CRT* the JFTC also adopted a controversial methodology of calculating fines for the wrongdoers. The fines related not only to the sales of the cartel-affected products which entered the Japanese market, but also went well beyond that threshold. Overall, in *CRT* the JFTC embarked on a collision course with foreign counterparts. The appeal is pending before the Japanese Supreme Court, which hopefully will avail itself of this opportunity to ascertain the limits of the extraterritorial reach of the Antimonopoly Act. If the JFTC's approach is upheld and followed by other regimes, it is likely to also adversely affect Japanese firms that operate internationally and are engaged in conduct causing competitive harm in other markets, even if not directly or substantially. It may be that the JFTC sought to demonstrate its commitment to fighting offshore anticompetitive conduct, but it operated within a regulatory framework unprepared for such a refocusing and picked a suboptimal case. An amendment of the fining policy, which is currently being considered,⁹⁷ may help to align at least the enforcement aspect with internationally prevalent practice.

Japanese competition law and policy cannot be ignored by businesses operating internationally. They would be well advised to increase their awareness of the rules applicable in that jurisdiction given that the Japanese competition watchdog demonstrates determination to deal with transnational violations and apply the Antimonopoly Act in a far-reaching manner.

⁹⁷ 'Japan Antitrust Watchdog Eyes Fines for Foreign Cartel Members' *Nikkei Asian Review* (22 July 2016) at <<http://asia.nikkei.com/Politics-Economy/Policy-Politics/Japan-antitrust-watchdog-eyes-fines-for-foreign-cartel-members>>.