

THE INTERNATIONAL JOURNAL OF HUMANITIES & SOCIAL STUDIES

A Case Study of Extraterritorial Application of the Japanese Antimonopoly Act

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Abstract:

This paper discusses extraterritorial applications of the Japanese Antimonopoly Act through a well debated case over CRT TVs in 2016 in Japan involving multiple companies in several countries. The case is theoretically and practically significant because it was the first case in the world in which the 'demand' side was united as a group to be considered under similar situations. By doing so, the scope of extraterritorial application of antitrust laws in countries involved is expected to be expanded. In other words, Japanese companies with bases and subsidiaries around the world will be able to file lawsuits in Japan regardless of which country is affected, and seek trials based on Japanese antitrust laws. Finally, we argue that, under the Japanese Antimonopoly Act, the effect doctrine is not yet the basis for officially judging related cases.

Keywords: Antitrust law, antimonopoly act, Japan, extraterritorial application, consumer location theory, case analysis

1. Introduction

Japan's Antimonopoly Act was created after World War II and was influenced by the United States and Germany. Since the law's enforcement in 1947, it has been gradually improved by domestic industrial policies. The original position of prioritizing industrial considerations for economic recovery after World War II has been changed to the current priority of competition considerations. Japan's economy has reached a rapid pace of development due to its aggressive entry into the international market. To maintain its competitive order, Japan uses the extraterritorial application of antitrust laws to protect its domestic interests.

In recent years, the cartel case for television picture tubes have been a hot debate involving international communities. In this paper, we provide a case analysis of this well-known case in Japan to explore the grounds for extraterritorial applications of the Japanese Antimonopoly Act (1947). First, we will provide a case overview consisting of a case summary, case issues, and claims of parties, paving our way for our case analysis and discussion. As all referenced case documents and academic debates are in Japanese, we have reframed from the normative practice of putting in-text citations. Bringing the indigenously debated issues in Japan into the English literature, we have arranged all relevant documents, in the original language, at the end of the paper to give easier access for those who are unfamiliar with the Japanese language. Also note that the first and/or corresponding author (see Endnote 2) of this paper will be happy to receive queries regarding references of any particular argument cited in the text.

2. Case Summary

According to the official ruling, the parties to this case consist of suppliers and consumers of TV picture tubes. The suppliers include a group of companies and their subsidiaries in several countries: MT Video Display (whose head office is located in Osaka, Japan), MT Video Display Indonesia, MT Video Display Malaysia, MT Video Display Thailand, Samsung SDI Malaysia Sdn. Bhd. (headquartered in Malaysia), Chuka Eikan (headquartered in China and Taiwan), Chuka Eikan Malaysia, LG Phillips Displays (headquartered in South Korea), LP Displays Indonesia (affiliated with LG Phillips Display), and CRT (Thailand). The consumers consist of companies with head offices in Japan and their manufacturing

subsidiaries in Southeast Asia, including Orion Electric Co., Ltd., Sanyo Electric Co., Ltd., Sharp Corporation, JVC Corporation, and Funai Electric Co., Ltd.

In this case, a consumer side company may have selected one or more above-mentioned manufacturers and distributors, which usually has a local manufacturing subsidiary, affiliated company, or manufacturing contractor located in Southeast Asia. In addition to TV picture tubes purchased by contractors, they were negotiating and outlining certain planned purchases for each year along with purchase price and quantity for each quarter. The consumer side companies instruct their manufacturing subsidiaries located in Southeast Asia to purchase the TV picture tubes based on the negotiation outcome.

Meanwhile, the supplier side meets the minimum target price of TV picture tubes that each company of the above-mentioned manufacturing subsidiaries, affiliated companies or manufacturing contractors should comply with, which was agreed by the concerned local manufacturing subsidiaries. Regarding the agreement, the Japan Fair Trade Commission (JFTC) ordered cease and desist, as well as a surcharge for violating Articles 2.6 and 3 of the Antimonopoly Act (?). Dissatisfied with the trial decision, Samsung SDI Co., Ltd. and Samsung SDI Malaysia Sdn. Bhd. appealed to the Tokyo High Court against the trial decision by JFTC. The Tokyo High Court issued three decisions, which were expressed in three different ways. Since the actual contents of all three decisions are similar, and for the purpose of this paper the following demonstrates the relevant decisions regarding the Samsung SDI Malaysia:

The plaintiff's request was that the procedure for ordering the payment of surcharges by the Japan Fair Trade Commission (hereinafter referred to as the JFTC) was illegal, and Antimonopoly Act (1947) did not apply to this case. The reason is that the JFTC's decision on this matter violates the Constitution and other laws and regulations (Article 82, Paragraph 1, Item 2 of the Antimonopoly Act); and even if the Antimonopoly Act is applicable, it is related to competition over consumers located in Japan, recognizing the substantial limits of competition in certain trading areas while there is lack of substantial evidence to support the plaintiff's request. If there was no substantial evidence to prove the facts on which the trial decision was based, the trial decision by the JFTC can be overturned under item 1 of the same paragraph.

