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## Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective

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# Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective

Frank K. Upham

## Abstract

To begin the analysis of Japanese regulation, Part I looks closely at the structure and implementation of the Large Scale Retail Stores Law (“LSRSL”) by the Ministry of International Trade and Industry (“MITI”). The LSRSL and its implementation are representative of Japanese agency practice, and their detailed description can aid in forming preliminary generalizations about the legal nature and explanations for the delegation of power to private parties that this Article argues comprises Japanese regulatory style. To confirm the representative nature of administrative practice under the LSRSL and to provide additional breadth to the analysis, Part II looks at instances of delegation in several other areas of bureaucratic practice from MITI supervision of structural adjustment under declining industries statutes to the granting of broadcast licenses by the Ministry of Posts and Telecommunications (“MPT”). In order to get a sense of the preconditions and limitations of this style of regulation, Part II also examines the less successful use of similar regulatory techniques in both economic regulation and by local governments interested in controlling land use within their jurisdictions. Part III draws on U.S. administrative law norms and European regulatory theory to refine the model of privatized regulation that emerges from Parts I and II. The Conclusion assesses the likelihood that recent legal and political changes in Japan and growing international pressures for transparency in domestic administrative processes will lead to changes in Japanese regulatory style in the near future.

## ARTICLES

### PRIVATIZED REGULATION: JAPANESE REGULATORY STYLE IN COMPARATIVE AND INTERNATIONAL PERSPECTIVE

*Frank K. Upham\**

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### INTRODUCTION

Central to any discussion of the nature of the Japanese bureaucracy is the role of the economic ministries. How one evaluates the ministries' performance will influence how one describes the Japanese economy, the nature of capitalism, the origin and nature of Japan's trade surplus, and much more. Seen by some as at the center of a web of influence that extends to the far reaches of the economy and as deserving much of the credit for economic growth up to the 1980s,<sup>1</sup> the best that others can

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1. See generally CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975* 35-82 (1982) (discussing role of economic bureaucracy in growth and development of Japanese economy).

say about the economic bureaucracies is that they have been too weak to ruin the economy by having any influence over it.<sup>2</sup>

How one feels about these divergent claims depends on how one analyzes the regulatory role. Advocates of the bureaucracy's power point to its omnipresence in the Japanese economy and assume that presence equates to influence. Critics stress most ministries' general lack of legal power and conclude that private economic actors follow bureaucratic guidance only when it suits their own interests.

The key to both interpretations lies in their attention to the phenomenon of administrative guidance.<sup>3</sup> Defined variously, administrative guidance is essentially the tendency of all Japanese bureaucracies, and arguably of all bureaucracies everywhere, to prefer informal means of policy implementation to formal ones. It includes the practice of an agency to instruct private parties to take action that the agency does not have the legal power to compel.<sup>4</sup> In the economic context, this means a ministry's efforts to extend its regulatory influence beyond its formal statutory power and to influence firm behavior to achieve economic results that are not supported by compulsory enforcement power.

That the scope, content, and nature of administrative guidance are important to understanding Japanese regulation is a

2. See generally JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 139-68 (1991); see also Muneyuki Shindō, *Kanri sareta shijōkyōso ni yoru keizaihaten* [Economic Development by Managed Market Competition], *EKONOMISUTO*, May 17, 1993, at 124 (presenting both sides of argument in debate over role of economic bureaucracies) [hereinafter *Managed Market Competition*]. This statement concerning the debate regarding bureaucratic influence in the Japanese economy simplifies the discussion because it ignores the change in the bureaucracies' role over time.

3. See e.g., JOHNSON, *supra* note 1, at 242-74 (describing MITI's uses of administrative guidance); MITSUO MATSUSHITA, *INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN* 60 (1993) (discussing use of administrative guidance as central to role of economic regulation); *Gyōsei shidō: Dokushi seisaku to sangyō seisaku (Zadankai)* [Administrative Guidance: Competition Policy and Industrial Policy (Symposium)], 741 *JURISUTO* 15-36 (1981); Yoriaki Narita, *Gyōsei shidō no kinō to kōzai* [The Function and Merit of Administrative Guidance], 741 *JURISUTO* 39-44 (1981); see also MUNEYUKI SHINDŌ, *GYŌSEI SHIDŌ* [ADMINISTRATIVE GUIDANCE] 1, 27-76 (1994) (discussing use of administrative guidance by Japanese bureaucratic agencies).

4. The concept of administrative guidance actually covers a much wider field of activities than instructing private parties on how to act. It includes purely promotional activity and subsidies; information gathering, processing, and distribution; and intra- and inter-ministerial communications; communications between the central government and local entities; and much more. See MATSUSHITA, *supra* note 3, at 61-65 (discussing categories of administrative guidance).

truism, but a focus on administrative guidance will miss much of what is distinctive in Japanese regulatory style. In various forms and under diverse rubrics, administrative guidance is repeated in every capitalist economy. Furthermore, implicit in the focus on administrative guidance per se is the assumption that the regulatory structure within which it operates is similar to that of the United States, most fundamentally that there is a clear or at least discernible line between the public sphere of the agencies and the private sphere of the regulated. Under these assumptions, administrative guidance plays basically the same role as legally compulsory regulation in other capitalist legal systems. It is easy then to conclude, if one begins with the assumption of the ministries' power, that administrative guidance is remarkable because it achieves results that are impossible in other systems without binding legal power. Conversely, if one assumes bureaucratic impotence, it is easy to dismiss administrative guidance as toothless rhetoric.

The problem is that the structure within which regulation operates often makes the debate on administrative guidance irrelevant. In fields as distinct as land use planning and broadcast licensing, Japanese bureaucrats delegate their public power to private parties and function not as direct implementers of regulatory policy, but, at most, as overseers of its private implementation. This pattern frequently extends to the formation of policy as well as its implementation, and the bureaucratic role diminishes to intervention at moments of political crisis. At other times, the agency plays an active monitoring and enforcement role, but seldom does a Japanese agency play the role that one would expect from the classic models of economic regulation.

This Article proposes a model of this style of Japanese economic regulation. It argues that Japanese regulators delegate part or most of their power to private parties to a degree and in a manner unanticipated in the literature on either Japan or regulation in general.<sup>5</sup> It presents a detailed study of this mode of

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5. Observers of Japanese regulation and government-business relations have described this phenomenon variously. Richard Samuels' statement that the "Japanese bureaucracy does not dominate, it negotiates" certainly captures much of what this Article describes, as does John Haley when he uses the terms "regulation by cartel" and "consensual governance." See RICHARD SAMUELS, *THE BUSINESS OF THE JAPANESE STATE* 260 (1987); HALEY, *supra* note 2, at 139-68; Curtis J. Milhaupt & Geoffrey P. Miller, *Cooperation, Conflict, and Convergence in Japanese Finance: Evidence from the 'Jusen' Problem* (unpub-

regulation in the retailing industry and follows with briefer treatments of regulation in several other sectors to determine the variations and limitations of the model. Although this Article makes no claim of universality for the model, the author believes that the delegation of public power described herein, referred to as privatized regulation, is not exclusive to these areas and that it represents a common style of regulation in Japan.

This Article examines how and by whom Japan is governed. It focuses is on the structure and legal nature of government intervention in the market and on the relationship between the formal legal system and the exercise of power by the Japanese bureaucracy. It does not directly address the current debate between those who argue that the bureaucrats rule Japan and those who argue that the bureaucrats are simply agents of Japanese political parties.<sup>6</sup> Whichever group ultimately calls the shots, public power is exercised through the bureaucrats, and an understanding of how they govern will deepen the understanding of the nature of political power in Japan, regardless of whether one considers privatized regulation as the product of an independent bureaucratic will or as an illustration of principal-agent theory.

Because of this domestic focus, the areas of inquiry are more commonly thought of as domestic, rather than international issues. To the extent that the model is accurate, however, it should be of interest to anyone interested in a series of interrelated questions about the world economic and legal order. An initial question concerns the nature of capitalism and whether the pattern of delegation of public power described here is dis-

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lished draft on file with author) (referring to financial regulation as "regulatory cartel"). This Article would go further, however, to argue that at times the bureaucracy does not even negotiate; it simply steps back from all engagement and leaves the implementation of regulatory power to the private sector. Although this approach is unknown to U.S. theories of regulation, it is closer to European models of government regulation.

6. The two schools of thought are most commonly represented by Chalmers Johnson, in *MITI and the Japanese Miracle*, stressing the role of the bureaucrats in the creation of what Johnson describes as the developmental state, and J. Mark Ramseyer and Frances McCall Rosenbluth, in *Japan's Political Marketplace*, stressing the role of the Liberal Democratic Party ("LDP"). Ramseyer and Rosenbluth argue that the bureaucrats' power was only as agents of the politicians. See John C. Campbell, *Hedgehogs and Foxes: The Divisive Rational Choice Debate in the Study of Japanese Politics*, SOC. SCI. JAPAN, Jan., 1997, at 36-38 (providing insightful comment on debate over role of bureaucrats in Japan).

tinative in fundamental ways or is simply a variant of the bargaining between public and private actors that characterizes all economic regulation.<sup>7</sup> A broader question concerns the existence and nature of convergence, the argument that technological, economic, and political factors are forcing the integration of national economies and a decline in the importance of nation states as economic and social units.<sup>8</sup> Advocates of convergence theory point to the North American Free Trade Agreement ("NAFTA"), the European Union, the successful conclusion of the Uruguay Round, and the creation of the World Trade Organization ("WTO") as representative of the increasing interdependence and homogenization of advanced societies. To the extent that national regulatory styles remain distinct and particularistic, however, they pose a challenge to the deep economic integration and social convergence that many commentators seem to assume are inevitable.

Although the Japanese practices described in this Article may appear distinctive to U.S. observers, many are repeated in similar contexts in the United States and elsewhere. The involvement of organized private groups in the exercise of public power is at the heart of corporatist and quasi-corporatist regulatory regimes in Europe and is not unknown in the United States.<sup>9</sup> What the author believes are distinctive about Japanese regulation, however, are the degree of delegation and the legal nature of the regulatory process. In many of the instances examined in this Article, the bureaucracies' delegation to private actors is virtually total. In these extreme instances, a bureaucratic entity charged with implementing a statute does little more than create a space within which regulated parties create their own decision-making structure and allocate resources, including the public resources represented by licenses and other forms of public privilege, according to their own private criteria without any principled bureaucratic oversight. The administra-

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7. See Gerd Winter, *Bartering Rationality in Regulation*, 19 *LAW & SOC'Y REV.* 219, 220, 230-32 (1985) (discussing bargaining between public and private parties in various national regulatory regimes).

8. See generally NATIONAL DIVERSITY AND GLOBAL CAPITALISM 1 (Suzanne Berger & Ronald Dore eds., 1996) (discussing convergence of national economies as result of technological, political, and economic changes in global economy).

9. See generally PRIVATE INTEREST GOVERNANCE 1 (Wolfgang Streeck & Philippe Schmitter eds., 1985) (analyzing role of private interest groups in exercise of public power in United States and Europe).



tive agency may intervene during times of political crisis, but rarely does so in the ordinary course of regulation, instead choosing the cheap and safe course of delegation.<sup>10</sup>

This degree of private involvement is possible because of the legal nature of much of Japanese regulation. In many instances, formal law is irrelevant. Unlike the quasi-public entities of private interest governance in European corporatist regulation, the private parties in Japanese privatized regulation are often totally informal, without any legal identity whatsoever. Even in those cases where the entities are created by statute, they rarely operate in accordance with the statutory norms or carry out the expected functions. Their decisions, therefore, are not public acts in the eyes of the Japanese legal system and are difficult to attack directly. Similarly, an act of delegation by a government agency usually lacks the legal nature of an administrative act cognizable by a court in judicial review. The agency's choice to delegate its powers, therefore, effectively avoids legal scrutiny because none of the public or private behavior is directly actionable in administrative litigation. The result is a system of regulation that is both legally and politically opaque and that often creates economic structures that are at best of questionable legality and at worst clearly illegal.

The system of privatized regulation, however, can operate only under certain circumstances. The legal nature that allows it to operate invisibly usually means that there are no direct legal tools available to private parties to enforce their decisions. In some cases, the delegating agency also lacks the compulsory power to achieve its goals and even when it does have the power, its formal exercise will automatically render the entire system legally visible and politically vulnerable. As a result, privatized regulation relies on various forms of informal enforcement. These means can be brutally effective in maintaining discipline in the short run, but in the long run informal methods only work when the parties are united either because they know that disunity will lead to the unpredictable discipline of the market, what Japanese call "excessive competition", or because privatized regula-

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10. Delegation is cheap because it relieves an agency of its obligation to make decisions that often require a great deal of procedural formality and technical expertise. Delegation is safe because in most contexts in Japan it is less visible politically and legally and, hence, less vulnerable to public criticism.

tion created a stable and profitable cartel that makes the benefits of going along much greater than those to be gained by going alone. It is not surprising, therefore, that privatized regulation is most frequent and most effective, in sectors of the economy where cartelization can create an expanded pie for cartel members and compensate them for the costs of regulation.

It is unclear how often these conditions exist within the Japanese economy, but it is most likely that they exist in a smaller number of sectors now than they did thirty years ago. The declining formal power of the Japanese economic ministries, the increasingly close scrutiny of Japan's domestic market by its trading partners, the enormous wealth and, hence, independence of many Japanese companies, and a growing awareness within Japan of the costs of this regulatory style have presumably decreased the areas where privatized regulation can survive. This Article will review some of these factors in Part II and in the Conclusion, but it would be a mistake to believe that the forces operating toward greater formality and openness in regulatory practice have fully carried the day. The genius of privatized regulation includes its ability to reward its critics for going along and to do so with the least political or legal notoriety. The nature of privatized regulation is such that there is no quick way of gauging its prevalence, growth, or decline. This Article, however, will at least help observers of Japan recognize and understand privatized regulation when they encounter it.

To begin the analysis of Japanese regulation, Part I looks closely at the structure and implementation of the Large Scale Retail Stores Law <sup>11</sup> ("LSRSL") by the Ministry of International Trade and Industry ("MITI"). The LSRSL and its implementation are representative of Japanese agency practice, and their detailed description can aid in forming preliminary generalizations about the legal nature and explanations for the delegation of power to private parties that this Article argues comprises Japanese regulatory style. To confirm the representative nature of administrative practice under the LSRSL and to provide addi-

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11. *Daikibō kouritenpo ni okeru kourigyō no jigyōkatsudō no chōsei ni kansuru hōritsu* [*The Law Concerning the Adjustment of Retail Business Operations in Large Scale Retail Stores*], Law No. 109 of 1973 (Japan) [hereinafter LSRSL]; see Frank Upham, *Privatizing Regulation: The Implementation of the Large-Scale Retail Stores Law*, in *POLITICAL DYNAMICS IN CONTEMPORARY JAPAN* 264-94 (Gary D. Allinson & Yasunori Sone eds., 1993) [hereinafter *Privatizing Regulation*] (discussing LSRSL from perspective of Japanese interest politics).

tional breadth to the analysis, Part II looks at instances of delegation in several other areas of bureaucratic practice from MITI supervision of structural adjustment under declining industries statutes to the granting of broadcast licenses by the Ministry of Posts and Telecommunications ("MPT"). In order to get a sense of the preconditions and limitations of this style of regulation, Part II also examines the less successful use of similar regulatory techniques in both economic regulation and by local governments interested in controlling land use within their jurisdictions. Part III draws on U.S. administrative law norms and European regulatory theory to refine the model of privatized regulation that emerges from Parts I and II. The Conclusion assesses the likelihood that recent legal and political changes in Japan and growing international pressures for transparency in domestic administrative processes will lead to changes in Japanese regulatory style in the near future.

### I. THE IMPLEMENTATION OF THE LARGE SCALE RETAIL STORES LAW IN CONTEMPORARY JAPAN

A detailed analysis of the structure and implementation of the LSRSL illustrates the nature of economic regulation in contemporary Japan. The initial focus of this analysis is on the structure and policy of the law, which in many ways is typical of post-war Japanese regulatory statutes and not dissimilar to regulatory statutes in Western Europe.<sup>12</sup> This Article then examines the law's case by case application to specific circumstances by the regional offices of the MITI in order to provide an understanding of the actual practice of Japanese regulation.

#### A. *The History and Structure of the LSRSL*

The LSRSL story begins with the passage of the Department Store Law<sup>13</sup> ("DSL") in 1937. Enacted to protect small merchants from department stores, the DSL was repealed during the Allied Occupation and then re-enacted in 1956. For the next decade, the DSL helped structure Japanese retailing in a

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12. See, e.g., *Loi Royer [Royer Law]*, Law No. 73-1193 of 1973 (France); see also John T.S. Keeler, *Corporatist Decentralization and Commercial Modernization in France: The Royer Law's Impact on Shopkeepers, Supermarkets and the State*, in *SOCIALISM, THE STATE AND PUBLIC POLICY IN FRANCE* 265, 265-74 (Philip G. Cerny & Martin A. Schew eds., 1985).

13. *Hyakkatenhō [Department Store Law]*, Law No. 116 of 1956 (Japan) [hereinafter DSL].

way that served the interests of department stores and small retailers alike. The permit system cartelized department stores by restricting new entrants and guaranteeing the territory of existing branches. It simultaneously protected small merchants outside of the established commercial centers from high volume competitors.

The emergence of a new form of retailing known as the *suupaa*, or superstores, began to break down the DSL system. Superstores were mass merchandisers offering a product mix similar to department stores but without the fashionable image. Superstores expanded rapidly in the 1970s by developing a new corporate form designed to avoid the restrictions of the DSL and enable the superstores to exploit the niche between department stores and independent neighborhood retailers. By 1981, six of the ten largest retailers in Japan were superstores,<sup>14</sup> and by the late 1960s both the department stores and small retailers were lobbying for revision of the law. The result of the ensuing legislative battle was the LSRSL of 1973.

There were three significant differences between the LSRSL and the DSL. First, the LSRSL added the protection of consumer interests and the rationalization of the retailing industry to the purposes of the act.<sup>15</sup> Second, it replaced the direct regulation of the permit system with a notification and adjustment system.<sup>16</sup> Under the DSL, department stores could not operate without explicit approval from an administrative agency. Under the LSRSL, however, no such approval was necessary, although large stores did have to notify MITI of their plans and might have to participate in an adjustment process which could lead to changes in their original plans. Third, the LSRSL shifted the

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14. JETRO, *Retailing in the Japanese Consumer Market*, JETRO MARKETING SERIES NO. 5 16, 25 (1985) [hereinafter JETRO MARKETING SERIES NO. 5]. The remaining four retailers were department stores. *Id.* The top six superstores in 1982 were Daiei, Itô-yôkadô, Seiyu, Jusco, Nichii, and Unii. *Id.* They were still the top six, in the same order, in 1988. *Yureru Daitenô (jô)* [*The Swaying Large Stores Law (1)*], NIHON KEIZAI SHINBUN, Oct. 20, 1988, at 6. Superstore chains were able to build large stores in new areas by exploiting a loophole in the DSL. The law defined department stores as single units of more than 1500 square meters. A superstore, on the other hand, consisted of several legal entities, each of less than 1500 square meters, operating under a common corporate identity within a single building. JETRO is the quasi-governmental Japan External Trade Organization, whose role it is to support trade with and investment in Japan.

15. See LSRSL arts. 1, 11, Law No. 109 of 1973 (Japan).

16. *Id.* arts. 3-7.

target of regulation from the type of store, such as department stores, to the volume of retail activity. The LSRSL focuses on the amount of retail floor space in a single building and disregards the legal nature and corporate structure of the store or stores within it.<sup>17</sup>

Passage of the LSRSL can best be explained as a political compromise among department stores, small and medium retailers, and superstores, but official MITI commentaries on the LSRSL invariably cited strengthened consumer protection and industry rationalization as statutory goals.<sup>18</sup> Besides guaranteeing small merchants an "enterprise opportunity," Articles 1 and 11 of the LSRSL specifically require due consideration to the interests of consumers and to the well-being of the retail industry as a whole.<sup>19</sup> Economists and large retailers gave a generally positive initial appraisal of the LSRSL because of such inclusion.<sup>20</sup> While these goals were potentially contradictory, legal commentators contemplated the bureaucratic creation of a set of criteria that would balance these varied interests on a case by case approach.

Procedure under the LSRSL during the initial regulatory period of the LSRSL can be usefully divided into three stages. These stages were notification of the intention to build and operate a store, the adjustment of the proposed commercial activities of the new store with those of the existing merchants in the area, and enforcement of the result.<sup>21</sup> The process began with notification to a regional office of MITI of a store's plans, includ-

17. *Id.* art. 3(1).

18. See e.g., Jun Arima, *Ima gyōsei wa rigai no tairitsu suru daitenhō ni dōtorikunde iru ka* [How Will the Bureaucracy Deal with the Large Stores Law Now That It Is the Object of Interest Conflict?], SHŌGYŌKAI [THE JOURNAL OF RETAILING], Apr. 1988, at 146. Arima was a MITI official at the time involved in LSRSL policymaking.

19. LSRSL arts. 1, 11, Law No. 109 of 1973 (Japan).

20. Toshimasa Tsuruta, *Kokusaiika jidai no daitenhō wa dō arubekika* [What Should the LSRSL Be Like in the Age of Internationalization?], EKONOMISUTO, Dec. 13, 1988, at 47.

21. For much of the period under discussion, the LSRSL divided new stores into two classes by size. *Privatizing Regulation*, *supra* note 11, at 271-72 n.20. The main difference in treatment of classes one and two is that the former come under the initial jurisdiction of the regional office of MITI and the latter under the prefectural governor's office. *Id.* For purposes of simplicity, the following description deals primarily with the construction and operation of a new class one retail outlet. The adjustment process also applies to renovations of existing stores and changes in operating conditions, including floor space, hours, and monthly and annual days of operation, that bring the store's operations within the law's purview. *Id.*

ing the opening date, floor space, and hours and days of operation.<sup>22</sup> MITI then forwarded the notifications to two tripartite *shingikai*, or deliberative councils.<sup>23</sup> The first *shingikai* was the Commercial Activities Adjustment Board established within the local chamber of commerce, followed by the Large Scale Retail Stores Deliberative Council at the regional level.<sup>24</sup> These councils, made up of merchants, consumers, and representatives of the public interest, brought the sides together and determined whether the plans should be adjusted to lessen the impact on local merchants. The councils then submitted their opinion to MITI, which made an independent judgment based not only on the council's recommendations but also on the interests of consumers and the retailing industry in general.<sup>25</sup> If MITI concluded that adjustment was necessary, it issued a *kankoku*, or recommendation, which listed the desired changes.<sup>26</sup> A recommendation had no legal force and a retailer could violate its terms without incurring legal liability or being subject to MITI sanctions. If a retailer did violate the terms of the recommendation, however, MITI had the power to issue a *meirei*, or order, which was compulsory.<sup>27</sup> The statute contemplated that the entire process from notification through enforcement would normally take no more than eight months.<sup>28</sup>

### B. Commercial Adjustment Under the LSRSL

Implementation under the LSRSL has generally had only a loose relationship to its formal structure. The shift from the permit system of the DSL to the notification system of the LSRSL ostensibly meant that government intervention would be the ex-

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22. LSRSL art. 5, Law No 109 of 1973 (Japan).

23. See Frank Schwartz, *Of Fairy Cloaks and Familiar Talks: The Politics of Consultation*, in POLITICAL DYNAMICS IN CONTEMPORARY JAPAN 217-41 (Gary D. Allinson & Yasunori Sone eds., 1993) (providing general description of role of *shingikai* in Japan); see also FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 168, 199 (1987) (describing use of *shingikai* deliberation councils) [hereinafter LAW AND SOCIAL CHANGE]; JOHNSON, *supra* note 1, at 47-48 (discussing *shingikai* in economic policy context).

24. *Privatizing Regulation*, *supra* note 11, at 271.

25. LSRSL arts. 7-14(2), Law No. 109 of 1973 (Japan). These criteria established the process of consultation. Article 11 specifically required the consideration of consumer and general industry interests. See *id.* art. 11.

26. *Privatizing Regulation*, *supra* note 11, at 271.

27. *Id.*

28. LSRSL arts. 7-8, Law No. 109 of 1973 (Japan).

ception rather than the rule and that an emphasis on free market principles played a role in convincing large retailers and others to support the law. At the same time that it was extolling free market competition to the large retailers, however, MITI and the Liberal Democratic Party ("LDP") were promising small retailers that the notification system would operate "just like a permit system."<sup>29</sup> In the subsequent decade and a half, MITI more than fulfilled this promise and eventually created a system that erected barriers to entry into the retail industry far surpassing those of the DSL.<sup>30</sup>

In the first five years of operation, however, MITI allowed nearly 1500 new large stores to open under the law, approximately doubling the number that existed prior to 1974.<sup>31</sup> Many chains, moreover, skirted the law altogether by opening stores of just under 1500 square meters.<sup>32</sup> The response of independent retailers was to lobby for extended coverage and tighter restrictions on new entrants into the retailing industry.<sup>33</sup> Local governments promulgated ordinances and administrative guidance to restrict opening stores of less than 1500 square meters.<sup>34</sup> By 1977, the Japanese Parliament, or Diet, had passed a resolution urging action to protect small retailers and MITI had established a series of study commissions on the "retail problem."<sup>35</sup> The Diet extended the LSRSL's coverage in 1978 from stores of more

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29. *Gekishin ima, ryūtsū ga kawaru* [Severe Earthquake Now, Distribution Changes], SHŪKAN TŌYŌ KEIZAI, Aug. 6, 1988, at 9. The Japanese phraseology is "kagirinaku kyokasei ni chikai todokedesei ni suru."

30. *Privatizing Regulation*, *supra* note 11, at 271-72.

31. *Id.* at 272.

32. Tsuruta, *supra* note 20, at 49.

33. MITI, SHIN DAIKIBO KOURI TENPOHŌ NO KAISETSU [EXPLANATION OF THE NEW LSRSL] 3 (Tsūshōsangyōshō sangyōseisakukyoku, daikibo kouri tenpo chōseikan [MITI Industrial Policy Bureau, Large Scale Retail Stores Adjustment Office] ed., 1988) [hereinafter MITI MATERIALS].

34. In Tokyo, for example, both the city and each ward have separate sets of administrative guidance in addition to the LSRSL. See *Tokyōtō kourishōgyō chōsei ni kansuru yōkō* [Tokyo City Outline Guidance Concerning the Adjustment of Retailing], Apr. 22, 1985, in Economic Planning Agency Materials (on file with author) [hereinafter EPA Materials]; *Suginamiku chūkibo kouri tenpo shutten ni kansuru shidōyōkō* [Suginami Ward Outline Guidance Concerning the Opening of Medium Scale Retail Stores], July 1, 1986, in EPA Materials, *supra*. The *Nihon Keizai Shinbun* estimates that over 60% of local entities have some form of locally created restriction on the opening of medium scale retailers, which generally covers all stores of less than 500 square meters. *Chūkiboten hisei hirōgaru* [Restrictions on Medium Scale Stores Spread], Nihon Keizai Shinbun, Sept. 29, 1988, at 2 [hereinafter *Restrictions Spread*].

35. *Restrictions Spread*, *supra* note 34, at 2.

than 1500 square meters to all stores of more than 500 square meters. Small retailers began to call for the return to both the permit approach under the DSL and regulating stores on the basis of type as well as amount of floor space. The latter was necessary to protect independent stores from yet another competitive threat, the convenience store chains, which competed not on the basis of size but on price and hours of operation.<sup>36</sup>

Any attempt to pass such protective legislation would have elicited substantial opposition. Recourse to the Diet, however, was unnecessary because MITI was able to restructure the regulatory scheme to meet the small retailers' demands without any legislative action whatsoever. Beginning in 1979, MITI refused to accept a retailer's statutory notification unless it appended a document setting forth the terms under which local merchants agreed to the new store's opening.<sup>37</sup> At this stage, before any formal steps had been taken under the law, the large store and local merchants entered into negotiations on the conditions under which the latter would agree to the opening of the new store. Sometimes these negotiations were carried out by the members of the formal Commercial Activities Adjustment Board, but more frequently by local merchants themselves in the form of a Large Store Countermeasures Taskforce or Large Scale Retail Stores Policy Subcommittee or similarly named group loosely affiliated with the local chamber of commerce.<sup>38</sup>

This distortion of the statutory procedure and the general withdrawal of MITI from its statutory role of final decision maker corrupted the implementation of the LSRSL. Instead of the contemplated seven to eight months between initial notification and opening, it became common for negotiations to take seven to eight years and delays of ten years were not unheard of. The resulting agreements also clearly reflected the veto power the local merchants wielded. They covered not only the four statutory items subject to adjustment<sup>39</sup> but also frequently extended to

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36. See Ken'ichi Miyazawa, *Endaka keizaika de hen'yô suru ryûtsû kikô* [Changing Structure of Distribution Under the High-Yen Economy], *EKONOMISUTO*, Sept. 13, 1988, at 58-59; Masanori Tamura, *Chûshôgyôsha suitai saseta daitenhô* [Large Stores Law Causes Small Enterprises' Decline], *NIHON KEIZAI SHINBUN*, Oct. 24, 1988, at 15.

37. See generally *Privatizing Regulation*, *supra* note 11, at 264-94 (detailing account of administrative steps leading to store opening procedures).

38. *Id.* at 274.

39. See LSRSL arts. 3-10, Law No. 109 of 1973 (Japan) (stipulating statutory periods for opening date, floor space, daily hours, and annual days of operation).



matters that were unrelated to the legitimate concerns of the LSRSL and were a *prima facie* violation of the Anti-monopoly Law ("AML").<sup>40</sup>

### C. *The Legal Nature of the Adjustment Process*

Given the gap between the goals of LSRSL and its application in practice, one might expect that an injured party would have convinced the courts to force MITI to implement the statute in accord with its statutorily-defined content and intent. As in the United States, if a plaintiff can show that a government act violates the statute on which it is based, a court will nullify it. A common way to demonstrate illegality is to show that the government agency has used the wrong criteria or followed incorrect procedures in making a decision. Under Japanese administrative law, however, getting a court to review administrative action presents a series of difficulties that are aptly illustrated by the *Etsurigo* litigation stemming from the opening of a store in Japan's Iwate Prefecture.<sup>41</sup>

In the *Etsurigo* litigation, the Etsurigo Shopping Center Co-operative Co. notified MITI of its plan to build a three story 23,904 square meter shopping complex in Etsurigo Village on

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40. SEIFU KISEI NADO TO KYÔSÔSEISAKU NI KANSURU KENKYŪKAI [RESEARCH COMMITTEE ON GOVERNMENTAL REGULATION AND COMPETITION POLICY], KISEIKANWA NO SUISHIN NI TSUITE [REGARDING THE PROMOTION OF DEREGULATION] 1, 51-52 (1989) [hereinafter FTC REPORT]. The Research Committee on Governmental Regulation and Competition Policy is a creation of the Fair Trade Commission ("FTC"). The report contains several case studies of the operation of the LSRSL. See Tsuruta, *supra* note 20, at 49. Examples of such matters sought by local merchants that were outside the legitimate concerns of the LSRSL include requirements that the new store allow specified local merchants as subtenants on favorable terms, make large donations to local merchants' groups, not carry certain items or lines of products, and maintain prices or services at the same level as surrounding merchants. FTC REPORT, *supra*, at 52. Exacerbating the inconsistencies of the LSRSL itself were the panoply of actions by local governments that arose in the 1980s to restrict retail activities not covered by the statute. See *Dokusen kinshihô* [Anti-monopoly Law], Law No. 138 of 1947, as amended 1988 (Japan) [hereinafter AML].

41. See Tadashi Matsumoto, *Meikaku ni sareta daitenhô no fubi* [The Defects of the Big Stores Law Made Clear], 463 HANREI TAIMUZU 71 (1982) (analyzing LSRSL in context of litigation in Iwate Prefecture); see also Judgment of the Tokyo District Court of Mar. 16, 1982, 1035 HANREI JIHÔ 17; Judgment of the Tokyo High Court of June 24, 1985, 1156 HANREI JIHÔ 37. The abuse of the Adjustment Board to promote, rather than restrict, the opening of large stores occurred more frequently between 1974 and 1979 than after 1979. That the informality of the process allows abuse in either direction became important when MITI was forced to increase the number of store openings in response to U.S. pressure at the end of the 1980s.

