Customer Location and the International Reach of National Competition Laws

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Introduction

At present, more than 100 jurisdictions around the globe have enacted national competition laws. To be sure, some ambitious attempts have created a number of best practice guidelines and enabled information sharing among relevant competition authorities. However, each competition authority is founded on its own national competition law.

In such a situation, some cases may give rise to multiple jeopardy regarding the same conduct and even the same trade. To clarify these issues, this article will describe the current framework of adjustment and examine the most pertinent issues.

International law does not regulate much with respect to the global reach of national competition laws. National competition authorities are usually free from constraint by any international laws when applying their own national competition statutes. Any adjustments are up to each jurisdiction. Under such conditions, we, the international community, need guidance for interpreting and enforcing each national competition law.

I. Basic Framework

1. The Effect Doctrine

Leading competition law jurisdictions have adopted the Effect Doctrine as their common guiding principle for international cases. The Effect Doctrine justifies the application of a national competition law when conduct has an anticom-

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petitive effect on a market within the particular jurisdiction.

A pioneer was the *Alcoa* case.[1] With the Supreme Court case of *Hartford Fire*[2] regarded as a halfway landmark, the Effect Doctrine has become a well-established principle in the US.

EU competition law has followed the same path. It started its argument with a unique principle of implementation doctrine in *Wood Pulp*. The Court of Justice in *Wood Pulp* pointed out that the application of EU competition law was justified because the alleged cartel participants "implemented their pricing agreement within the common market."[3] The Court failed to define the concept of "implementation" explicitly, but it should be noted that the "purchasers within the Community" received delivery of price-fixed products in the case.[4] As a result, the EU's implementation doctrine is an equivalent of or at least is included in the Effect Doctrine. Later, in the merger case of *Gencor*, the Court of First Instance explicitly accepted the Effect Doctrine.[5] In *Intel*, the General Court, the successor of the Court of First Instance, carefully checked the case according to both doctrines and then reached a similar result.[6]

This trend of the Effect Doctrine has exerted an influence over other jurisdictions, including Japan.[7] The Fair Trade Commission of Japan (JFTC) organized a study group on the issue and published its report in 1990.[8] The report declared that

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1 United States v. Aluminum Co. of America, 148 F.2d 416, 443-445 (2d Cir. 1945).

2 Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) ("[…] it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

3 Judgment of 27 September 1988, *A. Åhlström Osakeyhtiö v Commission*, C-89/85, EU:C:1988:447, paras. 16-17.

4 Judgment in *A. Åhlström Osakeyhtiö v Commission*, EU:C:1988:447, paras. 2-3 and 17. In Judgment of 9 July 2015, *InnoLux Corp. v Commission*, C-231/14 P, EU:C:2015:451, para. 73, the Court of Justice found that "the cartel participants, including InnoLux, *implemented* that worldwide cartel in the EEA by *making sales in the EEA* of the goods concerned by the infringement to independent third parties" (emphasis added). It is an illustration that the Court of Justice found implementation when delivery of price-fixed goods occurred in the European Economic Area (EEA).

5 Judgment of 25 March 1999, *Gencor Ltd v Commission*, Case T-102/96, EU:T:1999:65, para. 90.

6 Judgment of 12 June 2014, *Intel Corp. v Commission*, T-286/09, EU:T:2014:547, paras. 231-249 (preliminary observations), 250-297 (qualified effects), 298-314 (implementation).

7 For an overview of Japanese Antimonopoly Act, Simon Vande Walle and Tadashi Shiraishi, "Competition Law in Japan," in John Duns, Arlen Duke, and Brendan Sweeney eds., *Comparative Competition Law* (2015).

8 Dokusenkinshi-ho Shogai Mondai Kenkyukai [Study Group on International Issues in the Antimonopoly Act], "Dokusenkinshi-ho no Ikigai Tekiyo" [Extraterritorial Application of the Antimonopoly Act], in Kosei Torihiki Iinkai Jimukyoku [Executive Office of the Fair

even foreign firms would be subject to the Japanese Antimonopoly Act (AMA) if alleged conduct harmed competition in "a domestic market."[9] The report also limited the reach of the AMA by clarifying that the AMA should be applied only when a foreign firm's conduct had a substantial effect on "a market of our jurisdiction."[10]

The Effect Doctrine, though established, was without a specified definition of "effect." In other words, the JFTC's concept of "a domestic market" or "a market of our jurisdiction" was an open question. The next step should have been defining the key concept.