3. Case issues and claims of each party

There are three significant issues in this case. The first relates to the legality of the procedure regarding the order to pay the surcharge. The second is whether the latter part of Article 3 of the Antimonopoly Act (1947) can be applied. The final issue relates to whether the sales amount of the TV picture tubes corresponds to the 'sales amount of the product' defined in the section, and whether or not it is the basis for calculating the surcharge. We further explain these issues in the below subsections.

3.1. Claims in the JFTC's Trial Decision

Regarding the first issue above, the JFTC's claims are considered to be legal because all the surcharge payment orders were made in accordance with Japanese legal procedures. In addition, since JFTC could not realize the consular service of the surcharge order and its copy to the Malaysian Consulate through the Ministry of Foreign Affairs, it was considered in the case under public service. Following on from this, this public service should not infringe on Malaysia's sovereignty as it does not exercise public rights within Malaysia's territory.

Regarding the second issue, the JFTC applied the Antimonopoly Act in this case based on the relationship between the head offices in Japan and their local subsidiaries, affiliated companies, manufacturing contractors, etc. (hereinafter referred to as local affiliated companies) in Southeast Asia, along with the transaction process. JFTC considers that the competition in a certain trading area in this case is conducted over consumers located in Japan, and thus the latter part of Article 3 in the Antimonopoly Act should apply which substantially limits competition in a certain trading area. In addition, certain trading areas were defined as sales areas for the TV picture tubes in the case. Regarding consumers, based on the above facts, after considering the relationship between the TV manufacturer in Japan and its local affiliated company, the Japanese company and the local affiliated company are inseparable, so they should be considered as a whole consumer. Furthermore, regarding the substantial restrictions on competition, the cartel act in this case was applicable to the contents stipulated in Article 2.6, and the market price was thus influenced to some extent.

Regarding the final issue above, the TV picture tubes in this case fits the definition of the 'product' in Article 7-2, Paragraph 1 of the Antimonopoly Act, and the sales can be said to be the sales of the product. Thus, the calculation of the surcharge is based on the sales amount of the TV picture tubes.

3.2. Plaintiff's Claims

Regarding the issue above, the JFTC's surcharge payment order is argued to be a violation of the important procedure of giving advance notice, failing to give a defense opportunity to the other party of administrative disposition under, Article 31 of the Constitution. In addition, since the order of the JFTC does not follow the prior procedures stipulated by law, the plaintiff argues that there is a serious defect which is a violation of Article 49-3 and Article 50-6 of the Antimonopoly Act. Moreover, it was submitted that there is no separate agreement or vote for the surcharge payment order, which also violates Article 69, Paragraph 1 of the Antimonopoly Act. Furthermore, the plaintiff argues that there is a problem with the signature stamp on the surcharge payment order, which violates Article 50, Paragraph 1 of the Antimonopoly Act. In addition, it is argued that the request for the Malaysian government's approval of the JFTC's surcharge payment order, the issuance of press release materials, and the delivery of public notices are invalid because they are double issuances for the same facts. Finally, the plaintiff argues that the applied law was not applicable in this

case because there was an international concession violation which caused a conflict between procedure and the foreign government on the public notice delivery.

Regarding the second issue above, the plaintiff submits that the territorial principle under international laws is the basis of jurisdiction, and there is a possibility that the competition law of each country can be applied to cases where business activities are not completed within one area due to internationalization. In this case, it is necessary to avoid adverse effects such as conflicts of policies in other countries and duplicate dispositions according to overlapping jurisdictions. For example, the internationally recognized effect principle usually conforms with the US requirement of 'direct, substantial and foreseeable effects.' The plaintiff argues that the trial decision only states the relationship between the concerned TV manufacturers and distributors in Japan for the purchase outside Japan, and thus does not show any evidence that it is effective in Japan.