March 20, 1979.<sup>42</sup> The superstore Jusco was to occupy 14,000 square meters and local merchants were to occupy 6000 square meters. The Etsurigo Commercial Activities Adjustment Board met six times between May 18 and July 23 and recommended that Jusco's space be reduced to 7500 square meters and the local tenants remain at 6000 square meters. Jusco accepted this recommendation, and, on September 12, 1979, Jusco and the prospective local tenants filed its second stage notification pursuant to the LSRSL.<sup>43</sup>

The Adjustment Board reconvened on October 19, 1979 and ten days later, at its eighth meeting, adopted a resolution accepting the stores' notification and forwarded it to the regional Tohoku Large Stores Council. This Council submitted its opinion to MITI on November 27, 1979, recommending a further fifteen percent reduction of total space. MITI then issued and Jusco accepted a recommendation calling for the reduction in space as well as certain reductions in operating hours.<sup>44</sup> The whole process took less than nine months.<sup>45</sup>

In January, 1981, 117 local merchants sued for the nullification of MITI's recommendation. The plaintiffs claimed that the recommendation denied local small merchants the "enterprise opportunity"<sup>46</sup> that Article 1 of the LSRSL provided and the process that formed the recommendation violated both the statute and MITI's regulations stipulating how the adjustment process was to be conducted. Specifically, the local merchants alleged that President Takahashi of the Etsurigo Chamber of Commerce, whose son was the president of the Etsurigo Shopping Center Cooperative, had a direct conflict of interest and had selected members of the Adjustment Board solely on the basis of their pro-shopping center views.<sup>47</sup>

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42. Matsumoto, *supra* note 41, at 72.

43. *Id.*; see LSRSL art. 5, Law No. 109 of 1973 (Japan) (requiring submission of notification prior to opening store).

44. *Privatizing Regulation*, *supra* note 11, at 275.

45. *Id.*

46. Matsumoto, *supra* note 41, at 71; see LSRSL art. 1, Law No. 109 of 1973 (Japan). The statute states its purpose as, "*sono shūhen no chūshōkourigyō no jigyōkatsudō no kikai o tekisei ni kakuho shi . . .*" [appropriately preserve the enterprise opportunities of small and medium merchants in the surrounding area . . .] *Id.*

47. Matsumoto, *supra* note 41, at 72; *Privatizing Regulation*, *supra* note 11, at 276. Supporting the allegation of conflict of interest was the fact that the spouses of three of the members were to become tenants in the complex. *Id.* The local merchants argued that the participation of these persons in the board's deliberations violated both Article

The plaintiffs further alleged that the board's investigation and deliberations were insufficient. They argued that the board had failed to consider the current condition of small scale retail operations in the area, local retailers' prospects for modernization, consumer convenience, and the extent of the detrimental impact on existing retailers. The merchants argued, moreover, that the Adjustment Board had not followed the detailed computation formulas provided in MITI's guidance and handbooks.<sup>48</sup> Nor had the regional MITI bureau supervised the board's deliberations as required by MITI's rules. MITI's representative failed to attend a single meeting despite repeated requests by local merchants to investigate improprieties regarding the composition and activities of the board. The plaintiffs pointed to the Diet debates on the LSRSL for proof of the importance of adequate governmental supervision and argued that the failure of the local MITI office to exercise such supervision rendered the board's process unfair and illegal.<sup>49</sup> The plaintiffs argued that MITI's failure to conduct its own investigation and its uncritical reliance on the board's findings constituted a further ground for illegality.

Journalistic reports and practices elsewhere under the LSRSL leave little doubt that the plaintiffs' factual claims were largely accurate and that the facts amounted to a blatant conflict of interest on the part of Takahashi and the board and a clear abdication of statutory duties by MITI. Such procedural abuses would probably have been enough to convince the courts to declare the whole process illegal. Because the doctrines of Japanese administrative law severely restrict judicial review of government action, however, it made little difference what improprieties the plaintiffs might have been able to prove. In the end, the District and High Courts had little trouble either in rejecting the local merchants as proper plaintiffs or in finding that the MITI recommendation to Jusco was not the type of administrative act

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1 of the LSRSL and MITI's own administrative guidance requiring the president of the local chamber of commerce to appoint members who will "represent the views of all local small-scale retailers." MITI, *90 nendai ni okeru ryūtsū no kihon hōkō ni tsuite (chūkan tōshin)* [Regarding the Fundamental Direction of Distribution in the 1990s (Interim Report)], in MITI INDUSTRIAL POLICY OFFICE, *DAIKIBŌ KOURI TENPOHŌ HŌKISHŪ* [THE LARGE-SCALE RETAIL STORES LAW: COLLECTED LAWS AND REGULATIONS] 242 (1990).

48. *Privatizing Regulation*, *supra* note 11, at 276.

49. Matsumoto, *supra* note 41, at 73.

that could be challenged in court.<sup>50</sup>

Under Article 3 of the Administrative Case Litigation Law<sup>51</sup> ("ACLL"), which governs judicial review of bureaucratic action in Japan, a plaintiff must show that the allegedly illegal act is an "administrative disposition or other exercise of public power."<sup>52</sup> The Japanese Supreme Court has narrowly interpreted this concept to include only "official conduct which forms rights and duties in citizens or confirms their scope."<sup>53</sup> To be actionable, the effect of the bureaucratic action must be immediate and directed at the plaintiff specifically and must either deny a citizen a previously existing legal right or compel him to perform a new legal duty. Actions that affect one's economic interests, as opposed to legal rights, are considered too informal to be judicially cognizable.<sup>54</sup> In *Etsurigo*, the challenged act was the MITI recommendation based on Article 7 of the LSRSL. The plaintiffs argued that such a recommendation was in practice the equivalent of a permit to operate under the stipulated conditions and, as such, gave the shopping center a right that it did

50. *Id.* at 71-73. The district court opinion only directly answered the question of whether the plaintiffs had standing to bring this action. It concluded that they did not, so there was no need to inquire whether a plaintiff with standing could challenge a recommendation. The High Court confirmed the district court's conclusion of no standing but also decided that a recommendation was not in the nature of an administrative disposition and, therefore, could not be the subject of administrative litigation under the Administrative Case Litigation Law ("ACLL"). See HIROSHI SHIONO, *GY-ŌSEIHŌ [ADMINISTRATIVE LAW] 80-108* (1991) (providing general overview of standing and administrative disposition); *Id.* at 107-08 n.3 (discussing interplay of standing and administrative disposition doctrines); Frank K. Upham, *The Legal Framework of Japan's Declining Industries Policy: The Problem of Transparency in Administrative Processes*, 27 HARV. INT'L L.J. 425-32 (1986) (analyzing doctrines of judicial review in Japan) [hereinafter *Legal Framework*]; Robert W. Dziubla, *The Impotent Sword of Japanese Justice: The Doctrine of Shobunsei as a Barrier to Administrative Litigation*, 18 CORNELL INT'L L.J. 37-62 (1985) (discussing doctrines of standing and administrative dispositions in Japan); see also Frank K. Upham, *After Minamata: Current Prospects and Problems in Japanese Environmental Litigation*, 8 ECOLOGY L.Q. 213 (1979) (discussing doctrines governing judicial review of administrative action in Japan) [hereinafter *After Minamata*].

51. *Gyōsei jiken soshōhō [Administrative Case Litigation Law]*, Law No. 139 of 1962 (Japan) [hereinafter *ACLL*].

52. *Id.* art. 3.

53. See *Sasaki v. Atami City Agricultural Council*, 9 MINSHŪ 217 (S. Ct. 1955) (Japan) (holding that notice from defendant did not constitute administrative disposition); see also Dziubla, *supra* note 50, at 45 (indicating "supervisory orders, permissions, approvals, and regulations among agencies or within a single agency cannot be the object of litigation because they do not directly create or form the rights and duties of citizens.").

54. LAW AND SOCIAL CHANGE, *supra* note 23, at 171-72.

not previously have. Pursuant to the plaintiffs' claim, opening the shopping center would infringe the rights of local merchants to be protected from such competition unless proper procedures were followed and a legally valid recommendation issued.<sup>55</sup>

Japanese courts interpreting the ACLL, however, are generally uninterested in the substance of government actions or the practical effect on citizens.<sup>56</sup> They are centrally concerned with the legal nature of the action, however, and the courts in *Etsurigo* determined that the recommendation changed no one's legally enforceable rights or duties. Unlike an order under Article 8 of the LSRSL, Jusco had no legal duty to abide by the recommendation. The recommendation, moreover, gave Jusco no new rights because Jusco was legally free to open the store without any action by MITI whatsoever.<sup>57</sup>

Even if the recommendation had created a right or duty in Jusco, the courts' decision would have been the same because the courts also found that the merchants did not have standing to bring the action.<sup>58</sup> Article 9 of the ACLL limits standing in administrative actions to persons with a "legal interest" in the administrative disposition.<sup>59</sup> Japanese courts have narrowly interpreted this provision to mean:

Legal interests are created by provisions vesting an administrative agency with the duty of protecting some personal interest. But where an agency is to act for the general public interest, personal interests affected by the action are only reflex interests. A plaintiff with only a reflex interest does not have standing to sue.<sup>60</sup>

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55. See Matsumoto, *supra* note 41, at 71-73.

56. LAW AND SOCIAL CHANGE, *supra* note 23, at 171-72.

57. Matsumoto, *supra* note 41, at 72.

58. *Privatizing Regulation*, *supra* note 11, at 277-78.

59. ACLL art. 9, Law No. 139 of 1962 (Japan).

60. Ichiro Ogawa, *Judicial Review of Administrative Actions in Japan*, 43 WASH. L. REV. 1075, 1087 (1968); SHIONO, *supra* note 50, at 96-108. An interest affected by an administrative disposition is a reflex interest, or *hanshatekiriki*, when it is considered part of the general public interest protected by the underlying statute, rather than an individual interest specifically protected by the statute. Shiono cites the interests of surrounding residents in the issuance of a building permit as an example of a "reflex interest and thus not an object of judicial protection" in an administrative action under the ACLL. *Id.* at 98. It is likely, therefore, that consumers attempting to sue under the LSRSL would only have reflex interests. *Id.* at 104. The leading case is the *Housewives Federation Juice Case*. See *Shufu Rengōkai v. Kōsei Torihiki Iinkai* [Federation of Housewives v.

A legal interest, therefore, requires injury to an individualized interest that the agency is specifically charged to protect under a relevant statute.

The courts concluded in the *Etsurigo* opinions that the goal of "enterprise opportunities" for local merchants set forth in Article 1 of the LSRSL was not enough to give any individual merchant more than a reflex interest in the adjustment process. Had consumers been suing MITI on the ground that the 6390 square meters allotted to Jusco in the recommendation was too small to serve their interests, the result would have been the same. Neither consumers nor merchants have the individualized interest under the LSRSL sufficient to grant them standing to challenge MITI's actions.<sup>61</sup>

Under Japanese courts' interpretation of judicial review and standing, the only potential plaintiff under the LSRSL would be a prospective large retailer dissatisfied with the amount of space given him through the adjustment process. The retailer could not have sued on the basis of a MITI recommendation, however, because it would not have had any legal obligation to follow the recommendation.<sup>62</sup> The retailer would have had to ignore the recommendation, open the store according to its original plans, and wait until MITI issued a legally binding order under Article 8 of the LSRSL.<sup>63</sup> At that point, the retailer would have lost the right to operate the store under any terms other than those of the order and would have suffered the type of direct legal harm necessary to challenge an administrative action.<sup>64</sup>

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Fair Trade Commission], 882 HANREI JIHŌ 3 (S. Ct., Mar. 14, 1978) (Japan). The denial of standing to competitors, however, is not so clear. SHIONO, *supra* note 50, at 102-03; see *The Public Bath Case*, 16 MINSHŪ 57 (S. Ct., Jan. 19, 1962) (Japan).

61. See Matsumoto, *supra* note 41, at 71; *Privatizing Regulation*, *supra* note 11, at 278.

62. *Privatizing Regulation*, *supra* note 11, at 277.

63. LSRSL art. 8, Law No. 109 of 1973 (Japan) (providing authority to MITI to issue legally binding order only after notifying large store has ignored MITI's recommendation).

64. Such a suit would have posed no legal problems in terms of access to judicial review. An Article 8 order would clearly be considered an administrative disposition and the large retailer would have had standing. The substantive result, however, is another matter. Given MITI's discretion under the statute, the plaintiff would likely have lost unless it could show the kind of clear illegality present in *Etsurigo*. Such a loss, furthermore, would leave the plaintiff much worse off than just acquiescing in the Article 7 recommendation because the retailer would have had to invest in the floor space, construction costs, equipment, and so forth, necessary to open in defiance of the recommendation. The relationship between the voluntary recommendation of Article 7

MITI has never issued a formal order in the implementation of the LSRSL.<sup>65</sup> Large retailers invariably either reach a compromise with local merchants or give up. Under the procedures in effect during most of the 1980s, MITI did not even accept notifications from retailers without appended documentation of the compromise agreement with local merchants.<sup>66</sup> Under these circumstances, MITI was never formally involved until the deal was finalized, at which point there was no reason for MITI to issue a recommendation, much less a binding order.<sup>67</sup>

#### D. *The Structural Effect of the LSRSL*

The absence of a plausible chance of judicial review meant that MITI could manipulate the law to respond to political pres-

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and the compulsory order of Article 8, therefore, established a substantial barrier to litigation. It essentially forced a retailer to gamble a potentially large investment on winning a suit that, absent clear malfeasance on MITI's part, it was likely to lose. It would, of course, have been possible for a large retailer to create a situation where a test case would have been inexpensive. To expect that to happen, however, is to ignore the huge benefits that the LSRSL cartel conferred on the large as well as small retailers.

65. *Privatizing Regulation*, *supra* note 11, at 278. The author has not found a single instance where MITI issued an Article 8 order under the LSRSL. In fact, during the early 1980s even Article 7 recommendations became rare as the process became entirely informal. See Kôsuke Ôyama, *Ôgatatenfunso ni okeru tsisanshō • shōkōkaigisho no 'chōsei' hōdō* [*The Practice of MITI: Chamber of Commerce in Adjusting Large Store Disputes*], in NIHONGATA SEISAKU KETTEI NO HENYŌ [THE CHANGE IN JAPANESE STYLE POLICYMAKING] 64 (Minoru Nakano ed., 1986).

66. *Privatizing Regulation*, *supra* note 11, at 278-79.

67. *Id.* at 278. Legally, a large retailer could have attempted to notify MITI without appending the required agreement with local merchants and, when MITI refused to accept the notification, sued to force MITI action. *Id.* The retailer's argument would have been that requiring such an agreement with local merchants was an illegal delegation of MITI's public duty to implement the statute to private parties and, therefore, that MITI had a legal obligation to act on a notification with or without an appended agreement. *Id.* There is precedent for such suits in transportation licensing, land use, and affirmative actions contexts. See *e.g.*, *Higashi v. Oshima*, (Osaka H. Ct., July 30, 1979) (Japan) (translation of opinion on file with author). Moreover, MITI later admitted that its blanket refusal to accept notifications during the 1980s was illegal, but victory at this stage would only have gotten the plaintiff the right to proceed with the formal adjustment process as provided for in the statute. *Privatizing Regulation*, *supra* note 11, at 278-79. While the formal process might have been more sympathetic to the interests of the retailer and consumers, it would have been time consuming and, given MITI's great discretion under the statute, would likely have resulted in an eventual order no better than what the retailer could get from the merchants directly. *Id.* at 279. If MITI eventually did issue an order, the retailer would finally be able to challenge it directly, but by that point any victory would have been pyrrhic indeed, especially because the litigation would have destroyed an informal arrangement that benefited the large retailers as much as it did smaller retailers. *Id.* Most large retailers were quite satisfied with the cartelization effect of MITI's implementation of the LSRSL.

sure and to prevent specific commercial activity without utilizing formal legal measures.<sup>68</sup> After independent merchants were successful in convincing the Government to tighten restrictions on new stores in the late 1970s, MITI was able to cut the number of notifications by seventy-five percent and maintain such levels through the 1980s.<sup>69</sup> When international pressure required liberalization in the late 1980s, MITI was able to increase the number of notifications several fold in the space of months,<sup>70</sup> relying solely on administrative measures and negotiations with leading retail chains.

Flexible response to the prevailing political winds was not one of the statutory goals of the LSRSL, however, and arguably the LSRSL was ineffective in doing anything more than that. It clearly distorted the development of the retailing industry and substantially raised prices for consumers.<sup>71</sup> Even from the perspective of the small merchants, the results were mixed. Certainly, those who were included as tenants in new retail complexes or received direct payoffs benefited from the law. Those small retailers in areas where new stores were excluded entirely

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68. *Privatizing Regulation*, *supra* note 11, at 279. A review of the number of store openings demonstrates MITI's ability to prevent specific commercial activity without recourse to formal legal measures. The number of class one stores making notification under the law dropped from a high of 576 in 1979 to 132 in 1982 and then to 125 in 1983. Óyama, *supra* note 65, at 64 (citing MITI research statistics). Thereafter, it remained below 200 until the late 1980s when U.S. pressure forced reform. NIHON RYŪTSŪ SHINBUNSHA, RYŪTSŪKEIZAI NO TEBIKI 1989 [THE RETAIL ECONOMY HANDBOOK 1989] 69 (1989). In 1987, the number jumped to 203 from 157 in 1986, and some regional MITI offices announced the intention of accepting notifications regardless of local opposition. In 1990, after the law had become a trade issue and MITI had announced that it would accept all notifications without preconditions, the number of class one stores rebounded to a pace of over one thousand openings per year. See Frank K. Upham, *Retail Convergence: The Structural Impediments Initiative and the Regulation of the Japanese Retailing Industry*, in NATIONAL DIVERSITY AND GLOBAL CAPITALISM 263-97 (Suzanne Berger & Ronald Dore eds., 1996) [hereinafter *Retail Convergence*].

69. *Privatizing Regulation*, *supra* note 11, at 279.

70. *Id.*

71. *Id.* Economists have questioned the assumed inefficiency of the LSRSL. See Takatoshi Ito & Masayoshi Maruyama, *Is the Japanese Distribution System Really Inefficient?*, unpublished paper presented at The National Bureau of Economic Research Conference on the United States and Japan: Trade and Investment, Oct. 19-20, 1989 (on file with author); Kiyohiko G. Nishimura, *The Distribution System of Japan and the United States: A Comparative Study from the Viewpoint of Consumers*, unpublished paper presented at The Japan Economic Seminar, East Asian Institute, Columbia University, Nov. 16, 1991. Whatever the measure of efficiency, however, the dramatic increase in large store openings upon loosening of restrictions implies that the LSRSL had a substantial impact on market behavior in the retail sector.



or were forced into price or merchandise cartels with local merchants also benefited at least in the short run, but the overall effect of the law does not seem to have been to ensure "enterprise opportunities" for small merchants in any absolute sense. In fact, the number of small retailers began to decline for the first time in Japanese history between 1982 and 1985, a period of tight restrictions under the LSRSL.<sup>72</sup>

Despite the law's apparent shortcomings, few directly involved in retailing were completely dissatisfied with the LSRSL during the 1980s. Small merchants complained about the law's inability to protect them from a decline in absolute numbers, but vigorously defended the law when it came under attack.<sup>73</sup> Large retailers complained about the arbitrary power granted the small merchants, but did not generally oppose the law or call for its repeal. Besides its protection for small merchants, the law had also helped large retailers form an effective cartel.<sup>74</sup> Presi-

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72. *Id.* Stores with less than three employees declined 9.3% and stores with three or four employees declined 1.1%. KEIZAI KIKAKUCHŌ [ECONOMIC PLANNING AGENCY], KAIHŌGATA RYŪTSŪ SHISUTEMU NO KŌCHIKU NI MUKETE [TOWARD THE CONSTRUCTION OF A LIBERALIZED RETAIL SYSTEM] 66-67 (1988) [hereinafter EPA REPORT] (quoting MITI, WAGA KUNI NO SHŌGYŌ [JAPANESE COMMERCE]). In the meantime, the number of stores in every other category increased, with that of the largest, over 100 employees, increasing 4.5%. *Id.* The decline in absolute numbers of small stores does not mean that the LSRSL was not having the intended protective effect. The decline would likely have been much sharper without the law.

73. *Privatizing Regulation*, *supra* note 11, at 280. There was also a subtle shift in attitude among the small retailers. Their decline during the period of the LSRSL's strictest enforcement convinced many that they could not survive on their own and that competition with the new forms of retailing required a revitalization of established commercial areas that could only be accomplished with the cooperation of large retailers. *Id.* at 282. Their conviction did not extend, however, to advocating either the repeal or substantial relaxation of the LSRSL. They wanted to retain control so that they could invite or exclude large stores into their areas as circumstances dictated. To ensure their continuing ability to do so, many small merchants actually wanted the formal statutory power of the LSRSL strengthened. *Ryūtsū kindaiika ni shōgai* [Obstacle to Modernization of Distribution], NIHON KEIZAI SHINBUN, Oct. 21, 1988, at 1 [hereinafter *Obstacle to Modernization*]. The *Nihon Keizai Shinbun* stated:

It's a rule under the LSRSL that large stores must talk with the local merchants before opening, but the authority is in various forms of administrative guidance. If this rule were to disappear, it would be like a kite whose string has been cut. We need the authority to conduct adjustment transferred to the local governments.

*Id.*

74. See Miyazawa, *supra* note 36, at 60 (discussing cartelization of large scale retailing); Gekishin, *supra* note 29, at 11-12; Tsuruta, *supra* note 20, at 51; *Obstacle to Modernization*, *supra* note 73, at 1; Tamura, *supra* note 36, at 15; *Unyō haizenka kaiseika* [Implementation of LSRSL Reformed? (Statute Amended?)], NIHON KEIZAI SHINBUN, Nov. 28, 1988, at 3

dent Shirô Asami of Eidensha, a large regional appliance retailer, in 1988 candidly noted, "[t]he level [of restriction] is just about right now. Any looser and rivals could come in. Any stricter and we couldn't expand out."<sup>75</sup> Another source summarized the large retailers' attitudes by stating:

To repeal the LSRSL and go to free competition would threaten earnings, and the big superstores are most afraid of that. The fundamental consensus is that the LSRSL should be applied in a way more advantageous to the superstores. Without mincing words, they would like a shift from restricted competition under the leadership of small retailers to managed competition under the leadership of the superstores.<sup>76</sup>

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[hereinafter *Implementation*]. Cartelization of large stores did not mean the end of competition. Just as they had under the DSL, competition and change continued, and entrepreneurs created new forms of retailing like specialty stores, discount stores, franchise chains, and electronic marketing that effectively bypassed the restrictions of the LSRSL. *Privatizing Regulation*, *supra* note 11, at 281. The forces that most visibly restructured the distribution industry in the 1980s, however, were the massive leisure complexes and the convenience stores. *Id.* On the one hand, retailers moved out to the suburbs and built huge retail, sports, and entertainment centers on former factory sites. On the other hand, retailers "downsized" their stores below the LSRSL level and opened 24 hour convenience stores. *Privatizing Regulation*, *supra* note 11, at 281. Between 1982 and 1985, the same period in which the smallest independents were decreasing in number by 9.3%, the sales of convenience stores rose by 84%, faster than any other form of retailing. EPA REPORT, *supra* note 72, at 21. During the late 1970s, when MITI had enforced the law more or less as written, there had been intense competition for territory and reduced profits. By August 1988, the superstores had registered their highest profits in history, however, and large retailers had generally rebounded. *Swaying Large Stores Law (1)*, *supra* note 14, at 6. The reasons were complex and included increased profit margins made possible by a rise in the yen. Arguably the cartelization engendered by the LSRSL had also contributed to improved profits. *Privatizing Regulation*, *supra* note 11, at 280-81. That the ranking of the largest retailers remained essentially stable through the decade supports the proposition that the cartel effect of the LSRSL stifled competition. Miyazawa, *supra* note 36, at 60. The top six super stores were Daiei, Itôyôkadô, Seiyu, Jusco, Nichii, and Unii. *Id.*

75. *Gekishin*, *supra* note 29, at 11.

76. *Id.* Most large retailers spoke in more measured tones, especially when speaking for attribution. President Nakauchi of Daiei, the largest superstore, for example, made a perfunctory nod toward free competition but was clearly satisfied with the way the law had protected his store's status when he stated:

I approve [of retail liberalization] in both general theory and in the particulars. It is, however, not necessary to repeal the LSRSL. That would be unacceptable — before you knew it, there would a Sears opening next door! It would be fine if the Commercial Activities Adjustment Board would just discuss matters correctly. Not even getting a foot in the door is inappropriate, but if it was done according to the language of the statute, it would be fine.

*Id.* at 12. The rhetoric was not entirely uniform. When asked whether the LSRSL pro-

E. *Reform Under Pressure: The Structural Impediments Initiative*

Despite retailers' general satisfaction with the LSRSL, some level of reform became inevitable in the late 1980s. Foreign pressure was a major impetus for reform, but domestic pressure was equally strong. Between 1988 and 1989, the Japanese media,<sup>77</sup> the *Keidanren*,<sup>78</sup> the Economic Planning Agency<sup>79</sup> ("EPA"), the Fair Trade Commission<sup>80</sup> ("FTC"), and the *Shingyōkakushin*, or Second Administrative Reform Commission<sup>81</sup> all called for varying degrees of relaxation. Perspectives varied, but all cited the heavy toll on Japanese consumers, especially the gap between dropping import prices and high retail prices, and the unfairness and anti-import bias inherent in the implementation of the LSRSL.<sup>82</sup> As the direct target of small retailers' pressure to strengthen the LSRSL, only MITI resisted.

In December 1988, MITI's Councilor for Commercial Distribution, Michinao Takahashi, responded to U.S. criticism by pointing to the rising share of imports in the total retail sales of superstores and department stores.<sup>83</sup> Takahashi, reiterating the special circumstances that made the rate of about 200 new large stores per year appropriate, stated:

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tected the superstores, President Nishikawa of Unii, a company which had seen its steadily rising market share frozen in sixth place by the strengthening of the LSRSL in the 1980s, stated:

No. No. If we fall into a protectionist mentality, our industry is finished. We grew because we made it our practice to always be looking for opportunities for new stores, new locations, and new products. If a company is protected by the law and fixates on controlling its own dominant territory, it will be ruined. . . . We don't need it. We don't need it. Under the restrictions [of the law], all is serene and peaceful, but if it all becomes vested rights, then those with influence are strengthened, and that's a problem.

*Id.* at 11-12.

77. See *Reform Distribution Now*, JAPAN. ECON. J., Mar. 25, 1989, at 10.

78. See Keidanren, *Daikibo kouritenpohō kaisei no hyōka*, *Keidanren sangyōkibanbu* [Evaluation of the LSRSL Revision, Keidanren Foundation Group], Aug. 1993 (on file with author); Keizai Koho Center, *Deregulating Distribution: Keidanren Proposals for Transport, Trade, Retailing, and Farming and Food Processing*, KKC BRIEF NO. 48, July 1988.

79. See EPA REPORT, *supra* note 72, at 37-38 (analyzing need for deregulation of retailing sector and LSRSL).

80. See FTC REPORT, *supra* note 40, at 37-56 (discussing deregulation of LSRSL).

81. See *Kiseikanwa he chōsetsu honkakuka* [Toward Achieving Deregulation of the Adjustment Process], NIHON KEIZAI SHINBUN, Nov. 13, 1988, at 3 (summarizing results of Second Administrative Reform Commission).

82. *Privatizing Regulation*, *supra* note 11, at 283.

83. *Id.* at 284-85.

Japanese retailing is characterized by many stores of extremely small scale densely packed into small land areas. If you look at it from this perspective, some adjustment of commercial interests is necessary within each area and the LSRSL is one way to accomplish that. If large stores were completely free to open, it would plunge local business into chaos.<sup>84</sup>

Even Takahashi, however, recognized that the delays and conflicts caused by the LSRSL were excessive, that there was excessive variation in local rules, and that reforms of the adjustment process and some relaxation of hours were necessary.<sup>85</sup> He took pains, however, to stress that complete deregulation was premature:

On the one hand, many people talk about the benefits and convenience to consumers [of 24 hour convenience stores]. Closing times are one example. If you have to go to work or something and return to find the stores all closed, there's nothing you can do. It's very inconvenient. So, complete liberalization would be great, they say. But you can not forget the perspective of the really small merchants caught in this kind of competition. How much protection do you give them? From this perspective the framework [of the LSRSL] is necessary.<sup>86</sup>

Takahashi's question was partially answered on May 24, 1990, when MITI announced a package of short and long term reforms pursuant to the Structural Impediments Initiative ("SII") talks with the United States. Immediate steps would be taken under current law to make opening a large store quicker and easier. MITI would submit to the 1991 regular session of the Diet amendments to the LSRSL designed to streamline the process. MITI further pledged within three years to fundamentally reevaluate its policy toward the retail industry, including consideration of total liberalization.<sup>87</sup>

The immediate measures meant substantial changes in the operation of the law. First, MITI announced that it would accept

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84. Michinao Takahashi, *Unyô no 'kaizen' de daitenhô wa sonzoku suru* [With "Reform" in Implementation, the LSRSL Will Continue], *EKONOMISUTO*, Dec. 13, 1988, at 56.

85. *Privatizing Regulation*, *supra* note 11, at 284.

86. Takahashi, *supra* note 84, at 57.

87. See *Privatizing Regulation*, *supra* note 11, at 285 (analyzing MITI response to U.S. pressure to reform retailing industry during Structural Impediments Initiative ("SII") talks).

all notifications submitted under the law. Second, time limits were placed on the commercial adjustment process. The process still began with an explanation by the prospective retailer of its plans to local merchants, but the new rules limited this stage to four months and eliminated the requirement of the local merchants' consent.<sup>88</sup> Even if opponents remained dissatisfied, the formal process moved to the next stage. The entire process from initial announcement of intention by the large retailer to the final decision was to take no more than eighteen months.<sup>89</sup>

In addition to the measures relating directly to the process of commercial adjustment, MITI immediately increased the permissible hours and days of operation for large stores and exempted retail space devoted to imports from the law in certain circumstances.<sup>90</sup> It also initiated measures to increase the "transparency"<sup>91</sup> of the process by requiring quarterly reports on the status of pending notifications, establishing a bureau within MITI to answer inquiries regarding notifications, and providing for limited disclosure of meeting results of the various entities involved in the adjustment process.<sup>92</sup>

MITI explained these measures to the United States as the maximum change possible under the LSRSL. The eighteen month deadline, however, was almost double the maximum time under the statute itself. The liberalized hours and days of operation, moreover, were well short of what MITI could have established by simply revising its own ministerial order. Transparency remained impossible so long as the informal and non-statutory pre-notification explanation meetings were a significant part of the process. Had MITI simply decided to follow the formal process stipulated in the LSRSL, the degree of liberalization and transparency would have been much greater. To do so, however, would likely have meant an increase in the speed of reform unacceptable to MITI.

While the fundamental nature of regulation under the

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88. *Id.*

89. *Id.*

90. *Id.*

91. See Masu Uekusa, *Government Regulations in Japan: Toward Their International Harmonization and Integration*, in *JAPAN'S ECONOMIC STRUCTURE: SHOULD IT CHANGE?* 237, 264-67 (Kozo Yamamura ed., 1990) (explaining general criticism of Japan in SII talks regarding lack of administrative transparency).