2. The Customer Location Doctrine

(1) General Proposition

One attempt to define "effect" can be seen in the Customer Location Doctrine.[11] This doctrine defines the phrase "a market of our jurisdiction" as "a market that has customers located in our jurisdiction." In other words, the Customer Location Doctrine defines the term "effect" as "the effect on customers located in the particular jurisdiction." If conduct has an effect on such a market, the jurisdiction can apply its competition law. The Customer Location Doctrine is not a competing alternative to the Effect Doctrine; rather, it is complementary or supplementary to the Effect Doctrine, elaborating on its basic concept, "effect." It is difficult to find what other efforts have been made to define the concept of "effect." In most cases, competition authorities and commentators have preferred situations where no specified definition is used. That is why this article demonstrates the robustness of the Customer Location Doctrine through inductive analyses based on a number of practices (see below 2. (2)-(7)), rather than by deductively comparing it with other possible general propositions.

The Customer Location Doctrine faced a lot of opposition; however, this opposition did not deal it a serious blow. Some criticisms were based on similar contentions in relation to the 1992 DOJ Statement, the export cartel cases, or the concept of the "worldwide market," and they will be examined later (see below 2. (2), (3), and (5)). Other criticisms were only emotional ones made against the idea of defining the concept of "effect" with a solid formula. Recent articles have tended to be based on propositions that are similar to the Customer Location Doctrine.

Trade Commission of Japan] ed., *Dumping Kisei to Kyoso Seisaku Dokusenkinshi-ho no Ikigai Tekiyo* [Dumping Regulation and Competition Policy / Extraterritorial Application of the Antimonopoly Act] (1990).

[9] *Ibid*., p. 67.

[10] *Ibid*., p. 84.

[11] Tadashi Shiraishi, "Jikoku no Dokkin-ho ni Ihan-suru Kokusai Jiken no Han'i" [Substantive Reach of National Competition Laws], *Jurisuto* [Jurist] No. 1102 and No. 1103 (1996).

Even the JFTC, which previously was reluctant to agree to the Customer Location Doctrine, has explicitly reasoned its conclusion in an equivalent proposition (see below II. 3. (2)).

Although the Customer Location Doctrine is pursued in this article as a descriptive theory, it is also valid as a normative proposition because most competition law communities agree that the most important goal of competition law is to protect customers and the competition for those customers.

(2) 1992 DOJ Statement

In 1988, the last year of the Reagan administration, the US Department of Justice (DOJ) issued guidelines containing the so-called "footnote 159," under which the DOJ would challenge foreign anticompetitive practices only when they injured US consumers, rather than exporters.[12]

In 1992, the DOJ abandoned the footnote, proclaiming that it would challenge foreign practices even when they did not injure US consumers if they injured US exporters.[13]

The 1992 DOJ statement was harshly criticized by the competition authorities of other jurisdictions, including the JFTC. The JFTC promptly issued a statement opposed to the DOJ, arguing that the JFTC should exclusively handle anticompetitive conduct when such conduct had an effect on "a market of our jurisdiction."[14] The JFTC again failed to define the phrase "a market of our jurisdiction." But, from the context, it obviously referred to a market of customers located in Japan.

The DOJ silently dropped its proposition when it completely updated the guidelines in 1995.[15] Along with this, the DOJ tried to achieve a similar goal by introducing "positive comity" to international competition law communities. For example, Article V, Section 1 of the agreement between the US and Japan[16] clearly shows what "positive comity" is:

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[12] U.S. Department of Justice, *Antitrust Enforcement Guidelines for International Operations* (1988), n. 159. These guidelines were reprinted in *Antitrust & Trade Regulation Report*, Vol. 55, No. 1391 (1988).

