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ls Extraterritoriality Good or Bad? (1) Regulatory environment approach

- Rise of online economy (SNS, e-commerce, sharing economy, fin-tech) makes almost every piece of regulatory legislation arguably be applicable beyond state territories.
- If extraterritoriality is denied, regulatory differences will be caused among online businesses targeting the same consumers/markets. Such regulatory disparity is not desirable.
- E.g., should Google be registered under the Telecommunications Business Act of Japan and be subject to the Act's "secrecy of communications" provision? Japanese competitors are severely regulated by the Act.

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ls Extraterritoriality Good or Bad? (1) Regulatory environment approach

- If the Act is applied to Google, and it would be banned to analyze Google mail contents at least with regard to Japanese users, in the same way Japanese competitors are banned. That would kill Google's business model while providing for a level playing field for its competitors.
- By pursuing extraterritoriality, on the other hand, domestic laws would globally be criticized if they are not persuasive enough. Think of the Google example.
- But regulatory reform could eventually follow. Conflict would create a new world.

Is Extraterritoriality Good or Bad? (2)It is (almost) everywhere There are barely unnoticeable examples of extraterritorial application of domestic laws. It can be said to be omnipresent. They are unnoticeable because they would cause no conflicts between states, but theoretically they are still examples of extraterritoriality of statues. E.g., The Administrative Agency Information Disclosure Act ("FOIA") gives "any one" the right to apply for disclosure of government documents. It creates rights both inside and outside the territory of Japan. E.g., The Election Act covers voting rights of Japanese nationals outside Japan.

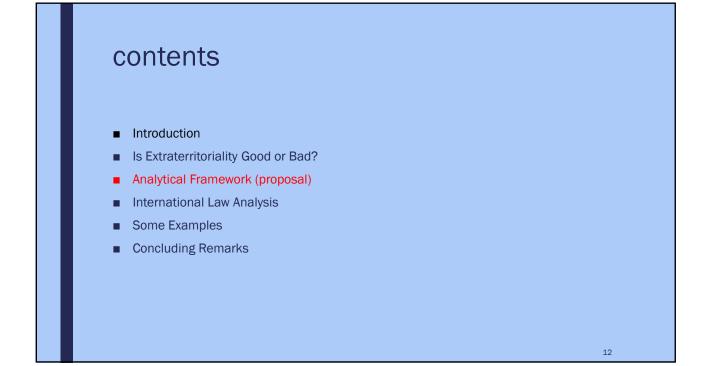
Is Extraterritoriality Good or Bad? (2)It is (almost) everywhere

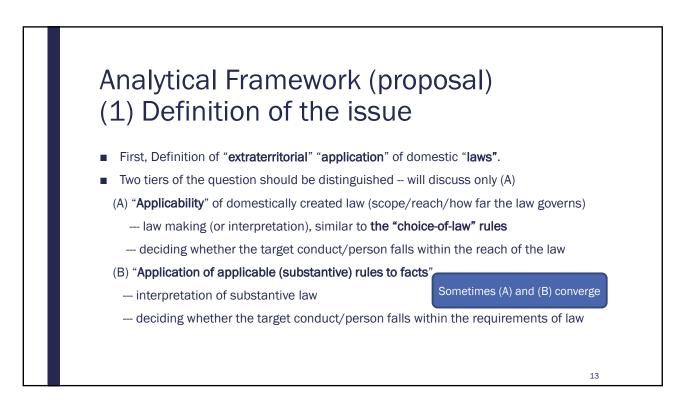
- Sup. Cot decisions of 2006 & 2007. Atomic Bomb Survivors' Assistance Act provides for AB survivors' entitlement programs such as healthcare allowances. Although the Act does not limit its scope to those whose domiciles are in Japan, the government interpreted the Act not applicable to those recipients who have afterwards moved their domicile to another state, and said "their right to receive money simply vanishes."
- The plaintiffs, Korean and Brazilian nationals who came back to their home countries after obtaining their entitlements, challenged this interpretation in court.
- The Sup. Ct. flatly denied the government's interpretation, holding that it was against "the spirit of the act" to help the difficult situations suffered by the AB survivors. The Court was not bothered by extraterritoriality at all.