92. *Id.*

LSRSL remained unchanged, the results changed dramatically. In the second half of 1990, over nine hundred prospective new large stores were announced, more than double that of the previous year and more than nine times the rate from 1982 to 1985.<sup>93</sup> The U.S. toy retailer, Toys "Я" Us, became the first foreign store to be allowed to open under the LSRSL and announced that it planned one hundred stores by the end of the decade.<sup>94</sup> Large Japanese retailers also reported that the adjustment process had become easier.<sup>95</sup> Small merchants and local governments accelerated the trend toward using large stores as the nucleus for the revitalization of established areas.<sup>96</sup> Trade associations for small and medium retailers also began to lobby on the national level for various forms of subsidies to replace the declining protection of the law.<sup>97</sup>

In May 1991, the Diet amended the LSRSL effective January 1992.<sup>98</sup> The amendment raised the floor space dividing line between class one and class two stores, liberalized the procedures for the large store councils, urged restraint on local government restrictions, and eliminated adjustment altogether for areas of less than 1000 square meters devoted to imports.<sup>99</sup> These statutory measures, while significant, were overshadowed by changes in MITI's implementation of the law effective January 1992. The eighteen month period for opening a store was further shortened to one year.<sup>100</sup> Pre-notification explanation and negotiation, which had taken up to ten years in the mid-1980s, were eliminated. After notification, the owner of the proposed building had to explain their plans to local merchants, a process

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93. *Shutten chōsetsu ga jinsokuka* [Store Opening Adjustment Process Quickens], YOMIURI SHINBUN, Dec. 6, 1990, at 1, 6 [hereinafter *Store Opening Process Quickens*].

94. *Id.* at 1.

95. *Id.*

96. *Privatizing Regulation*, *supra* note 11, at 286.

97. *Id.*

98. *Id.* at 287.

99. *Store Opening Process Quickens*, *supra* note 93, at 6.

100. *Privatizing Regulation*, *supra* note 11, at 286. The elimination of the local Commercial Activities Adjustment Boards was crucial to the shortening of the period in the proposed amendment and to increased transparency. *Id.* The regional Large Stores Council was to perform the initial deliberation on the impact on local retailers and consideration of reductions in size or operating conditions. *Id.* at 286-87. It was hoped that the regional rather than local nature of the council and the status of its members as quasi-public servants, making them subject to criminal liability for bribery or self-dealing, would eliminate the corruption and deliberate delay that had marked the history of the boards. *Id.* at 287.

which could not exceed four months. The next step for the retailers who planned to open in the new building was notification and an eight month commercial adjustment period.<sup>101</sup>

The next steps came in 1994 with the publication of MITI's promised reassessment, reforms, and further incremental amendments of the LSRSL. Although the interim SII Report had hinted at suspension of the law altogether for some areas, the reassessment in 1994 concluded no major steps were necessary because the prior measures had already eliminated the outstanding problems.<sup>102</sup>

MITI's appraisal appears correct because new store notifications continued at a much higher level than during the 1980s, despite adverse economic conditions.<sup>103</sup> The increasing number of large volume stores, a growth in direct importing by retailers, and new marketing strategies led to drops in the prices of imported consumer goods such as business suits, British whiskey, and U.S. cosmetics, which had resisted even the most drastic yen appreciation of the 1980s.<sup>104</sup>

Substantive reform did not mean, however, a fundamental change in regulatory style. Although liberalization meant more stores opening more quickly, there are indications that the nature and locus of decision-making remains largely unchanged, which is considerably more important from the perspective of regulatory process and administrative transparency than the number of stores opened. The chairperson of one large stores council in western Japan stated:

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101. *Id.* at 286. The purpose of this step is to decide whether the proposed retail complex should be allowed to open as planned or whether changes should be recommended by MITI.

102. *Id.*

103. Approximately 60% of new stores were allowed to open as planned, and adjustment periods remained within the one-year limit. Most gratifying to the United States and their Japanese allies, the first half of the 1990s saw a rapid growth in discounting, including the continuing expansion of Toys "Я" Us, and an increase in price competition in retailing markets. *Id.* at 286.

104. See generally Emily Thornton, *Revolution in Japanese Retailing: Bargain Hunting Catches on in Japan, Boosting the Fortunes of Discount Stores*, FORTUNE, Feb. 7, 1994, at 143 (discussing changes in Japanese retailing sector); Yumiko Ono, *Bargain Hunting Catches on in Japan*, WALL. ST. J., May, 19, 1992, at b1; *Japan Shops the Wal-Mart Way*, ECONOMIST, Feb. 6, 1993, at 67 (describing recent changes in Japanese retailing industry). Leonard Schoppa reports that Toys "Я" Us had opened 14 stores as of June 1994 and had plans for 10 more by mid-1995. LEONARD J. SCHOPPA, JR., BARGAINING IN JAPAN: WHAT AMERICAN PRESSURE CAN AND CANNOT DO 76 (1997).

It's too bad but there is no objective basis for calculating the amount of floor space to cut. The commercial data are worthless, so we've never used them. We usually just follow the opinion of the locals, which means the local merchants. . . . It's scary to think what we would do if we had to give a reason for our conclusions.<sup>105</sup>

The LSRSL process has shifted substantially toward liberalization in terms of speed and the number of stores opened, but remains legally informal in terms of the locus and criteria of decision making.

## II. JAPANESE REGULATORY STYLE IN DIFFERENT CONTEXTS: FURTHER EVIDENCE OF PRIVATIZED REGULATION AND A GLIMPSE AT ITS LIMITS

MITI's implementation of the LSRSL is not an aberration. It is representative of the fundamental nature of Japanese regulation in a range of industries and regulatory contexts, each with distinct legal, political, and bureaucratic characteristics. To begin, Part II examines licensing in broadcasting and transportation, where regulators choose among potential entrants, impose conditions on the entrant's operations, or both. Part II next examines MITI's management of competitive conditions within statutorily designated declining industries. Part II then tests the limits of privatized regulation in the face of determined resist-

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105. The *Nihon Keizai Shinbun* in November 1994 analyzed the implementation of the statute in all eight regional MITI bureaus and found that the incidence of MITI recommended floor space reductions increased from 23.2% of notifications between January 1992 and March 1993 to 39% between April 1993 and March 1994. *Hirogaru Daiheiten Funsō* [*Large Store Strife Spreads*], *NIHON KEIZAI SHINBUN*, Nov. 23, 1994, at 10 [hereinafter *Large Store Strife Spreads*]. The recommended reduction in floor space was as high as 60% to 70% in some cases. *Id.* A MITI spokesperson rejected this characterization, claiming that the Large Store Councils "respect the locals' opinions" but then make "comprehensive" judgments. *Id.* An official at one large retailer reported that the amount that it had to pay to local merchants to open a new store, ¥3000 per square meter generally and over ¥4000 in the Kansai area, had declined by 50% but had not disappeared and that the "pre-pre-notification adjustment" had reappeared in other guises. *Id.* The *Nihon Keizai Shinbun* report was corroborated by other sources. On November 17, 1994, the Keidanren called for the step by step repeal of the LSRSL, and, in June 1995, an FTC panel agreed. The panel, consisting mainly of scholars, concluded that the law still lacks transparency, injures consumers by limiting competition, and requires new stores to enter into backstage deals with local merchants. *FTC Panel Calls for Abolition of Large-scale Retail Law*, *JAPAN DIG.*, June 26, 1995, at 11.



ance by individuals unwilling to comply with the unwritten rules of privatized regulation.

### A. Evidence of Privatized Regulation in Other Contexts

#### 1. Licensing

The licensing of television broadcast stations by the MPT<sup>106</sup> and the licensing of land transport, particularly taxis and inter-urban bus routes, by the regional bureaus of the Ministry of Transportation ("MOT") illustrate the characteristics of privatized regulation in the context of licensing. These ministries' statutory authority to regulate is clear, and their power either to deny at the outset or later to withdraw the right to operate forces firms into an ongoing relationship with the ministries. The market structures of these industries, however, are very different, indicating that the MPT and MOT face different challenges in maintaining stability and market control.<sup>107</sup>

#### a. Television Broadcast Licensing<sup>108</sup>

The statute under which the MPT licenses broadcast television stations is a product of the postwar occupation of Japan and a virtual copy of the U.S. Federal Communications Act.<sup>109</sup> The Broadcasting and Radio Wave laws,<sup>110</sup> consistent with its U.S. counterpart, require the MPT to evaluate multiple applicants

106. See *Denpahō* [Radio Wave Law], Law No. 131 of 1950 (Japan); *Hōsōhō* [Broadcasting Law], Law No. 132 of 1950 (Japan).

107. See generally Jonathan Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 BUFFALO L. REV. 615 (1991) (discussing high barriers to entry into television broadcasting market in Japan). Moreover, the television market in Japan is concentrated into five national groups and has historically been closely associated with leading politicians within the LDP. *Id.* at 665-67, 671. There are low barriers to entry in the land transportation sector, especially the bus, trucking, and taxi industries. The transport sector is also more diffuse economically and more closely tied to local rather than national politicians.

108. This section of the Article is drawn primarily from Weinberg, *supra* note 107, at 615-735; Takaaki Hattori, *Kiseikikan no arikata to menkyoseido* [The Methods of Regulatory Organs and the Licensing System], 67 HŌRITSU JIHŌ 22-27 (1995) [hereinafter *Methods of Regulatory Organs*]; Takaaki Hattori, *Tokyō shin U kyoku ni yūseishō no ikisugi "gyōseishidō"* [The MPT's Excessive Administrative Guidance to Tokyo's New Television Station], HŌSŌ NIHYŌ, May 1992, at 16-19 [hereinafter *Excessive Administrative Guidance*]; Yasuhiko Tajima et al., *Hōsōseido no shōrai to hōsōhō (Tōron)* [The Future of the Broadcasting System and Broadcasting Law], 67 HŌRITSU JIHŌ, 28-53 (1995).

109. See Weinberg, *supra* note 107, at 661-64.

110. See Broadcasting Law, Law No. 132 of 1950 (Japan); Radio Wave Law, Law No. 131 of 1950 (Japan).

and choose the one most qualified to serve the public interest.<sup>111</sup> Despite the similarity between the U.S. and Japanese statutes, however, actual practice under the two statutes differs significantly, illustrating the divergent ways U.S. and Japanese administrative agencies operate within similar formal legal constraints.

The story of postwar broadcast licensing begins in 1950 when the MPT's predecessor, the Radio Regulatory Commission ("RRC"), had to decide how to allocate AM radio licenses among many applicants. Consistent with the U.S. statutes and practice, the applicable Japanese regulations provided, "when there is a shortage of availability in frequencies, . . . priority shall be given to the applicant whose plan can be considered to contribute most to the public welfare."<sup>112</sup> When the RRC actually allocated the licenses, however, it avoided the competitive process altogether, substituting a process that eliminated the need to evaluate candidates or make legally binding choices among them.

Instead of gathering information about the applicants through a formal investigation and a series of comparative hearings, the RRC simply told the applicants that it would accept only a single application. This *ipponka chôsei* or "unification adjustment"<sup>113</sup> process draws on the same concept that animates commercial adjustment under the LSRSL. The process forces the various prospective licensees to bargain among themselves, often with direct or indirect guidance from the ministry or its designee,<sup>114</sup> until they can form a single company and submit a unified application for the license. This has been the mode of operation used by the MPT ever since the 1950s.<sup>115</sup>

The key question in adjustment is who decides, and on what criteria, who will participate in the bargaining process. Under the LSRSL, the process was typically begun by one of the large stores announcing its intention to open in a particular area. Thereafter, the chain constituted one side of the negotiating process. The identity of the other side was more complicated

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111. Weinberg, *supra* note 107, at 664.

112. *Id.*

113. *See id.* at 664-68 (describing unification adjustment process).

114. *See id.* at 666 (describing MPT practice of choosing designee to facilitate unification adjustment process); *see also Excessive Administrative Guidance, supra* note 108, at 16-19 (describing role of MPT in licensing of Tokyo Metropolitan Television).

115. Weinberg, *supra* note 107, at 664 n.206. In fact, the *ipponka* process dates from the beginning of broadcasting in Japan under the Wireless Telegraph Act of 1915. *See* GREGORY KASZA, *THE STATE AND MASS MEDIA IN JAPAN 1918-1945* 74-79 (1988).

because the local merchants were different each time a large store was opened. According to the statute, the chamber of commerce was to represent their interests through the consultative process,<sup>116</sup> but MITI's avoidance of the statutory process meant that informal and unstable groupings of small merchants might on occasion supplant the chamber's role. In these cases, it was potentially difficult for the large store to determine from whom the "right" to open should be purchased and to be sure that both MITI and the rest of the area merchants would respect the bargain. This resulted in inordinate delay and led to the creation, within the retail chains, of specialists in techniques of interpreting local power structures and assuring the cooperation of local power brokers. One supermarket chain executive told the author that "store openers" required only two skills, patience and the ability to drink large amounts while negotiating with local merchants.

The process in television licensing is considerably simpler, largely because the participants generally are repeat players. The Japanese media industry is dominated by five groups, each is affiliated with one of the five national newspapers and maintains a national television network with a flagship Tokyo station.<sup>117</sup> When the MPT announces the availability of a new channel in an area where the network believes a new affiliate would be worthwhile, the network encourages related persons and firms to form a company to file an application with the MPT's regional office.<sup>118</sup>

The MPT then chooses an influential person in the region to facilitate the adjustment process.<sup>119</sup> If the prefectural governor is an ally of the ruling party, he frequently conducts the adjustment. If not, it may be a local business leader or even a Diet member from the area who has a particular interest in the communications industry. One participant described the adjuster's role as:

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116. See LSRSL, Law No. 109 of 1973 (Japan).

117. Weinberg, *supra* note 107, at 665-66.

118. *Id.* at 668-70. Typically local businesses, including independent local media, also file applications, and the total number of formal applications, most of which are proxies for the real parties in interest, can reach over one thousand. *Id.* The 159 companies who applied in 1991 for a new Tokyo channel, however, may be more typical of the number of applicants for any given broadcasting license. *Excessive Administrative Guidance*, *supra* note 108, at 16.

119. Weinberg, *supra* note 107, at 666.

[T]o compare the contact telephone numbers listed on the various applications, and group together all those with identical numbers listed. This practice eliminated some sham applications, filed in the hope of gaining extra seats at the *ipponka* table, and began to narrow down the applications to the important players. [The] task . . . was to lead these players — most importantly, representatives of the key stations — to an agreement acceptable to all regarding the shareholder and board-of-directors structure of the new venture.<sup>120</sup>

The complexity of the adjustment process for television licensing varies widely. In a rural prefecture with a preexisting radio licensee, for example, standard practice simply would be to assign the licensee the television license. Because the radio licensee normally was owned by a consortium consisting of the leading prefectural newspaper, and regional banks and companies, rivals were rare and little adjustment was necessary.<sup>121</sup> In large cities with multiple licensees and economic groupings the process required more direct intervention by the MPT or its designees.<sup>122</sup>

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120. *Id.* at 667-68. The leader of the process sometimes becomes the head of the new station. *Id.*

121. *Id.* at 671. Because the leading figures in adjustment often included powerful LDP politicians, the licensing process was a prime source of financial resources for the LDP. Former Prime Minister Kakuei Tanaka's term as Minister of Posts and Telecommunications in the late 1950s established Tanaka and later associates like Shin Kanemaru as powerful players in communications policy and opened up numerous opportunities for their individual participation in granting new licenses. Kanemaru, for example, emerged as the largest shareholder of TV Yamanashi after it was awarded the UHF license for Yamanashi Prefecture. *Id.* Because TV Yamanashi was part of a consortium that also operated the dominant newspaper and a local radio station, Kanemaru became a central player in the regional communications oligopoly as well as its representative in the Diet. *Id.*

122. The MPT took a very activist role in the licensing of Tokyo Metropolitan Television in 1991-93, for example. Rather than allow the 159 applicants in 1991 to work out their own formula for adjustment, the ministry dictated who would form the core group for the single applicant and the respective capital contributions from different types of participants. The entire process was informal. In fact, the MPT announced its schedule so that formal consultation for selecting the licensee would begin and end on Friday, May 22, 1992, and the preliminary license would issue on Monday, May 25, 1992. As it worked out, the adjustment took longer than the MPT had anticipated and the license did not issue until January 1993, and even then only 158 of the original 159 applicants agreed. The 159th applicant persevered and forced the MPT to reject its application formally. See *Excessive Administrative Guidance*, *supra* note 108, at 16-19. For a story of one attempt by an outsider to use judicial review to break into the system, see Takaaki Hattori, *Hôsôkyoku kaisetsu narazu (jô): Nihon yûryôtebebi (kabu) no menkyôshinsei o megutte* [No New Station (1): About Japan Pay TV's License Application], HÔSÔ RIPOTTO,

The MPT's choice of uniform adjustment has contributed to the concentration and homogenization of the Japanese media.<sup>123</sup> Because the process involved established LDP figures, local economic and communications consortia, and one or more of the national media groups, the chances of diversity among broadcast licensees were low, both in terms of economic and political divergence.<sup>124</sup>

Homogeneity in media perspectives and the concentration of media in a small number of groups with ties to the LDP and Japan's business establishment had clear political and economic advantages for the party, its members, and its supporters. The absence of a major branch of the media at the national level that was controlled by heterodox views severely limited the development of a popular consciousness substantially at odds with that of the LDP. At the local level, the process gave LDP Diet members both the opportunity to reward supporters with a place at the table and to take a place there themselves.

That the MPT should choose a method of implementation congenial to the LDP and the major players in the communications industry is not surprising. One explanation is that the MPT bureaucrats are the politicians' agents and that agents generally do what is in their principals' interests. Alternatively, the identity of interests among MPT implementation policy, the LDP, and the media may be because the ministry has created an industry structure of its own liking. A highly concentrated, profitable, and homogeneous industry, dependent for its maintenance on a peculiarly discretionary form of regulation is quite likely to be just what MPT bureaucrats would choose irrespective of LDP needs. The fewer the players in the industry and the less diverse their perspectives, the more stable will be the industry relationships that form the basis of privatized regulation. That the process also provides lucrative positions for retiring MPT bureaucrats is not coincidental.

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Nov. 1, 1987, at 56-63 [hereinafter *No New Station (1)*]; Takaaki Hattori, *Hōsōkyoku kaisetsu narazu (ka): Nihon yūryōterebi (kabu) no menkyōshinsei o megutte* [*No New Station (2): About Japan Pay TV's License Application*], *HŌSŌ RIPPOTTO*, Jan. 1, 1988, at 62-67 [hereinafter *No New Station (2)*].

123. Weinberg, *supra* note 107, at 684-86.

124. *Id.* Given the composition of the typical licensee, it may not be too extreme to argue that the broadly held commonality of interests and views throughout the industry made either form of heterogeneity literally unthinkable. See *id.*

## b. Transportation Licensing

The same pattern of privatized regulation exists in transportation despite industry conditions quite dissimilar to broadcasting.<sup>125</sup> The Land Transportation Law sets forth criteria for the MOT to apply in licensing new entrants to the industry or when granting new routes to existing licensees. The prefectural Land Transportation Bureaus, charged with the task of licensing, however, consistently resisted applying these criteria and instead relied whenever possible on the industry to make these decisions through an adjustment process fundamentally similar to that used by the MPT.

The licensing process consisted of four steps.<sup>126</sup> The first was determining actual and future demand and whether the current licensees could meet it.<sup>127</sup> If not, the agency had to undertake the second step, determining the number of additional licenses needed and whether they should be allocated only to existing licensees, to new entrants, or to both according to some ratio.<sup>128</sup> Assuming that some new licensees would be created, the third step was to decide which potential new entrants met the statutory criteria, and the final step was choosing which

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125. See generally AKIRA MORITA, *KYONINKA GYŌSEI TO KANRYŌSEI* [LICENSING ADMINISTRATION AND THE BUREAUCRACY] 141-298 (1988) (analyzing licensing bureaucracy in Japan). Morita's data on the MOT are primarily from the 1950s and 1960s, but discussion of the proposed deregulation of the taxi and trucking industries in the 1980s and 1990s confirmed that the process continued at least throughout the early 1990s. See Yoshio Inoue, *Kōkyōryōkin to kyōninkatetsuzuki* [Public Fares and Approval Procedures], *HŌ TO SEISAKU*, Feb. 1982, at 45; Akira Negishi, *Kōkyōryōkin to shōhishahogo* [Public Fares and Consumer Protection], *HŌGAKU SEMINAA ZŌKAN: GENDAI NO KIGYŌ*, Dec. 1980, at 200-08; Yoshi Shiomi, *Basujigyō menkyo shinsei ni kakaru kyōtei no hōteki kōsokuryoku* [The Legally Restrictive Power of Agreements Concerning Applications for Licensing Bus Operations], 105 *SHŌHŌ ZASSHI* 563-71 (1992); Wamai Soneno, *Noriaijidōsha jigyōshakan no unsōjigyō no menkyoshinsei oyobi jigyōsuikō nikansuru kyōteichū no gōi ga hōteki kōsokuryoku o yūshinai to sareta jirei* [An Example of the Legally Restrictive Power of the Agreement Process Among Bus Companies Concerning Transportation Licensing Applications and Business Operations], 1358 *HANREI JIHŌ* 181-85 (1990); Interview by Ronald Dore with Masao Ogura, President and Chairman of the Board of Yamato Transportation Co. (Nov. 1993) (transcript on file with author) [hereinafter Ogura interview].

126. MORITA, *supra* note 125, at 189. Morita deals with a wide array of transportation issues. This Article focuses on the licensing of taxis with reference to taxi fare setting and route allocation in the trucking industry. These areas were chosen for two reasons. First, they are representative of the phenomena that Morita describes in other contexts. Second, they have been a source of continuing concern to Japanese economic regulation into the 1990s.

127. *Id.* at 189-90.

128. *Id.* at 190-91.

among them were most qualified.<sup>129</sup> At each of these stages, the conflicts between existing licensees and new applicants and within each group was potentially intense. Unlike the situation in television broadcasting, the cost of entry into the taxi, inter-urban bus, or trucking industry was too low to constitute an effective barrier or create a natural oligopoly. The number of potential applicants, thus, was not so easily controlled either by the ministry or by the existing industry.

To deal with the determination of demand, perhaps the technically most difficult of its tasks, the regional road transportation bureaus relied on statutory deliberative councils.<sup>130</sup> Like the Large Stores Council in the LSRSL context and similar to deliberative councils throughout Japanese Government, the *Jidōsha unsō kyōgikai*, or Motor Vehicle Transportation Deliberative Councils, were tripartite bodies with representatives of industry, consumers, and the public interest.<sup>131</sup>

Statutorily required consultation with deliberative councils is common in Japanese administration as it is in many other countries.<sup>132</sup> The actual function of the councils vary widely in Japan.<sup>133</sup> In some contexts, it has been a mere *kakureminō*, or fairy's cloak, to legitimate agency decisions, while in others it has been the site of intense political conflict.<sup>134</sup> In transportation, the deliberative council virtually replaced the bureaucratic agency in making the most difficult and sensitive decisions regarding the determination of demand for taxi service and bus

129. *Id.* at 192-93.

130. *Id.* at 202.

131. *Id.* at 203. Each council had nine members, three from industry, three from users or consumers, and three from "experienced and learned citizens" or the relevant government agency. *Id.*

132. See DAVID VOGEL, NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES 269-76 (1986) (claiming that regulation in Great Britain is much more flexible and consultative than in United States); *Id.* at 90-91 (discussing use of advisory committees and voluntary industry regulation in Great Britain); STEVEN KELMAN, REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL SAFETY AND HEALTH POLICY 191 (1981) (discussing use of advisory committees in both Sweden and United States); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 189-90 (1991) (analyzing use of advisory committees in United States).

133. See Schwartz, *supra* note 23, at 217-41 (providing overview of use of deliberative councils).

134. *Id.* The role of deliberative councils in transportation regulation was crucial in making decisions. This contrasts with the practical veto power MITI gave to the local merchants in the LSRSL context which caused the role of the councils to become purely ritualistic.

routes.<sup>135</sup> The recommendations were not concerned with general directions or broad policy. They set specific numbers of additional licenses or vehicles to be allowed during specific time periods in specified areas. The formal determination by the agency itself, therefore, became nothing more than the ratification of the council's prior decision.

A major problem with the shifting of decision-making from the agency to the deliberative council was the dominance of the latter by the industry. Although industry representatives constituted only three of nine total members, commentators agree that these representatives controlled both the agenda and substance of council deliberations.<sup>136</sup> The technical nature of the issues and the diffuse nature of consumer interests made it difficult to have consumer representatives without any connection to the industry. The dominant role of the local chamber of commerce in choosing members and the probability that chamber designees would reflect industry views exacerbated this difficulty. Independence was even less likely among the three members chosen from the MOT and persons of "learning and experience," who were usually directly or indirectly tied to the industry.<sup>137</sup>

Along with the capture aspect of industry control of the deliberative councils, Akira Morita emphasizes their legitimating function and the effective insulation of the Road Transportation Bureaus and the MOT from political attack.<sup>138</sup> This shift of decision-making from the agency to the quasi-public deliberative council also meant that the locus of real power was farther from the agency formally responsible, and that it would be harder for

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135. MORITA, *supra* note 125, at 202. According to Morita, the agency followed the council's recommendation in 99% of the cases. *Id.* (citing *Cyôsei kansatsuhôkoku 1958* [Administrative Inspection Report 1958]).

136. *See, e.g.*, MORITA, *supra* note 125, at 202 (discussing domination of deliberative councils by industry representatives in transportation sector).

137. *Id.* at 224. Although warning that it oversimplifies the role of the councils, Schwartz notes that at one point industry representatives held 64% of the 1411 committee, subcommittee, and specialist seats on MITI's Industrial Structure Council, the leading economic council, and a full 98% of the seats on MITI's steel subcommittee. Schwartz, *supra* note 23, at 224. Inoue and Negeshi confirm Morita's contention that industry dominates the MOT councils. *See* Inoue, *supra* note 125, at 47 (discussing domination of transportation advisory councils by industry members); Negishi, *supra* note 125, at 203 (analyzing influence of industry representatives seated on transportation advisory councils).

138. MORITA, *supra* note 125, at 207.



dissatisfied parties or ordinary citizens to challenge decisions.<sup>139</sup> Although there is no direct evidence that avoiding judicial review was among the goals of the MOT in choosing to rely virtually entirely on the councils, it is another instance of the bureaucracy fashioning its decision-making processes in a way that lessens the chance of judicial scrutiny.

The Land Transportation Bureaus' practice in the remaining three steps of licensing more closely resembles the MPT's practice in broadcast licensing. The rapid increase in economic growth in the 1950s and 1960s led to a concomitant increase in the number of applicants for new or additional inter-urban bus routes.<sup>140</sup> The degree and intensity of conflict made the decisions among them difficult, and the frequent involvement of local politicians exacerbated the political risk. The Bureaus' response was to instruct the industry to limit the number of applications to the number of available licenses. Morita describes the process:

The Ministry of Transportation sent "autonomous adjustment" administrative guidance to the applicants. Here autonomous adjustment meant that the rival applicants were to discuss and adjust their interests and create a single application or reduce the number of applications to the number available. For example A and B would discuss and decide that A would apply for route X and B for route Y and that each would withdraw its other application. Or the applicants would decide to enter agreements allocating cargo areas or schedules, sharing facilities, etc. When there were many applicants, they would also sometimes form new legal entities

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139. It is likely that the doctrines of standing and ripeness would block a direct attack on a bureau decision that stated that a particular number of additional licenses were required in a given area at a given period because that number, in and of itself, would not have an immediate effect on any individual's legal rights. Such a decision might be challenged indirectly, however, by a rejected applicant arguing that the agency had illegally underestimated the demand for taxis and that this error led the agency to reject its application. Such an argument would be complicated, however, if the bureau could simply respond that it was correctly considering the deliberative councils' advice. Moreover, such a challenge would probably fail because it would be difficult for the rejected applicant to show that the rejection was because of the number of allotted licenses rather than for any number of other possible reasons. The plaintiff would then be forced to show illegality on the part of the council and that this illegality caused its determination of the needed additional licenses and that the bureau followed its advice, rather than arriving at the same number through the exercise of its own discretion.

140. MORITA, *supra* note 125, at 206.

through mergers or joint investment and achieve a single application thereby.<sup>141</sup>

It is unclear how actively the agency intervened to monitor the unification process or to supervise its result. At times the MOT may have been able simply to indicate the number of applications and rely on the industry members to decide who would submit them. At other times the agency relied on the good offices of local notables as the MPT did in the broadcast licensing context.<sup>142</sup> Both methods left the decisions for the applicants to work out through private bargaining, which meant that "the ministry did not abide by the system and itself compare the applicants' suitability in light of the licensing criteria and select the most qualified."<sup>143</sup>

In contexts such as large scale increases in the number of taxi licenses, autonomous adjustment did not always succeed in producing the exact number of license applications that the Road Transportation Bureau was willing to grant. This forced the Bureau to convene the statutory hearing process and choose among applicants. Even at this stage, the MOT's primary concern was to mediate an agreement among the applicants.<sup>144</sup> This process, which is the equivalent of the adjustor's role in broadcasting adjustment, caused excessive delays. More troub-

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141. *Id.* at 216. One such autonomous adjustment became the basis of a contract action when one of the parties withdrew and attempted to violate its terms. The court found the agreement not legally binding, although its reasoning was partly based on the plaintiff's own earlier failure to live up to the agreement's terms. See Judgment of the Supreme Court, Second Petty Bench, Nov. 24, 1989, 1344 HANREI JIHŌ 132 (1990); see also, Shiomi, *supra* note 125, at 563-71 (discussing Okudōgo Tourist Bus case); Soneno, *supra* note 125, at 181-85 (analyzing Okudōgo Tourist Bus case).

In the taxi industry, the trade association actually filed all applications on behalf of its members until 1979, when the FTC made it clear that the practice was a violation of the AML and that the individual companies had to file individually. Thereafter, they simply filed separate identical applications. In the words of one commentator, there was "absolutely no change." Yoshitsugu Akiyama, *Takushijigyo no kiseikanwa ni kan suru ikhōsatsu — A Study of the Deregulation of Taxi Industry (sic)*, SHAKAI KAGAKU, July, 1994, at 26; see Harunori Yamada & Noboru Kobayashi, *Takushii jigyo ni kakaru unchinseigenjiken [A Case of Limitations on Taxi Fares]*, KŌSEI TORIHIKI, Feb., 1983, at 43 (discussing FTC's formal warning of Gumma Prefecture taxi association).

142. See Shiomi, *supra* note 125, at 563 (describing mediation of financial power brokers in Okudōgo Tourist Bus case); Soneno, *supra* note 125, at 182 (discussing mediation in Okudōgo Tourist Bus case).

143. MORITA, *supra* note 125, at 217.

144. *Id.* at 217-18.

ling to Morita was the distance that the whole approach took the licensing system from its statutory goals:

The Ministry of Transportation's greatest concern in these decisions was not to whom to give the license or how the industry should develop along a given route or in a given area; that is, it was not concerned with realizing its policy goals. Rather it was adjusting the interests of the applicants and other interested parties. It follows that the ministry's attitude was not to control opposition to its decisions by taking actions that would realize its policy objectives. Instead, it took the passive and defensive attitude of softening opposition by avoiding decisions altogether.<sup>145</sup>

The agency still resisted a decision on the merits even when mediation failed.<sup>146</sup> It instead relied almost exclusively on disqualifying individual applicants on trivial grounds rather than deciding which among qualified applicants best fit the statutory criteria. The agency was extremely strict on form, even disqualifying applications for typographical errors. It used the social trust criterion broadly and loosely, once disqualifying an applicant because of a divorce.<sup>147</sup> It relied, whenever possible, on marginally relevant numerical requirements such as garage space rather than more central, albeit less mechanical, criteria related to market performance.<sup>148</sup>

Masao Ogura's description of MOT licensing in the trucking industry confirms Morita's account of the MOT's role in taxi licensing. Ogura is the president of Yamato Transport, one of Japan's largest freight companies, and an outspoken critic of the bureaucracy. He found the ministry's persistent refusal to exercise its discretionary power in the truck licensing process so minimal that he characterized it as the "abandonment of administrative power."<sup>149</sup> According to Ogura, the MOT did no independent investigation and would have had no data on which to base decisions if it had been forced to make any.

Of course, the MOT had no desire to make any decisions. According to Ogura, the MOT's role under the Road Transport-

145. *Id.* at 222.

146. *See id.* at 222-31 (describing MOT criteria used to disqualify applicants rather than making decisions based on merit of applications).

