

A Preliminary Analysis of Legislative Process in Japan

A Recent Example from
Antitrust Regulation and
Securities Regulation
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0. Basic Knowledge

- **Comparative Law: US and Japan**
 - Substantial rule -> sometimes very similar
 - Its enforcement -> sometimes very different
 - Today's topic can be seen as one example of this contrast

1. Securities Regulation

- **Substantial rule: very similar to that of the US**
 - Adopts basic approach of Securities Act of 1933 & Securities Exchange Act of 1934

1. Securities Regulation

- **Enforcement level: very low**
 - SESC (Securities and Exchange Surveillance Commission): weak power
 - Understaffed
 - Lack of administrative penalty
 - Nonexistence of class action
 - Nonexistence of presumption of damages
 - -> No civil action

1. Securities Regulation

- **Result [as is widely alleged]**
 - Many insider tradings and market manipulations are unpunished
 - Discouraging market participation of individual investors (really?)

2. Antitrust Regulation

- **Similar situation to that of securities regulation**
- **Substantial rule: very similar to that of the US**
 - Adopts basic approach of Sherman Act

2. Antitrust Regulation

- **Enforcement level: very low**
 - FTC: weak power
 - Understaffed + Lack of incentive (Miwa/Ramseyer)
 - Insufficiency of administrative penalty
 - 1-6% of sales, but limited to three years
 - Nonexistence of class action
 - Nonexistence of presumption of damages
- **Result [as is widely alleged]**
 - ‘DANGO’ everywhere, or, paradise of cartels

3. Deregulation & Enforcement

- **Deregulation Subcommittee**
 - Installed by Prime Minister Koizumi
 - Published ‘Plan to Pursue Deregulation’
 - Deregulation in many areas
 - At the same time, enhancement of ex-post monitoring
 - In order to provide basic condition of ‘free and fair market’
 - Including reinforcement of enforcement in antitrust regulation and securities regulation

3.1 Reform Project of Antitrust Regulation

- **FTC set up a Working Group**
 - Consisted mainly of legal scholars
 - Discussed doctrinal issues
 - E.g., relationship between administrative penalty and the constitutional principle of ban of double punishment
- **After the WG reached solutions to the issues, FTC drafted a bill**
 - Stricter administrative penalty
 - Strengthened FTC’s investigation authority

3.1 Reform Project of Antitrust Regulation

- **FTC tried to submit the bill to Diet in spring 2005**
- **The business community, typified by JFEC (Japan Federation of Economic Organizations), opposed fiercely**
 - Complaining that penalty against violation is already high enough
- **The opposition was so serious that FTC finally gave up submitting the bill**

3.1 Reform Project of Antitrust Regulation

- **FTC announced that it will try again in the future**
 - And FTC is now trying to submit the bill in this fall
 - But JFEC and the business community are strongly opposing
 - Many people anticipate FTC will fail again

3.2 Reform Project of Securities Regulation

- **After the doctrinal discussion at FTC WG reached solution, FSA (Financial Services Agency) also tried to reinforce enforcement of securities regulation**

3.2 Reform Project of Securities Regulation

- FSA also organized a WG, but without getting its advisory opinion, FSA soon drafted a bill
 - Introduction of administrative penalty
 - Furthering investigative authority of SESC
- The bill was submitted to Diet on March 5 2004 and was adopted on June 2 2004
 - Although the business community opposed, complaining that present regulation is ambiguous and increases the cost of business judgment

4. What Caused the Difference?

- Both reforms seem to implement similar policy: reinforcement of enforcement
- Five possible explanations of the difference
 - Cultural background
 - Efficiency
 - Effect on relevant interest groups
 - Political power of FTC & FSA
 - Packaging of multiple reforms

4.1 Cultural Background

- “DANGO is part of Japanese culture and is difficult to be changed”
 - No explanatory power or just tautology
 - Why aren't insider trading, market manipulation also part of 'Japanese culture'?