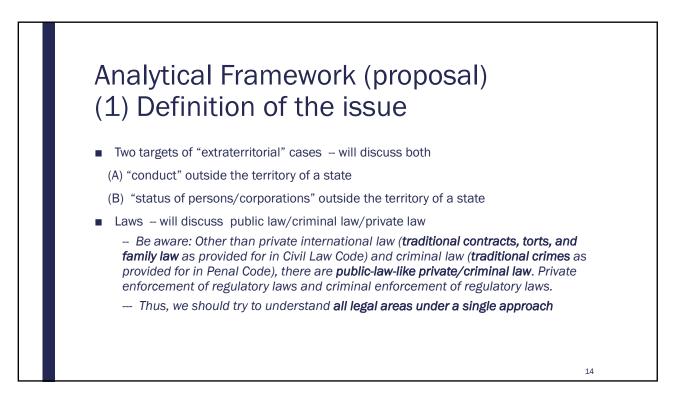


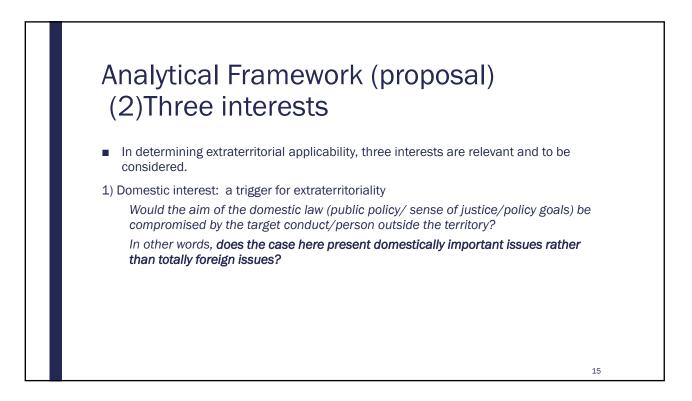
Is Extraterritoriality Good or Bad? (3) Nothing unusual

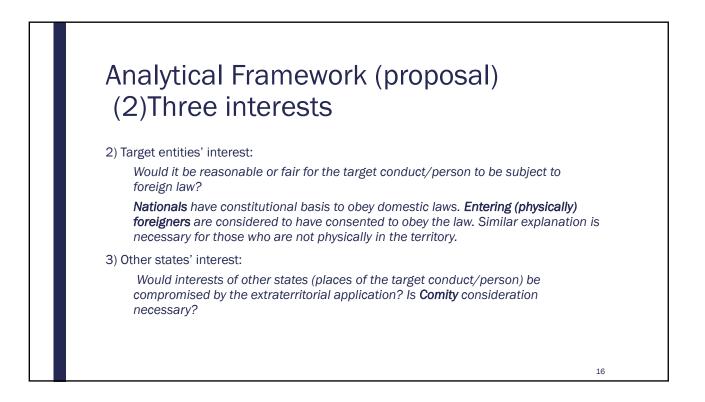
- Laws are inevitably extraterritorial simply because people like to cross borders, either physically or by communications (by snail mail or digitally). Laws are created for territorial governance, but the borders turn out to be easy-to-climb walls.
- Cross-border activities are now basis (not part) of our daily life and all business activities, and our thinking about domestic laws should evolve accordingly.
- Domestic Laws need extraterritoriality to retain their effectiveness, sometimes even to ensure equality. Extraterritorial application of laws should be regarded as a regular legal process, nothing unusual nor exceptional. International conflicts are necessary process for legal developments, just like the government being sued domestically when they make new laws or issue new rules and regulations.
- Roles of borders differs depending both on time and areas of laws.