147. *Id.* at 226-28.

148. *Id.* at 228.

149. Ogura Interview, *supra* note 125.

tation Law was the same as MITI's under the LSRSL. The MOT would simply say no to new applicants whenever an existing competitor objected. Because each firm realized that its own chances of getting new routes in the future depended on the good will of its competitors, the role of the MOT did not necessarily mean that new routes were never granted. Instead of being recalcitrant, most industry members adopted a "you scratch my back and I'll scratch yours" approach that allowed new entrants unless there was a chance that it would cause "excessive competition," in which case existing firms in that market exercised their veto power and the MOT indicated that it would reject the application.<sup>150</sup>

When faced with a competitor's veto, Yamato's initial course of action was to enlist a politician not to persuade the MOT to accept the application, but to help persuade the other trucking company to withdraw its opposition. If political intervention failed or was unavailable, Yamato frequently succeeded by offering to divide the market with the established companies. When persuasion and collusion failed, Yamato often purchased the right to the route from the competitor.<sup>151</sup> Finally, in three extreme cases where all else failed and the prize was worth the cost, Yamato filed a formal application despite its rival's veto. When the MOT refused to act on the application, Yamato sued to compel the MOT to make a decision. In each of these instances a license was issued within a year of the filing of litigation. As Ogura put it, "[b]ureaucrats are all alike. You file administrative litigation, and their attitude changes just like that. They hate litigation."<sup>152</sup> The problem with litigation as a normal tactic, Ogura claimed, was that the Road Transportation Bureau could stall an applicant for up to five years before a court would entertain a suit for administrative inaction.<sup>153</sup>

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150. *Id.*

151. *Id.* It is unclear from the text of the interview whether Yamato would acquire the rival company or simply pay it to withdraw its objection to Yamato's license.

152. *Id.* It is unclear what happened with these suits because they were withdrawn once the licenses issued. The assumption is that they were suits to force an agency decision, but Ogura does not explicitly say so.

153. *Id.* In at least one transportation case, a court has found a much shorter period to be too long. See *Mitsubishi Taxi Group v. Japan*, 1454 HANREI JIHŌ 61 (Osaka Dist. Ct., May 3, 1993). Mitsubishi Taxi sued for compensation for the MOT's delay in accepting and then ruling on its application to increase its fare. The MOT's delay was less than six months, of which the court found two months was excessive and ordered

## 2. Cartelization in Industrial Policy

Cartelization has been a by-product of the mode of policy implementation chosen by the ministry in each of the areas discussed thus far. Cartelization was not, however, a formal part of government policy. In many areas of industrial policy, on the other hand, cartels ranging from production cartels to help tide industries over recessions to export cartels as a response to trade pressure are an explicit vehicle for policy implementation.<sup>154</sup>

### a. Types and Uses of Cartels

Cartels in Japan have a variety of legal natures. Many are

compensation. The ministry was apparently attempting to punish Mitsubishi for ignoring earlier administrative guidance and to force it to raise its fare to its competitors' level. Mitsubishi wanted a fare increase that would still keep it below its competitors.

The passage of the Administrative Procedures Law ("APL") in 1993 may have made Ogura's tactic even more effective and may have substantially weakened the MOT's power to refuse to accept or act on an application. See *Gyōsei tetsuzukihō* [Administrative Procedures Law], Law No. 88 of 1993 (Japan). For a discussion of exactly how the APL may affect the MOT's practice of delaying action to force applicants to negotiate or "adjust their activities" with competitors, see Tadasu Watari, *Kyōninka shinsei no katte na shori wa yurusarenai* [The Arbitrary Treatment of Permit Applications Will not Be Allowed], HŌGAKU SEMINAA, Nov., 1994, at 42-45. Watari describes an instance where a railroad company duly filed an application for a fare decrease for both cargo and passenger service. When it was vehemently opposed by its competitors, the applicant rallied consumers and used support for the application. Nonetheless, the MOT returned the application and instructed the company to reapply after it had adjusted the matter with its competitors. According to Watari, this type of administrative behavior is much more difficult under the APL. For a similar discussion of how the APL and local versions thereof will affect similar practices in land use, see Katsuya Uga, *Gyōsei to shimin no kankei no henkaku* [Changes in the Relationship Between Citizens and Administration], HŌGAKU KYŌSHITSU, Aug., 1996, at 4.

It is also important to note that Yamato Transport was not the only transportation company to use litigation to disrupt privatized regulation. Despite the Mitsubishi Taxi Company's well publicized victory, the best known maverick in the taxi industry has been the MK Taxi Company of Kyoto. MK has used the courts to force the MOT to allow it to break ranks with its competitors and maintain lower fares, first in Kyoto and then later in other parts of Japan. For differing views of the decade-long process and its relationship to the taxi industry in general, see Shinichi Kido, *MK hōshiki de takushii gyōkai wa sukuenai* [The MK System can not Save the Taxi Trade Association], EKONOMISUTO, Oct. 10, 1985, at 54; Nobuo Sakamoto, *MK takushii no tōsen wa shippai shiteinai* [The MK Taxi Challenge is not Failing], EKONOMISUTO, Jun. 7, 1994, at 60; see Akiyama, *supra* note 149, at 15-42 (discussing complicated regulatory scheme for taxis and MK's role therein).

154. See generally Harry First, *Structural Antitrust Rules and International Competition: The Case of Distressed Industries*, 62 N.Y.U. L. REV. 1054 (1987) [hereinafter *Structural Antitrust Rules*] (providing general theoretical approach to use of cartels in depressed industries policy).

secret and illegal, as is true of any economy, and are intended solely for the private benefit of the cartel members. This Article, however, is concerned only with the range of cartels, policy cartels, formed with some degree of government involvement or acquiescence.<sup>155</sup> Policy cartels come with a wide range of legal authority, including none at all.

At one end of the spectrum are formal policy cartels that have been statutorily authorized, such as the depression cartels under the AML and the capacity-scraping cartels under the depressed industries legislation of the 1970s and 1980s.<sup>156</sup> Next on the spectrum of formality are statutes that delegate the responsibility to monitor and promote a specific economic sector to a ministry, but stop just short of authorizing cartelization. The Petroleum Industry Law ("PIL") is a representative example of such a "sectoral" policy cartel.<sup>157</sup> Finally, there are "jurisdictional" policy cartels, for which the only legal authority is the general mission statement in the statute that established the particular ministry. These cartels are jurisdictional because they are established under the general jurisdictional authority of the particular agency.<sup>158</sup> Despite their technically criminal nature, both

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155. Because these cartels are connected in varying degrees to government policy, the term policy cartels is used. Policy cartels are further divided into three categories based on their legal nature: formal policy cartels, sectoral policy cartels, and jurisdictional policy cartels.

156. These cartels are formal and legal. The scope of a firm's cooperative activity that is exempted from the AML may vary, but the cartel's existence has received formal government approval. The members, actions, and scope of these formal, policy cartels form part of the public record. See *Tokutei fukyo sangyo antei rinji sochihō* [*Declining Industries Law*], Law No. 44 of 1978 (Japan) [hereinafter DIL]; *Tokutei sangyo kōzo kaizen rinji sochihō* [*Structurally Depressed Industries Law*], Law No. 44 of 1978, as amended 1983 (Japan) [hereinafter SDIL].

157. See *Sekiyugyōhō* [*Petroleum Industry Law*], Law No. 128 of 1962 (Japan) [hereinafter PIL]. The PIL clearly contemplates an active supervisory role for MITI in the petroleum industry. It requires each firm to file annual production plans for review by MITI, which then must publish annual five year supply plans for the industry and nation as a whole. MITI uses the firms' production forecasts to decide whether to license new refining capacity, to issue administrative guidance advising individual firms to restrict output, and to develop retail price guidelines for the industry. Because of its broad responsibilities under the PIL, MITI and industry members argued that the PIL implicitly authorized cartelization under the ministry's guidance. In the 1970s, however, the Supreme Court in the *Oil Cartel Cases* determined that the PIL did not authorize such activity and, further, that industry action that violates the terms of the AML, even when undertaken with explicit MITI permission and encouragement, remains subject to criminal liability. See SHINDŌ, *supra* note 3, at 137-49 (analyzing MITI's role in cartelizing petroleum industry in context of *Oil Cartel Cases*).

158. See *Tsūshō sangyōshōhō* [*MITI Establishment Law*], Law No. 275 of 1952 (Japan).

jurisdictional and sectoral cartels have been a common means of carrying out the monitoring and promotional duties of ministries during much of the postwar period. Such cartels are frequently well known and openly discussed.

The Japanese Government, via the FTC, has been reluctant to pursue criminally even clearly illegal policy cartels. The reasons are complex but include an FTC preference to act through warnings and other consultative procedures, rather than formal legal proceedings.<sup>159</sup> Some commentators argue that this reliance on informality is simply a more effective means of enforcement in the Japanese social and cultural context, but extrinsic pressures on the FTC may be more important constraints. The construction firms that are at the center of the cartelization process, known as *dangô*, are a major source of funds for LDP politicians, for example, and any threat to the profits culled from *dangô* would be a serious threat to the politicians.<sup>160</sup>

The tolerance of cartels and the reluctance to prosecute them is more interesting than simply corrupt politicians acting to protect their benefactors. Sectoral and jurisdictional cartels are illegal, but they also are inextricably interwoven with bureaucratic policy and policy implementation.<sup>161</sup> One reason that Jap-

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MITI's mission statement provides, for example, that MITI was established to encourage economic development and stability. MITI oversaw numerous such cartels from the 1950s through the 1970s in a broad range of industries, with the contentious steel cartel of 1964 and 1965, known as the Sumitomo Metals Incident, being perhaps the best known example. The author uses the term "jurisdictional policy cartels" because their sole legal basis is the jurisdiction of the sponsoring agency.

159. SCHOPPA, *supra* note 104, at 219-21; see Harry First, *Antitrust Enforcement in Japan*, 64 ANTITRUST L.J. 147, 155 (1996) [hereinafter *Antitrust Enforcement in Japan*] (stating that FTC "has always preferred to act informally, disposing of the bulk of its cases through warnings or guidance."); HALEY, *supra* note 2, at 162-63.

160. *Id.* The seriousness of the threat to profits from the cartels was illustrated in 1982 when the FTC threatened to move against construction *dangô* and faced such a political backlash that it eventually not only pulled back, but even issued a set of "guidelines" telling the industry precisely how they could conduct *dangô* to avoid being subject to FTC attention. SCHOPPA, *supra* note 104, at 223; BRIAN WOODALL, JAPAN UNDER CONSTRUCTION: CORRUPTION, POLITICS, AND PUBLIC WORKS 36-48 (1996). Even in 1992, after *dangô*-related corruption scandals threatened to bring down the LDP for the first time in almost fifty years sending the mass media into a righteous uproar over political corruption, Construction Minister Kishiro Nakamura intervened openly with the FTC investigations to prevent a series of prosecutions of construction companies involved in *dangô* in Saitama Prefecture. MARK TILTON, RESTRAINED TRADE: CARTELS IN JAPAN'S BASIC MATERIALS INDUSTRIES 112 (1995).

161. For most of the postwar period, the Ministry of Construction ("MOC") has structured the award of public projects to foster implicitly, if not directly create, the

anese ministries go to such lengths to facilitate cartels is undoubtedly the needs of ruling politicians, as exemplified by the flow of contributions from *dangô* or the electoral support of local merchants in the LSRSL context. There are, however, frequently legitimate policy rationales as well. Each ministry views the nurturing of a healthy industry as its primary goal, and it defines health as stability for the weak and small firms and efficiency for the successful ones.<sup>162</sup>

Less noble motives are also at work in the bureaucratic preference for cartels. Cartelization strengthens the trade associations through which privatized regulation typically operates and, thus, makes governance much easier than would fidelity to the statute. Fewer personnel, especially technically trained personnel, are needed, and ministries frequently can appear to avoid making what would be politically dangerous choices. On a personal level, the price cutting, bankruptcies, and other destabilizing phenomena that accompany market discipline would endanger the jobs waiting for bureaucrats upon their retirement from government service.<sup>163</sup>

Cartels, thus, address a wide range of policy, political, institutional, and personal needs of the bureaucrats who facilitate them. The advantages to industry are even more apparent, but only an examination of such cartels in operation can provide an

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*dangô* system. This designated bidder system, under which only a certain number of approved construction companies can bid for government projects, effectively establishes cartel membership. The regular leaking of the supposedly secret "ceiling prices" for acceptable bids guaranteed cartel members the highest possible price for the project. The subsequent publication of all bids meant that the cartel could discover and punish any company that submitted an inappropriately low bid. Just to be sure that private punishment was effective, the MOC would drop any cartel cheaters from the designated list for the next round of bidding. WOODALL, *supra* note 160, at 36-50. This activity is technically illegal, but is conducted under the agency's explicit authority to monitor a specific sector. *Id.*

162. The rationales for stability vary. For the MOC or Ministry of Transport ("MOT") it is often quality and safety. Stable industries with adequate profit margins are supposedly necessary for safe infrastructure projects and transportation networks. For MITI, stability in energy and other basic industries, such as steel or petrochemicals, is justified as necessary for secure supplies for downstream sectors. In other instances, there is a social welfare rationale, as illustrated by MITI's protection of small merchants under the LSRSL and of the cartels under the declining industries legislation.

163. Most bureaucrats have a substantial personal stake in guaranteeing a stable and profitable industry because their most financially rewarding period personally comes in their early 50s after they *amakudari*, or descend from Heaven, descending from their ministry into a company within the sector they previously regulated.



accurate idea of their role in the economy as a whole. While such data are normally difficult to obtain, recent analyses of Japanese industrial policy by U.S. political scientists provide valuable new data on the way cartels operated under Japan's declining industries statutes of the 1970s and 1980s.<sup>164</sup>

## b. Declining Industries Legislation and the Cement Cartel

### i. The DIL and SDIL: Statutory Protection of Declining Industries

Increasing competition from newly industrializing countries in the 1970s and the oil shocks of 1973 and 1979 posed new challenges to MITI: namely, to manage the decline of a wide range of hitherto successful industries.<sup>165</sup> To make matters worse, this was also the period when the *Oil Cartel Cases*<sup>166</sup> confirmed what the FTC, in its episodic bureaucratic struggles with MITI, had long argued. The FTC asserted that informal policy cartels, whether jurisdictional under the MITI Establishment Law or sectoral under statutes like the PIL, were *prima facie* illegal and that the executives of companies participating in policy cartels would be liable to criminal prosecution. The result of these two factors was a series of laws, including the 1978 Depressed Industries Law<sup>167</sup> ("DIL") and its successor, the Structurally Depressed Industries Law<sup>168</sup> ("SDIL") of 1983, aimed at giving MITI the policy tools to manage declining industries. Among these tools was the authority to foster and supervise cartels to cut production capacity in designated industries.<sup>169</sup>

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164. See generally GREGORY NOBLE, REGIMES AND INDUSTRIAL POLICY: THE POLITICS OF COLLECTIVE ACTION IN JAPAN AND TAIWAN 1-54 (ch. 3) (1995) (unpublished dissertation, on file with the author) (analyzing use of cartels in Japanese steel industry during 1970s and 1980s); TILTON, *supra* note 160, at 35-49 (discussing cartel activity in Japanese industry); ROBERT M. URIU, TROUBLED INDUSTRIES: CONFRONTING ECONOMIC CHANGE IN JAPAN 107-15 (1996) (discussing steel industry's efforts to cartelize in 1970s).

165. URIU, *supra* note 164, at 108-06. The management of declining industries did not start with the DIL nor has it been limited to MITI. Textiles went into decline in the 1960s, and when shipbuilding went into decline in the early 1970s, it was under the jurisdiction of the MOT, rather than MITI. See *id.*

166. See LAW AND SOCIAL CHANGE, *supra* note 23, at 184-88 (discussing *Oil Cartel Cases* as challenge to informality in Japanese industrial policy); see also SHINDO, *supra* note 3, at 137-49 (analyzing use of administrative guidance in context of *Oil Cartel Cases*).

167. DIL, Law No. 44 of 1978 (Japan).

168. SDIL, Law No. 44 of 1978, as amended 1983 (Japan).

169. While there are significant differences between the DIL and the SDIL, for the

These laws empowered MITI, after prior consultation with the FTC, to create formal cartels that would not be subject to AML prosecution.<sup>170</sup> The rationale was that cooperation would lead to enhanced efficiencies that would either revitalize the industry or ease its decline.<sup>171</sup> What is most interesting about these cartels is that they lacked the tools necessary to be effective. First, they were voluntary. No firm was forced to join them, and there was no legal control over outsiders. Second, there was no limitation on imports. MITI and the affected industries had proposed including both measures in the legislation, but both were dropped when the FTC and the U.S. Government objected.

The reliance on cartels to carry out economic policy without providing any legal means to control members or to bar new entrants into the market defies economic theory and common sense.<sup>172</sup> Even in the best of worlds, cartels are difficult to man-

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purposes of this Article, the two are treated as a single statute. The SDIL replaced the DIL at the end of the DIL's five year term. Whereas the DIL was limited to capacity cutting cartels, the SDIL authorized joint production, sales, purchasing, product specialization, and mergers as well. By the end of the 1980s, U.S. pressure prevented its renewal or strengthening. Instead, the SDIL was replaced by the Structural Conversion Facilitation Law ("SCFL"), which remained effective until 1994. See *Sangyōkōzō tenkan enkatsuka rinji sochihō* [Structural Conversion Facilitation Law], Law No. 24, of 1984 (Japan) [hereinafter SCFL]. Unlike its predecessors, the SCFL did not allow direct cartelization. Rather, MITI was to advise firms individually on the capacity cutting process. Whether this technical distinction made any difference in the actual process remains to be seen. See TILTON, *supra* note 160, at 48 (presenting pessimistic view of differences resulting from SCFL's procedural changes).

170. LAW AND SOCIAL CHANGE, *supra* note 23, at 90. Under both the DIL and SDIL capacity elimination cartels were exempt from AML attack once approved by MITI. Other types of cartels, however, were still covered by the AML, meaning the FTC essentially had a veto power over cartel activity. See *id.* at 191-92 (analyzing statutory provisions of DIL and SDIL).

171. *Id.* at 188. This rationale is commonly used for various forms of assistance to industries beset by international competition. See Alan Sykes, *Protectionism as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255 (1991) [hereinafter *Protectionism as a "Safeguard"*] (arguing that government assistance is not efficient means of revitalizing or easing decline of industry); see also *Antitrust Enforcement in Japan*, *supra* note 159, at 147.

172. Of course, there are other examples of cartels that are successful without legal means of creation or enforcement. One is the mob controlled cartel in New York City's construction industry. See RONALD GOLDSTOCK ET AL., *CORRUPTION AND RACKETEERING IN THE NYC CONSTRUCTION INDUSTRY: THE FINAL REPORT OF THE NEW YORK ORGANIZED CRIME TASK FORCE 11-100* (1990). The authors assert that the mob has organized a successful cartel in the New York City construction industry for most of the twentieth century. As a result, project costs in New York City are the highest in the United States. *Id.* at 15. The authors point out that the inevitable problem with cartels that lack formal, legal means of compulsion is enforcement, which they refer to as "ra-

age, and the situation in the late 1970s and 1980s was decidedly not the best of worlds. Within each industry a minority of firms opposed cartelization because those firms believed they would thrive in the expected market shake-out. It was natural to expect these firms to resist joining any cartels and to cheat if they did. These industries were, furthermore, internationally noncompetitive. They were losing market share overseas, published domestic prices were substantially higher than world prices, and the standardized nature of the products meant that there was little difference between Japanese and foreign quality. To make matters worse, Japan's trading partners were sensitive to its persistent trade surpluses and would likely object to any detectable barriers to imports. In the face of these threats, the DIL and the SDIL gave the industries and MITI no tools beyond the right to cooperate in a limited range of activities without legal liability.

The result in some sectors was what one would expect. Domestic aluminum production virtually disappeared, a victim of the impact of rising energy prices on a product often described as "congealed electricity."<sup>173</sup> The collapse was not, however, so sudden or uncontrolled that MITI and the industry were prevented from reserving the lion's share of imports for overseas subsidiaries of Japanese firms.<sup>174</sup> MITI also failed to form an effective cartel in the minimill sector of the steel industry, a failure caused not by a flood of imports, but by the constant defection of relatively efficient domestic producers.<sup>175</sup> These failures, however, were the exception. In seeming defiance of market economics, several sectors succeeded in managing their markets so that most firms survived intact, imports achieved little or no market penetration, and domestic prices remained comfortably high. Remarkably, by maintaining export prices well below its

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tionalization," and that the mob played the role of "rationalizing body" in the New York City cartel. *Id.* at 65. MITI and the trade associations played this role in Japan.

173. TILTON, *supra* note 160, at 52-56.

174. URIU, *supra* note 164, at 17. In the aluminum smelting industry, the increase in energy costs made the price differential between domestic and foreign aluminum so high that production fell 97% and nine of ten plants closed in the decade from 1977 to 1987. See TILTON, *supra* note 160, at 50-79 (describing decline of domestic aluminum production in Japan during 1970s and 1980s). Imports replaced virtually all domestic production, although it is worth noting that the industry and MITI were able to save the lion's share of the Japanese market for captive imports controlled by former domestic producers. *Id.* at 58-61.

175. NOBLE, *supra* note 164, at 29-31 (ch. 3).

domestic prices, Japan remained a net exporter in most of these sectors even though its industries were high cost producers of products similar in quality to those produced elsewhere.<sup>176</sup> Despite repeated anxiety in the Japanese media about the hollowing out of the economy, domestic production in most sectors, including chemicals and kiln products like cement, iron, and steel, has not decreased during a period of supposed decline.<sup>177</sup>

Explaining how this feat was accomplished is difficult and complicated. Each industry varies in important ways that affect the ease and means of market control. The role of technology in production, the degree of capital intensity, the political resources of the industry association and its unions, the fungibility of its products, the gap between domestic and world prices, the sensitivity of powerful trading partners to import barriers, and many other factors differ from industry to industry and among products within the same industry.<sup>178</sup> The process of forming and enforcing the cartel thus differed in each instance.<sup>179</sup>

## ii. The Cement Cartel

The method by which the declining industries statutes worked is evidenced by a successful cartel in the cement industry. As is true for most of Japan's designated depressed industries, cement began its competitive decline after the first oil shock in 1973. By 1975 it had received FTC permission to form a depression cartel under the AML. Over the next decade, the industry formed two further legal AML production cartels and a series of illegal and unauthorized price cartels.<sup>180</sup> After investi-

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176. TILTON, *supra* note 160, at 9-11, 139, 171. Cement is a sector dominated by middle income "late developers". It is not a sector where one would expect an advanced nation like Japan to be a leading producer. The product is relatively standardized, advanced or expensive technology plays little role in production, and labor costs are a significant part of overall costs. Japan, furthermore, enjoys no particular advantages in either natural resources or transportation.

177. *Id.* at 11.

178. URIU, *supra* note 164, at 10-21.

179. *Id.* The difficulty of getting data on what are, to reiterate, illegal activities further increases the difficulty in generalization because illegality means that data gathering will be unusually idiosyncratic and dependent on finding sources which may not be readily confirmed or refuted by more conventional sources.

180. TILTON, *supra* note 160, at 89. The FTC also pursued cement producers for unauthorized price cartels in a 1990 case. In this later case, however, the FTC actually initiated criminal action and levied fines of US\$96 million. Because the FTC did not pursue legitimate aspects of the cement cartel, such as the exclusionary boycott, priva-

gations and FTC warnings regarding the private cartels in 1983 and 1984, the industry applied for official designation as depressed in 1984.<sup>181</sup> It remained under MITI protection under the SDIL and its successor the Structural Conversion Facilitation Law<sup>182</sup> ("SCFL") until 1990, when capacity expansion restrictions under the latter were lifted.<sup>183</sup> Throughout this period, designation meant that certain cooperative measures were legally possible and that mergers could take place with lessened FTC scrutiny. At no time during this period, or before or since, has MITI or the industry itself had the legal power to restrict imports or to force compliance with production or price agreements. Under the SDIL and SCFL, neither the earlier AML cartels nor the later sectoral cartels possessed the legal tools necessary to control the market.

It is surprising, therefore, to examine the state of the international cement market as of 1992, after almost twenty years of formally recognized "depression" and "decline" of the Japanese industry. Three of the four countries to export over five million tons of cement in any single year from the 1970s through the early 1990s were Spain, Greece, and South Korea.<sup>184</sup> The fourth was Japan, which was the leading exporter of cement in the period from 1979 to 1986 and again in the early 1990s.<sup>185</sup> Japan was able to achieve this status despite published domestic cement prices that averaged 68 percent higher than import prices, and 154 percent higher than its own export prices between 1986 and 1993.<sup>186</sup> Despite these differentials, imports have never captured even as much as five percent of the domestic market, and in 1992 the import market share was 1.2 percent.<sup>187</sup>

To maintain this degree of market control, MITI and the industry used a combination of public and private efforts that in many important respects resembles regulation in the licensing process for stores, television channels, and transportation routes. The major actors were MITI on the Government side and the

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tized regulation in the cement industry continued into the 1990s. See SCHOPPA, *supra* note 104, at 248.

181. TILTON, *supra* note 160, at 92.

182. SCFL, Law No. 24 of 1984 (Japan).

183. TILTON, *supra* note 160, at 115.

184. *Id.* at 80-81.

185. *Id.* at 81.

186. *Id.*

187. *Id.*

trade associations for the cement and ready-mix concrete industries on the private side.<sup>188</sup> Playing secondary roles were the FTC, without whose acquiescence market management would have been impossible, and the trade associations in the construction industry, without whose cooperation the cement cartel would collapse.<sup>189</sup> In the background were the Ministry of Construction ("MOC"), whose designated bidder system makes *dangô* possible, and the LDP, whose financial interests were served by the entire arrangement and who passed the legislation that created the legal framework for declining industry policy.<sup>190</sup>

At the core of the system was an agreement among the trade associations in the cement, ready-mix concrete, and construction industries to boycott non-member firms. The construction industry agreed to buy only trade association cement, and the cement cartel promised to sell only to members of the construction trade association. If a construction company bought imported cement, for example, members of the cement association would not sell to it in the future. Similarly, the cement association would boycott trucking firms, ready-mix concrete firms, trading companies, or longshoremen who handled or purchased imported cement.

Supporting these private arrangements were formal and informal efforts by MITI, the MOC, the FTC, and other government agencies, including customs officials and local governments. MITI played the central role by helping the cement industry organize and maintain its cartel and by taking a particularly active role in encouraging and monitoring an effective cartel among the many small scale ready-mix concrete companies.<sup>191</sup> The MOC cooperated when necessary to facilitate the relationship between the cement and construction industries, particularly when changes in the basic agreement were needed. The FTC's role was what it has been throughout its history: to ignore exclusionary boycotts due to the need to enforce privatized regulation.<sup>192</sup> Finally, local governments and customs officials are alleged to have attempted to block imports by refusing

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188. *See id.* at 83.

189. *Id.*

190. *Id.* at 84.

191. *Id.* at 90-91.

192. The FTC has almost never pursued exclusionary practices in any context. *See Antitrust Enforcement in Japan, supra* note 159, at 170-73.

to sell land or delaying clearance of South Korean imports.<sup>193</sup>

These arrangements contributed to making the Japanese construction industry the most expensive in the industrialized world.<sup>194</sup> Because Japan's construction market is also the largest in the world, the social cost of this inefficiency is enormous.<sup>195</sup> The cartelization of all the industries involved in construction likely contributed substantially to these high costs in a way that is remarkably similar to the impact of the cartelization of the retail sector on the high cost of consumer goods in Japan.

The most obvious beneficiaries of this arrangement were the cement companies and their employees. Profits were maintained at an artificially high level, and the need to address high costs either through technological innovation or lowered wages and layoffs was reduced. The benefits of the cement cartel to MITI, the MOC, the construction industry, and the ready-mix concrete industry are more complex.

It is at least partially true that the ministries involved were simply following the LDP's instructions, but the interests of the politicians may not be a complete explanation.<sup>196</sup> There is good reason to believe that bureaucrats have their own personal, institutional, and policy reasons for preserving stable industries. A cement industry disappearing under a flood of imports would have much less room for retired bureaucrats.<sup>197</sup>

193. TILTON, *supra* note 160, at 108-09

194. WOODALL, *supra* note 160, at 17.

195. *See id.* at 48. Construction investment as a percentage of GNP in Japan, 18.2%, is more than twice that of the United States, 8.5%, and almost 50% higher than the United Kingdom's, 12.4%, the next highest among advanced, industrialized nations. Per capita spending on construction in Japan, US\$3480, is twice that in either the United States, US\$1630, or the European Community, US\$1690. *Id.* Furthermore, the construction industry is growing faster in Japan than in any comparable country. Between 1987 and 1993 the Japanese market expanded by nearly 50%, and the proportion of the national work force in construction grew from 4.7% in 1955 to 9.6% in 1992. *Id.* The inefficiencies are reflected qualitatively as well. Although the top Japanese firms are unsurpassed, they coexist with a large sector of small construction companies whose "technological capacities [are] only slightly superior to those of medieval builders." *Id.* at 38.

196. *See id.* at 39-40. The classic example is that of Shin Kanemaru, an LDP "kingmaker." *See supra* note 121 (setting out Kanemaru's involvement with broadcasting sector). Police arrested Kanemaru in the early 1990s after discovering over US\$50 million in gold bullion and negotiable securities in a condominium rented by Kanemaru to store the booty from *dangô* payoffs. *Id.*

197. The need for positions with private firms, therefore, is a reason for bureaucrats to foster a healthy industry, but it does not explain why the industry would hire bureaucrats. To justify the *amakudari* system, the firms must see a connection between

Mark Tilton claims that MITI also had a policy interest in preserving domestic production that was independent of the LDP's need for a flow of campaign contributions and its own bureaucrats' desire for secure retirement positions. Tilton argues that MITI saw cement as one of a group of basic industries whose survival was vital to Japanese economic well being. The ministry supported high profits only for domestic production and balked when the cement industry proposed importing Korean cement within the cartel framework. Cartelized imports would have preserved the LDP's source of funds, the profitability of the industry, and its dependence on bureaucratic cooperation and, thus, *amakudari* positions, but it would have done so at the cost of declining domestic production. MITI combined with the FTC to block the plan. The FTC was concerned with effects on prices and MITI claimed that domestic producers becoming importers was inconsistent with structural reform.<sup>198</sup> In Tilton's opinion, therefore, MITI's implementation of the statutes is fully understandable only when the ministry's concern with a stable domestic supply of basic industrial materials is considered as an important and independent motivation.<sup>199</sup>

No matter what explanation of its motivations one accepts, all observers agree that MITI could not have created effective cartels without the industries' cooperation.<sup>200</sup> The system succeeded because of the relationships among industries that both made them interdependent and provided the economic rents that allowed each industry to pay cartel prices to its suppliers. Thus, the construction industry would not have honored the cement or ready-mix concrete exclusionary agreements if they had not been able to charge cartelized prices in turn.<sup>201</sup>

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their good fortune and ministry policy. Sumitomo metals, which had prided itself on its status as the only steel company without an ex-MITI official on the payroll, hired its first immediately after MITI threats to withhold foreign exchange forced it to abide by a production cartel it felt favored its rivals. Similarly, the Cement Association and the Ready-Mix Concrete Federation hired their first retired bureaucrats in 1984 when they decided to join the SDIL framework. TILTON, *supra* note 160, at 92-93.

198. *Id.* at 83, 111-12.

199. *Id.* at 19-21.

200. URIU, *supra* note 164, at 25. MITI had no statutory basis either to compel cartel behavior against reluctant firms or to prevent legal attacks from the FTC.

