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Environmental Protection Agreements in Japan and the United States

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ENVIRONMENTAL PROTECTION AGREEMENTS IN JAPAN AND THE UNITED STATES

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Abstract: In an environmental protection agreement, local government regulatory authorities and the regulated industry enter into a binding written agreement that specifies limits on pollution and supplements the applicable regulatory requirements. They have been utilized in Japan for over twenty years. This Comment discusses the content and practical uses of these agreements as they have been used in Japan, and postulates their legal status under three theories: that such agreements are relational social contracts; that they are informal administrative guidance; and that they are civil contracts. The legal character of environmental protection agreements in Japan has never been well-defined, primarily because of lack of litigation. Therefore, this Comment analogizes from the manner in which courts in both Japan and the United States have treated similar land use development agreements. It concludes that environmental protection agreements in the United States could be a valuable supplement to the current regulatory system, as long as agreements are truly voluntary and that some justifiable relationship exists between the conditions imposed and the public good.

I. INTRODUCTION

Despite differences in legal tradition and culture, the United States and Japan share distinct similarities in their systems of environmental control. These two industrial democracies have developed complex and analogous pollution control laws, regarded as models by the rest of the world. This is partly due to common trends in industrial evolution. Both nations are heavily industrialized, in transition from older, polluting industries, such as chemical manufacturing and metal smelting, to high technology and service industries with more diffuse environmental effects. The moralistic grass-roots citizen movements that arose in both countries during the early 1970s generated a wave of new environmental laws.[1] These laws share common assumptions and structures. They are both grounded on the "polluter pays principle,"[2] have adopted strict and prescriptive standards, and rely on technology-forcing, "best available control" regulatory strategies. Both Japan and the United States use a two-

[1] For a discussion of the evolution and impact of citizen politics on environmental law in Japan, see MARGARET A. MCKEAN, ENVIRONMENTAL PROTEST AND CITIZEN POLITICS IN JAPAN (1981) and JULIAN GRESSER ET AL., ENVIRONMENTAL LAW IN JAPAN 3-50 (1981).

[2] This is the general belief that industry should shoulder the financial and technical burdens of controlling contamination, while government should closely monitor the result.

tiered administrative system wherein the national government primarily sets policies and standards, and the state or prefecture primarily implements them.

These overarching similarities emphasize important differences between the two nations' approaches to environmental control, such as assumptions concerning relationships between government, industry and the general public, and the means used to achieve these strict pollution control standards. In Japan, the national laws function as a "floor," while local government negotiates much stricter, site-specific particularized standards. Japanese businesses exhibit a higher tolerance for variations in the regulatory requirements between different localities, even within the same industry. In Japan, a "fair" standard is not necessarily one which treats everyone the same, but rather one which takes into account all the unique local preferences and pecularities.[3]

The United States is now facing the consequences of its regulatory choices; the limits of its so-called "command and control" system of regulation are well documented.[4] There is an ongoing debate within the United States (and in Europe) about what alternatives exist, how to most effectively and efficiently regulate industrial pollution. Two main schools of thought have emerged. One school proposes replacing or supplementing command and control regulation with "indirect regulation," *i.e.*, they support the use of economic incentives and market-oriented regulations to send pricing signals that channel industry choices in environmentally preferable ways.[5] The other school advocates the increased use of self-

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[3] This acceptance of particularized solutions reflects historically prevalent attitudes in Japan about the role of law in society. "The notion that a justice measured by universal standards can exist independent of the wills of the disputants is apparently alient to the traditional habit of the Japanese people." Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan, in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41, 50 (Arthur T. von Mehren ed., 1963).

[4] "Command and control" regulations are those that require a specific action by a regulated entity, usually by meeting stated technological standards of pollution, often the best available technology. Critics assert that this system has tended to result in a profusion of detailed laws and regulations, which consume precious money and energy through high transaction costs. The laws, developed in a fragmented way, have resulted in fragmented programs that often allow cross-media transfer of pollutants, while the level of regulation is not well-correlated with the level of actual environmental risk. *See generally* SCIENCE ADVISORY BOARD, U.S. EPA, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION (1990); OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, SERIOUS REDUCTION OF HAZARDOUS WASTE (1986).