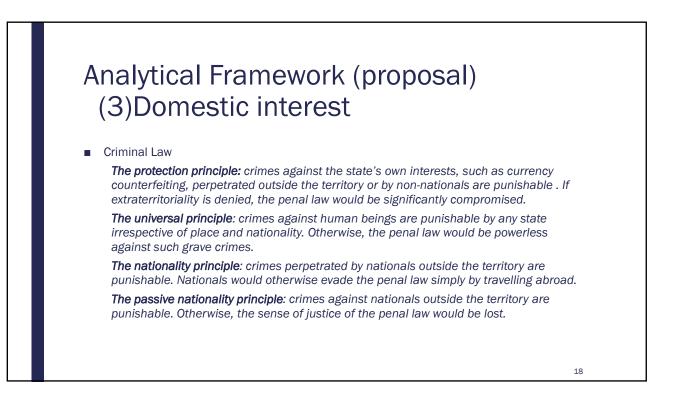








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Analytical Framework (proposal) (3)Domestic interest

Public Law

Effects Doctrine: competition law protects market mechanism (therefor consumers' interest of the state). As far as a cartel agreement exerts influence to the market/consumers of another state, its law should be applicable. *Nationalities and territoriality have nothing to do with the aim of the law.*

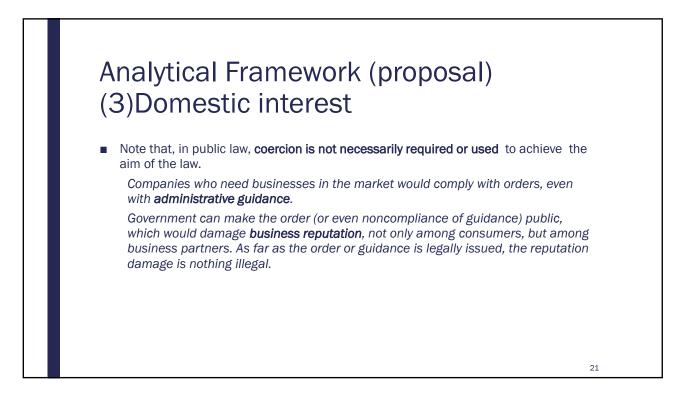
E.g., "<u>It is obvious</u> that the objectives of competition law would be insufficiently safeguarded if one applied competition law exclusively to conduct by nationals of the enforcing state, or to conduct that takes place on the territory of the state: <u>a</u> cartel is no less harmful just because the cartelists travelled to an exotic location of their meetings; and consumers are hardly interested in the nationality of those who exploit them." by Florian Wagner-von Papp, UCL.

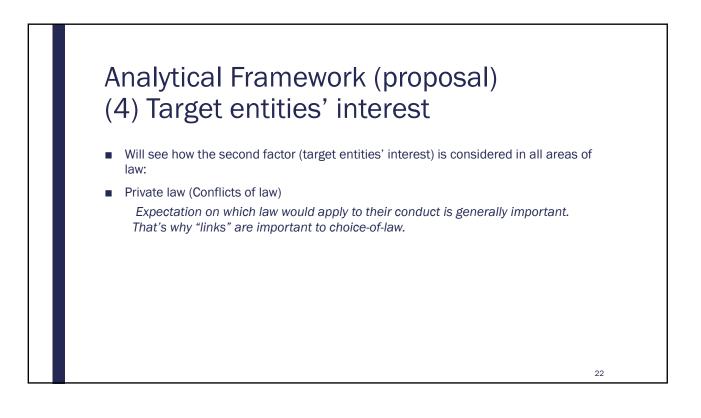
Analytical Framework (proposal) (3)Domestic interest

Public Law

Source of information: Privacy protection law protects personal information of anybody within the territory. Such information must be protected in the same way even after it crosses the border. Otherwise, simply by sending to and storing the information in no privacy protection state, **the aim of the law can easily be compromised**.