201. Here is one piece in the puzzle of why the FTC and others allowed the *dangô* system to continue for so long and so openly when *dangô* appears to be merely an unholy combination of political corruption and industrial gangsterism. It may indeed be such a combination, but *dangô* is also at the center of an industrial structure that



MITI's role is most reflective of the distinctive characteristics of Japan's regulatory style in the facilitation of these private arrangements. Limited statutory power meant the ministry had to take a more active role than was usually necessary in the licensing case studies, where the industries needed the ministries' permission or acquiescence to operate. In the declining industries context, however, MITI had no comparable power, and firms could either refuse to join the cartel or cheat if they thought they could prosper in a market shakeout. SDIL cartels were vulnerable not only to internal defections by members, but also to their customers' access to cheaper imports. If the domestic price was so high that it outweighed the costs of rupturing stable relationships with their suppliers and the ministries, MITI had no legal means to prevent customers from turning to cheaper imports.

To overcome these weaknesses, MITI needed strong allies in the ready-mix concrete sector of the cement industry and in the construction industry. In construction, the *dangô* system had long ago created and maintained an effective cartel administered through the trade association. Concrete was more difficult. It was a new industry created in the 1960s and 1970s when the cement industry shifted from selling dry concrete directly to construction companies to selling it through newly created ready-mix companies. The cement companies decided not to create wholly owned subsidiaries. Instead they tried to maintain effective control through the safer and cheaper tactic of creating interlocking *keiretsu* relationships by limited equity investment, loans, and exchanging personnel.<sup>202</sup> These measures might have succeeded if the cement companies had been alone or if there had been substantial barriers to entry, but gravel, construction, and trading companies were also forming ready-mix companies and were independent of cement industry control. By 1977, when the construction industry was suffering from a pro-

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supports a great deal more than the LDP and the construction industry. For the FTC to attempt to eradicate *dangô* root and branch, rather than occasionally pursuing extreme or inappropriate cases, would mean a structural change in the economy that few in Japan desire or consider necessary.

202. TILTON, *supra* note 160, at 89. Onoda Cement, for example, "invested some equity in the ready-mix concrete firms to which it sold cement and dispatched some of its own employees to them in order to exert some control. Cement companies also loaned money to create leverage with ready-mix companies." *Id.* at 89-90.

longed recession between the two oil shocks, there were over 4000 ready-mix concrete companies, and MITI had already identified the industry as a potential source of disunity and excess competition.<sup>203</sup>

A prerequisite to preservation of the cement industry, therefore, was stability in the ready-mix concrete sector.<sup>204</sup> MITI did not have the legal tools to restrain entry into the sector so success depended on the creation of private institutions strong enough to become MITI's partners in gaining control over the sector. MITI took the first step in 1976 when it joined the Cement Association and the Ready-mix Concrete Federation ("Federation") forming the Committee for the Modernization of the Ready-Mix Concrete Industry ("Committee").<sup>205</sup> The Committee in turn organized the industry into industrial cooperatives, which would qualify for government subsidies as small businesses and which could coordinate capacity scrapping efforts, share demand forecasts and investment plans, form joint sales companies, and take other measures to lower production and raise prices.<sup>206</sup> With cement industry support, the Federation had considerable success in expanding membership and participation in the various joint activities. By 1979, ready-mix concrete prices had improved considerably relative to cement prices, reducing the fears of excessive competition in the industry.<sup>207</sup>

The organization of the ready-mix industry was only one part of the industries' and Government's reaction to deteriorating conditions in the construction sector during the 1970s. Various other steps were also necessary before the Cement Association, which did not have a history of close cooperation with MITI, was able and willing to use the statutory framework for declining industries. The FTC had to make clear that independent action by the cement industry was no longer possible, first by the denial of further AML depression cartels and then by warnings against the industry's unauthorized price cartels. Although it is unclear whether the FTC set out specifically to support MITI policy, the result of its actions was to replace an illegal price cartel with the broader and legal SDIL cartel. Because the indus-

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203. *Id.* at 90.

204. *Id.* at 89-91 (discussing Japan's ready-mix concrete cartel).

205. *Id.* at 90.

206. *Id.*

207. *Id.* at 91.

try's previous efforts had lacked both the legitimization and support of bureaucratic guidance and monitoring, it had been vulnerable to prosecution and to defection within its ranks. Once under MITI's aegis, however, the Federation could conduct a range of cooperative activities with political and legal legitimacy. Equally important, the now legalized inter-firm cooperation could serve as the basis for collusion that went beyond the boundaries of the SDIL. While these activities may not have been entirely immune from FTC prosecution, the cover of the legal activities made detection a great deal more difficult.<sup>208</sup> MITI's role as information clearinghouse for SDIL activities enabled it to monitor other activities as well.

At the core of the sectoral policy cartel formed on the basis of the formal SDIL cartel was the triangular agreement among the construction, ready-mix concrete, and cement industries, which was in turn supported by agreements with trading companies, trucking firms, and longshoremen to boycott imported cement. These agreements were in direct conflict with the terms of the SDIL, which pointedly did not authorize any barriers to imports. They were also in violation of the AML. These agreements, however, received widespread support and assistance from local governments and MITI.<sup>209</sup>

If importers were able to find available port facilities and get by customs, they had to find a trucking firm willing to forego future business with domestic companies. The Cement Association's agreement with the truckers' trade association established

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208. *See id.* at 93-101 (discussing formation of cement industry cartel and role of MITI and FTC).

209. *Id.* at 106-10. At least one local government refused to sell land to a Korean company, apparently for protectionist reasons, and customs officials deviated from their prior methods and international practice to require cement importers to use a method of weighing cement, which caused a three month delay and forced the company to build an entirely new US\$250,000 facility. *Id.* at 109. After the facility was completed, officials returned to the previous practice. MITI also contributed its support to these agreements. Before SDIL designation of the cement industry in 1984, testing procedures for Japan Industrial Standards ("JIS") had been the same for all cement. In December 1984, however, MITI made testing more stringent for imported cement and required concrete companies to disclose any use of imported cement. There was no direct disclosure requirement, but companies using imported cement had to have the tests done by a semi-public testing organization, making clear the identity of companies using imported cement. The additional testing requirements were expensive and time consuming, and disclosure provided the industry with immediate and reliable information on violators of the boycott. *Id.*

a registration system to limit the former to use of the latter's trucks. In return, the truckers refused to handle imported cement. If, nonetheless, cement importers managed to find a truck, the Cement Association followed the trucks to discover which ready-mix companies were using imports. Domestic cement companies then tried to intimidate the "criminals," as they called them, by cutting off supplies of domestic cement. While these practices were not on the public record, participants and trading companies spoke openly about them in the press. One trading company official stated, "[g]iven our relationship with the domestic producers we cannot start importing immediately. But the import business is certainly attractive."<sup>210</sup> An official of the Committee on Special Measures to Deal with Imports and Exports formed by the Cement Association spelled out its policy to refuse to deal with any importers as follows:

Japanese importers will have to bear all the costs of facilities for imports and sales on their own. They will have no support from [domestic cement] makers. Even if they bring in cheaper imports, there will be high costs for them, and the price will end up being the same as for domestic cement.<sup>211</sup>

Despite the openness of these activities, the cement industry did not have much reason to fear FTC intervention. Although the FTC had pursued price cartels and even attacked excessive *dangô* on occasion, it had never disturbed a concerted refusal to deal with imports, despite repeated reports of such activities.<sup>212</sup>

Despite the acquiescence of the FTC, the active encourage-

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210. *Id.* at 107.

211. *Id.* at 107-08.

212. Some commentators attribute this reluctance to a policy preference for attacking price cartels that the FTC believes have a more direct and immediate impact on domestic prices rather than a willingness of the FTC to join in creating barriers to imports or even to a general weakness *vis-à-vis* other agencies and the LDP. Other commentators argue that the FTC does not consider all cartels as equally illegitimate and is most concerned with cartels that are inconsistent with national policy. Conversely, policy cartels, especially sectoral policy cartels formed with the active encouragement of another agency with specific statutory responsibility to supervise the industry, are often considered legitimate. When the cartel is an integral part of national policy, or when the FTC had a voice in the formation and design of the cartels, as was likely the case in the cement cartel of 1984 and other cartels under the SDIL, the chance of interference is further lessened, even though the cartels are likely to go beyond the legal authority granted by the statute. See generally SCHOPPA, *supra* note 104, at 219-21; *Antitrust Enforcement in Japan*, *supra* note 159, at 147; LAW AND SOCIAL CHANGE, *supra* note 23, at 169.

ment of the MOC and MITI, occasional harassment of imports by local governments and other officials, and the best efforts of the trade associations, the price differential between imported and domestic cement was so great that the cartels did not hold perfectly. In 1984, both South Korean and Taiwanese producers succeeded in selling enough cement to gain a 0.3 percent share of the Japanese market. The response of Japan's Cement Association, besides the measures designed to stop further imports detailed above, was to approach its Korean and Taiwanese counterparts with an offer to share the market in return for their cooperation. The part of the deal that called for Japanese cement companies to import Korean cement was blocked by MITI and the FTC as inappropriate to structural adjustment under the SDIL, but the Association's efforts to convince their foreign rivals to profit from rather than destroy the domestic cartel appear to have been generally successful. Korean cement was thereafter priced below domestic cement, but substantially above the world price. A spokesperson for the trading company that eventually imported Korean cement expressed his philosophy as, "[w]e will not set prices so as to provoke domestic manufacturers. It is a distribution company's duty to make sure a situation does not develop where bad money drives down prices, and I intend to live up to this duty."<sup>213</sup>

This pattern of illegal cartelization directed at a specific policy goal has been repeated many times in the course of industrial policy toward "troubled industries." Robert Uriu describes similar patterns among a wide range of industries under a number of statutes, including shipbuilding, textiles, coal mining, cotton spinning, paper, synthetic fiber, steel minimills, and integrated steel.<sup>214</sup> Tilton recounts similar efforts in other industries designated under the DIL or SDIL, including aluminum, petrochemical, and steel.<sup>215</sup> The PIL has been the vehicle for sectoral policy cartels in the petroleum industry, including the price and production cartels that were the subject of FTC prosecution in the *Oil Cartel Cases* and the gasoline import cartel.

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213. TILTON, *supra* note 160, at 111.

214. See generally URIU, *supra* note 164, at 45-236 (analyzing cartelization in various domestic Japanese industries, including shipbuilding, cotton spinning, paper, and steel).

215. See TILTON, *supra* note 160, at 50-79, 122-68, 169-89 (discussing illegal cartelization efforts in aluminum, petrochemical, and steel industries in Japan).

Despite the variety of industries and legal and political circumstances, certain commonalities can be found and related to the traits that characterized our previous three case studies. The most striking is perhaps the divergence from legal rules. Inter-industry agreements to honor each other's cartels and to boycott imports were at the core of declining industry policy, and yet the underlying statutes did not permit the collusive control of either domestic defectors or imports.<sup>216</sup> Private actions intended to accomplish either, with or without MITI encouragement, were violations of the AML despite the informal consultations with the FTC that in practice eliminated the chance of criminal prosecution. The statutes may have broadened the industrial policy process by involving the FTC, a step made legally and politically necessary by the *Oil Cartel Cases*, but neither statute gave any entity the legal power to enforce the results of such consultation. Thus, the Cement Association was not able to use legal means to prevent imports; it had to resort to private efforts, such as following renegade truckers and threatening defecting concrete companies with retaliation, or rely on government obstructionism, such as the manipulation of the testing requirements for imported cement.<sup>217</sup>

Thus, private bargaining among the involved industries and among the various firms within the industries replaced the application of statutory norms or formally promulgated administrative regulations. As a result, the implementation of declining industries policy was considerably easier for MITI than it would have been if MITI had not been able to rely on private actors to formulate and carry out much of the policy. Declining industries policy, therefore, shares an ease of regulation with the previous case studies, but there is a distinct difference in degree. Unlike in the LSRSL context, MITI could not simply refuse to accept notifications and allow the private bargaining to follow its own course more or less undisturbed.

Declining industries policy required active bureaucratic intervention on at least two levels. First, as a prerequisite to delegation, MITI had to be certain that the industry had the organizational strength to control the market. In some sectors, as in

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216. *Id.* at 17-18.

217. See *supra* note 209 and accompanying text (discussing JIS and manipulation of testing standards for cement).

ready-mix concrete, this meant strengthening the trade associations.<sup>218</sup> Second, the lack of legal means of market control meant that bureaucratic intervention was necessary, even with strong trade associations. The formal reporting requirements under the statutes, which could be used indirectly to discover the use of imports, meant MITI could act as an information clearinghouse for the cartel. MITI's power to manipulate relevant rules or procedures, such as the testing requirements for imported cement, meant that MITI could erect additional barriers to imports, supplementing the industries' own means of control.<sup>219</sup> These did not need to be permanent or formal. If timed correctly, they could play a decisive role in discouraging imports without becoming visible enough to become a trade issue.

B. *The Limitations of Privatized Regulation: The Entrepreneurial Exception*

Privatized regulation does not always succeed. Three instances where privatized regulation failed entirely or partially to achieve the sponsoring agency's goals include the gasoline import cartel organized by MITI under the PIL, the declining industries cartel in the minimill sector of the steel industry, and attempts by local governments to control land use, specifically the size and shape of high rise buildings in residential areas. In each instance, entrepreneurs challenged the adjustment process, revealing the limitations and weaknesses of the privatized regulation model.

One of the keys to privatized regulation is a cooperative private sector with the unity and cohesion to create, monitor, and enforce agreements. Entrepreneurs necessarily threaten sectoral unity. They often introduce new ideas or technology and tend to ignore group interests in favor of their own goals, which are often growth, rather than maintenance, of market-share. They are also willing to trade assurance of survival for the chance of greater profits and frequently disdain the rhetoric of consensus and harmony that permeates privatized regulation in favor of the iconoclastic rhetoric of individualism and competition.

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218. TILTON, *supra* note 160, at 92, 100.

219. *Id.* at 101.

### 1. The Lions Oil Incident

Sometimes control of entrepreneurs is relatively easy, as when the high costs of entry create a natural oligopoly and increase the possibility of consensus, which was arguably true in broadcasting and many declining sectors. Alternatively, trade associations in cooperation with government agencies may take direct action to enforce the cartel, as was characteristic of the interlocking cement-concrete-construction cartel, which required constant maintenance through devices ranging from following "criminal" trucks to shifting customs standards. When active enforcement is difficult, embarrassing politically, or simply too expensive, paying the entrepreneur to comply may be the cheapest and most effective means of control. In some circumstances, however, none of these measures works, and extraordinary measures become necessary. Such was the case with Taiji Satô, founder of the Lions Oil Company.<sup>220</sup>

To many Japanese and U.S. commentators fed up with what they characterized as "Japan Inc.," Satô was a dream come true when he appeared on the international scene in 1983. Instead of the scion of an established family, Satô is the illegitimate son of the spurned mistress of a small time blackmarketeer. Instead of the buttoned down graduate of an elite university, he is the graduate of a junior college, all the more remarkable because two year colleges in Japan are predominantly finishing schools for prospective brides and overwhelmingly female. Moreover, as a former amateur fighter and street brawler, Satô prefers boxing to golf.<sup>221</sup>

Most importantly, however, Satô knew how to work the market and had a taste for profit that he pursued vigorously and with utter disregard for its cost to his competitors. Satô began with a single, independent gas station. He bought surplus gasoline on the spot market, priced aggressively, and soon was able to steal customers from his affiliated competitors. Rival station owners cut his hoses, adulterated his tanks, physically attacked him, and sent dozens of drivers to his stations for ¥500 of gas, each paying with ¥10,000 notes and insisting on the full panoply of service,

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220. See Frank K. Upham, *The Man Who Would Import: A Cautionary Tale About Bucking the System in Japan*, 17 J. JAPANESE STUD. 323, 327 (1991) [hereinafter *Cautionary Tale*] (describing Lions Oil Incident).

221. See generally *id.* (discussing Taiji Satô's personal background).



including emptying ash trays, checking the air, and wiping the windshield.<sup>222</sup> When Satô complained of harassment, the police not only refused to protect him—he was the problem, they argued, for “destroying order in the industry”—but actually arrested him for using excessive force in his own self defense.<sup>223</sup>

Satô prospered despite his tormentors.<sup>224</sup> He quickly expanded to a chain of stations and began looking for a source of gasoline that would be both cheaper than the domestic spot market and would allow him independence from the domestic refiners whose control of the distribution system denied him complete market freedom. He quickly realized that imported gasoline would meet both these requirements. Because of the PIL-based sectoral cartel, Japanese gas prices were well over the world market price, and the diversity of the world's petroleum refining industry meant that finding suppliers should not be a serious problem. Furthermore, importing gasoline, as well as other refined petroleum products, was perfectly legal.<sup>225</sup> All Satô had to do under the PIL was notify MITI of his plans.<sup>226</sup>

Satô found his supplier in the Singapore Petroleum Company, which already had a lucrative business selling naphtha to Japan with MITI's blessing, and secured the necessary line of credit from his long-term bank, Jônan Credit Bank. Satô filed the necessary documents on December 3, 1984. The MITI official receiving the notification objected that his action would undermine the national policy of supporting domestic refining capacity and maintaining low kerosene prices. Satô simply responded that he had a legal right to register and that he would leave national policy to others. On December 6, Satô held a press conference to announce that he was importing 3000 kiloliters of gasoline and planned to sell it at ten percent below the

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222. *Id.* at 328.

223. *Id.*

224. *Cautionary Tale*, *supra* note 220, at 328. Lions' survival illustrates the fundamental weakness of privatized regulation, the ability and willingness of cartel members to cheat. To survive, Lions had to have gasoline, the only source of which were the refiners that constituted the cartel and that were in cartelized relationships with Lions' retail competitors. That Satô seems never to have had difficulty getting gasoline from domestic refiners means that he was always able to find refiners willing to sell to him on the spot market despite the threat he posed not only to his retail rivals, but also potentially to the survival of the import cartel.

225. *Id.* at 329.

226. PIL, Law No. 128 of 1962 (Japan).

current prevailing price.<sup>227</sup>

The tanker full of 3000 kiloliters of Lions Oil gasoline, accompanied by a fleet of small boats and helicopters from the domestic and international media, entered Kobe harbor on December 28, 1984. The ship was duly offloaded into bonded storage tanks to await customs clearance on January 7, 1985. Sensing that a dramatic victory over establishment Japan, a victory unprecedented at least in the degree of international attention and interest, was soon to be his, Satô passed the New Year's holiday in a celebratory glow.

Satô's victory celebration ended on January 4 when the manager of Jônán Credit Bank arrived at his office. Skipping the usual New Year's greetings, he tearfully reported, "[w]e can not continue financing! It's not my idea, but . . . . We just can't finance any company that does not follow national policy."<sup>228</sup> It appears that the Ministry of Finance ("MOF") had issued guidance against granting credit to any company violating national policy and Jônán Credit Bank's headquarters would not allow the manager to disregard the MOF's instructions, despite their legally voluntary nature. Without credit, Lions Oil could not pay the customs duties due in three days and Satô faced the prospect of imminent ruin.

Satô was rescued by an unlikely savior. On January 7 and 8, Satô went to MITI headquarters and signed an agreement formally accepting MITI's administrative guidance against the import of gasoline and renouncing any intention to import gasoline in the future. Satô then signed a written request that MITI use its good offices with the cartel to find a buyer for the current cargo at commercial rates, and assure future allocation of gasoline from cartel members at the previous conditions and prices.<sup>229</sup> Thereafter, Nippon Oil, whose president was the chairman of the Petroleum Association of Japan and, thus, the titular chief of the cartel, agreed to purchase the offloaded gasoline. To make sure that all watching understood the import of their victory, MITI and the association required that the purchase not go forward under the official designation of "gaso-

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227. See *Cautionary Tale*, *supra* note 220, at 330.

228. TAJI SATÔ, *ORE WA TSÛSANSHÔ NI BARASARETA [I WAS BUTCHERED BY MITI]* 1, 147 (1986).

229. *Id.* at 162-63.

line", which would have been a formal violation of national policy, but as "naphtha."<sup>230</sup>

Despite his apparent capitulation, Satô was not finished. He immediately began looking for a secure line of credit and a new import contract. He soon found the necessary financing from a variety of new sources, including a foreign bank, but finding the gasoline was more difficult. First the Singapore Petroleum Company, mindful of its profitable naphtha business, refused a second contract. Satô headed for the Philippines on February 13, where he signed a contract for 4500 kiloliters to be delivered in April. The Japanese Government countered with a threat of foreign aid delays to the Philippines, however, and by April the deal was dead. Finally, Satô thought that he had found a supplier, an undisclosed People's Republic of China refinery operating through a Hong Kong broker, that was beyond the reach of Japanese pressure. Satô held another press conference on May 24 to announce that a tanker with cheap gasoline would be arriving in Osaka on June 2.<sup>231</sup>

The tanker never arrived. When Satô called his broker, he was told that a previous report that the ship had been loaded was erroneous. Further inquiries indicated that some unexplained "difficulty in production" had caused an indefinite delay. Satô eventually learned from Chinese representatives that they could not export gasoline to Lions Oil at that time. They would, however, be glad to sell him naphtha.

Satô was defeated, the crisis was over, and national energy policy was safe. Satô had successfully demonstrated, however, the vulnerability of the gasoline cartel to a determined and sophisticated attack. Although Satô was no longer in a position to challenge the cartel, other entrepreneurs undoubtedly waited in the wings. As a result, MITI and the Petroleum Association convinced the cabinet that they needed further legal power to maintain the cartel in the future, and in 1985 the Diet passed the Provisional Measures Law on the Importation of Specified Petroleum Products.<sup>232</sup> The law banned the import of gasoline with-

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230. *Id.*

231. *Id.* at 135-44. This arrangement was particularly gratifying to Satô because it reprised the strategy of one of his personal heroes, Kôjirô Matsukata, who had defied government and cartel wishes by importing "red oil" from the Soviet Union in the early 1930s. *Id.*; SAMUELS, *supra* note 5, at 175-76.

232. *Cautionary Tale*, *supra* note 220, at 336. The Provisional Measures Law on the

out a permit and established, as necessary criteria for a permit, that the prospective importer have domestic refining capacity and adequate storage facilities. Because the petroleum industry already suffered from overcapacity, no outsider was likely to invest in the refining capacity or storage facilities necessary to meet these criteria, which meant that the law effectively limited import permits to the members of the existing gasoline cartel. The law, disingenuously described by MITI to the international media and its trade partners as a "liberalization" of the gasoline market, had transformed the illegal sectoral cartel into a legal cartel directly enforceable by compulsory administrative orders.

Satô entitled his memoir of these events *I Was Butchered by MITI* and successfully portrayed himself to the media as a free trade warrior slain by the greedy oil companies and the all powerful MITI.<sup>233</sup> The story is more complicated. Satô had defied the rules of privatized regulation and come within a hair of success. Moreover, the path was open to others to attempt to break the cartel after securing a foreign line of credit. Stopping such attempts likely would have required increasingly open bullying of foreign governments, companies, and banks, a cost much too high for Japan to pay more than once.<sup>234</sup> Instead, the Government decided to forsake privatized regulation and move to straight command and control regulation by requiring a license to do what had previously been legally unrestricted.

Formalizing regulation in the petroleum sector ran few risks. Only established domestic refiners, all cartel members, could qualify to import gasoline, and none of the refiners was in the economic position to risk open market competition.

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Importation of Specified Petroleum Products was passed in December 1985 and expired in 1996. See *Tokutei sektyuseihin yunyû zantei sochihô* [Provisional Measures Law on the Importation of Specified Petroleum Products], Law No. 95 of 1985 (Japan).

233. See *Cautionary Tale*, *supra* note 220, at 323 (describing Lions Oil incident via review of Satô's book). The full story of the Lions Oil Incident may never be publicly known. MITI officials argue privately that Satô was never really interested in importing gasoline or breaking the cartel. They argue that Satô instead intended from the beginning to extort a payoff from the Petroleum Federation. At the time, there were rumors to the same effect, stating that Satô had sold some of his stations to major refiners at inflated prices as part of the payoff. Such factual ambiguity is precisely what makes privatized regulation both possible and so resistant to attack.

234. The U.S. Government was largely silent during the Lions Oil saga, despite the intense media attention. The reason, according to one United States Trade Representative source, was that U.S. refiners were not in a position to export gasoline to Japan at that time.

Neither MITI nor the industry, therefore, needed to worry that a member would apply for an import permit without thorough consultation with the trade association and MITI itself. Many sectors of the regulated economy, however, are not so settled. The prospect of an outsider or defector makes formalization much riskier, because it opens up the process to the possibility of direct judicial review and the straightforward application of statutory criteria to a process that all participants, save the outsider, would prefer to remain informal. It was generally more preferable to manage policy cartels informally, putting up with occasional cheating, than to exercise formal, legal power and run the risk of placing control over the particular sector's future in the hands of the courts or, even worse, the market.

## 2. The Minimill Sector<sup>235</sup>

Another episode of outlaw entrepreneurs is the story of Tokyo Steel Manufacturing ("TSM") and its father and son presidents, Tarô and Masanari Iketani. Although personally more conventional, the Iketanis shared both Satô's acute business sense and his vigorous opposition to government or private manipulation of the market. Unlike Satô, however, they were successful in their defiance of cartelization and triumphed in a thirty year war with MITI, the steel cartel, and the general trading companies.<sup>236</sup>

Minimills employ a different technology from the more familiar integrated steel mills. Instead of using blast furnaces to process iron ore into pig iron and then steel, minimills use electric arc furnaces to turn scrap into finished steel products. They operate on a much smaller scale and are much more flexible in their production functions. Until recently, they occupied a marginal niche within the steel industry, producing relatively low quality and undifferentiated products sold primarily to the construction industry. Within Japan minimills traditionally did not enjoy the long term contracts, stable financing and marketing relationships, and subdued competition that characterized the integrated mills. These apparent disadvantages, however, dis-

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235. This section of the Article relies heavily on the unpublished work of Gregory Noble. See generally NOBLE, *supra* note 164, at 1 (ch. 3) (analyzing Japanese industrial policy in steel minimill sector). The works of Uriu and Tilton confirm Noble's conclusions.

236. *Id.* at 5 (ch. 3).

guised unappreciated competitive advantages. Compared to blast furnaces, electric arc furnaces can be turned on and off cheaply, can operate at low production volumes efficiently, and can be built, upgraded, moved, and shut down easily. This flexibility combined with the Iketanis' willingness to introduce new technology and enter new markets to enable TSM to flaunt the interests of managed competition and emerge victorious.<sup>237</sup>

Minimills were a small and unstable adjunct to the steel industry in the 1960s. They consisted largely of independent family firms with only loose ties to the integrated firms that dominated the industry. They were useful for recycling scrap and filling small lot orders, but subject to the wide fluctuations of international scrap prices on the supply side and the cyclical nature of the construction industry on the demand side. Their financial instability made them vulnerable to acquisition by the integrated companies, and despite the Government's willingness to mediate market sharing agreements to help them survive, many were acquired in the 1950s and 1960s and converted into downstream fabricators and dignified resting places for executives retiring early from the integrated firms.

In the early 1970s, minimills were in a period of rapid expansion.<sup>238</sup> The capacity of minimills increased sixty percent from 1972 to 1974, and the concern among MITI bureaucrats shifted from protecting minimills from acquisition, to controlling their investment rate and encouraging self-restraint. Because steel prices were high, however, the minimills were economically successful and largely uninterested in cooperation. MITI realized that discipline could be imposed, reckless expansion checked, and excess competition avoided only by consolidation. MITI reversed its previous policy of protecting minimills from competition and urging the integrated steel makers to enter the minimills' markets and establish "cooperative tie-ups" with them. This consolidation through "adjustment" remained the policy of both MITI and the industry for the next twenty years, extending over several periods of boom and bust for the minimills.<sup>239</sup>

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237. See generally *id.* (discussing background of Japanese minimill sector).

238. *Id.*

239. *Id.* at 10-11 (ch. 3). This policy was pursued not only by MITI and the integrated steel industry led by Nippon Steel, but also with the cooperation of the general trading companies, the nine regional electricity companies, and any others who could

Fluctuations in construction demand, high levels of investment-related debt, and trading company and government support over the next several business cycles enabled the major steel companies to bring many of the independents under their control.<sup>240</sup> MITI worked to accelerate the consolidation of the industry through the promotion of mergers and the encouragement of production, investment, and price cartels. Its role was classic "adjustment": facilitating industry groups with names like Management Committee on Basic Problems that conducted surveys and invariably advocated concerted measures to reduce capacity; arranging private financing for firms that cut production; using its regional offices to monitor cartel activity; mediating market allocation agreements; creating loan guarantee funds for cooperative firms; ensuring that government procurement for aid to developing countries was limited to suppliers complying with the appropriate pricing and investment conditions; urging general trading companies to refrain from undercutting cartel prices; and generally running interference for the industry's goals in the larger political and bureaucratic world.<sup>241</sup>

These efforts bore fruit. Many independent firms were absorbed into the integrated companies, but the mainstream met failure at one important point, the control of outsiders. Except for a brief period when the FTC approved a recession cartel under the AML,<sup>242</sup> MITI lacked legally compulsory measures to enforce jurisdictional cartels. TSM in particular resisted MITI's legally, non-binding tools of industrial policy. The Iketanis ridiculed the rhetoric of duty and harmony and talked instead in the language of competition and efficiency.<sup>243</sup> Above all, Masanari Iketani urged that steel should not become another perpetual dependent of the government like the textile industry.

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bring leverage to bear on the minimills to give up their independence and join the mainstream of the steel industry.

240. The time period under analysis has been compressed for purposes of this Article. Not all of the devices mentioned were used during any particular period, but all were present over the period under discussion, from 1975 to 1995.

241. NOBLE, *supra* note 164, at 12-31 (ch. 3). There were reports that MITI even "cheated" on its own cartel by offering permission to build new capacity in the future if independent firms would comply with the cartel. *Id.* at 29 (ch. 3) (describing incident in 1977 that convinced three of nine remaining outsiders to defect and join mainstream cartel).

242. *Id.* at 21, 24-25 (ch. 3).

243. *Id.* at 14 (ch. 3). For example, Iketani, at a time when MITI was pressing for capacity reduction in order to raise prices, cut TSM's prices.

Furthermore, TSM was in the financial and economic position to ignore the threats of retaliation and prosper without the security of cartels. TSM had no debt, had constantly streamlined its operations, and used the newest technology.<sup>244</sup> By the mid-1970s when the steel industry and MITI were attempting to sustain the cartel, TSM had transformed itself from a marginal player into a firm capable of taking advantage of the inherent flexibility of minimills not only to survive, but also to move into the heretofore sacrosanct markets of the integrated mills.

Economic resources are not determinative in the decision to resist or cooperate with the efforts of privatized regulation and are not sufficient by themselves to succeed. Almost by definition, the targets of "adjustment" are economically successful firms. What TSM had besides deep financial resources and a technological edge was entrepreneurial leadership willing to spurn the guaranteed profits of going along and to take the inevitable risk of competition, even in the face of industry and bureaucratic hostility. The Iketanis were not ready to relax and enjoy the fruits of their efficiency within the mainstream, even if this included the chance to be the leader of the "convoy."<sup>245</sup>

TSM also had powerful allies outside the steel industry. When Satô of Lions Oil was holding his press conferences promising cheap gasoline to Japanese drivers, no one except a bemused international media seemed to take his side. The underlying rationale of MITI's energy policy, independent refining capacity and cheap kerosene for heating Japanese homes, made a lot of political, if not economic, sense to many groups, including the LDP, the FTC, major Japanese banks, and the *Keidanren*. A breakdown in the national gasoline cartel had little to offer to most important players, and the refiners' cartel did not directly threaten the economic independence of other sectors. Giving the steel industry and MITI the tools necessary to rein in TSM, however, was opposed by the FTC, a minority faction within the LDP, most opposition parties, editorials in the *Nihon Keizai Shinbun*, and significant elements within the business elite, including leaders of the construction industry.<sup>246</sup>

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244. *Id.* at 15 (ch. 3).

245. *Id.* at 43 (ch. 3). Among the carrots offered for cooperation was the chair of the trade association.

246. *Id.* at 25-28 (ch. 3). These entities opposed MITI's draft of the SDIL.