[5] Marketable rights (*e.g.*, the Clean Air Act's emissions-credit trading system) and various state fee systems have been the primary uses of indirect regulation in the United States. *See generally* Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171 (1988).

regulation, whereby government shares either regulatory power, enforcement power, or both with the regulated community.[6] Experiments with self-regulation include the voluntary adoption of industrial standards (such as ISO 9000 and ISO 14000)[7] and regulation development through structured negotiation ("reg-neg").[8]

Environmental protection agreements, which contain elements of both indirect regulation and self-regulation, may be a viable third option in the United States. In an environmental protection agreement, government regulatory authorities and the regulated industry enter into a binding written agreement specifying comprehensive limitations on pollution that either supplant or supplement the otherwise applicable regulatory requirements.[9] Like indirect regulation, management via environmental protection agreements depends on decentralized, independent choices by businesses pursuing their own economic and social goals, which, in the aggregate, shape environmental policy outcomes. Like self-regulation, environmental protection agreements involve the adoption of a regulatory standard through voluntary negotiation. Yet, these agreements appear to be based on contract law, an old and universal form of law.

In Japan, such environmental protection agreements, called "*kōgai boshi kyōtei*",[10] have been extensively used for the last twenty years. In

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6 Eric Bregman & Arthur Jacobson, *Environmental Performance Review: Self-Regulation in Environmental Law*, 16 CARDOZO L. REV. 465, 466 (1994).

7 ISO 9000 is an international voluntary standard, developed under the auspices of the International Organization for Standardisation ("ISO"), that sets out a recommended quality assurance system for adoption by industries. It is applicable to a wide range of industries, rather than to a specific product as are the more typical technical ISO standards for chemical quality, information processing, photography, mechanical engineering, and so forth. ISO 14000 is a similar voluntary standard, currently in the process of being developed, which will consists of a recommended environmental management system, incorporating elements of life-cycle assessment, internal auditing, and eco-labelling. *See generally* Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L. Q. 479 (1995).

8 For a refreshingly critical discussion of the reg-neg approach, see Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1207-12 (1994).

9 The definition is one used by Richard B. Stewart, *Environmental Contracts and Covenants: A United States Perspective, in* ENVIRONMENTAL CONTRACTS AND COVENANTS: NEW INSTRUMENTS FOR A REALISTIC ENVIRONMENTAL POLICY? 143 (Jan M. van Dunne ed., 1993).

10 "*Kōgai boshi kyōtei*" can variously be translated as "environmental protection agreement," "pollution prevention agreement," "pollution control agreement," or "public nuisance prevention agreement." Because the terms "pollution prevention" and "pollution control" have legally specific meanings in the United States, this Comment will use the term "*kyōtei*" (meaning, simply, "agreement") to describe the Japanese form of environmental protection agreements.

fact, as of October 1992, over 40,000 companies had signed agreements ("*kyōtei*") with prefectures, cities and towns.[11] Eminently useful and adaptable, on average about 1,600-2,000 new agreements are developed each year.[12] *Kyōtei* are the basic building blocks of Japan's site-specific, particularized form of environmental control. They have been instrumental in improving environmental and economic effectiveness, while stimulating preventative rather than remedial technologies.[13] This is so even though in general there are no statutes or regulations that define or require the development of *kyōtei*.

This Comment explores the feasibility of using environmental protection agreements, the equivalent of *kyōtei*, in the United States. The primary issue is enforceability. If polluters are under no legal obligation, why would they agree to voluntarily accept more stringent standards? If they do agree, what prevents them from reneging on the agreement if compliance with it becomes expensive or inconvenient? Without an authorizing statute, it is critical to determine whether the environmental protection agreement is a contract, enforceable under traditional common law principles, or merely a form of very specific agency guidance and therefore potentially unenforceable in a court of law. Unfortunately, the enforceability of *kyōtei* in Japan remains somewhat of a puzzle despite their common usage, primarily because widespread compliance with these voluntary agreements has resulted in a paucity of case law.

This Comment first discusses the content and practical uses of *kyōtei* in Japan, as well as briefly outlining the legal basis for the government's authority to negotiate. It next examines three theories on the legal character of *kyōtei:* they may be an expression of a social relationship, without legal meaning; they may be a form of informal, site-specific administrative guidance, with legal relevance under some circumstances; or depending on

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[11] ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT ("OECD"), OECD ENVIRONMENTAL PERFORMANCE REVIEWS: JAPAN 103 (1994). This document cites the most recent (1991-1992) Japan Environment Agency figures for the breakdown of *kyōtei* by type, industry sector, and party composition. The data for 1971-1981 is compiled in Yoshikazu Shibaike, *Guidelines and Agreements in Administrative Law,* 19 LAW IN JAPAN 63, 77 (Russell Allen Yeomans trans., 1983). The breakdowns for each year between 1983 and 1990 are individually reported in the Japan Environment Agency's annual report for that year. JAPAN ENVIRONMENT AGENCY, QUALITY OF THE ENVIRONMENT IN JAPAN (1983-1990).