[13] *Department of Justice Policy Regarding Anticompetitive Conduct that Restricts U.S. Exports* (April 3, 1992). This statement was reprinted in *Antitrust & Trade Regulation Report*, Vol. 62, No. 1560 (1992), pp. 483-484.

[14] Kosei Torihiki Iinkai [Fair Trade Commission], "Beikoku no Yushutsu wo Seigen-suru Hankyosoteki Koi ni Taisuru Beikoku Shihosho no Hantorasuto-ho no Shikko Hoshin no Henko ni Tsuite" [On the Change of DOJ's Antitrust Enforcement Guidelines for Anticompetitive Practices Restraining U.S. Export] (April 9, 1992).

[15] The U.S. Department of Justice and the Federal Trade Commission, *Antitrust Enforcement Guidelines for International Operations* (1995).

[16] *Agreement Between the Government of Japan and the Government of the United States of America Concerning Cooperation on Anticompetitive Activities* (October 8, 1999).

> If the competition authority of a Party believes that anticompetitive activities carried out in the territory of the other country adversely affect the important interests of the former Party, such competition authority, taking into account the importance of avoiding conflicts regarding jurisdiction and taking into account that the competition authority of the other Party may be in a position to conduct more effective enforcement activities with regard to such anticompetitive activities, may request that the competition authority of the other Party initiate appropriate enforcement activities.

The consecutive phenomena above show the robustness of the Customer Location Doctrine.

(3) Export Cartel

In 1972, the JFTC issued cease and desist orders to export cartels.[17] Because of these orders, most of the JFTC community sought to criticize the Customer Location Doctrine. This was contradictory to their opposition to the 1992 DOJ statement.

It should be borne in mind that the cease and desist orders were rendered before the 1977 amendment of the AMA, which introduced administrative fines for cartels. One should refrain from attaching importance to such orders. The JFTC has avoided accusations against export cartels ever since.

(4) International Cartels

The Customer Location Doctrine applies to international cartels, which have customers located in multiple jurisdictions. As a result, these cartels can be called upon to answer multiple accusations from competition authorities in numerous jurisdictions worldwide. Criminal or administrative fines are usually calculated based on the amount of sales to the customers located within the relevant jurisdiction, according to a number of competition laws including those of the US,[18] the EU,[19] and Japan.[20] Those facts are well described by the Customer Location Doctrine. In other words, each competition law applies only to a portion of the whole international cartel; the competition law of Jurisdiction X applies only to the portion in

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[17] For example, JFTC, Recommendation Decision, December 27, 1972 (Asahi Kasei *et al.*: Showa 47 (kan) 18), *Kosei Torihiki Iinnkai Shinketsushu* [Report of JFTC Decisions], Vol. 19 (1973), p. 124.

[18] US criminal fines depend upon the amount of "volume of commerce." *United States Sentencing Commission Guidelines Manual*, Chapters 2 and 8.

[19] The European Commission imposes administrative fines depending upon the amount of "value of sales." *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* (2006/C 210/02), paras. 12-18.

[20] AMA Article 7-2(1).

which the cartel participants fixed the prices of products sold to customers located in jurisdiction X. They implicitly and unconsciously divide a whole cartel agreement into segments depending on the target customers. The JFTC's *Marine Hose* case supports this observation.[21] In the proceedings, the JFTC found a whole agreement that targeted customers worldwide, in which Japanese firms were assigned to Japanese customers, a UK firm was assigned to UK customers, and so on. However, the JFTC cut off the Japanese portion, in which all the customers were located in Japan.[22] In that aspect, the JFTC's *Marine Hose* case is an explicit illustration of the Customer Location Doctrine before an international cartel.

This is what the US Supreme Court, in *Empagran*, meant in saying the Sherman Act "can apply and not apply to the same conduct, depending upon other circumstances," including "the related underlying harm."[23] In *Empagran*, the Court denied treble damages to those plaintiff customers located abroad unless they proved a requisite US nexus.

(5) Global Mergers

In a similar way, because firms proposing global mergers have customers located in different jurisdictions, legal counsels usually plan to notify multiple competition authorities. One can usually observe parallel investigations and parallel decisions by some competition authorities. Decisions are made for each market with customers located in each jurisdiction.