No nationality & territoriality: Some laws, such as AB Survivors Assistance Act, **need to ignore nationality and border** because its purpose is that the government helps all victims with perfect impartiality.





Analytical Framework (proposal) (4) Target entities' interest

Criminal Law

The protection principle: criminals are targeting a specific state. That makes reasonable to make them subject to that state's law.

The universal principle: universally criticized nature of crimes makes the perpetrator subject to every nation's law.

The nationality principle: nationals can expect to be punished under their home nation's law.

The passive nationality principle: do offenders should expect to be punished under the victims' home nation's law? Generally no, except for in the case of **crimes intended against specific nationals** (typically terrors against US tourists).

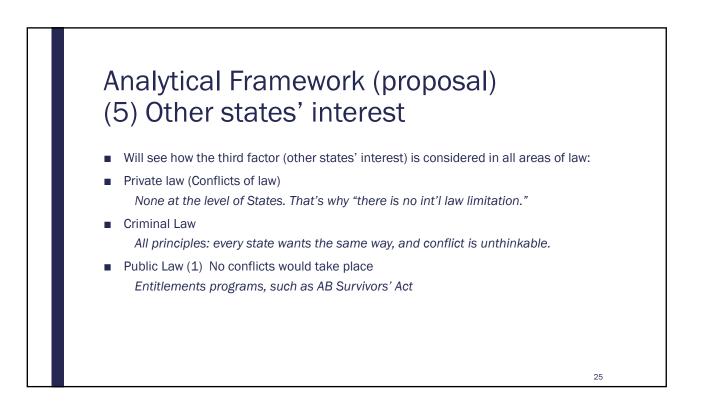
Analytical Framework (proposal) (4) Target entities' interest

Public Law

Effects Doctrine: The cartel agreement has target territory (markets/consumers). That should make them subject to **the law of each market**. But what if online platforms happen to influence unintended states' markets??

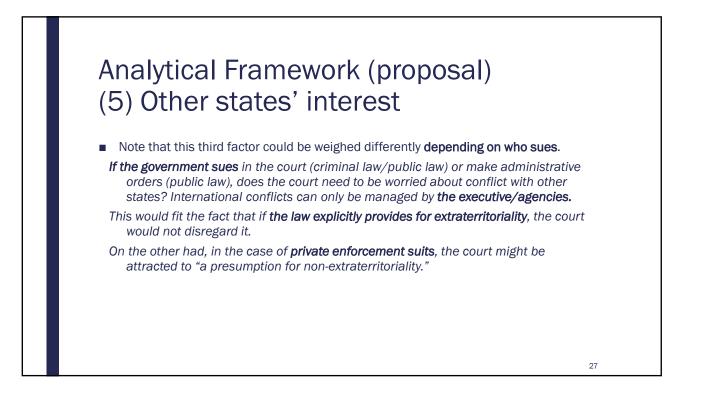
Source of Information: business operators who gather personal information (should) know where it comes from. That should make it reasonable that they are to be regulated by **the law of source of information**.

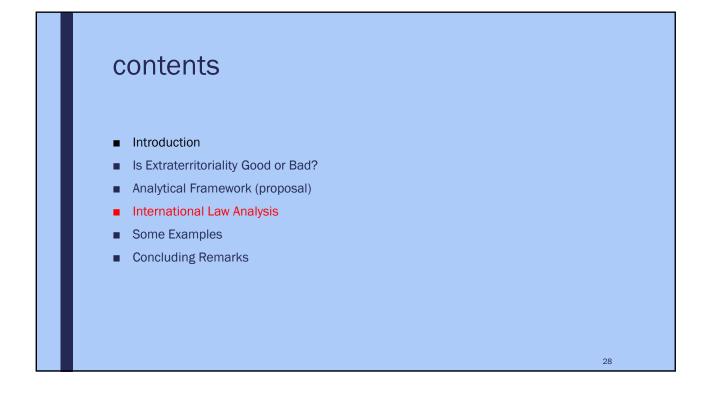
No nationality & territoriality: Under the AB Survivors Assistance Act, recipients under the Act **usually expect** to retain their right for allowances **wherever they live**.