As a result of this political disunity, the steel industry and MITI were never successful in acquiring the legal power to enforce the cartel directly. Persistent efforts by MITI and the steel industry to enable, encourage, and coerce the absorption of the minimills into the mainstream, nonetheless, succeeded incrementally. With each market downturn, a few more independent firms were cajoled or coerced into mergers and tie-ups with major producers. By the late 1980s, only TSM remained defiantly outside the mainstream. TSM continued on as a strong independent competitor, even though other minimills, acting in conjunction with the wishes of their larger parent firms, overtook TSM in terms of marketshare.<sup>247</sup>

### 3. Land Use Control by Local Governments

Local efforts to control land use began in the early 1970s when urban and suburban governments used a form of administrative guidance known as "outline guidance" to slow down and regulate real estate construction.<sup>248</sup> Outline guidance required real estate developers to discuss their construction plans with neighboring residents and adjust them in order to gain the residents' approval.<sup>249</sup> Because municipalities did not have the legal authority to pass binding ordinances controlling land use, outline guidance did not have the force of law, and cities could not

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247. *Id.* at 39-40, 46 (ch. 3) (discussing fate of other "maverick" minimill firms in Japan).

248. This section is based on the following work: TATSUO INOUE ET AL., *KYŌSEI HE NO BŌKEN [THE CHALLENGE OF CONVIVIALITY]* 8-35, 122-90 (1992) (defining "conviviality" and application of conviviality to land use); Kyōko Isa, *Kunrin suredomo kinō sezu: Jidai ni okurehajimeta nihon no hōritsu [Reigning but not Functioning: Japanese Law Behind the Times]*, AERA, July 7, 1992, at 24; Mark Ramseyer, *On the Non-Reviewability of Administrative Guidance and Other Myths*, (unpublished draft on file with author); Tsuneo Suzuki, *Yōkōshidō no fujunshu to todokedesho no henreisoichi [The Return of Notifications Because of a Failure to Obey Outline Guidance]*, comment on the Judgment of the Utsunomiya District Court of Feb. 28, 1991 (on file with author); *Musashino shichō kyūsui kyōhi jiken jōkokushinkettei ni tsuite [Regarding the Decision in the Appeal of the Case of the Refusal to Supply Water by the Mayor of Musashino City]*, 954 JURISUTO 31 (Apr. 15, 1990); *Yōkōshidō no aratana tenkai [New Developments in Outline Guidance]*, NENPŌ JICHIGAKU, 1994, at 94; Katsuya Uga, *Yōkōshidō: Futankin o chūshin toshite [Outline Guidance with a Focus on Exacted Payments]*, 880 JURISUTO 106 (Mar. 15, 1987); Michael Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923 (1984).

249. Young, *supra* note 248, at 931-32. Outline guidance also generally required developers to donate land or money for public services. See Uga, *supra* note 248, at 106; Young, *supra* note 248, at 923. This Article focuses on the negotiations component because of its apparent similarity to privatized regulation under the LRSRL.

enforce it directly. Instead, unless the developer complied with the guidance, cities refused to supply municipal services, such as water or sewage hookups, or grant permits necessary to construction, such as access to city streets for oversize vehicles.<sup>250</sup>

On the surface, outline guidance reproduced the situation faced by large stores under the LSRSL. Whenever a developer wanted to build a high rise building in a residential neighborhood, developers faced open-ended negotiations with a diffuse group of adversaries, each potentially seeking self-interested concessions.<sup>251</sup> There were, however, fundamentally important differences. In the LSRSL context, the regional MITI office may not have had the legal right to refuse to accept notifications, but MITI's Establishment Law did give MITI jurisdiction over the distribution industry. The LSRSL, furthermore, gave MITI specific power to structure the terms of a large store's opening. The Construction Standards Law ("CSL"), in contrast, denied municipalities jurisdiction over construction standards and the design plans of the built environment.<sup>252</sup> The law gave those powers exclusively to the MOC and the central government. The localities' position in terms of legal resources, therefore, was substantially weaker than that of any of the agencies discussed thus far.

The municipalities' economic or social situation exacerbated their legal weakness. There was no way to create a win-win situation similar to those created by cartelization in privatized regulation in other sectors. Any concessions wrested from the builder meant higher costs or lower profits with little opportunity to pass them on to the eventual purchasers.

The political situation was also very different. In the LSRSL context, MITI was acting consistently with dominant political

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250. Young, *supra* note 248, at 932-33. Had the guidance been a valid local ordinance, the city could have enforced it directly, perhaps with fines for excessive height or orders to halt illegal construction. Local governments, however, did not have the legal power to enact building requirements that went beyond those set by the MOC under the Construction Standards Law. See *Kenchiku kijunhō* [Construction Standards Law], Law No. 201 of 1950 (Japan) [hereinafter CSL]. Local governments possessed delegated jurisdiction over key permits and services, but their power was derivative of the central government and could only be exercised in accord with the underlying statutes for road transport, water, sewage, and so forth. Young, *supra* note 248, at 932. Cities had no legal right to withhold or condition approval on grounds that the developer had not secured the permission for the proposed construction from neighboring parties. Isa, *supra* note 248, at 24.

251. Young, *supra* note 248, at 932, 942.

252. *Id.* at 932.

forces on both the national and local levels. Until the beginning of the SII talks, no one was actively opposing the LSRSL because no organized interest was being hurt by it. Similarly, "adjustment" in the broadcasting and transportation industries was undertaken with the approval of most if not all powerful groups affected. In declining industries policy, the perceived need for stability of supply in basic industries and the economic rents generated by effective cartels insured general political support.

The municipalities issuing outline guidance, on the other hand, were out of the mainstream politically. They were typically controlled by anti-LDP coalitions or the Japan Socialist Party. The LDP and the central government opposed outline guidance and worked actively to eliminate it both through the MOC, whose bureaucratic, political, and legal authority outline guidance openly disdained, and eventually through the Ministry of Justice ("MOJ").

To summarize, local governments were attempting to force land developers to make significant financial sacrifices without the slightest legal authority. Nor did local governments have any resources with which to reward developers in return for cooperation. Although often passionately supported by their own constituents, local mayors were opposed by the LDP, a united central bureaucracy, and the relevant business community.

Into this setting came Kiharu Yamada, owner and operator of Yamaki Construction Company and a vigorous opponent of outline guidance, particularly as practiced by Musashino City, a Tokyo suburb known for its early and aggressive use of the practice. Yamada's approach to informal requests for cooperation with government policy is reminiscent of Lions Oil's Satô's response to MITI's evocation of national policy: "You're ordering something that ain't a statute or a regulation, and you're forcing it on us. You're violating the separation of powers." As a parting shot to Mayor Kihachirô Gotô of Musashino, Yamada relied on that supposed favorite U.S. aphorism, "You've got a problem? Sue me."<sup>253</sup>

Yamada then proceeded to honor the guidance primarily in the breach and reacted with vigorous litigation whenever challenged by either the city or neighbors. The litigation soon be-

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253. Ramseyer, *supra* note 248, at 19 (quoting Kuni v. Gotô, 1114 HANREI JIHÔ 13 (Tokyo Dist. Ct., Feb. 24, 1984) (Japan)).

came the focal point of a two decade battle between Gotô and Yamada. The latter initially sued the city in the 1970s for injunctive relief when faced with refusals to respond to requests for water and sewage hookups, then followed up with claims for compensation for damages suffered during the delay. Yamada was joined in his battle by the MOJ, which prosecuted Gotô in 1978 for criminal dereliction of duty in refusing to act on Yamaki's application for water service. The Supreme Court eventually affirmed Gotô's conviction in 1989.<sup>254</sup> The ultimate judicial insult, however, was Yamada's successful taxpayer's suit requiring Gotô to repay Musashino City for the cost of the mayor's criminal defense.<sup>255</sup>

The result of this successful litigation campaign was a series of suits by other contractors in the early and mid-1980s requesting return of funds contributed to local infrastructure funds. Although generally unsuccessful in the lower courts, the Supreme Court decided in their favor in a 1993 decision<sup>256</sup> that essentially ended the twenty year history of coercive outline guidance with a ringing reaffirmation of the legal nature of administrative guidance in general and outline guidance in particular stating, "outline guidance is not based on law. It is, for the [city], simply a set of internal standards that cover the administrative guidance to be given entrepreneurs. Through measures like the refusal to provide water service contracts, however, it effectively forces entrepreneurs to comply."<sup>257</sup> The coercive nature of outline guidance meant that its noble motives and laudable goals were insufficient to make it legal. The Supreme Court ruled as follows:

Granted, the outline guidance was designed to protect the living environment of Musashino citizens from uncontrolled development. Granted, too, the administrative guidance enjoyed broad support from Musashino citizens. Nonetheless, administrative guidance may properly seek only contributions that are voluntary. Because the conduct above violated that

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254. See Suzuki, *supra* note 248.

255. Ramseyer, *supra* note 248, at 23 (*citing* Gotô v. Yamada, 1354 HANREI JIHÔ 62 (Sup. Ct., Mar. 23, 1990) (Japan))

256. See Ramseyer, *supra* note 248, at 25 (*citing* Takahashi v. Musashino shi, 47 SAIBAN MINSH 574 (S. Ct., Feb. 18, 1993) (Japan)); see Suzuki, *supra* note 248; *New Developments in Outline Guidance*, *supra* note 248, at 94 (providing somewhat different interpretation of these same cases).

257. Ramseyer, *supra* note 248, at 26 (translation by Ramseyer).

principle, it was an illegal exercise of public power.<sup>258</sup>

#### 4. The Entrepreneurial Exception and the Limits of Administrative Guidance

Although it took almost two decades to do so, the outline guidance cases simply confirmed what other cases in other contexts had earlier established. The refusal of government agencies to accept and act on applications, notifications, or statutorily based documents was illegal.<sup>259</sup> Because privatized regulation frequently relies on precisely this practice to create the framework for "adjustment" activities by the private sector, the success of Yamada's litigation strategy raises the complex question of how law interacts with other social, political, and economic factors in each iteration of privatized regulation and why entrepreneurs like Satô and others have not used similar techniques to destroy privatized regulation in other contexts.

An initial answer is that litigation might not have been as successful in other sectors. Unlike the clear illegality of outline guidance, the bureaucratic promoters of privatized regulation in other sectors had not only the legal right to be involved in the sector but also in most cases a legal obligation to promote its growth as well. The legitimacy of bureaucratic involvement, in

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258. *Id.* (quoting *Takahashi*, 47 SAIBAN MINSHÛ at 574) (translation by Ramseyer).

259. One instance occurred in the setting of affirmative action benefits for Burakumin, a historically discriminated against Japanese minority who have received various forms of assistance for the last 30 years under both local and central government programs. Because Burakumin are completely indistinguishable from other Japanese without a background check and because it became politically difficult for the government to identify Burakumin directly, many local governments developed a system of administering benefit programs that resembled privatized regulation in some ways. The Osaka city government, for example, delegated the task of identifying who was of Buraku origin to private organizations controlled by the Burakumin themselves. To make this system work, the city would simply refuse to accept applications for benefits unless the application had the seal of approval of the appropriate organization. This system worked fine until a split occurred in the Burakumin community and the organization refused to give its seal to anyone who belonged to the rival organization. Members of the latter organization then bypassed the prior private approval stage, applied directly to the Osaka city government, and then sued when the city refused to take action on the application without the necessary seal. The plaintiffs eventually won at the Osaka High Court, and the city reformulated the private organization to include members of both factions. See *Higashi v. Oshima* (Osaka H. Ct., July 30, 1979) (translation of opinion on file with author). The city did not discontinue the delegation of power itself. See Frank K. Upham, *Ten Years of Affirmative Action for Japanese Burakumin: A Preliminary Report on the Law on Special Measures for Dôwa Projects*, 13 LAW IN JAPAN 39 (1980) [hereinafter *Ten Years of Affirmative Action*].

other words, might have made the courts more tolerant of extra-legal means for reaching a policy goal that was at least arguably within the agency's statutory jurisdiction.<sup>260</sup> As a result, potential litigants might have faced additional difficulty on both procedural and substantive levels. First, in a procedural action to force an agency to take action on or simply accept a plaintiff's application, the time during which the agency could "reasonably" delay might have been judicially extended to the point where it usually made more sense to participate in the give and take of privatized regulation than to fight. This appears to be true for Ogura in his relations with the MOT, where litigation was a valuable tactical tool to force the agency to act in extreme cases, but not a strategic means to destroy the system as a whole.

More telling, however, is the likely substantive result for the litigant after the agency was forced to act on the merits of its application. In outline guidance, reaching the merits virtually guaranteed the developer success. Unless the locality was able to show extreme behavior on the part of the plaintiff, it had no discretion, and its denial of a sewage hook-up, for example, was automatically illegal.<sup>261</sup> In other contexts, however, a ministry's decision would be discretionary. A court may be reluctant to overturn discretionary actions even if they seemed more calculated to uphold the process of privatized regulation than to achieve the goals of the statute. In other words, the agency would likely be able to disguise a decision intended to maintain the discipline of privatized regulation as simply an exercise of its statutory discretion.

A potential plaintiff's difficulty becomes even greater because each local iteration of privatized regulation is part of a national system supported by a unitary bureaucracy. Enforcement by the MPT, the MOT, or MITI is not limited to direct retalia-

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260. In its decision in favor of Yamada, the Japanese Supreme Court specifically left open the question of whether there might be circumstances where a developer's refusal to cooperate with outline guidance would justify the denial of municipal services. See *Takahashi*, 47 SAIBAN MINSHŪ at 574. Ramseyer argues convincingly that the body of outline guidance cases indicates that these circumstances will be rare in that context. See Ramseyer, *supra* note 248, at 23-26. In another context, however, where the balance of legal and political resources is reversed, courts might act differently, especially if the government can argue that the private party's behavior amounted to an abuse of rights. *But see* Suzuki, *supra* note 248; *New Developments in Outline Guidance*, *supra* note 248, at 94.

261. See Young, *supra* note 248, at 932.

tion in a specific one shot game as it is when a locality is enforcing outline guidance. A national ministry, at least when dealing with a national firm, is involved in a much more complex relationship with a myriad of opportunities for punishing violators formally or informally. In many instances, these opportunities are extended even further when one ministry can convince another to cooperate, as was the case with the MOF's disciplining of Lions Oil and the joint actions taken by several government agencies in creating and enforcing privatized regulation in the cement cartel.

Although indirect bureaucratic action to enforce an illegal cartel, as one might characterize the MOF's administrative guidance to Jōnan Credit Bank to cut off credit to Lions Oil, may have been just as illegal in some abstract sense as Musashino City's refusal to approve a road or water permit to Yamaki Construction, the practical meaning would have been different. Lions Oil would have lacked both standing and ripeness in an administrative lawsuit, leaving only a tort action for damages under the State Redress Law.<sup>262</sup> Although these damages would in theory have been sufficient, Lions Oil would have had great difficulty proving three necessary elements. First, a court may have found MOF's guidance legal. Advising banks to avoid loans that contravene national policy may seem unexceptional to Japanese courts, especially if the guidance remains voluntary. Second, because Jōnan was not compelled to abide by the guidance, the causal connection between the guidance and Jōnan's decision would have been weakened. Third, Lions Oil may have had difficulty showing actual injury, since it did in the end sell its imported gasoline, as naphtha, to Nippon Oil, and Japanese have in the AML context been very reluctant to recognize legal causation for economic injuries.

For these reasons and perhaps others, the legal difficulty of challenging privatized regulation would have been substantial in most circumstances, but it is likely that the general lack of legal challenges owes more to the benefits of privatized regulation to all participants than to its ability to survive judicial scrutiny. For example, most real estate developers complied with outline guidance for a decade or more, leading one to suspect that either the benefits of compliance or the costs of litigating may be

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262. *Kokka baishōhō* [*State Redress law*], Law No. 125 of 1947 (Japan).

higher than they appear even in the more or less zero sum game of outline guidance.<sup>263</sup> Both the benefits of going along and the costs of open defiance are much higher in most privatized regulation, where cartelization ensures not only guaranteed survival for the weak, but also extra profits for the efficient.

In these nurturing conditions, it is only the outsider or the maverick that will object to the preservation of the system. The most directly affected outsider, of course, was the consumer, and the standing and ripeness doctrines of Japanese administrative law effectively eliminated any legal avenue of attack for consumers and even many insiders. Examples include dissatisfied small stores in the LSRSL context or advertisers or other media in the broadcasting context. This still leaves room for mavericks like the Iketanis and Satô who see privatized regulation as creating opportunities for profit rather than for complacency. As the sagas of both Lions Oil and TSM demonstrate, however, a maverick had better be prepared for a prolonged battle before victory can be assured. In most instances of privatized regulation, moreover, the maverick will be battling not only the bureaucracy and the unified members of its own industry, but also often members of upstream and downstream industries.<sup>264</sup>

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263. Interviews with academic observers of land use practices in Japan report that most developers still comply with municipal guidance in most instances. The level and nature of exaction were affected by Yamada's Construction's litigation campaign, but the practice continues. For a selection of cases and literature on the U.S. practice, see ELLICKSON & BEEN, *LAND USE CONTROLS*, (Chapter Three: Zoning Changes and the Rights of Neighbors) (unpublished draft on file with author). This is not surprising given that developers in the United States also face quasi legal exaction. It may simply be cheaper to go along with "reasonable" demands than to fight. Alternatively, the donations may get the developers better treatment than they are legally entitled to. In other words, donations may function as an open bribe made not to an individual official but to the city itself.

264. Satô, for example, had a clear legal right to import gasoline, as clear as that of Yamada to build and Iketani to produce steel. Satô, however, lacked powerful allies and financial staying power. No one, not even the U.S. Government or business community, rallied to his cause, and he did not have the strength to buck the system alone. Iketani, too, was a maverick of sorts and eventually became a pariah within some parts of the steel industry. At the beginning of his battle, however, he was typical of the minimill sector in that he was too small to be worthy of attention by the major players. He was also an astute businessman, who chose his battles carefully and who avoided the corporate debt that would have made TSM vulnerable to acquisition during recessions. Most importantly, by the time the battle over minimills really closed, Iketani had powerful allies in opposing the inclusion of compulsory legal power in the declining industries statutes, including the United States and the Japanese FTC. Unlike in the cement and ready-mix concrete cartels, there was no industry-wide consensus on the impor-



Local governments like Musashino City, therefore, faced political and legal obstacles that are not usually present in privatized regulation, but outline guidance may have faltered for structural reasons as well as political and legal ones. Unlike privatized regulation, where members of the same or related industries negotiate among themselves on a horizontal basis, the structure of outline guidance was vertical. It fit the traditional model of command and control regulation neatly so that the lines between the regulator operating in the public sphere and the regulated business operating in the private sphere were clear. As a result, the bureaucratic steps were discrete enough to become the objects of administrative litigation, and the disappointed contractors were in precisely the position *vis-à-vis* the municipality to have standing to sue.<sup>265</sup> The local governments were not delegating regulatory power to an organized industry group ready to use it to establish and maintain a cartel, but rather were ordering individual members of a hostile industry to make unilateral sacrifices.

In doing so, local governments were relying on administrative guidance to accomplish what would ordinarily be done with clear and compulsory legal authority. That they failed merely illustrates that administrative guidance can not replace legally authoritative regulation outside of the framework of privatized regulation. It is also further evidence of the point that it is not administrative guidance that is distinctive about the Japanese bureaucracy, but the incentive framework and legal nature of privatized regulation within which it operates. Once that framework is absent or breaks down, administrative guidance may be no more powerful in Japan than informal guidance is in the United States.

### C. *Characteristics and Limitations of Privatized Regulation*

With the lessons of the entrepreneurial exception in mind, the characteristics and limitations that define privatized regula-

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tance of maintaining stability in the sector. Finally, by the mid-1980s when most of the other independents had been absorbed, TSM's lone status as an outsider began to work to its advantage as it was able to free ride on the industry cartel with little chance of effective countermeasures.

265. The disappointed contractors were in precisely the same legal position as the Burakumin in the Osaka affirmative action context. See *supra* note 259 (discussing Burakumin affirmative action litigation).

tion can be identified. Most obvious is the determinative role of private parties under ordinary circumstances. In each case, the public agency charged with making decisions under the applicable legal rule delegated that power to private parties. Although the statutes frequently envisioned a consultative role for quasi-public committees, the agency, whenever possible, substituted wholesale delegation for consultation and used its formal power solely to ratify the private decision that emerged. When full delegation was not possible, the government played various facilitating roles. In declining industries policy, this included inter-ministerial cooperation to create the private entities necessary to manage a successful cartel. In transportation licensing it meant eliminating applicants on arbitrary criteria, and in broadcasting it meant finding the right person to bring the various interests together.<sup>266</sup> But rarely did it mean independent decision-making by the agency according to statutory criteria.

A second commonality follows naturally from the first and is a key to the structure of the system. The legal norms that should have dictated the process and results of regulatory action were largely irrelevant. The technical requirements concerning floor-space or market conditions promulgated by MITI under the LSRL played no role in the bargaining among small merchants and chain stores in the 1980s. Nor was the "public welfare" criterion of the Broadcasting and Radio Wave laws an apparent factor in the bargaining that led to a single applicant for broadcast licenses under the MPT. Even when formal statutory power was invoked, as occurred most frequently in the transportation context, the MOT avoided the application of substantive criteria. Indeed, in many instances the regulatory result was not only unrelated to statutory norms but technically illegal, either because the result was at odds with the formal goals of the legislation or because it was a violation of the Anti-monopoly Law.

The law's irrelevance in most instances of privatized regulation was only possible because the doctrines of Japanese administrative law insulated the adjustment process from judicial review by most interests injured by it. The standing doctrine makes judicial review unavailable to most outsiders, and the ripeness doc-

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266. With respect to Tokyo Metropolitan Television, the MPT made the basic decisions itself outside of the formal procedures and then let the applicants fill in the details.

trine prevents insiders from suing until the process is largely completed. Privatized regulation is structured so that insiders generally have more to lose by litigation than they could hope to gain, further decreasing the chance of judicial intervention. Even in the exceptional case, as recounted by President Ogura of Yamato Transport Co., litigation is seen more as a wake up call to the bureaucrats than as an attempt to vindicate the statutory process.

The lack of legal control over the process is exacerbated by its decentralized nature. One could imagine an extra-legal process that was nonetheless governed by clear criteria created and enforced by bureaucratic authority. These non-statutory criteria might be related to efficiency, plan rationality, social or regional equity, the personal ambitions of the bureaucrats, or the interests of the ruling party. The important point is that they would be centrally determined and their uniform application enforced by a hierarchical bureaucratic system. Such was not the case with privatized regulation. Although occasionally enforced on a national basis, its actual use was to enforce localized bargains. There was no consistent set of objective or technical criteria in any of the sectors this Article examined. Instead, the result was determined by the relative bargaining strength of the private parties involved in the particular negotiation.

The irrelevance of pre-established enforceable norms did not mean chaos or disorder. On the contrary, the ad hoc bargaining that was at the heart of privatized regulation may have been more predictable than U.S. administrative litigation or the adjudicative and rule-making procedures that judicial review might have structured. Certainly, it is infinitely more predictable than the operation of the market, the uncontrolled nature of which privatized regulation is designed to avoid. Participants in the granting of television licenses, taxi permits, or declining industry cartels likely knew rather well how they would fare in the negotiations that occurred, and while the bargaining under the LSRSL may have been somewhat less predictable, the stability of market shares among large retailers at the height of the LSRSL regime is dramatic evidence of the fundamental stability and long term predictability of the system. Certainly the petroleum refiners and gas station owners considered the preservation of the import cartel as indispensable to the fending off of the chaos that would have followed market competition. Even in

the minimill sector, the mainstream of the industry led by Nippon Steel was able eventually to bring all other minimills under their control and to keep TSM's market share within manageable bounds.

The process was predictable, however, only for those intimately familiar not only with the structure of the system in general but also with the circumstances of each iteration. While the large stores may have been confident about market share on a national basis and media groups may have been sure that they would get some piece of the action in each new station, the precise result was a function of local circumstances. For outsiders, there was no way to discover the existence of the system, much less its nature or structure, and outsider participation at the local level was virtually impossible. Nor, given its extra-legal and often illegal nature, was information readily available even to the Japanese media. Of course, even if outsiders knew what the process was and its costs, entry into the bargaining circle was not open but controlled by the parties themselves, supported when necessary by their bureaucratic sponsors.

A final commonality of privatized regulation was the rhetoric of consensus. At times it was descriptive as in the use of the convoy metaphor by commentators on the LSRSL system, while at other times it evoked cultural ideals as in the reference to the importance of duty and loyalty by members of the steel cartel in their attacks on TSM. Frequently it was simply the expression of the desirability of stability and order. In most of its manifestations, it was explicitly contrasted with the "excessive competition" of the market. The reference to coexistence and a shared fate echoed the national mythology of "village Japan", "harmony", and uniqueness that often justifies and insulates self interested action in Japan and obscures from view the conflict and change that is also part of the reality of Japanese society.<sup>267</sup>

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267. Like every other society, Japan's traditions and traditional rhetoric are often of recent origin. The tradition of harmony, or "*wa*", for example, is typically associated by Japanese with Prince Shotoku of the seventh century. Despite these historical connotations, the spirit of *wa* as associated with Shotoku actually came into general use in the twentieth century as a device to foster national unity. See generally Kimio Itô, *The Invention of 'wa' and the Transformation of the Image of Prince Shotoku in Modern Japan*, in MIRROR OF MODERNITY: MODERN JAPAN'S INVENTED TRADITIONS 1 (Stephen Vlastos ed., forthcoming, Univ. of Calif. Press) (discussing origin of use of concept of *wa* in twentieth century Japan); see also ERIC J. HOBBSBAWM & TERENCE O. RANGER, *THE INVENTION OF TRADITION 1* (1983) (analyzing theory of invented traditions in general).

The plausibility of this rhetoric was heightened by the horizontal nature of the process created by delegation. Instead of many firms competing for a license or permit, only one emerged from an apparently consensual process to accept it as its due. The forced bargaining and the cohesion needed to make and enforce decisions also likely led to a real level of mutual knowledge and understanding, if not respect, inside each industry. Even Masanari Iketani of TSM eventually became an officer of the trade association. As the firms within a sector were forced to cooperate, a natural hierarchy developed that usually survived mavericks like Iketani and Ogura. Defection may still have been possible, but interlocking personal and business relationships substantially increased its cost and decreased its benefits.

### III. PRIVATIZED REGULATION IN PERSPECTIVE

A reexamination of privatized regulation from a comparative perspective can help clarify what in Japanese regulatory practice is unique and what is merely one variation of practices common elsewhere. This section first examines privatized regulation from the perspective of the ideals of U.S. administrative law, drawing primarily on the typology of Richard Stewart.<sup>268</sup> It then compares privatized regulation to two complementary models of contemporary European regulatory practice, Wolfgang Streeck and Philippe Schmitter's private interest governance<sup>269</sup> and Gerd Winter's bartering rationality.<sup>270</sup>

The ideals of U.S. administrative law are useful for two reasons. First, they are likely to be representative of the normative perspective of most readers, including Japanese and European readers. Discussing them explicitly makes explicit what are likely otherwise to remain implicit biases. Second, the transparency, openness, and accountability of U.S. administrative procedure are echoed in the norms of international trade, not only by U.S. trade negotiators but also in the WTO Agreements on Technical Barriers to Trade and Sanitary and Phytosanitary Measures. A discussion of privatized regulation in these terms may fore-

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268. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

269. See Wolfgang Streeck & Philippe C. Schmitter, *Community, Market, State - and Associations? The Prospective Contribution of Interest Governance to Social Order*, in PRIVATE INTEREST GOVERNMENT 1, 10 (Wolfgang Streeck & Philippe C. Schmitter eds., 1985).

270. Winter, *supra* note 7, at 219-20.

shadow and illuminate future trade debates and provide some sense of what shape future international pressure on Japan is likely to take.

The comparison with European models provides a less starkly normative perspective. Both models describe patterns of governance that involve the devolution of power from purely public entities to private or quasi private actors. The Streeck and Schmitter model of private interest governance examines the structure of regulation and emphasizes the influential role of associations in the creation and implementation of social policy. Winter looks at the process of enforcement and argues that the implementation of policy through legal rules has been largely replaced by ad hoc bargaining between government agencies and private parties.

The role of private organizations in private interest governance and the informal give and take of bartering rationality echo the structure and processes of privatized regulation respectively. Drawing out those similarities will dispel the idea that Japanese regulation is so distinctive that it can be considered unique in the strong sense of the term. Using the norms of U.S. administrative law as a lens as we draw these comparisons will enable us to determine what is distinctive about Japanese practice because, as we shall see, the ideals of procedural regularity, openness, and transparency are neither foreign to private interest governance nor entirely absent from bartering rationality.

#### A. *Privatized Regulation Through the Lens of U.S. Administrative Law*

##### 1. The Norms of U.S. Administrative Law

Much of the literature on regulation in the United States is concerned with the legitimization of the role of the bureaucracy in the economy, what one administrative law scholar has described as U.S. lawyers' 200 year project to control government action through law.<sup>271</sup> The now-conventional wisdom portrays the legitimization process as evolving in three stages, each linked intellectually to more general stages of legal development and

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271. Jerry Mashaw, *Panel: The Structure of Government Accountability: Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 414-15 (1996) [hereinafter *Reinventing Government*].

historically to periods in the development of U.S. capitalism.<sup>272</sup>

The first stage limits administrative agencies in a capitalist economy to executing the commands of the legislature. Absent legislation, the bureaucracy has no inherent power to intervene in private activity, which is left to the actions of autonomous individuals operating in the world of private contract and property. When the electorate through legislation authorizes intervention, the agency does no more or less than enforce the clear dictates of the statute. The judiciary's role is to ensure that the agency does not stray too far from the expressed legislative intent. Aptly called the "transmission belt" model by Richard Stewart, this model recognizes no bureaucratic role in the formation of policy and no discretion in its implementation.<sup>273</sup>

Although the transmission belt model satisfied the need to justify government intervention in the private sphere and still retains normative power, its descriptive power did not survive the legal realists, the New Deal, and the establishment of the welfare state. The establishment of independent agencies such as the Interstate Commerce Commission or the Federal Communication Commission with the power to regulate sectors of the economy on the sole criterion of the "public interest" or "public convenience or necessity" made it clear that bureaucrats did more than merely execute the legislative will. Even when the legislature attempts more specific instructions, definitional questions inevitably leave wider discretion to the bureaucrats than the broadest interpretation of the transmission belt would allow or could justify.<sup>274</sup>

The New Dealers' response was to link administrative discretion to technical expertise, which was seen as both describing the bureaucrats' policy advantage over legislators and judges and justifying the otherwise unauthorized burden on private rights.

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272. See Stewart, *supra* note 268, at 1678-81. The wisdom was not yet conventional when Stewart wrote. See also JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 16, 24 (1985) [hereinafter *DUE PROCESS IN THE ADMINISTRATIVE STATE*]; PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 18-19 (1978) (describing stages of general legal development and "evolutionist" theory of legal development). That these stages of general legal development may never have existed is irrelevant for the purposes of this Article. See Erhard Blankenburg, *The Poverty of Evolutionism: A Critique of Teubner's Case for "Reflexive Law"*, 18 *LAW & SOC'Y REV.* 273, 284 (1984).

273. See Stewart, *supra* note 268, at 1680-81.

274. *DUE PROCESS IN THE ADMINISTRATIVE STATE*, *supra* note 272, at 17.

Because the courts remained in the background available to review the exercise of this discretion, the problem of legislative control implicit in the transmission belt model was at least addressed if not satisfied, but the primary justification for the bureaucrats' independent discretion and power was their professional or scientific knowledge and methodology.<sup>275</sup>

The expertise model itself came under criticism in the 1960s when critics argued persuasively that administrative agencies had been captured by the regulated industries and that any expertise was being exercised primarily to serve private instead of public interests. The response was to open the system to a wider range of interests and to greater political and judicial scrutiny, what has come to be called the interest representation model.<sup>276</sup> Both the legislature, through statutes like the Freedom of Information Act,<sup>277</sup> and the judiciary, through the relax-

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275. See JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (1938) (providing classic explanation of technical expertise model). Implicit in the expertise model was a shift from viewing administrative agencies as law enforcers, applying rules to fact situations, to substantive problem solvers. This new role demanded more than a knowledge of the statute or of relevant facts pertaining to a single issue or incident; it demanded "the application of continuous, specialized intelligence to underlying issues of policy" that was to be acquired not only by specialized training or technical knowledge but also by "constant exposure to a single type of problem." *DUE PROCESS IN THE ADMINISTRATIVE STATE*, *supra* note 272, at 19. Experience, research, and steadily increasing familiarity with the substantive area would compensate for any initial lack of the requisite scientific expertise.