Some merger control decisions define a worldwide market as the relevant market for the analysis. Even such decisions are compatible with the Customer Location Doctrine. When a competition authority defines a worldwide market as the relevant market, the premise is that sellers, including the merging firms, have to, for various reasons, implement the same pricing for customers worldwide. In such a situation, if the merged firm can raise prices worldwide, it can do so in a national market too. If the merged firm cannot raise prices worldwide, it cannot do so in a national market either. This is why the competition authority does not have to scrutinize segmented national markets, only the worldwide market as a whole. Such scrutiny also facilitates information sharing among relevant competition authorities because they can talk about a shared relevant market. Such practices are compatible with the Customer Location Doctrine because the implicit and ultimate

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[21] JFTC, Orders, February 20, 2008 (Marine Hose: Heisei 20 (so) 2; Heisei 20 (no) 10), *Kosei Torihiki Iinnkai Shinketsushu* [Report of JFTC Decisions], Vol. 54 (2009), pp. 512 and 623.

[22] According to AMA Article 7-2(1), all turnover affected by a price-related agreement should be the base for administrative fine calculation. The JFTC refrained from legal evaluation of other portions and calculated the fine based only on turnover to customers located in Japan.

[23] F. Hoffmann-la Roche Ltd. v. Empagran S.A., 542 U.S. 155, 174 (2004).

goal for each authority is its own national market, while it explicitly mentions only worldwide market for the sake of convenience. It should be kept in mind that in most jurisdictions, merger control is enforced without imposing fines. In my view, this is why the worldwide market definition is not often observed in cartel cases, in which fines are imposed.

(6) Unilateral Conduct

The Customer Location Doctrine also survives in unilateral conduct cases. As implied in the analysis of the 1992 DOJ statement, exclusionary conduct has to affect domestic customers adversely in order for it to be accused. The exploitative abuse of a dominant position or a superior bargaining position also needs to cause injury to domestic customers, and it suffices because the exploitative abuse of such a position is regulated from the perspective of protecting customers.[24, 25]

(7) Conclusion

Based upon this analysis, the Customer Location Doctrine is applicable to almost all phenomena in competition law, with the exceptions of the 1992 DOJ statement and other trivial examples. Even the JFTC, which used to hesitate about explicitly accepting the doctrine, changed its position to rely on the Customer Location Doctrine in *CRT Cartel* (II. 3. below). The debates proceed to the next stage.

II. Who are "Customers"?

1. Issues to be Discussed

Once we can agree on the Customer Location Doctrine to a certain extent, the next issue is to define the term "customers." One method for exploring this issue is to study headquarters-subsidiary cases. In these cases, the headquarters of customers are located in Jurisdiction X and their subsidiaries are located in Jurisdiction Y. The headquarters in Jurisdiction X negotiate prices and conditions with cartel members, and then direct their subsidiaries to purchase products in Jurisdiction Y. In such a situation, it could be an issue whether Jurisdiction X, with the head-

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[24] Exploitative abuse cases often include those of abuse by buyers. In such cases, the Customer Location Doctrine should be the supplier location doctrine.

[25] The JFTC is a frequent regulator of abuse of a superior bargaining position, but it adheres to a complicated proposition that the regulation is not for the purpose of protecting the victim, but for the purpose of protecting competition for the alleged firm and its competitors or competition for the victims and their competitors. For a general perspective on exploitative abuse, including a critical analysis on JFTC's complicated proposition, see Tadashi Shiraishi, "A Baseline for Analyzing Exploitative Abuse of a Dominant/Superior Position," *UT Soft Law Review*, No. 5 (2013), pp. 1-8.

quarters, or Jurisdiction Y, with subsidiaries, is allowed to apply its own competition law and impose fines. In general, this is an issue of defining "customers" and whether to focus on a decision-maker aspect or on a product-receiver aspect.