4.2 Efficiency

- Maybe...
 - as Professors Miwa/Ramseyer insisted recently
- But, not so apparent
 - Both reforms seem to carry out similar function

4.3 Effect on Interest Groups

- Who will be affected adversely by the proposed reforms?
- Securities regulation
 - Public corporations (especially their directors) & Securities Brokers
 - Effect of the reform is expected to be mixed
 - Trend of 'Corporate Governance' in Japan
 - It is probably hard to oppose proposals which try to reduce agency cost

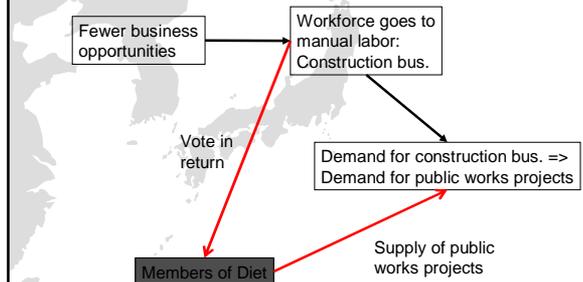
4.3 Effect on Interest Groups

- Antitrust regulation
 - All corporations/individuals will be affected
 - Particularly severe effect on small/middle-sized construction businesses in provincial areas

4.3 Effect on Interest Groups

- **Small construction business in provincial areas**
 - In contrast to city area, there are not so many business chances [*Why not go to city areas?*]
 - Unskilled labor goes to construction business
 - But there are not so many construction projects that over competition arises
 - Response: solicitation of public works projects and cartel to distribute profit-

In Provincial Areas



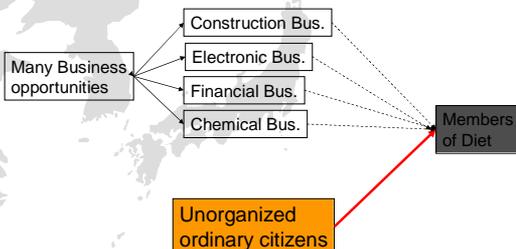
4.3 Effect on Interest Groups

- **Construction business and Politicians**
 - Public works projects are funded by local municipal authorities, usually supported by national budget
 - Diet members try to bring in their electoral district as many such projects as possible
 - Construction businesses, in return, cast their votes to the politicians and provide support in human resource and money

4.3 Effect on Interest Groups

- **However, in City areas (e.g., Tokyo, Osaka):**
 - Construction industry has only a small share; there are lots of other industries
 - The most powerful voting power often lies in nonaffiliated ordinary citizens
- **Result**
 - Politicians from provincial areas strongly oppose the reform; politicians from city areas are usually indifferent because opposition does not seem to increase their vote directly

In City Areas



4.3 Effect on Interest Groups

- **Caveat**
 - The above explanation is based on traditional '1970 year system', under which LDP has preserved its great political power
 - But, political balance in Japan is now under great change
 - Particularly in city areas, opposition against public works projects is rapidly rising
 - Therefore, the situation may change in the near future

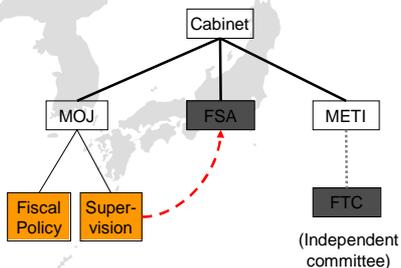
4.4 Political Power of FTC/FSA

- Two factors
 - Political power/Legislative technique
- Political power
 - FSA's predecessor is MOF [Ministry of Finance]
 - MOF controls national budget and has [had?] big political power
 - But, MOF is just a predecessor: now, Fiscal policy and supervision is completely separated

4.4 Political Power of FTC/FSA

- Legislative technique
 - Legislation requires lots of know-how
 - E.g., 'Nemawashi' [consensus building in advance]
 - FSA has taken over many people from MOF, who are good at such legislative technique
 - FTC is quasi-judiciary branch and has few experience in legislation
 - What FTC utilized was only logic, and FTC found few supporters and many opponents

Organizational Chart



4.5 Policy Packaging

- The antitrust bill involved reinforcement of enforcement alone
- In contrast, the securities bill included deregulation regarding prospectus, entry of banks into securities brokerage business, and so on
- Can this packaging explain the difference?
 - Interest groups could have encouraged to adopt only deregulatory part, but they did not

5. Conclusion

- Two implications from the above discussion
 - Chose carefully which authorities to consult with
 - Some authorities are smarter regarding legislation technique than others
 - Explore what kind of interest groups are behind and the extent of their political power
 - Usually interest groups in provincial areas have more political power than those in city areas