276. A second response to the perceived failure of the expert model has been deregulation. If expertise and administrative intervention in the economy was in most cases simply a disguise for rent seeking behavior by the regulated industry, the proper response was the elimination of regulation altogether. The classic example of deregulation was the elimination of the Civil Aeronautics Board in the 1970s and free competition in airline pricing, but deregulation does not necessarily mean simply the end of all government involvement. More frequently, it has meant the partial replacement of command and control by market incentives. A typical example is tradable pollution permits, where industry members are able to purchase and sell the right to emit certain levels of pollutants. Another example is the auctioning of the broadcast spectrum rather than its distribution through random allocation or competitive licensing. The introduction of market principles, it is argued, both eliminates the cost of agency monitoring and enforcement and fosters more efficient results because the firm for whom the resource is most valuable will purchase the right to use it.

277. See, e.g., Freedom of Information Act, Pub. L. No. 93-502, §§ 1-3, 88 Stat. 1561 (1974); Government in the Sunshine Act, Pub. L. No. 94-409, § 4(a), 90 Stat. 1241 (1976); Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972); Pub. L. No. 94-409, § 5(c), 90 Stat. 1247 (1976); Pub. L. No. 96-523 § 2, 94 Stat. 3040 (1980); see also *DUE PROCESS IN THE ADMINISTRATIVE STATE*, *supra* note 272, at 27; *Reinventing Government*, *supra* note 271, at 417 (discussing specific statutory provisions guaranteeing public participation).



ation of threshold doctrines like ripeness and standing, demanded greater inclusiveness and accountability in the administrative process on the grounds that a diversity of views would lead to decisions that were based on better information and that reflected a wider range of interests.

The emphasis has been primarily on improving procedure rather than eliminating administrative discretion. The legislature continues to draft statutes that delegate substantial power to regulatory agencies, and the judiciary almost invariably prefers to remand administrative mistakes for additional or different procedures rather than dictating substantive results. This preference for procedure is responsive to the U.S. preoccupation with contest and rule metaphors:

It satisfies simultaneously a craving for direct democratic participation in an increasingly bureaucratic public life and the demand for equality before the law. There may be winners and losers in bureaucratic politics, but the game should be fair. *Access* to the seat of power — now the bureau rather than the legislature or court — should be open to all.<sup>278</sup>

It is precisely this ideal of an open contest on a "level playing field" with its implication of winner-take-all that clashes directly with the norms and practices of privatized regulation.

## 2. Privatized Regulation from the U.S. Perspective

The relationship of privatized regulation to U.S. administrative law norms will vary considerably depending on whether one focuses on the formal law or its implementation in practice. The LSRSL is illustrative. As written, it contains elements of both the expert model and the interest representation model. The use of consultative committees is not as developed in the United States as it is in Europe or Japan, but it is not unknown and fits the interest representation model comfortably.<sup>279</sup> The committees' anticipated role in the LSRSL was to bring together on both local and regional levels representatives of the affected independent retailers, the retail industry more generally, consumers, and

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278. DUE PROCESS IN THE ADMINISTRATIVE STATE, *supra* note 272, at 27-28 (emphasis in original).

279. *See, e.g.*, Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972); Pub. L. No. 94-409, Sec. 5(c), 90 Stat. 1247 (1976); Pub. L. No. 96-523, § 2, 94 Stat. 3040 (1980).

the general public interest. If the regional committee had then made the final determination subject to MITI ratification, the statute would have been a variant of the pure interest representation model not dissimilar to the U.S. practice of negotiated rulemaking.<sup>280</sup>

The LSRSL and similar statutes in other areas, however, contemplate only an advisory role for deliberative councils leaving it up to the bureaucrats to make the final judgment independently. MITI and the other officials are supposed to rely not only on the input of the consultative committees, but also on bureaucratic expertise and experience. The resulting combination of interest representation and bureaucratic expertise, while perhaps not replicated precisely within U.S. regulatory law, is theoretically unremarkable.

The implementation of the statute, however, is another matter. Whatever else one might say about the standardless delegation of public power to private parties, it is not anticipated by U.S. literature on administrative law or economic regulation. While capture theorists might argue that regulation in the United States occasionally has approached this result in certain sectors, the process has rarely resembled the LSRSL scheme.<sup>281</sup> Indeed, the implementation of the LSRSL resembled the crea-

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280. An obvious and important difference, however, is that 'regneg' is usually limited to rulemaking, which is prototypically policymaking. Privatized regulation is typically adjudication, the application of rules to a given set of facts, rather than rulemaking. Although advisory committees have a role in adjudicatory decisions, as illustrated by the licensing of new drugs by the Food and Drug Administration, this role is limited by the nature of fact-finding in adjudication and the parties' individualized stakes in the outcome. While tripartite or expert panels might play a consultative role, the due process considerations involved in any adjudication would, in theory at least, require any final decision to be made independently by the administrative agency according to clear and accessible processes.

281. One area where a similar process occurs in the United States is the enforcement of land use controls by local government. Variances, for example, are administratively granted permissions to deviate from existing zoning restrictions. In planning theory, they should be granted only in exceptional circumstances, but in practice they are often routinely granted when neighbors either consent or do not object. In some instances the neighbor's involvement is legally anticipated. At other times, it is simply a product of administrative practice. See generally ELLICKSON & BEEN, *supra* note 263. Ellickson and Been not only document the role of neighbors in the administration of variances, but also trace the struggle of courts with the persistence of ad hoc dealmaking between land developers and local governments. U.S. courts have evolved from hostility toward deal making and attempts to prevent it to a grudging recognition of both its inevitability and virtues.

tion of a system of private ordering more than economic regulation.

This system of private ordering operated like a market. To open a store, the large retailer had to purchase the right from the small retailers in the area, just as it had to purchase or lease land or any other factor of production. As with most markets, it was created by the government giving rights to potential players in accordance with political decisions and then stepping back and allowing the final allocation of resources to be determined by private decisions. In this instance, of course, it is a market with a "twist." Instead of permanent entitlements allocated by law, the rights are allocated by the bureaucracy and are transferable without legislative action. The content of the rights is even farther removed from the free market of conventional economic analysis: instead of "private property" being the right to open a store at an individual's discretion, the property right is to be free from competition by large stores. In a conventional market, the small merchants can theoretically protect themselves by purchasing the large store owner's right to operate if the owner is willing to sell and the merchants can match his price.<sup>282</sup> Under MITI's reversed allocation of rights under the LSRSL, the large store owner has the converse option of buying the small merchants' right to remain free from competition if they are willing to sell and the large store can meet their price.

It is no surprise that by the ideals of U.S. law, where the principles of due process and judicial review reign supreme, privatized regulation fares very poorly. Privatized regulation fits none of the legitimizing models of administrative law. The transmission belt model seems even more detached from reality in the Japanese setting than it did in the U.S. setting: the intent of the legislature, at least as articulated in the statutes, is ignored, usually without even rhetorical reference to its terms or goals.

The interest representation model seems initially to describe and legitimate the Japanese process better. Delegation certainly meant adequate representation of the regulated parties' interests. Indeed, until they were successful in reaching an

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282. In practice, this right was illusory because there were several chains. To protect themselves, local merchants would have had to purchase the right from all of the chains and would still have faced the possibility of new entrants.

accommodation of their interests reasonably satisfactory to all participants, no decision would issue, regardless of the agency's view of the desirability of a given result. Of course, the interest representation model was intended to rectify, not the under-representation of the regulated industry or industries, but that of the public interest, of the interests too diffuse or legally affected too indirectly to be brought into the agency's inner circle.

Privatized regulation all but ignored these interests, unless one takes the rather doubtful position that the ministries themselves somehow protected them. While certainly envisioned in the underlying statutes, one is hard pressed to find actual instances of such representation in any of this Article's case studies. If Mark Tilton's account is correct, declining industries policy included a vision of the national interest in the sense that strategic economic planning required, in MITI's opinion, a stable domestic industry in a range of basic materials sectors. This vision was never tested, however, by formal or even informal interaction with the diffuse and unorganized interests the interest representation model is intended to include in the bureaucratic calculation. Even in outline guidance, where the residents' interests in protecting their sunlight or preventing increased population density and traffic congestion were the *raison d'être* of the process, the real but more diffuse interests of the residents of other districts that inevitably had to absorb the displaced population were ignored. It is difficult to see in these cases, therefore, anything approaching the interest representation model.

The expert model appears to be a more plausible justification for what was occurring. It advocates wide bureaucratic discretion and justifies judicial passivity, both characteristics of privatized regulation. Japanese bureaucrats also boast a reputation for technical competence and political neutrality, and their expertise has been credited with much of Japan's national successes. Upon closer inspection, however, the idea of expertise seems frequently as absent in the practice of privatized regulation as the legislative mandate or interest pluralism of the other models. The fundamental characteristic of privatized regulation was not careful deliberation by thoughtful bureaucrats, but the more or less unsupervised delegation of their power to the regulated parties.

While one might surmise that ministerial expertise played a crucial role in designing the structure of delegated decision-

making, the supporting evidence is scant indeed.<sup>283</sup> With the important exception of declining industries, direct bureaucratic intervention to correct stable compromises that fell outside the bounds of administrative rationality were exceptional.<sup>284</sup> The interventions noted in this Article were typically not on substantive lines. Instead bureaucrats intervened when necessary not to shape the substance of a consensus, but to reinforce the framework necessary to reach and enforce one. Thus, MITI bureaucrats rarely, if ever, intervened in the LSRSL process during the 1980s, no matter how far the results diverged from statutory goals. Similarly in transportation or broadcasting, the roles of government were usually instrumental to the privatized process, but not to its result.

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283. One intriguing, if implausible, interpretation of MITI's implementation of the LSRSL would portray it as an attempt to force market participants to internalize the external cost of their productive activity. The decision not to prohibit large stores altogether is a recognition that they benefit the public, but the requirement that they purchase the right to open forces them to internalize some of the costs of their operation. These costs include the deterioration of neighborhoods, the loss of secure employment, and the destruction of human relationships among customers, neighbors, and merchants, which many observers see as accompanying the disappearance of small scale independent merchants. The establishment of a market for opening rights, rather than simply a set fee, allows only the most efficient stores to open, because it will be the most profitable stores that will consistently be able to meet the local merchants' price. Thus, the social dislocation of a large store in an established retail market will arise only when the large store is relatively efficient, not only in relation to the small stores that it will drive out of business but also in relation to other large stores against which it must bid to purchase the right to open. This process ensures not only that the most efficient large store will acquire the right to operate but also that no store will open unless the decreased profits or cost of going out of business for existing merchants are less than the profit to be made by the proposed new store. When the costs are greater than the gain, the new store will not be willing to meet the small merchants' price, and the store will not open.

This theorizing has an attractively rational ring about it, and one can envision MITI policy makers arguing in this vein, perhaps calling on experts in community development or city planning to assist them in evaluating the importance of certain forms of retailing to urban quality of life. But, of course, this vision is pure fantasy. Even the few defenders of MITI's implementation of the LSRSL, including the occasional economist who argued that the Japanese retail sector was efficient, did not argue that it was the reasoned outcome of a policy debate over the public good. MITI may have operated the statute like a market, but it was inspired by the political market of sectoral cartels that we have seen operating throughout privatized regulation, not the logic of economic markets that animates the idea of tradable pollution rights in environmental law.

284. Another instance is in the broadcasting context when the MPT had to intervene to reach a stable compromise, particularly in the more complex environments of urban licenses. *See supra* note 122 and accompanying text (discussing MPT intervention in licensing process). It is unclear, however, whether these interventions were in the service of neutral expertise or for less legitimate purposes.

In the declining industries context, however, intervention may have been more policy based. In the cement industry case, MITI and the MOC intervened to create and sustain the ready-mix concrete trade association, and local governments and customs officials cooperated to restrict imports. Some observers would classify this intervention as aimed solely at reinforcing the private cartel illegally created on the foundation of the legal structurally depressed industries law cartel, as simply a procedural intervention to support the private interests of the cement industry similar to the cartels under the LSRSL and elsewhere. Tilton, however, has argued that declining industries intervention had a strong policy component as well. He argues that the cement cartel was important to MITI's policy objective of preserving domestic cement production rather than cement company profits for their own sake.<sup>285</sup> Of course, such intervention by MITI was legally inappropriate, if not itself illegal. MITI encouraged criminal activity by the industry in a manner reminiscent of the administrative guidance attacked by the FTC in the *Oil Cartel Cases* of the 1970s.

Even if this scenario were true, and it is vigorously opposed in other studies of Japanese declining industries policy conducted by Robert Uriu and Gregory Noble,<sup>286</sup> it is likely that MITI's role fell short of James Landis' ideal of the expert and neutral bureaucratic guardian of the public welfare. The curious mixture of MITI's omnipresence in the economy and the frequent weakness of its legal tools may have made compromise with private interests necessary even when its goals were unrelated to party politics. The intertwining of bureaucrats' personal interest with that of the regulated industry, most vividly exemplified by the *amakudari* system, also makes any observer pause before attributing exclusive causal power to motivations derived largely from technical or expert analyses. There is also the important question of whether a regulatory regime that is largely extra legal and often dependent for its implementation on illegal behavior can really be characterized benignly as the exercise of expertise. Nonetheless, if we are to view Japanese regulatory style in U.S. terms, the expert model seems to fit better than any other.

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285. TILTON, *supra* note 160, at 83.

286. See URIU, *supra* note 164, at 1; NOBLE, *supra* note 164, at 1 (ch. 3).

B. *Japanese Regulation as Privatized Governance: Through the Lens of European Models of Governance*

Models of administrative law and practice devised to describe and legitimate U.S. bureaucratic behavior are perhaps not the best source for a comparative understanding of Japanese practice. The focus on formal law and the need to account for and legitimize bureaucratic behavior are useful for identifying the fundamental nature of Japanese practice, but they may be too far removed from that practice and too representative of the United States to be able to explain it.<sup>287</sup>

This section adopts and simplifies two European models and uses them to examine Japanese regulatory style from a perspective less idiosyncratically identified with the United States. The first, private interest government, will help to place Japanese regulatory style within a model of social order. The second, bartering rationality, provides a model of the regulatory process that will enable us to understand the behavior of the parties to Japanese regulation in institutional context. After a brief presentation of each model, this section examines the degree to which each model fits Japanese practice and tries to identify what, if anything, is distinctive about Japanese regulatory practices.

1. Private Interest Governance

Drawing on the continental European tradition of neo-corporatism, Streeck and Schmitter rest private interest governance on the idea of "associations" and "associational order." For them associations' role in social order is commensurate to that of the three traditional models of social order: the community, the market, and the state.<sup>288</sup> According to Streeck and Schmitter, associational order is overlooked by social theorists because their analytical perspectives are limited by the boundaries of their own models.<sup>289</sup> Thus, market economists see associations as cartels, communitarians see them as inevitably alienated from

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287. Whatever the distinctiveness of privatized regulation, it may be U.S. regulatory practice that is truly unique. Its procedural formality and tolerance for judicial intervention are arguably not repeated on the same scale anywhere else. See Robert Kagan, *On Regulatory Inspectorates and Police*, in *ENFORCING REGULATION* 59 (K. Hawkins & J. Thomas eds., 1984).

288. Streeck & Schmitter, *supra* note 269, at 1.

289. *Id.* at 3.

the communities from which they emerge, and political scientists and lawyers see associations as threats to liberal democracy and the rule of law.<sup>290</sup> Once analyzed independently, rather than as a deviation from or function of another form of social order Streeck and Schmitter claim that “associational order” constitutes a “separate logic of collective action and social order” that has the same conceptual importance as the other three.<sup>291</sup>

They state the core of their model as follows:

The central principle is that of . . . negotiation within and among a limited and fixed set of interest organizations that mutually recognize each other's status and entitlements and are capable of reaching and implementing relatively stable compromises . . . in the pursuit of their interests. A corporative-associative order is, therefore, based primarily on interaction within and between interdependent complex organizations.<sup>292</sup>

Streeck and Schmitter distinguish private interest governance from interest group pluralism. In their model, associations do not simply reflect their members' private interests.<sup>293</sup> Associations have enough organizational strength to create them as well.<sup>294</sup> They do not simply influence social policy; they directly participate in policy formation and implementation. In this process, they share “in the state's authority to make and enforce binding decisions” that represent not only their own interests but also those of other associations and of the state.<sup>295</sup> To do so, they require the organizational strength to make and enforce decisions both internally among their members and externally in the interactions with other associations and other social actors.<sup>296</sup>

Paradoxically, private interest governance requires a relatively strong and autonomous state. Associations do not arise naturally from shared beliefs or interests, nor can they survive once created without state assistance and enforcement.<sup>297</sup> The

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290. *Id.* at 3-4.

291. *Id.* at 11.

292. *Id.* at 10.

293. *See id.* at 10-11.

294. *Id.*

295. *Id.* at 20.

296. *Id.*

297. *Id.*



complex and diffuse member interests, the temptations of defection, and the difficulty of organizational stability and efficiency are too great in contemporary society for associations to exist without state assistance. Furthermore, without a state with some degree of autonomy, delegation of public authority to private associations would lead to rent seeking that would destroy the political legitimacy of the model.<sup>298</sup> Streeck and Schmitter's associational order, therefore, requires a state strong enough to create associations and police their internal structure, to facilitate and manage interactions among associations, and to monitor and limit associational activities so that they are consistent with the public interest.

## 2. Bartering Rationality

The model of associational governance provides a way to place privatized regulation in a broader model of social order, but reveals little about the nature of the process of regulation itself. If it is groups of small merchants, trade associations, and deliberative councils that actually regulate substantial portions of the Japanese economy, how can the process be characterized? It is certainly not similar to the licensing or adjudication that provides the fundamental typology of U.S. administrative law. Nor does it have much to do with either the rule application of the transmission belt model or the procedural due process of the interest representation model. The process resembles bargaining more than the typical activities of legal actors within the sphere of public law. While many commentators have noted the bargaining element in contemporary law, for our purposes the most useful description of bargaining in the regulatory process is "bartering rationality" that Gerd Winter argues dominates modern regulatory practice.<sup>299</sup>

Bartering rationality is most obvious in the implementation phase of regulation where the agency will frequently reach accommodations with the regulated party to forego some aspect of its formal regulatory power in return for certain actions or forbearance on the part of the regulated. The agency's legal power

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298. *Id.* at 21. Otherwise, delegation of public authority would become what Theodore Lowi calls "sponsored pluralism." See THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 1, 60 (1979).

299. Winter, *supra* note 7, at 220.

in this context is, as Winter puts it, a “mere bargaining chip,” to be traded incrementally for cooperation in the implementation of policy goals.<sup>300</sup> The agency’s ability to refrain from full exercise of its legal power can mean granting a permit when denial is within its discretion as well as stopping short of full enforcement of regulatory norms. In return, the firm can offer a range of accommodations. It can agree to immediate partial compliance, as when a firm agrees to drop legal opposition to enforcement efforts; it can offer to provide benefits that the firm is not necessarily required to give, as when a firm agrees to donate land or an easement in return for a land use permit; or a party can simply agree to make certain payments to the government as in permit fees or, more recently, auctioned pollution or broadcasting rights.<sup>301</sup>

Regulatory bargaining has existed as long as regulation. Identification and analysis of the phenomenon, however, are more recent, as evidenced by the absence of any treatment of negotiation in the classic theories of administrative law. Instead, the concepts of fidelity to law, procedural due process, and equality of treatment dominated the historical discussion of regulation on the continent as well as in the United States. The ideal of regulation was equality of enforcement and fidelity to the legislative will.<sup>302</sup>

According to Winter, this model began to decline with the legal realists, who saw the gap between the ideal of full and equal enforcement and the actuality of partial enforcement as inevitable.<sup>303</sup> Some realists, notably Thurman Arnold, went further and argued that the gap was not only inevitable, but also desirable in practice. For Arnold, efficient government required willful departure from the ideal, but the myth of “symmetry, moral beauty, and logic” in law enforcement remained indispensable for political legitimacy.<sup>304</sup> Government was forced to create a *sub rosa* organization that “constantly violate[d] those principles

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300. *Id.*

301. *Id.* at 220-21.

302. *Id.* at 233-34. Equality of enforcement and fidelity to the legislative will are, in other words, Stewart’s “transmission belt” model of administrative legality, which Winter cites as equally applicable to Great Britain and Germany as to the United States.

303. *Id.* at 234.

304. *Id.* at 234-35.

in covert and hidden ways."<sup>305</sup> In other words, scholars could recognize and discuss the existence and desirability of the gap but the "creed of full enforcement" must be left intact for law to perform its legitimating function.

What is new for Winter in recent scholarship on regulation is the advocacy of bargaining as an ideal, rather than as a necessary accommodation, by those who take an economic, game theory, or sociological approach to regulation, in other words by all observers who study regulatory law as a social rather than a doctrinal phenomenon. For game theorists, "the expected rewards for both agency and firm . . . from mutual cooperation exceed" what either party could expect by independent action.<sup>306</sup> For economists, the "efficiency criterion implies that a rational enforcement strategy will not seek to induce full compliance nor even maximum feasible compliance with the law, but cost-justified compliance."<sup>307</sup> For sociologists, "the attempt to control regulatory enforcement primarily by external legal requirements [is] deeply troublesome, insofar as it induces in both inspectors and the regulated an attitude of legal defensiveness, a concern for adequate documentation rather than substantive achievement, and a degree of rule-bound rigidity."<sup>308</sup> For sociologists, fidelity to law in the regulatory context is no longer "necessarily a societal good."<sup>309</sup> It becomes a social good only after an "objective analysis" has indicated that it comes "at an acceptable cost."<sup>310</sup>

In order to function well in this bargaining process, sociologists advocate training regulators in the techniques of "interpersonal relations with complainants and businessmen; in the economics of the regulated industry; in the organizational dynamics, strengths and weaknesses of different kinds of business firms, in standards for exercising discretion, in cultivating allies, such as technical experts, within regulated firms . . . ; or in alternatives

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305. *Id.*

306. *Id.* (quoting John T. Scholz, *Cooperation, Deterrence and the Ecology of Regulatory Enforcement*, 18 *LAW & SOC'Y REV.* 179, 185-86 (1984)).

307. *Id.* (quoting Cento G. Veljanovski, *The Economics of Regulatory Enforcement*, in *ENFORCING REGULATION* 173 (K. Hawkins & J. Thomas eds., 1984)).

308. *Id.* (quoting Scholz, *supra* note 306, at 185).

309. *Id.*

310. *Id.* at 237 (citing JOSEPH DIMENTO, *GETTING COMPLIANCE: ENVIRONMENTAL LAW AND AMERICAN BUSINESS* 1-15 (1984)).

to enforcement."<sup>311</sup> Business rather than legal techniques become the methods of regulation, and fidelity to law is no longer even an aspirational goal of the regulatory process, being replaced both descriptively and normatively by social utility and efficiency.

While strongest among scholars and administrative practitioners, who have long treated the law more as a flexible reference point than a practical guide to action, Winter claims that this shift in discourse has begun to be recognized in legal doctrine as well. He points to the inclusion of bargaining in substantive statutes, as in tradable pollution rights or the auctioning of broadcast frequencies but then notes that courts remain skeptical of explicit bargaining by which agencies trade their legal power for partial compliance without statutory authority. He notes that U.K. courts have limited the ability of agencies to condition the issuance of permits on private behavior that the agency does not have the legal power to compel.<sup>312</sup> He then notes that German courts are less restrictive, allowing agreements between private parties and agencies that are not specifically authorized by law if they relate to the basic goal the agency is empowered to seek, are proportional, and are not forbidden by law.<sup>313</sup> Even in the United Kingdom, however, Winter argues that judicial invalidation of bargaining is rarely a practical impediment because lawsuits will only arise when the bargain falls through.<sup>314</sup>

### 3. Privatized Regulation from the Perspective of European Models of Regulation

Cobbling the Streeck and Schmitter and Winter models together results in a regulatory world that has marked similarities to Japanese practice. Government agencies do not attempt, even rhetorically, to implement formal statutory goals but rather do so to achieve some vision - Winter is not clear on where this

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311. *Id.* at 236 (quoting Kagan, *supra* note 287 at 59).

312. *Id.* at 237-38. Winter also cites a U.S. case standing for the same proposition. See *Bringle v. Bd. of Supervisors of the County of Orange*, 54 Cal. 2d 86, 351 P.2d 765 (1960). The case, however, actually approved the condition. For a U.S. case disapproving a conditioned approval, see *ELICKSON & BEEN*, *supra* note 263 (presenting excerpted version of *Fritts v. City of Ashland*, 348 S.W. 2d 712 (Ky. 1961)).

313. Winter, *supra* note 7, at 237-38.

314. *Id.* at 239.

vision comes from - of social utility through bargaining. Furthermore, agencies work not through interaction with individual firms on a one by one basis, but by delegating power to associations that are created and maintained by the state. Within the associations, organization is premised on the principle of consensus, not on the principle of legality. Bargaining is the modal form of behavior for interaction among and within associations and between associations and the state.

The parallels to the Japanese context are clear. The Streeck and Schmitter associations are the small merchants and large stores of the LSRSL, the shifting coalition of media groups in broadcasting, the *shingikai* and industry groups in transportation, and the various trade associations in declining industries. The mode of interaction and decision-making within industries as revealed by the case studies is at least superficially consistent with Winter's bargaining model. Law at best established a locus for the bargaining, but it never provided a detailed guideline for the results that emerged. The mode of interaction and decision-making among the associations is also bargaining. The intricate relationships across industries necessary to maintain domestic production of cement, for example, were formed on the basis of bargained for consensus and depended not on law, indeed they were in large part illegal, but on a constant give and take among the parties. Similarly, negotiations between large and small retailers, and among media groups, were not based on the ostensibly applicable statutory criteria, but on organizational, political, social, and economic resources.

These surface similarities, however, mask some profound differences in the role of the state and of law. The associations of Streeck and Schmitter's private interest governance enjoy enduring legal identities. Frequently, they are statutorily established specifically to carry out delegated governance tasks.<sup>315</sup> At other times, associations are preexisting entities that receive a statutory mandate to operate within a given sector. Seldom, if ever, are they totally informal as were the groups of small merchants that in many instances took over the role of the statutory committees in the LSRSL context or the media groupings in

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315. See, e.g., Wyn Grant, *Private Organizations as Agents of Public Policy: The Case of Marketing in Britain*, in *PRIVATE INTEREST GOVERNMENT* 182-96 (Wolfgang Streeck & Philippe C. Schmitter eds., 1985).

the broadcasting context. Nor were they simply industry trade associations without any legally defined public role, as were the trade associations in declining industries. Even when their role was legally clear, as in the *shingikai* of the transportation context, they went well beyond their statutory advisory role. In these instances, furthermore, they were not the freestanding associations envisioned by Streeck and Schmitter but rather were formal appendages of the agencies.

Private interest governance associations, therefore, receive not only delegated power but also delegated authority. They have a clear legal identity and enjoy legal legitimacy. According to Streeck and Schmitter, associations "shar[e] in the state's authority to make and enforce binding decisions" and, as such, receive "a unique resource that no other environment but the state has to offer: the ability to rely on legitimate coercion."<sup>316</sup> Private groups in the Japanese regulatory context may play a functionally similar role because they may make and enforce binding decisions, but they do so without legal legitimacy and often with only implicit political authority. Their role may not be secret in the sense of a totally private cartel, but it has rarely been as openly debated and legally promulgated as the enabling legislation of private interest governance associations has been.

As a result, Japanese privatized regulation is both less clearly tied to the state and less predictably successful. The less predictable success comes out in the excesses of the LSRSL and *dangô* regimes, which went well beyond what in public discussion the relevant ministries would have admitted to having encouraged. The latter is apparent in the failure of MITI and the steel industry to control the minimill sector and in the collapse of the LSRSL system under the attack of the SII talks. The lack of political authority and legal legitimacy means that privatized regulation is vulnerable to both internal dissidents and politically powerful outsiders in a way that private interest governance is not. Not only can privatized regulation not rely on direct legal coercion but its informal means of coercion are also substantially weakened once they are exposed to public debate because privatized regulation has rarely been fully discussed and agreed to in a politically legitimate forum. As the Lions Oil episode demon-

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316. Streeck & Schmitter, *supra* note 269, at 20.

strated, indirect coercion can still work but only when the relevant industry and government consensus is stable.

There are also corresponding differences between what actually occurs under Japanese privatized regulation and Winter's model of bartering rationality. Despite its seemingly radical departure from the conventional wisdom of Western administrative law, Winter's scheme retains its fundamental organizing principles, the clear distinction between public and private spheres and the resulting vertical orientation of the bargaining process. Winter uses the term "barter" rather than "bargain" to capture the commodification of law, the process where an agency swaps legal power for party compliance.<sup>317</sup> In his model, the public entity remains at the center of the regulatory process and there is no wholesale delegation of power to private parties such as in the Japanese context.<sup>318</sup>

Thus, one might say, bartering rationality correctly describes the process of adjustment in privatized regulation, but gets both the parties and the locus wrong. Instead of the agency incrementally bartering its legal power in return for private action consistent with the statutory mandate, the mandate is delegated to private parties who barter among themselves, not in the vertical relationship of the public private distinction, but in a horizontal relationship of parties that are hierarchically and legally equal. The locus of the regulatory activity, therefore, is not across the boundary of the public and private spheres, but within the private sphere. Although it may typically be the public power of the agency that creates the private space, the agency itself stands outside of the bargaining process. Even when it does intervene, as in selecting a facilitator for adjustment in broadcasting or to create a durable trade association in the ready-mix concrete industry, it does so within the private sphere, not within the public sphere as delineated by the statute.

Nonetheless, Winter's tale of legal commodification provides insight into the Japanese situation. Several of his criticisms of the recent academic developments that see bartering as legiti-

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317. Winter, *supra* note 7, at 220 n.1.

318. Winter also does not anticipate the inter-penetration of public and private spheres that is represented by the *amakudari* system in Japan and the revolving door system in the United States. Indeed, Winter seems to assume that the public actors operate in the public interest rather than as agents of political actors, a much debated proposition.

mate or desirable clearly apply to privatized regulation. One such criticism is his warning that regulation by barter may serve to preserve inequality among the regulated. Another is his fear that bartering will lead to a loss of a critical public. A third is the possibility that compromise, the inevitable result of bartering, obscures long term goals in favor of short term convenience, what Winter phrases as the satisfaction of the parties to the compromise at the cost of stimulating them to proceed according to some larger principle embodied in the law. A fourth is a more general fear which states:

[C]ommodification destroys the political character of legal power as it transforms legal endowments into commodities for bartering. The agency does not exert its powers but trades them. The commodification of legal power also tends to privatize (in the name of the public, to be sure) the authority given the agency.<sup>319</sup>

Winter's fears assume a model of bartering that does not always comfortably fit privatized regulation, but their implications for the meaning of law in Japanese regulation are nonetheless intriguing.<sup>320</sup> It is irrefutable that privatized regulation favored and preserved the status quo and in that sense preexisting inequality. It also sheltered the weak and restrained the efficient, at least in the sense of limiting rapid shifts in market share. Winter talks in terms of large firms having the resources to take the Government to court, which hardly seemed a factor in Japan, where it was as often the small emerging firm or the outsider that was eager to act legally. The firms at the top of the hierarchy in Japan were able to maintain that position through the horizontal bargaining of privatized regulation. Because the agency in Japan did not intervene to balance power relationships, as Winter seems to assume that it does in Europe and North America, recourse to court was unnecessary and undesirable for the more powerful firms.

Privatized regulation clearly prevented the development of a critical public that would challenge its processes and results. Of course, there were a myriad of reasons for the lack of a criti-

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319. Winter, *supra* note 7, at 247.