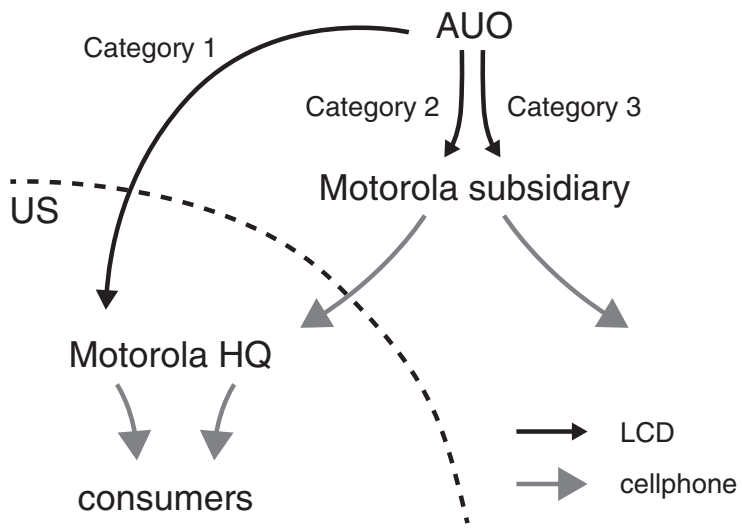
US and EU cases that could have included this issue are explored, and then a Japanese case in which the issue was the central point is analyzed.

2. LCD Cartel Cases in the US and the EU

(1) Motorola Private Damages Case

In *Motorola v. AU Optronics*,[26] Motorola sought treble damages in US courts for overcharges based on three categories of price-fixed LCD panels:

(a) Panels delivered to Motorola in the United States (Category 1);
(b) Panels delivered to Motorola's foreign subsidiaries outside the United States, where they were incorporated into cell phones sold in the United States (Category 2); and
(c) Panels delivered to foreign subsidiaries and incorporated into cell phones sold in foreign countries (Category 3).



A panel at the Seventh Circuit, led by Judge Richard Posner, concluded that:

(a) Motorola had a solid claim with respect to Category 1;[27]

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[26] Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015).

[27] 775 F.3d at 817. According to the statutory jargon in the US, this is an example of "import exclusion" from the exemption provision, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), which added Section 6a to the Sherman Act, 15 U.S.C. § 6a. Although it is distinguished from "effect exception" in the US, as explained later, "import exclusion" is a

(b) With respect to Category 2, even if the court "assume[d]" the existence of a direct, substantial, and reasonably foreseeable effect on domestic commerce,[28] such an effect did not give rise to a Sherman Act claim sought by Motorola;[29] and

(c) LCD panels in Category 3 never became a part of domestic US commerce, so they could not possibly support a Sherman Act claim.[30]

Category 1 does not give rise to any serious issues.

In contrast, Judge Posner's panel rejected Motorola's contention that Motorola's headquarters in the US and its subsidiaries were a single entity for the sake of the litigation.[31] This means that the Motorola's headquarters were denied a reward as an LCD panel customer. Category 3 was dropped here.

The "assumption" of a direct effect for Category 2 requires some notes. This was apparently a result of taking the DOJ's briefs into consideration,[32] and both the Court and the DOJ were focused on the fact that the price-fixed LCD panels were finally imported into the US after being incorporated into cell phones.[33] Motorola's claim that its US headquarters and subsidiaries were a single entity for the sake of litigation was clearly ejected from the reasoning for the "assumption."[34] If the court had admitted the claim, it would have included Category 3 in its consideration, and *Illinois Brick* would have been irrelevant because the headquarters would

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typical example of the Effect Doctrine and the Customer Location Doctrine.

[28] 775 F.3d at 819. According to the FTAIA jargon, this is an example of "effect exception." It is distinguished from "import exclusion" in the US because the price-fixed components (LCD panels) themselves were not imported.

[29] 775 F.3d at 819. The subsequent paragraphs of the judgment indicated a famous Supreme Court case (Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)) as the foremost reasoning for rejecting Motorola's claim.

[30] 775 F.3d at 817-818.

[31] 775 F.3d at 818.