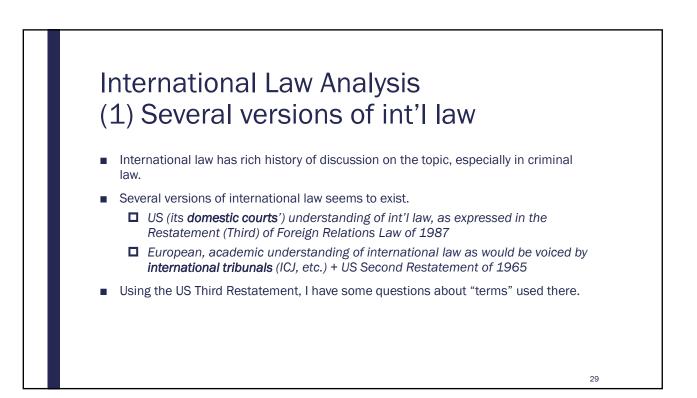


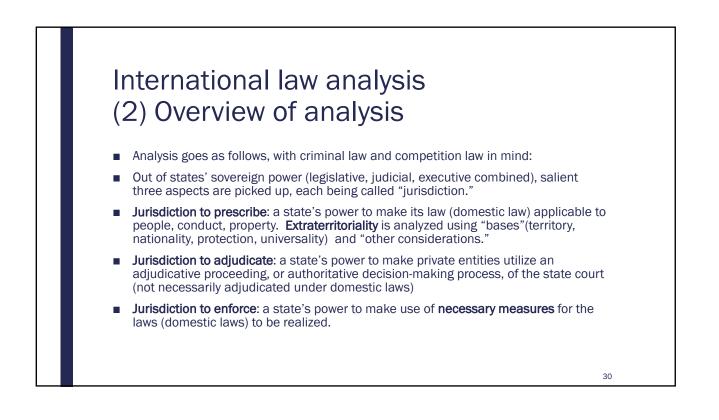


- Public Law (2) Conflicts are easy to take place, and need to think of settltment Tax: tax on one activity is dividable among relevant nations, thus tax agreements. Regulatory: complicated
 - --- Among **the targeted states** (whose markets are targeted) each state should apply their own law independently, no conflict here.
 - --- Between **the targeted state** and **the conduct state**: If the targeted state law requires to do things allowed in the conduct state **if the targeted state law requires to do things that are illegal in the conduct state**









International law analysis (3) Prescriptive jurisdiction

- The three-factor analysis (proposal) is about prescriptive jurisdiction.
- In my understanding, prescriptive jurisdiction should mean power to enact substantive laws (creating substantive rights, duties, and statuses). And it necessarily includes the power to decide their reach (whose and whereabouts of rights and duties), or the authority to decide applicability of its laws.
- Also, it should be noted that limited areas of substantive laws are discussed here: laws that restrict right/freedom and/or create duties (criminal law, regulatory law, tax law). Right-giving laws (entitlements programs, right to request information) are excluded because that would not cause int'l conflicts. For the same reasons, private law (contracts/torts/family) are excluded as well.

International law analysis (3) Prescriptive jurisdiction

Who, within the state, has the jurisdiction to prescribe?

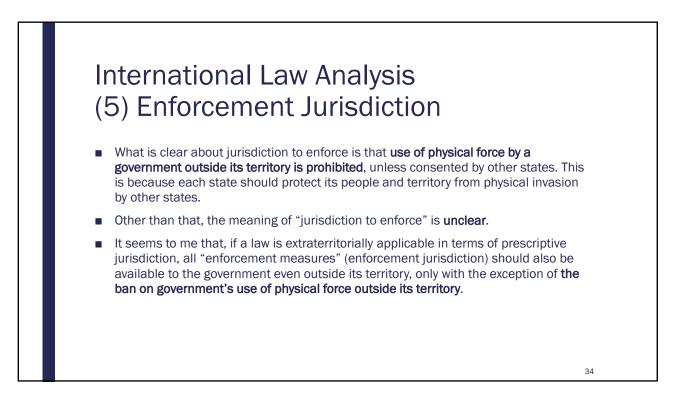
Legislature may expressly provide for extraterritoriality. Judiciary (courts) need to interpret the law if there is no explicit provision. The executive (president/ cabinet) may show their interpretation about extraterritoriality, which may be respected by the courts.