320. The list of Winter's concerns for what he calls "commodification" is incomplete and distorted to make it useful to the analysis of Japanese regulatory style. Winter has other concerns that do not relate well to Japan and have, therefore, been omitted.



cal public debate on the issues covered in this Article's case studies, but certainly the ad hoc and informal nature of privatized regulation hindered public awareness of its existence and the general satisfaction of its participants lessened the need to appeal to public scrutiny. It is equally clear that it was not public indifference or satisfaction that hindered debate. Once the issue of the implementation of the LSRSL was raised during the SII talks, the public debate was vigorous and generally favored U.S. demands for reform. Without a powerful outsider, however, these issues remained obscured.

Winter's third fear, the loss of the principled and long term goals of the law, is at the heart of privatized regulation. While there are differences in the degree of commonality among the case studies in this Article on several other dimensions, the attenuated relevance of statutory norms remains constant. It was only where the agency was unable to maintain the horizontal nature of the process and had to resort to vertical demands, as in the land use case, that the legal norms played a role. In outline guidance the important norm, the lack of legal power on the part of local governments, was negative. In privatized regulation, on the other hand, the agency and the participants were able to remain within the limitations of the model, to the exclusion of legality as Winter means it here.

Winter's last fear, or conclusion as he phrases it, was that bartering rationality privatized the public authority given the agency. Arguably, Winter's bartered regulation does not privatize authority to the degree that Japanese regulatory style did. The agency remains at the center of his model. It swaps parts of its legal power for compliance and, to that extent, remains in control of the process. The Japanese agency remained in control as well, but at a much greater distance. It created and controlled the locus of bargaining, but did little of it itself. If the need arose, as it did for MITI during the SII talks, the agency could take swift and determinative action, but while privatized regulation operates successfully, it is private to a degree unforeseen by Winter's bartering rationality.

Japanese privatized regulation is also arguably more "private" than Streeck and Schmitter's private interest government. The latter depends heavily on legal recognition of the groups operating as associations and of the legitimacy of the framework within which they operate. Thus, associations are statutorily cre-

ated entities with the power to compel firms or individuals to become members, with a legally enforceable internal structure, and with a monopoly in their status as intermediaries for a given class, sector, or profession. Associations, furthermore, interact with each other and the state within legally created institutions and according to mutually recognized formal rules. While some of these characteristics existed in privatized regulation, none of the instances that this Article examined exhibited all or even most of them. Even more striking, when elements of the formal legality of associational governance have existed, they were frequently ignored, as was the case when MITI chose to supersede the consultative committees of the LSRSL in favor of informal groups of merchants.

Unlike Streeck and Schmitter's neocorporatist regime, therefore, privatized regulation did not operate within what Claus Offe refers to as a "legal complex."<sup>321</sup> In privatized regulation, the law created the locus of private interaction, as when the MPT refused to accept multiple applications, and the doctrines of administrative law enabled the interaction to proceed without outsider interference. Otherwise, law was absent, and private bargaining structured the result. Privatized regulation, therefore, did not have the legal identity and status or the administrative transparency that characterize private interest government.

#### CONCLUSION: PROSPECTS FOR CHANGE

The scope and targets of government regulation have shifted over the postwar period, but the techniques of privatized regulation have remained remarkably stable. The same basic tools were used during the Sumitomo Metals Incident of the mid-1960s that were used in declining industries policy in the 1970s and 1980s. Similarly, although technological and economic change has eliminated the demand for local television broadcasting licenses, the MPT now reportedly uses "uniform adjustment" in the allocation of satellite broadcasting rights.<sup>322</sup>

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321. Streeck & Schmitter, *supra* note 269, at 22 (citing Claus Offe, *The Attribution of Public Status to Interest Groups: Observations on the West German Case*, in *ORGANIZING INTERESTS IN WESTERN EUROPE* 123-58 (S. Berger ed., 1981)).

322. Interview with Junichi Hamada, Institute of Social Science, Univ. of Tokyo, Summer 1996 [hereinafter Hamada Interview].

What has changed has been the content of economic regulation, not the style.

Continuity in style has been all the more remarkable given the extraordinary changes in the political, economic, and legal environment. In the 1960s, MITI and the Iron and Steel Association could back up their informal enforcement measures with the threat of MITI's withholding of foreign exchange under the Foreign Trade and Foreign Exchange Control Law ("FEFTCL").<sup>323</sup> They could also act with little concern that their tactics or goals would be noticed or objected to by foreign governments. By the 1980s, of course, neither condition was present.<sup>324</sup> Furthermore, Japan had shifted from an industrial mercantilist economy to a mature post-industrial economy with much lower growth rates and much stronger constraints on export growth.

These "environmental" changes meant changes in the balance of power both between the ministries and the trade associations and within industries themselves, witnessed by the different fates of TSM and Sumitomo Metals. The changes, however, had not led to the development of a new form of economic regulation. Whatever power the ministries may have had to dictate to the private sector in the first decades of the postwar era was gone by the early 1980s, but the loss of formal legal power may have made all parties more dependent on the techniques of privatized regulation. Certainly there were no indications in the mid-1980s that Japanese administrative processes had become any more transparent, open, or formal than they had been twenty years earlier.

In the 1990s, however, privatized regulation faces a set of new challenges. Most obvious is the state of the economy. By 1997, Japan had experienced over five years of recession, and commentators warned that the banking crisis and depressed asset prices meant that full recovery remained a distant prospect. The implication for privatized regulation was clear. A stagnant

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323. See LAW AND SOCIAL CHANGE, *supra* note 23, at 173; *Gaikoku kawase oyobi gaikoku bôeki kanrihō* [Foreign Exchange and Foreign Trade Control Law], Law No. 28 of 1949 (Japan) [hereinafter FEFTCL].

324. By the 1990s, the Government had lost most of its direct control over international financial movements, not only because of the liberalization of the legal regime but also because of the increased independence of the most successful Japanese companies. Hamada Interview, *supra* note 322.

economy meant that the participants in privatized regulation could no longer count on an expanding pie to offset and disguise its costs. Japan has overcome economic watersheds in the past with little change in its domestic regulatory structure. It is unlikely that sustained recession alone would force fundamental changes, especially because economic duress increases the demand for the "adjustment" that privatized regulation accomplishes so well at the same time that it makes it more difficult to achieve. What makes permanent change a possibility is a concatenation of structural changes in the political, economic, and legal environment in which privatized regulation must operate. The full story of these developments is beyond the scope of this Article, but four interdependent developments that have a direct impact on privatized regulation will be mentioned here: a decline in the social and political status of the bureaucracy, changes in the political balance of power and the electoral system, the enactment of the Administrative Procedures law<sup>325</sup> ("APL"), and continued conflict between the norms of international trade and the structure of privatized regulation.<sup>326</sup>

First is the damage that a series of policy failures and cor-

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325. APL, Law No. 88 of 1993 (Japan).

326. A fifth possible area is competition policy. If the FTC were to begin to enforce the AML vigorously and in a manner designed to attack the exclusionary practices that are at the heart of privatized regulation, it would present extremely serious problems for its continuation. There are some signs that attitudes toward antitrust enforcement are changing. The FTC, partly in response to U.S. pressure under the SII, has significantly increased its activity during the 1990s, including an increase in formal actions. See *Antitrust Enforcement in Japan*, *supra* note 159, at 157-73; SCHOPPA, *supra* note 104, at 244-50. In 1991, the FTC brought its first criminal action since 1973. *Id.* at 220, 248. A 1990 case against regional cement price cartels led to fines that surpassed the total fines in all cases from 1978 to 1990. *Id.* at 248.

This new enforcement campaign by the FTC is unlikely, however, to affect privatized regulation. The FTC remains weak in relation to the ministries that sponsor privatized regulation, and the FTC has few natural allies in the Diet or among organized interest groups. It is unlikely, therefore, to attack any aspect of privatized regulation that is considered legitimate by the mainstream economic actors in Japan. It is not surprising, therefore, that the Commission's burst of activity in the 1990s has been focused on resale price maintenance and other forms of price restraints and has not extended to exclusionary practices. Indeed, the FTC has almost never attacked exclusionary boycotts, regardless of whether the United States was watching. See *Antitrust Enforcement in Japan*, *supra* note 159, at 170-73. The 1990 case against cement cartels is illustrative of the relationship between the FTC and privatized regulation. Schoppa states, "[w]hile the FTC punished the firms severely for colluding to raise prices, it did nothing to force these firms to stop harassing construction firms and distributors that handle non-cartel (e.g. Korean) cement, practices that have been widely reported in the press." SCHOPPA, *supra* note 104, at 249. After the FTC action, domestic cement

ruption scandals have done to the respect and prestige of Japan's bureaucrats. Both the creation and subsequent collapse of the "bubble" economy of the late 1980s severely tarnished the reputation of the MOF.<sup>327</sup> In addition to the resentment of those directly affected, the reporting on the intricacies of the banks' bad loan crisis exposed the cynicism and social cost of the *amakudari* system that is a central part of the glue that holds privatized regulation together.<sup>328</sup> Adding to the injury of the bubble collapse was the insult of widespread and lavish entertainment of MOF and other bureaucrats by their regulated industries and even by other bureaucrats using tax revenues.<sup>329</sup> The structural corruption of the financial crisis and the embarrassingly lavish nightlife of the top bureaucrats were exacerbated by the sordidness of the Ministry of Health and Welfare scandals.<sup>330</sup> The discovery that the Ministry had allowed pharmaceutical companies to sell stocks of HIV-contaminated blood products after safe foreign alternatives were available, both to allow companies to sell otherwise worthless inventories and to give them the time to develop ways to protect domestic marketshare from U.S. and European competitors, was followed by the arrest of the Administrative Vice Minister who had been appointed to clean up the Ministry in a simple bribery scheme created by a

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prices fell 2%, but they remained substantially higher than import prices and the cartel was still able to keep out new competition. *Id.*

This approach to privatized regulation is instructive. Price gouging that harms the Japanese consumer and does so without any basis in national policy, for example, outside of the processes of bureaucratic sponsored privatized regulation, will be politically illegitimate and unprotected. Group boycotts established under the authority of privatized regulation, on the other hand, are politically legitimate, even if illegal, and are unlikely to be attacked by anyone other than the United States.

327. The run-up in land and stock prices that created the "bubble" greatly enriched those Japanese who owned land and stock but left the vast majority of Japanese behind, increasing wealth disparities at a rate unknown up to that point in the postwar era. When the crash came, even those who had benefited were embittered. Much of the blame for the bubble and its aftermath fell on the MOF. See Milhaupt & Miller, *supra* note 5.

328. See Ken Duck, *Now That the Fog Has Lifted: The Impact of Japan's Administrative Procedures Law on the Regulation of Industry and Market Governance*, 19 FORDHAM INT'L L.J. 1686, 1696-99 (analyzing criticism of *amakudari* system for its role in scandals).

329. See Duck, *supra* note 328, at 1701-03 (analyzing influence and reigning in of MOF-Tan network); Susan Pharr, *Corruption and Democracy in Japan*, paper presented at Annual Meeting of the Association for Asian Studies, Chicago, Mar. 13, 1997 (on file with author) (discussing *kankan settai*, or bureaucrats entertaining other bureaucrats).

330. See Eric A. Feldman, *Deconstructing the Japanese HIV Scandal*, Working Paper No. 30, JAPAN. POL'Y RES. INST., Feb. 1997 (on file with author).

shady nursing home entrepreneur looking for additional subsidies.<sup>331</sup>

The result is not simply the general realization that bureaucrats often act in a self serving manner. It is also the knowledge that bureaucratic policy can often be fundamentally wrong and that the error can mean huge costs for taxpayers. Because privatized regulation relies on an aura of bureaucratic expertise and neutrality for legitimacy, the heightened public awareness that bureaucrats are frequently both corrupt and wrong is likely to constrain when and how privatized regulation can operate in the future.

The second development consists of fundamental changes in the balance of political power and the nature of the electoral process. In 1989, the LDP lost its majority in the upper house of Japan's bicameral legislature. In 1993, the postwar dominance of the LDP was at least interrupted, if not ended, with the first non-LDP government since the 1940s. The LDP, shortly thereafter, regained power and continues in power in 1997, but only as a part of a coalition government. Repeated dramatic but vague calls for reform of the bureaucracy and deregulation of the economy have accompanied each of these regime changes, but the series of new governments has meant little for privatized regulation so far. The LDP has retained primacy and, to the extent that the parties articulate clear policy positions, the LDP and its coalition partners are more protective of the status quo than the opposition parties.

What will most likely matter in the long run, however, is the change in electoral rules passed by the Diet in 1994.<sup>332</sup> These reforms eliminated the single non-transferable vote ("SNTV") system in force since World War II and replaced it with a combination of single member constituencies and a proportional representation list. Many commentators on Japanese electoral politics believe that the SNTV system discouraged issue-based campaigning in favor of personalistic politics. The movement to

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331. See, e.g., *Okamitsu Admits to Taking Bribes*, MAINICHI DAILY NEWS, Mar. 27, 1997, at 1; Akira Kojima, *Lost in the Mists, Bureaucracy Awaits Reform: Japan's Ministries Need Clear Sense of Purpose, and Much Greater Accountability for Their Actions*, NIKKEI WKLY, Feb. 10, 1997, at 7; *Ex-Japanese Bureaucrat Admits Accepting Bribes*, N.Y. TIMES, Mar. 27, 1997, at A4; *Japanese Official Admits Corruption*, INT'L HERALD TRIB., Mar. 27, 1997, at 8; Pharr, *supra* note 329, at 2.

332. See *Kôshoku senkyôhō* [Public Official Election Law], Law No. 2 of 1994 (Japan).

proportional representation and single member districts, it is argued, may enable voters to focus more effectively on diffuse issues like consumer prices, the cost of living, or the environment. If so, voters may demand an administrative process and a form of economic regulation that is open to the participation of a broad range of interests.

One step toward such an administrative system was the APL passed in 1993 during the non-LDP government of Morihiro Hosokawa. Like the reforms of the LSRSL, the APL is a product, at least in part, of the SII talks.<sup>333</sup> It requires additional hearings, written statements of reasons for administrative denials, and written explanations for administrative guidance. Although a modest measure by U.S. standards of administrative process, it has had some initial well-publicized effects. The *Keidanren*, Japan's peak business organization, has created an APL "hotline" to receive complaints related to administrative abuses. The hotline was used by Amakusa Gas Co., a Kyushu natural gas distributor, to resist MITI attempts to force it to enter into "adjustment" with potential competitors before expanding its distribution network.<sup>334</sup> The Jōnan Credit Bank similarly refused to follow the tradition of pre-clearance of new products by MOF and offered lottery promotions for new savings accounts. When Jōnan persevered despite trade association and MOF criticism, several other banks followed suit.<sup>335</sup> On the other hand, the *Keidanren* official in charge of the hotline complains that too many companies remain hesitant to confront the bureaucracy or challenge the status quo. Others complain of the glaring loopholes of the law.<sup>336</sup> It excludes local government completely from its coverage<sup>337</sup> and applies only to administrative adjudication, leaving administrative rulemaking unconstrained. The latter is of special concern to privatized regulation because shifts in regulatory stan-

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333. The legislative history of the APL, however, predates U.S. involvement and can be traced as far back as the 1920s. Efforts continued throughout the postwar period. See Duck, *supra* note 328, at 1727-29.

334. *Id.* at 1746-47.

335. *Id.* at 1747-49.

336. Interview with *Keidanren* Official, Tokyo, Japan (Summer 1996).

337. This criticism ignores the fact that 47 prefectures passed their own administrative procedure ordinances with the force of law between 1994 and 1996. See DEETABUKKU GYŌSEI TETSUZUKIHŌ 1996 NENBAN [APL DATABOOK, 1996 EDITION] 135-261 (S\_much\_gy\_sei kanrikyoku [Management and Coordination Agency, Administrative Management Office] ed., 1996) [hereinafter 1996 APL DATABOOK].

dards and practices are often used to insulate markets from new entrants, including of course, foreigners. Most of the law's provisions, furthermore, require agencies only to "endeavor" to carry out their instructions.<sup>338</sup>

Pessimism on the overall effect of the APL, however, may be premature. Because the APL does nothing to improve directly the prospects for effective judicial review under the ACLL, it is unlikely by itself to lead to dramatic or immediate changes, but many of the APL's provisions may provide bureaucratic, political, and legal leverage to future opponents of privatized regulation. A brief review of the potential effect of Articles 6, 7, and 37, for example, illustrates how seemingly small hortatory changes may lead to greater opposition to resist privatized regulation. Articles 6 and 7 instruct each agency to establish and publish standard time periods for the processing of applications and to begin to process applications as soon as they are received.<sup>339</sup> When the agency considers an application insufficient for some reason, it should either give the applicant a reasonable time to comply or deny the application. Article 37 states that any formally complete notification, such as the notification required of Lions Oil to import gasoline or one of the notifications required of large retailers under the LSRSL, shall legally be considered as accepted as soon as it arrives at the appropriate administrative agency.<sup>340</sup> The combined result of these three articles, if the agencies and courts take them seriously, may be to make the ubiquitous practice of forcing adjustment by refusing to accept notifications or to act on applications and notifications upon receipt mean that recalcitrant parties can force the formal administrative process to begin immediately instead of being forced to engage in informal adjustment negotiations while the agency sits on the paperwork.<sup>341</sup> In addition, when an agency nonetheless

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338. Despite the absence of mandatory provisions, most agencies of the central government have taken the APL seriously. See 1996 APL DATABOOK, *supra* note 337, at 123-33.

339. APL arts. 6-7, Law No. 88 of 1993 (Japan).

340. *Id.* art. 37.

341. Uga discusses the same effect of locally promulgated administrative procedure ordinances on the practice of outline guidance in land use conflicts. See Uga, *supra* note 248, at 106. Uga cautions, however, that the problems of inadequate legal power on the local level and a city planning process that neglects citizen participation that outline guidance attempts to address are real and that reforming the excesses of local governments in outline guidance cannot provide a lasting solution. He argues



procrastinates, the publication of a standard time period for action should enable rebels like Ogura of Yamato Transport to sue more quickly and with a better chance of success.

The fourth of the interdependent factors threatening the stability of privatized regulation is the continuing tension between the norms of international trade and Japanese regulatory practice.<sup>342</sup> It is privatized regulation's legal inaccessibility that poses a problem on the international level. Some degree of privatization of the regulatory process occurs in every country, whether through ad hoc capture of the bureaucracy on the micro level or in the grand compromise of neocorporatism at the macro level. Whenever it occurs, it creates an opportunity for additional informal bargaining in the regulatory system, which in turn puts an increased premium on information available most readily to insiders. Thus, when a large retailer in the United States requires a conditional use permit or other zoning measure from a local government, it may well end up in a negotiation with either local merchants or prospective neighbors or both, regardless of the legal nature of the permit process.<sup>343</sup>

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that increased local autonomy and legal authority and an effective freedom of information regime are necessary.

342. See Alan O. Sykes, *The Positive Economics of WTO Agreements on Regulatory Barriers to Trade* (unpublished draft on file with author) [hereinafter *Positive Economics of WTO Agreements*].

343. The conflict between local merchants and chain stores is as old in the United States as it is in Japan or France. At one point in the 1930s, twenty-seven states had statutes that taxed chain stores discriminatorily in an open attempt to protect independent merchants from the perceived predatory practices of big city based chains. See JOSEPH PALAMOUNTAIN, *THE POLITICS OF DISTRIBUTION* 1 (1955); see also *State Bd. of Tax Comm'rs v. Jackson*, 283 U.S. 527 (1931) (upholding constitutionality of discriminatory state tax statutes); 53 CONG. REC. 8130-31 (daily ed. May 27, 1936) (statement of Rep. Robison) (supporting discriminatory state tax statutes favoring independent merchants). These efforts eventually failed, primarily because large retailers were able to forge political alliances with farm interests and effectively appeal to consumers, and direct impediments on large stores and retailers are now unusual in the United States. This has not meant the elimination of opposition to large stores, but it has forced local merchants to frame their opposition in terms of community values, traffic concerns, and quality of life issues and to forge alliances with residents opposed to large developments on grounds unrelated to the merchants' interests. They have had some limited success, particularly in the Northeast. See, e.g., *They're Up Against the Wal*, TIME, Nov. 1, 1993. The key to these efforts' success has been the mobilization of residents to appear at the public hearings required by the land use process in most states. Because a large development of any type, retail or otherwise, will normally require some form of special permit, residents are able to appear and argue that planning boards and the like, should exercise their limited discretion in such matters to reject the store's application. One opposition group, S.O.S. — Save Our Sturbridge (The Committee for Responsible

When a U.S. state legislature requires manufacturers to obtain a license for new car dealerships only when an established dealer objects, a new locus for extra-legal bargaining among manufacturers, prospective new dealers, and established dealers is created.<sup>344</sup>

Because bargaining requires and rewards a form of local knowledge unnecessary in the hypothetical world of markets governed solely by legal rules, outsiders begin at some disadvantage in every market.<sup>345</sup> In most instances, however, the bargaining occurs in the shadow of legal rules, that is, with the realiza-

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Growth), listed the following issues to be brought before a planning board faced with an application from a large retailer, in their case Wal-Mart: net effect on property taxes after expected decline in value of other commercial property; net loss of jobs caused by decline in other business activity; increased traffic, automobile accidents, and road maintenance costs; increased car theft, larceny, and car insurance rates; increased police costs and lengthened response times; air and water pollution and loss of wetlands; increased travel time for local residents; lower home values; after development of fast food outlets, muffler shops, etc., and "[t]he money spent there goes to Arkansas, not Sturbridge." Material provided by S.O.S. — Save Our Sturbridge (The Committee for Responsible Growth) (on file with author).

Local land use authorities in the United States commonly have some degree of discretion to refuse applications, depending on the nature of the development and the permit required. The Japanese local governments in the land use context, on the contrary, did not have discretion to deny permits. *See supra* notes 248-258 and accompanying text. Nor did the formal land use process provide for the same degree of public participation.

344. *See* *New Motor Vehicle Bd. v. Orrin W. Fox*, 439 U.S. 96 (1978) (upholding state statute requiring automakers to obtain approval of state motor vehicle board prior to opening or relocating retail dealerships to new market if franchisee in new market protests). The political impetus is exactly the same in both countries, and presumably in every democratic society. Local merchants are able to persuade local governments to protect their interests. For two further examples in the U.S. context, *see also* *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) (striking down state statute which required that applicants for pharmacy operating permit be "a registered pharmacist in good standing" or "a corporation or association, the majority stock in which is owned by registered pharmacists in good standing."); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) (upholding state statute which prohibited producers or refiners of petroleum products from operating retail service stations). A fundamental difference between the United States and Japan, however, is in the legal nature of these attempts. In the United States, they take the form of formal statutes. As such, they are not only subject to the political scrutiny of the legislative process, but also they are subject to judicial review on both their general legality and, if they pass that test, on the legality of their application in each instance. Because of the legal informality of privatized regulation and the deference of the Japanese judiciary toward administrative action, the Japanese version of local protection is much more politically and legally insulated.

345. Outsiders may have advantages as well. *See* Steve Glain, *Foreign Entrepreneurs Find Fertile Ground for Start-ups in Japan*, *WALL ST. J.*, Nov. 8, 1996, at A1.

tion by the actors that recourse to litigation or some other form of rule application is available.<sup>346</sup> Access to law sets limits on the bargaining. Thus, in the zoning and car dealership examples, the cost and likelihood of success in judicial review of an improper denial will guide the bargaining. A knowledge of the formal legal rules and institutions, therefore, can assist outsiders by both informing them of the locus of the bargaining and by counteracting the importance of local knowledge.

As we have seen, however, privatized regulation frequently lacks a clear legal identity. The locus, procedure, and results of adjustment in its many forms were usually not discoverable via legal channels of information. Pre-prenotification commercial adjustment in retailing was not promulgated as a statute or regulation; nor was unification adjustment in broadcasting; nor was the cartel formation of declining industries, whether it was the clear cut import prohibitions of the gasoline cartel or the more fluid maneuvering of cement or steel. Judicial intervention on behalf of outsiders in each of these instances was at best a remote possibility. By contrast, in the land use context, where neither the threshold doctrines nor agency discretion posed significant obstacles, judicial review was eventually effective. It is also interesting to note that only in outline guidance were the rules of the system openly debated and formally promulgated as if they were laws, which may have ironically rendered the system more vulnerable to attack than if the existence and nature of the system had been entirely informal as in privatized regulation.

Privatized regulation, therefore, exacerbates the outsider's difficulties by both making judicial review less effective and denying easy access to the information necessary to succeed within the system. This problem is exacerbated when the outsiders are foreigners, who usually lack the range and depth of local knowledge necessary to operate within informal systems. As the ultimate outsiders, only the clarity of effective rules or its equivalent will allow them access to the market on anything close to an equal basis.

It is not surprising, therefore, that transparency in Japanese administrative processes has become a central issue in trade negotiations with the United States, perhaps the leading exponent

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346. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L. J.* 950 (1979).

of a legalistic approach to international trade.<sup>347</sup> This dissatisfaction with not merely the results of Japanese economic practices but also with their nature was at the heart of the SII talks and is captured succinctly by the frequent U.S. appeal to “level playing fields” and other game metaphors. This Article has already reviewed the success of the SII in reducing procedural hurdles and delays under the LSRSL and contributing to the passage of the APL, and this pressure is likely to continue. At the behest of Kodak, the United States has taken to the WTO allegations of exclusionary trade practices in the film industry,<sup>348</sup> and the Federal Maritime Commission has begun administrative proceedings to investigate exclusionary practices in the management of harbor traffic.<sup>349</sup> Both involve the particular mixture of private and public actions that distinguish privatized regulation. U.S. negotiators also persuaded their Japanese counterparts to include the specific language of the APL in trade agreements on insurance and financial services, with the express purpose not only of enhancing access in these sectors but also of strengthening the implementation of the APL within Japan.<sup>350</sup>

These changes have been real, but it is unlikely that trade negotiations by themselves can achieve fundamental or enduring changes. In the first place, U.S. negotiating teams rarely have the expertise or experience to understand the domestic roots of what they are trying to change.<sup>351</sup> More important, despite their ideological posturing, the U.S. negotiators are more interested in tangible results than free market purity. Thus, free and open competition in, for example, the semiconductor mar-

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347. Uekusa, *supra* note 91, at 237, 264-67 (discussing U.S. pressure during SII talks for transparency in Japanese administrative process).

348. See Dewey Ballantine, *Film in Japan*, <<http://www.dbtrade.com/casework/film/film.htm>>; *Japanese Barriers on Imported Photographic Film and Paper: An Overview and Summary of the United States Submission to the WTO Dispute Settlement Panel*, <<http://www.dbtrade.com/casework/film/summarya.htm>>; *Japan - Measures Affecting Photographic Film and Paper: First Submission of the United States of America* (Feb. 20, 1997) <<http://www.dbtrade.com/casework/film/wto/toc.htm>>.

349. See Proposed Rules on Port Restrictions and Requirements in the United States/Japan Trade, 46 CFR PART 585 [Docket No. 96-20], Nov. 13, 1996.

350. Duck, *supra* note 328, at 1741-42, 1726.

351. Thus, the U.S. negotiators remained mute when the Japanese disingenuously claimed that 18 months was the shortest possible time limit for the LSRSL process under the statute and when they characterized the law requiring a license to import gasoline as a “liberalization” when, in fact, it made illegal the import of gas that had been free before.

ket, is ultimately less attractive than guaranteed market shares for U.S. owned firms.<sup>352</sup> Indeed when U.S. firms find a profitable niche within Japan, they and their Government are more likely to take advantage of protective regulatory barriers than advocate their dismantling.<sup>353</sup> Democratic governments, especially when reacting directly to company pressure for additional sales in foreign markets, are unlikely to be consistent champions of market discipline or the administrative rule of law if either threatens the success of their own industries.<sup>354</sup>

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352. Under the Semiconductor Agreement of July 30, 1986, the Japanese Government agreed to take active measures to raise the domestic Japanese marketshare of U.S. semiconductors to 20% and to maintain it at this level. This agreement was pressed on the Japanese by the ideologically free trade Reagan Administration and pointed to as a model by the more results oriented Clinton Administration. See SCHOPPA, *supra* note 104, at 67, 257-58.

353. The clearest recent instance of U.S. firms and their governmental advocates tempering their deregulatory zeal when U.S. interests among those threatened by market opening was the treatment of insurance under the Clinton Administration's Framework Talks. Prior to the talks, the "third sector" of the insurance market, i.e., that dealing with neither life nor casualty insurance, was heavily regulated in favor of U.S. firms, which enjoyed substantial profits in this niche. The Clinton Administration, not surprisingly, therefore opposed any unilateral deregulation of this sector. SCHOPPA, *supra* note 104, at 267.

354. Of course the United States is not the only country that complains about Japanese trade practices. Multilateral, as opposed to bilateral pressure also push toward greater formality and openness in Japan's regulatory style. The Uruguay Round of multilateral trade negotiations recently concluded two agreements, the WTO Agreement on Technical Barriers to Trade and the WTO Agreement on Sanitary and Phytosanitary Measures, on regulatory practices that may eventually have an effect on privatized regulation. These agreements prohibit regulatory protectionism and, most important for the purposes of this Article, they go beyond merely prohibiting its most obvious form, added requirements for foreign firms, to prohibit ostensibly neutral measures whose true objective and impact are protectionist. When a trading partner suspects that a facially neutral regulation is in actuality intended to protect domestic firms, therefore, it can use the WTO dispute resolution mechanism to force the responding country to justify its practices according to general scientific principles. Equally important, these agreements also require regulators to publicize new regulatory proposals and allow time for comments by foreign firms. These requirements are the international equivalent of the provisions of the APL and have the potential of becoming an important vehicle for reinforcing the APL's underlying norms. See *Positive Economics of WTO Agreements*, *supra* note 342.

An important weakness in these agreements, however, may limit their immediate effectiveness in the Japanese context. Like previous GATT/WTO agreements, they apply only to "policies promulgated by governments with which compliance is *mandatory*. 'Standards,' with which compliance is *voluntary* and which may result from either government or private sector activity" are not covered. *Id.* at n.1 (emphasis in original). Because privatized regulation rarely fits these formal requirements, it may escape WTO scrutiny in much the same way it escapes judicial review in Japan. It is true that the GATT has in the past looked behind the formal voluntariness of administrative gui-

Fundamental changes in the nature of Japanese economic regulation, therefore, will depend primarily on domestic politics. Privatized regulation has benefited the powerful segments of Japanese society for over fifty years, but there is no guarantee that it always will. On a procedural dimension, the informality of the current process has insulated the delegation of public power to a limited number of private actors from close political, as well as judicial, scrutiny. On a substantive level, it has favored producers over consumers by shifting onto the latter the costs of cartelization among the former. Because these practices have not prevented and may have contributed to fifty years of relatively egalitarian growth and prosperity for the Japanese electorate, it is not surprising that there have been no sustained demands for their eradication.

Times change, however, and both Japanese consumers and important sectors of the business world seem genuinely dissatisfied with the status quo, including the increasingly apparent costs of privatized regulation. These discontents, furthermore, may find an enhanced means of expression in the APL and recent electoral reforms, especially when allied with the repeated pressures of the United States in selected sectors. When and if that happens, privatized regulation will undergo fundamental change. Until then, reforms are likely to be limited to those incrementally necessary to satisfy irritated foreigners, and it is likely that any resultant reforms will repeat the pattern of changing the content and targets of regulation rather than its form. Unless it does the latter, however, Japanese regulatory style will remain difficult to understand and penetrate. The ultimate answer to the question of change, therefore, lies not in external pressure or global convergence, but where it belongs—in the domestic processes of Japanese democracy.

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dance used in a Voluntary Restraint Agreement on Semiconductors between the United States and Japan, declaring the guidance to be in fact compulsory. In that case, however, the enforcement mechanism was explicit and clearly within MITI's jurisdiction. In much of privatized regulation, however, the role of the government and the compulsory nature of the agreement are less clear and are more likely to be much more difficult to establish and require a much more intrusive investigation into domestic practices.