[32] 775 F.3d at 825. The DOJ, mostly with the FTC, submitted briefs three times to the Seventh Circuit in the case: *Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Panel Rehearing or Rehearing En Banc* (April 24, 2014), *Supplemental Brief for the United States as Amicus Curiae* (June 27, 2014)(hereinafter "DOJ June Brief"), and *Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party* (September 5, 2014)(hereinafter "DOJ September Brief"). As the court described, what the competition authorities wanted was a disclaimer that a court ruling against Motorola would interfere with criminal and injunctive remedies sought by the government with respect to Category 2. Before receiving the briefs, Judge Posner's panel had denied the requisite "effect" in its original judgment (Motorola Mobility LLC v. AU Optronics Corp., 746 F.3d 842, 844 (7th Cir. 2014)).

[33] 775 F.3d at 819, 825. DOJ September Brief, *supra* note 32, pp. 11-20.

[34] 775 F.3d at 819-820.

have been a part of the direct purchaser as a single entity with its subsidiaries.

(2) AUO Criminal Proceedings

In *United States v. Hsiung* (AUO Criminal Proceedings), under a case closely related to *Motorola v. AU Optronics*, the Ninth Circuit affirmed that the DOJ prevailed both for Category 1 and Category 2.[35]

What is important for this article is that the Ninth Circuit's ruling with respect to Category 2 was based mostly on the fact that finished products were imported into the US. The fact that negotiations between a price-fixed component seller and a customer's US headquarters took place in the US did not suffice by itself.[36] To be sure, the court mentioned the negotiations as a part of the "constellation of events that surrounded the conspiracy," but the negotiations on components with the customer's headquarters worked only as a factor for emphasizing the importance of the component in the finished products, which were imported into the US.[37]

(3) InnoLux Case

In the EU, the Court of Justice rendered a judgment on the calculation of administrative fines in a case closely related to the US ones mentioned above.[38]

In the proceedings, the European Commission established the following three categories, depending upon situations in relation to the European Economic Area (EEA):[39]

(a) The category of "direct EEA sales," which includes sales of cartelized LCD panels to another undertaking within the EEA;

(b) The category "direct EEA sales through transformed products," which comprises sales of cartelized LCD panels incorporated, within the group to which the producer belongs, into finished products which are then sold to another undertaking within the EEA; and

(c) The category of "indirect sales," which comprises sales of cartelized LCD panels to another undertaking outside the EEA, which then incorporates the panels into finished products that it sells within the EEA.

The Commission calculated fines based on the first two categories, (a) and (b), while it dropped the third category, (c), because "the inclusion of the third category was not necessary for the fines imposed to achieve a sufficient level of deterrence."[40]

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35 United States v. Hsiung, 778 F.3d 738, 753-756, 756-760 (9th Cir. 2015).

36 778 F.3d at 758.

37 778 F.3d at 759.

38 *InnoLux Corp.*, *supra* note 4.

39 *Ibid.*, para. 15.

40 *Ibid.*, para. 16.

The Court of Justice affirmed the decision of the European Commission.

Categories (a) and (b) belong to Category 1 in *Motorola v. AU Optronics*. Former category (a), in the EU case, is clearly included in Category 1. The latter category, (b), is similar to Category 1 because the makers of finished products were not subsidiaries of customers but were instead within the group of which a cartel participant was a member.

The third category, (c), is similar to Category 2 in *Motorola v. AU Optronics* because finished products were imported into the EEA.[41]

(4) Conclusion

There are some cases in the US and the EU that support the competition authorities for Category 2, but their reasonings are mainly based on the fact that finished products were imported into their homelands. Few reliable sources have been found in which a court or a competition authority has accused a foreign cartel with a reason based only on the fact that the customer's domestic headquarters negotiated with sellers and then directed its foreign subsidiaries.

3. CRT Cartel Case in Japan[42]

(1) JFTC Orders

In 2009, the JFTC issued a cease and desist order and imposed administrative fines in a cartel case involving cathode ray tubes (CRTs).[43] According to the JFTC, makers fixed the price of CRTs and sold them to CRT television makers located in Southeast Asian countries. Here, the CRTs were components and the CRT televisions were finished products. Five CRT television makers were part of the case: Sanyo, JVC, Sharp, Orion, and Funai. All subsidiaries that received deliveries of CRTs were located in Southeast Asian countries. Each of the five customers was headquartered in Japan.