Out of the three factors, the last one (conflict with other states) would not be well analyzed by judicial courts. That matter needs to be dealt with by the executive/agency level.

International Law Analysis (4) Adjudicative Jurisdiction

Jurisdiction to adjudicate

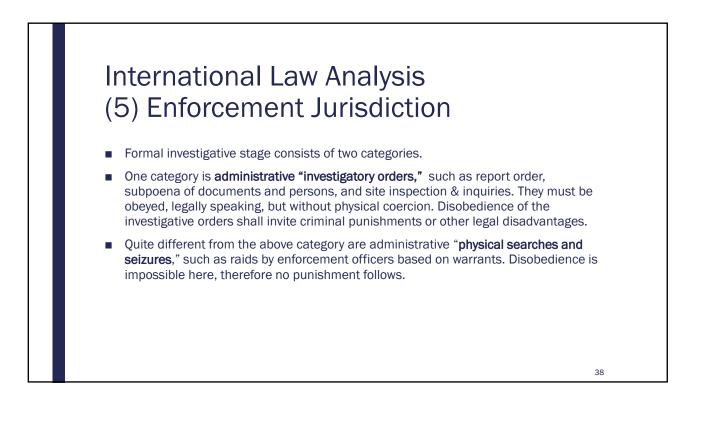
Jurisdiction to adjudicate is relevant only to private law lawsuits. (See international jurisdiction of civil matter courts.) As far as the government (prosecutors/ agencies) sues in the court of their state, international law problems would not take place in terms of this jurisdiction.



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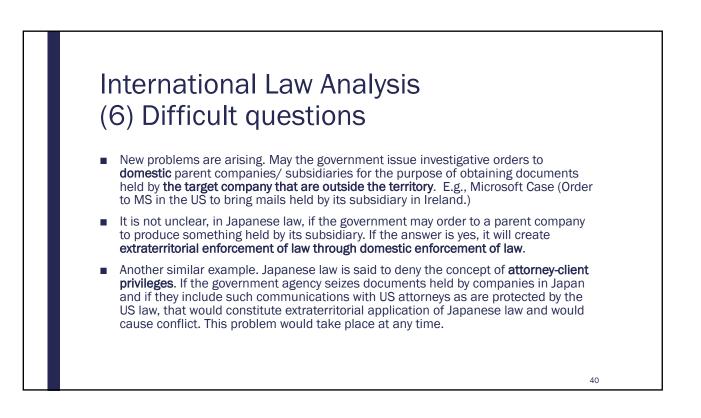






International Law Analysis (5) Enforcement Jurisdiction

- Investigative orders are legally coercive in the same way as cease and deist orders and civil penalties imposed by the court/agency enforcing competition law. It is hard to say that the former categorically be banned while the latter is allowed once extraterritorial applicability is affirmed.
- It is obvious physical searches and seizures are prohibited outside the territory. But I suppose that secretive investigation and investigative orders should not be categorically denied extraterritoriality.



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Some Examples (1) A very broad one

- The first Sup. Ct. decision on extraterritoriality of Anti-monopoly Act (Dec. 12, 2017)
- In 2010, the Japan Fair Trade Commission (JFTC) ordered several CRT (cathode ray tube) manufacturers ("CRT Manufacturers") to pay civil money penalty for their participation in cartel agreements made outside Japan that fixed the price of their products (CRTs) to be sold to several Japanese TV manufactures ("Japanese TV Manufacturers").
- The CRT Manufactures (parent/subsidiaries) were each based in Malaysia, Korea, Japan, Indonesia, and Taiwan. (Only the subsidiaries were ordered to pay the penalty.) The cartel agreement ended in 2007.
- The Japanese TV Manufactures (parent/subsidiaries) were regular buyers of the CRT Manufactures' products (CRTs).