Next, the plaintiff argues that it is not appropriate to use the applied law as a standard for the location of consumers in this case. The reasons given are in light of the concept of consumer location, while using the US Motorola case as a reference case in order to decide whether or not TV picture tubes manufacturers and distributors in Japan are consumers. Regarding whether or not there should be a substantial restriction on competition in a certain trading area, the conditions for applying the Japanese Antimonopoly Law include the consumers in Japan and substantial restriction on competition. In this case, the restrictions actually happened in Southeast Asia, not in Japan. Moreover, the plaintiff insists that because the picture tube is a part of the TV which makes it a separate product, and the TV picture tubes made by the local affiliated company did not supply to Japan, thus there is no substantial restriction on factual competition.

In addition, it is submitted that there is substantial evidence that Japanese manufacturers and distributors' negotiations and decisions regarding whether the fact-finding of this judgment that competition in certain trading fields has taken place over consumers located in Japan. There is no necessary relationship between the production activities of the local affiliated company, and the final decision-making power lies with the local affiliated company, so the Japanese consumers and their affiliated companies/subsidiaries outside Japan are not inseparable.

Finally, the supply process has been entirely carried out in Southeast Asia, and the judgment that competition in certain trading areas has been substantially restricted is based on circumstantial evidence. The recipient or customer does not exist in Japan and the product is neither consumed nor processed in Japan. The plaintiff insists that the JFTC lacks substantial evidence as a result of misinterpretation of the law's definition of 'consumers', as there is no evidence of any effect occurring in Japan. Regarding the dispute on the calculation of surcharges, it is submitted that conflicts of law enforcements with other countries should be avoided, preventing the plaintiffs from being the subject to multiple sanctions and/or fines for goods that have never been physically in the country as there are no preexisting examples of fines being calculated in such a manner.

4. Case Analysis

To begin with, TV picture tubes, the concerned product in this case, are not sold in Japan. Although the JFTC takes charge of affairs which have an effect on/in Japan, it is arguable the TV picture tubes purchased in this case have had any influence on Japanese consumers at all. First, the main function of a TV is to receive radio waves from broadcasting stations and to watch news and other programs. After Japan having converted to terrestrial digital broadcasting from 2011, TVs in Japan that do not match with the new digital broadcasting requirements can no longer be used fully; if there is a tuner attached, the TV could be used, but with several fees. It should also be noted that TVs still using picture tubes are considered a special type of garbage in Japan, and it is very costly to dispose it. Therefore, it is reasonable to assume that ordinary consumers would not buy such TVs. When bought, such TVs cannot be used for its original functions, and thus cannot be considered as a TV product in a normative sense.

In addition, this case is considered to be a case in which Japan's Antimonopoly Act is applied to foreign businesses, which is strictly based on territoriality and another case that succeeds the Marine Horse case as an out-of-region application case. Compared to the Marine Horse case, the present case also claims jurisdiction over foreign businesses in foreign countries. But in the present case, it differs from the decision not to impose a surcharge because there were no domestic sales in the Marine Horse case. Here, the JFTC and the court show rare examples for discussing jurisdiction over trial decisions and judgments.

In incorporating the theory of extraterritorial application of the United States and the EU, a new interpretation was made of the EU's economic entity doctrine. However, there is a fundamental difference between this case and the EU-related cases. In the EU, it is an 'economic unity' between the parent company and the subsidiary of the cartel actor, and this present case sees the cartel's trading partners as one. It seems to be the first international antitrust case that has claimed jurisdiction for economic entity.

The jurisdiction of this case was interpreted by the JFTC and the court not by the extraterritorial application based on the effect doctrine but by the consumer location theory. The latter is an original Japanese territorial principle, which is often criticized by the Japanese academia. The trial decision states: 'For at least if competition in a certain trading area is conducted over consumers located in Japan, and if the act substantially limits competition in a certain trading area and freedom in Japan; it then can be said that the competitive economic order has been violated, and the application of the latter part of Article 3 of the Act is in line with the purpose of [Article 1 of the Antimonopoly Act]. 'Neither the trial decision nor the judgment on this matter discussed whether or not there was jurisdiction under international laws, and only examined whether it could be directly applied to the latter part of Article 3 of the Japanese Antimonopoly Act. The following section discusses the opinions of Japanese scholars regarding (1) jurisdiction and (2) application of Article 2.6 of the Japanese Antimonopoly Act.