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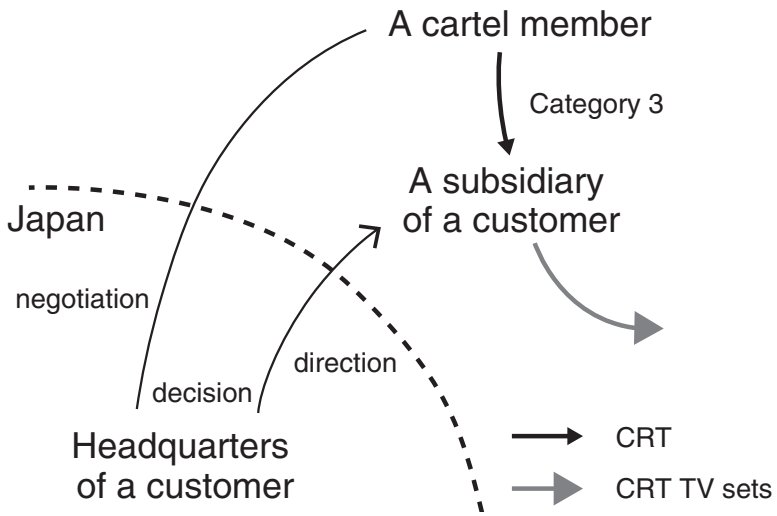
[41] The DOJ cites the view of the Commission on the third category, (c), in the EU case to support its position on Category 2. DOJ September Brief, *supra* note 32, p. 19, citing DOJ June Brief, *supra* note 32, p. 9 and n. 7. The DOJ is supposed to understand that the Commission had the requisite power to impose fines in relation to the third category, (c), but reserved its discretion.

[42] The author supported MTPD companies and Samsung SDI companies in this case by submitting personal briefs to the JFTC and the Tokyo High Court.

[43] JFTC, Orders, October 7, 2009 (CRT cartel: Heisei 21 (so) 23 and Heisei 21 (no) 62), *Kosei Torihiki Iinnkai Shinketsushu* [Report of JFTC Decisions], Vol. 56, No. 2 (2011), pp. 71 and 173. Some administrative fine orders to some foreign addressees were dated February 12, 2010, (Heisei 22 (no) 23). JFTC orders and decisions, and court judgments involving the JFTC as a party, can be downloaded from the JFTC's database: *available at* <http://snk.jftc.go.jp/JDSWeb/jds/dc001/DC001>.



(2) JFTC Decisions

MT Picture Display (MTPD) and its subsidiaries, and Samsung SDI in Korea and its subsidiary in Malaysia requested internal review proceedings at the JFTC.[44] In May 2015, the JFTC rendered decisions that approved its own orders.[45] As a general proposition, the decisions declared that the AMA could be applied at least in a situation in which a market with customers located in Japan was harmed by a cartel.[46] In support of this characterization, the JFTC decisions pointed out that the headquarters in Japan were, substantially, a single entity with subsidiaries in Southeast Asia because the headquarters negotiated with price-fixers, made decisions, and directed the subsidiaries.[47]

What is important is the fact that the JFTC decisions did not find any importation of these CRT television sets into Japan, making this a Category 3 case, not a Category 2 one. For the JFTC, the headquarters in Japan belonged to customers of price-fixed CRTs, not customers of the finished products, the CRT TV sets.[48]

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[44] The hearing procedure was repealed by a 2013 amendment of the AMA, but the CRT case is subject to the pre-2013 framework pursuant to interim measures.

[45] JFTC, Decisions, May 22, 2015 (CRT cartel: Heisei 22 (han) 2/5, 6 and 7). The proceedings were formally divided into three cases: MTPD and its subsidiaries (hereinafter "MTPD"), Samsung SDI Korea, and Samsung SDI Malaysia. The JFTC rendered three decisions with substantially similar reasonings.

[46] Decision for MTPD, *supra* note 45, p. 19. In this general proposition, we can see that the JFTC finally adopted the Customer Location Doctrine, although it was done so along with "at least" language.

[47] Decision for MTPD, *supra* note 45, pp. 40-41.

[48] Decision for MTPD, *supra* note 45, p. 41.