[12] BRENDAN F.D. BARRETT & RIKI THERIVEL, ENVIRONMENTAL POLICY AND IMPACT ASSESSMENT IN JAPAN 79, 89 n.25 (1991).

[13] OECD, *supra* note 11, at 104.

one's analysis and the facts of the case, *kyōtei* may actually be a fully enforceable civil contract.

"Environmental protection agreement" is the term used in this Comment to denote the potential U.S. equivalent of *kyōtei*. In order to evaluate their enforceability, this Comment analogizes from similar agreements in the land use arena in Japan and the United States, looking first at the judicial treatment of Outline Guidance[14] in Japan, and then at its U.S. counterpart, the development agreement. The legitimacy of the development agreement implicates the reserved powers doctrine, and the contracts and takings clauses of the U.S. Constitution. This Comment concludes that, based on the development agreement analogy and the limited treatment of *kyōtei* by Japanese courts, it may be possible in the United States to legally enforce a carefully crafted environmental protection agreement under certain conditions: (1) the company *voluntarily* consents to the adoption of more stringent requirements than are legally required, and (2) some justifiable relationship exists between the conditions imposed and the public good.

II. NATURE AND USES OF *KYŌTEI*

A *kyōtei* is an agreement between a private interest party and a public interest party, designed to control to various degrees the present and future behavior of both parties. The private interest party is always a company/entrepreneur, most frequently a large company,[15] or in some cases an industrial organization representing a group of similar companies. The public interest party might be a prefecture,[16] a municipality (*i.e.*, city or town), a citizen organization, or some combination of these.[17] Two-party

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[14] The Japanese term is *yōkō shido*. Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 931 (1984).

[15] Local governments have targeted large businesses for efficiency reasons. For example, in Himeji City (population 450,000) over 70% of the air pollution is controlled via *kyōtei* with just 3 businesses. Interview with Mr. Kuroda, Section Chief, Environmental Protection of Himeji City, in Himeji, Japan (Jan. 1993).

[16] A prefecture is analogous to a U.S. state; there are 47 in Japan.

[17] Shibaike, *supra* note 11, at 76-79.

agreements between a company and a municipality are the most common type of *kyōtei,*[18] and will be the primary focus of this Comment.

Three-party agreements also exist. A prefecture may join with the negotiating municipality in signing the agreement, to reinforce the municipality's legitimacy. Alternately, citizen groups may join the municipality, to symbolize community approval.[19] However, because other commentators have examined the phenomena of citizen-driven agreements,[20] they will not be examined in depth here. This Comment will also not address agreements between companies and citizen groups which are designed solely to compensate victims for the effects of *past* pollution through the pollution dispute resolution laws.[21] Rather, it will focus on those *kyōtei* which attempt to prevent pollution by influencing the *future* behavior of the polluter.

A. Private Enterprises' Commitments

In theory, a *kyōtei* could cover almost anything; the Japanese word for "pollution" (*kōgai*) literally means "public nuisance," something that disrupts the smooth flow of civil life, and encompasses a social rather than scientific flavor.[22] In general, however, *kyōtei* typically focus on environmental problems which are likely to impact the health of citizens or the aesthetics of the local community.

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[18] In 1991/92, only nine percent of the *kyōtei* were without government involvement, *i.e.*, solely between citizen groups and private enterprises. OECD, *supra* note 11, at 104.

[19] The closest U.S. equivalent to these citizen-driven *kyōtei* are the mandatory negotiations between companies seeking to site hazardous waste disposal facilities and the targetted communities, required under some states' laws. The end product of the negotiation is a contract or addendum to a permit, enforceable by the courts, that specifies limitations on construction, design and operation of the facility. For an interesting comparison of these hazardous waste siting agreements to *kyōtei*,. see Eckard Rehbinder, *Ecological Contracts: Agreements between Polluters and Local Communities, in* ENVIRONMENTAL LAW AND ECOLOGICAL RESPONSIBILITY: THE CONCEPT AND PRACTICE OF ECOLOGICAL SELF-ORGANIZATION 147, 151 (Gunther Teubner et al. eds., 1994).

[20] *See, e.g.*, Rehbinder, *supra* note 19. *See also* Geoffrey W.G. Leane, *Environmental Contracts—A Lesson in Democracy from the Japanese*, 25[2] U.B.C. L. REV. 361, 368 (1991).

[21] *See* GRESSER, *supra* note 1, at 325-46.