5. Discussion

Regarding jurisdiction, Professor Fumio Sensui of Kobe University claims that the criteria of Article 2.6 framed as 'at least' is limited. For example, there are substantial restrictions on competition in certain trading areas for product parts. If it occurs only in a foreign country and the finished product is imported into Japan, it may be excluded from the application of the Antimonopoly Act under the above standards unless the jurisdiction is claimed by an extraterritorial application.

Professor Kazuhiro Tsuchida of Waseda University argues that the trial decision does not represent a general criterion for the international scope of antitrust law. Article 2.6, which includes the phrase 'at least', limits the principle of consumer location, which is the foundation for jurisdiction of this present case, to this case only, and is subject to but not limited to unfair trade restrictions made in foreign countries. Antitrust laws can also be applied to behavioral types (such as joint boycotts) in which the anti-competitive effect appears as an exclusion effect on competitors, while another standard must be considered. In other words, if the consumer is not in Japan and the application is not made outside the region, it will not be possible to claim jurisdiction based on the consumer location theory.

Since Professor Fujio Kawashima's claim at Kobe University is limited to 'at least' which is also in the form of case judgment, in this present case the jurisdiction is established by factual territorial principle or theory of conduct. This is a particular case while not all cases are ruled as this manner. For example, the effect doctrine is not adopted in this case, but it is adopted frequently in other situations such as notifications of business combinations. There is a possibility that the effect doctrine will be adopted in other cartel regulation cases.

Professor Tadashi Shiraishi of the University of Tokyo argued that the phrase 'at least' is a general term, the purpose is to leave room for the Japanese Antimonopoly Act to be applied even if the consumer is not located in Japan. Although still debatable, the argument to remove the quantifiers does not seem appropriate.

Judging from the above statement by Japanese scholars, the JFTC's jurisdiction made based on the consumer location theory seems to be used as a substitute for the effect doctrine, while the original consumer location theory has its limits. If one claims jurisdiction under this rule, one may not be able to claim jurisdiction by the Antimonopoly Act that is given to the Japanese market. For example, in a case involving a cartel of product parts, if a cartel agreement is reached on a part of a product in a foreign country and a product made from that part is imported into Japan, it is considered that Japan's jurisdiction cannot be claimed. Throughout this case, the JFTC and the courts have seen the intention of expanding the scope of Japan's consumer location theory, using the word 'at least' as a means of jurisdiction in a way that broadens the interpretation of consumers and their location.

Some Japanese scholars argue that there is no need to appeal to effect doctrine. However, due to the influence of globalization, antitrust laws are being created in each country mostly based on the effect doctrine. Thus, it is doubtful that it makes sense for Japan to adhere to the objective territorial principle or the economic entity doctrine.

We now turn to Japanese scholars' opinions on certain trading areas and substantial restrictions on competition, which are the second important factor in consumer location theory in the present case.

The 'constant trading area' is equivalent to that in China's antitrust law, and the basic idea is considered to be the range of the impact of an exclusive monopoly on competition. Here, the definition of a certain trading area is 'the range in which the exclusion act brings about a substantial restriction on competition, and the range in which it is established is tentatively determined according to the specific action and the target, region, mode, etc. of the transaction.' Substantial restrictions on competition in certain trading areas' are requirements for determining anti-competitive behavior of businesses in the case of monopoly, unfair trade restrictions, and business mergers, but only in the case of business combinations. There are detailed provisions for certain trading areas. In this present case, the JFTC alleged that 'substantial restrictions on competition in certain trading areas' were affirmed as part of the requirements for unjust trading restrictions, but the method of defining certain trading areas is different from that of business combinations.

The court in this case adopted the idea of the decision of the Tokyo High Court on December 14, 1993 in the seal negotiation criminal case which is in line with the goods / services and geographical scope that were the subject of the agreement of the parties. The idea was to define the range of certain trading areas. As a result, Japanese TV picture tubes manufacturers and distributors became consumers. However, neither the JFTC nor the court has explained why they define consumers in this way.

We argue that, under the Japanese Antimonopoly Act, the effect doctrine is not yet the basis for officially judging related cases. In academia, many scholars formally endorse the effect doctrine and insist that it should be clearly defined. However, under the Japanese law system, it is the criminal law which is based on passive personalism that unilaterally claims jurisdiction over acts that violate Japanese laws even if carried out in foreign countries. Also, there are two articles of the Penal Code based on protectionism. Other than that, we have seen few claims of jurisdiction under the effect doctrine.