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Some Examples (1) A very broad one

- The fined CRT Manufacturers sued and asserted that the Anti-monopoly Act should not apply to their cartel because (1) the agreements were made outside of Japan and (2) only the foreign subsidiaries of the Japanese Manufacturers purchased the CRTs.
- Supreme Court upheld the JFTC's position, holding as follows:
- 1) The Act has no explicit provision on its applicability, or the scope of applicability, to conducts outside the territory of Japan.
- 2) Considering the purpose of the Act (to ensure consumers' interests by promoting fair and free competition), its provisions of cease and desist orders & civil money penalty orders should be interpreted to be applicable to such cartel agreed upon outside the territory as far as it interferes with the economic order of free competition in Japan.

Some Examples (1) A very broad one

- 3) Thus, for any conduct that fits the Act's requirements of the cartel (which includes "competitiveness of a certain market area is substantially restrained"), the cartelists may be ordered to cease and desist or pay penalties.
- 4) In this case, Japanese companies (TV Manufactures) were traders (buyers) of the products sold under the price-fixing agreement. The cartel interferes with the economic order of free competition of Japan.
- The scope of this effects doctrine is vigorously discussed among commentators. Note that the Court did not mention the quantity of "sales" of those CRT-TV sets in the markets of Japan (perhaps not much).
- From the three-factor analysis, the Sup. Ct. analyzes the domestic interest and the target entities' interest while there is **no mention to the third factor.**

Some Examples (2) A very narrow one

- Protection of Personal Information Act, as amended in 2015 has a provision on extraterritoriality.
- Section75 Sections 15,16,18(excluding second paragraph), 19 to25, 27 to 36, 41, 42 (only the first paragraph), 43, and the following section shall also apply to a "business operator handling personal information" who has obtained, through its offering of goods and services, personal information of persons who are in the territory of Japan, even when the operator handle such personal information outside Japan.
- Section 42 (1) When a business operator handling personal information has violated any of the provisions of Sections, and when the Personal Information Protection Commission finds it necessary to protect the rights and interests of individuals, the Commission may recommend the business operator to cease the violation and take other necessary measures to correct the violation

Some Examples (2) A very narrow one

- Section 42 (2) Where a business operator handling personal information having received a recommendation under the provision of the preceding paragraph does not take the recommended measures without justifiable ground, and when the Commission finds that the serious infringement on the rights and interests of individuals is imminent, it may order the business operator to take the recommend measures.
- Section 56 A business operator who violates orders issued under paragraph (2) or (3) of Section 42 shall be sentenced to imprisonment with work of not more than six months or to a fine of not more than 300,000 yen.
- This limit on extraterritorial applicability seems meaningless. There is no difference between recommendation and order in the sense that the law applies to conduct outside the territory. Is it because no extraterritorial principle in crim. law applies here?

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Concluding Remarks

Significance of borders differs depending on areas of law (a very tentative chart):

o borders	expanded fictitious borders		physical borders	
entitlement progra	ms			
compe	tition law (market b	ased, at least	cartels	5)
		securi	ties ex	change law (place of issuance/ sales)
	consumer prote	ection (consum	ner bas	sed)
	tax(online platf	orms?)	OR	tax (permanent establishments)
	privacy protecti	on (source bas	sed)	
		crim	inal la	v (traditional crimes)
private law (contracts)			рі	ivate law (torts)
onvironmontal low	(theoretically)	OR		environmental law + agreement

Thank you

For sharing my tentative thought on extraterritoriality, which is itself an "extra-territorial" observation, stepping out of my territory of administrative law.