(3) Tokyo High Court Judgments

The addressees appealed to the Tokyo High Court. They were divided into three different panels at the Court.[49]

The Tokyo High Court rendered three judgments in January and April 2016.[50] The reasonings were substantially identical, in that they allow an application of the AMA to a case with customers located in Japan, and they put an emphasis on the aspect of the decision-maker when they defined the "customers."[51]

(4) Analyses

The JFTC decisions and the Tokyo High Court judgments are unparalleled in the world's current competition law community. As examined in II. 2. above, judgments, decisions, and briefs by competent courts and competition authorities in the US and the EU provide no indications of justifying the accusations of a foreign cartel based solely on the fact of negotiations and directions as to products that were not imported into the jurisdiction.[52]

Decision-making itself, separated from receiving products, is not usually addressed in competition law. For example, in the pharmaceuticals market, medical doctors make decisions about which medicines to buy and how much, but competition laws protect patients who pay and consume medicines, not medical doctors who only decide and direct.

Decision-making is more virtual than the delivery of goods and services. Headquarters can be shifted only by legal paperwork without reference to economic reality. In my view, product delivery should receive a higher priority than decision-making if we aim to focus on economic realities.

Tokyo High Court judgments are optimistic in believing that competition au-

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[49] Pursuant to the pre-2013 framework, the Tokyo High Court reviews a JFTC decision by a panel with five judges (pre-2013 AMA Articles 85 and 87).

[50] Tokyo High Court, Judgment, January 29, 2016 (CRT cartel, Samsung SDI Malaysia: Heisei 27 (gyo-ke) 37); Tokyo High Court, Judgment, April 13, 2016 (CRT cartel, MTPD: Heisei 27 (gyo-ke) 38); Tokyo High Court, Judgment, April 22, 2016 (CRT cartel, Samsung SDI Korea: Heisei 27 (gyo-ke) 36). The judgments can be downloaded as indicated in note 43, above.

[51] Judgment for Samsung SDI Malaysia, *supra* note 45, pp. 62-64; Judgment for MTPD, *supra* note 45, pp. 38-41; Judgment for Samsung SDI Korea, *supra* note 45, pp. 82-84.

[52] DOJ's briefs cited JFTC's CRT case as an evidence of its adoption of the Effect Doctrine. DOJ June Brief, *supra* note 32, p. 7 ("For example, the JFTC has taken action recently against cartel members not operating in Japan but whose conduct had an *effect* in Japan.") (emphasis added). See also DOJ June Brief, *supra* note 32, p. 9 and n. 7, and DOJ September Brief, *supra* note 32, p. 19. Those passages do not show any indication that the DOJ was aware of the fact that neither price-fixed components nor their finished products had entered Japan.

thorities will adjust to avoid multiple sanctions on the same trade, but they do not seem to take into account the fact that their interpretation potentially gives rise to a number of private lawsuits, which are sometimes notorious in some jurisdictions. If a potential leniency applicant to the competition authority of Jurisdiction Y has to fear treble damages litigation in Jurisdiction X, such an applicant may decline to report, and such behavior may undermine the prosecutorial leniency systems of Jurisdiction Y.[53]

The characteristics of modern international norms include symmetry and reciprocity among national laws. If Jurisdiction Y expands the reach of its own competition law, other jurisdictions may feel free to adopt similar policies. Such an attempt by Jurisdiction Y would have a boomerang effect on itself, and Jurisdiction Y would become unable to oppose a similar expansion by other jurisdictions. The JFTC could persuasively criticize the DOJ in 1992 because the JFTC was in a moderate position. A national competition law should be modest to ensure international harmony.

Conclusion

With some disputes within the key concept, the Customer Location Doctrine has prevailed worldwide among competition law practices. It is usually beneficial for making hidden laws explicit.

The disputes, including the issue of headquarters-subsidiary, have been contributing to a more solid system for competition law. There must be more issues, for example, how to identify the location of customers in cyberspace cases. The Customer Location Doctrine may be required to be resolved and restructured in the future ahead of such advanced cases, but it will continue to be robust in the near future because it explains almost all practices to date.

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[53] This was what concerned the *Empagran* judgment of the US Supreme Court. 542 U.S. at 168.