Antitrust laws have both the character of public law and the character of private law. Protectionism and personalism, which are the basis for the extraterritorial application of Japanese laws, can be understood to claim jurisdiction from the standpoint of public law. Therefore, from this public standpoint, it seems appropriate for Japan to claim jurisdiction based on the effect doctrine. In this present case, it is considered that the jurisdiction was claimed not by the effect doctrine but by the territorial principle of consumer location, because it is a case between private companies and thus difficult to make direct connection to Japan's national or public interest.

Insisting on consumer location theory, this present case expands the scope of consumers and regards transaction as one process rather than the participants of the direct transaction, while all the participants in this process are the parties to the case. Among them, it has been pointed out that the consumer in this case is not a local subsidiary or

affiliated company in Southeast Asia of Japan that has directly dealt with Southeast Asia, but exists as one 'group'. In other words, in the present case, the JFTC and the courts emphasized that the consumer consists of companies such as the head offices, local subsidiaries, and affiliated companies in Japan. The method of interpretation seems to be very similar to the economic entity doctrine that is the basis of the traditional EU application outside the competition law, but the difference can be seen by comparison.

The EU economic entity doctrine considers the parent company and its subsidiary, or the parent company and its affiliated company, as one economic entity. Considering that, in terms of market supply and demand the supply side would become one. On the other hand, the present case was the first case in the world that the demand side was united. By doing so, the scope of extraterritorial application of antitrust laws in each country is expected to be further expanded. In other words, Japanese companies with bases and subsidiaries around the world will be able to file lawsuits in Japan regardless of which country is affected, and seek trials based on Japanese antitrust laws.

6. Conclusion

This present case has received various criticisms from Japanese scholars. We have examined why the JFTC and the courts adhered to the objective territorial principle and avoided the effect doctrine. Both objective territorial principle and effect doctrine are criteria for extraterritorial application of domestic laws, but which should be adopted under different circumstances? We argue that Japan was originally a closed country, and economic development was realized by the chaebol. After World War II, the US occupation introduced antitrust laws to support the collapse of the chaebol. But for a long time, antitrust laws were not very important. To Japan. However, extraterritorial applications have been considered since the 1990s, and the starting point was the JFTC's 'Extraterritorial Application of Dumping Regulations and Competition Policy / Antimonopoly Act (Antimonopoly Act External Relations Study Group Report)'. Since then, Japanese antitrust regulations have clearly allowed extraterritorial applications.

In addition, the surcharge may occur in more than one country, which would become inevitable following the present case's example. This is because Japanese companies stationed in Southeast Asia could seek possibilities allowing them to solve the case in accordance with the respective local antitrust laws. If the same proceedings against antitrust law are filed locally, it would be a double punishment for companies. In this regard, according to the opinion of Commissioner Odagiri at the JFTC, since the local competition authorities in other Southeast Asia countries are not actively enforcing the Antimonopoly Act, there is currently no double punishment. In other words, the enforcement of antitrust law by Japanese competition law authorities does not actively avoid conflicts of jurisdiction with foreign authorities when applying Japanese antitrust law or regulating anti-competitive acts. Correspondingly, the extraterritorial application of antitrust laws in each country may inevitably lead to jurisdiction conflicts. Nonetheless, conflicts should be resolved through bilateral or multilateral consultations. Finally, when a surcharge is ordered, it is necessary to further consider how to enforce it.

7. Note

1. This paper is adapted from part of the first author's PhD thesis submitted to and funded by PhDs scholarship from YOKOHAMA National University.

2. The corresponding author for this paper is HuamingWu (Email: 1211212946@qq.com).

3. The full names of companies mentioned in this paper/case are as follows:

- サムソン SDI Samsung SDI Company Limited
- MT 映像ディスプレイ株式会社 MT Video Display Co., Ltd.
- MT インドネシア PT MT Picture Display Indonesia
- MT マレーシア MT Picture Display (Malaysia) SDN BHD
- MT タイ MT Picture Display (Thailand Company Limited
- 中華映管 Chunghwa Picture Tubes Company Limited
- 中華映管マレーシア Chunghwa Picture Tubes(Malaysia) SDN BHD
- LG フィリップス・ディスプレイ LG Philips Displays Korea Company Limited
- LP ディスプレイズ・インドネシア PT LP Displays Indonesia
- タイ CRT Thailand CRT Company Limited
- 船井電機株式会社 FUNAI ELECTRIC CO., LTD

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