[22] Japanese students, asked to give examples of what they consider major environmental problems, have given answers such as "bad breath" and "old men on bicycles." The reasoning is that bad breath is objectionable, and old men on bicycles disrupt pedestrian traffic, cause injuries, and generally rend the fabric of society, as does air pollution. Douglas C. McGill, *Scour Technology's Stain with Technology*, N.Y. TIMES, Oct. 4, 1992, at 32.

While the early agreements contained only abstract promises by the company to reduce pollution and compensate for damages, later agreements are more explicit about obligations and sanctions.[23] They contain specific requirements that are significantly more stringent than what is legally required.[24] The formality of the negotiation process itself has also evolved over time, as has the difficulty in administering the resulting agreement.[25]

Kyōtei may include limits not only for air and water emissions, but also for industrial waste, noise, or offensive odors. The requirements can often be quite detailed and intrusive, specifying such things as facility design, the use of raw materials and fuels, the type or volume of product produced, working hours, emission monitoring, and/or reporting requirements.[26] By including renegotiation clauses that require use of the most recent technology,[27] *kyōtei* compel periodic readjustments to maintain these high standards.

Many *kyōtei* directly address citizen concerns or public relations. Some include a blanket liability clause, whereby the company promises to compensate any citizen who is harmed by the company actions.[28] *Kyōtei* might also include a "confer in good faith" clause,[29] whereby the company

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[23] GRESSER, *supra* note 1, at 248.

[24] Emission limits may be fifty percent stricter than the legal standard. Rehbinder, *supra* note 19, at 151.

[25] The changes in style and content of the *kyōtei* are partially a function of the increasing sophistication of the instrument itself, and partially a reflection of the unique convergence of politics in each locality. The experiences of the City of Tokyo, Chiba Prefecture, Kanagawa Prefecture, Kawasaki City, and Yokohama City are described in Kazuo Yamanouchi & Kiyoharu Otsubo, *Agreements in Pollution Prevention: Overview and One Example*, *in* ENVIRONMENTAL POLICY IN JAPAN 221, 223-26 (Shigeto Tsuru & Helmut Weidner eds., 1989).

[26] Shibaike, *supra* note 11, at 80. English translations of actual *kyōtei* can be found in: Yamanouchi & Otsubo, *supra* note 25, at 237-45 (Kagoshima Prefecture and Kyushu Electric Co.); GRESSER, *supra* note 1, at 399-404 (Iwaki City and the Japan Hydrogen Engineering Corp.; Himeji City, Hyōgo Prefecture, and Kansai Electric Co.; Ibaraki Nuclear Plant.

[27] Helmut Weidner, *Japan: The Success and Limitations of Technocratic Environmental Policy*, 14 POL'Y & POL. 43, 57 (1986).

[28] This sort of sweeping statement, which may strike an American lawyer as suicidal, is actually an acknowledgement of the prevailing liability law in Japan. The Law for Compensation of Pollution-Related Health Injury, passed in 1973, moved beyond the concept of strict liability to recognize the responsibility of the polluting industry to compensate the victims for their misfortune, through individual payments for medical expenses and lost earnings. Although the law itself limits the payments to certain diseases, victims, and regions, the concept of victim compensation has been picked up in *kyōtei* negotiations. *See* GRESSER, *supra* note 1, at 290-318.

[29] "Confer in good faith" clauses are not unique to *kyōtei*. They are often used in Japanese contracts, reflecting a belief that all contracts are ultimately tentative and subject to subsequent revision through ad

promises to negotiate any future disputes directly with citizens.[30] In some cases, citizens groups who want to directly monitor the company's environmental performance may obtain assurances that representatives will have the right to conduct site inspections or have access to privileged information.[31]

Kyōtei often, but not always, specify sanctions in the event of breach. The "sanction" might be no more than a statement that the company will immediately correct the problem that led to the offending emission. However, the agreement could specify much more draconian sanctions, such as giving the local government the authority to curtail or completely suspend operation of the facility.[32] Examples of other specified sanctions include a promise by the company to be fully liable for any and all environmental damages arising from the breach; interruption of municipal water supply services; or a disclosure requirement, requiring the embarrassing details of the violations to be published in a newspaper.[33]

B. Local Government's Commitments

1. Government's Authority to Enter into Kyōtei

Local governments in Japan are generally subordinate to the central government, which maintains tight control over fiscal affairs, and a corresponding control over all aspects of government work. For historical, practical and political reasons, the field of environmental control remains the outstanding exception to this norm of centralized control. Local governments have carved out a clear niche of authority in environmental protection, and have been more innovative and assertive than the central government.[34]

The original source of the local governments' authority is article 94 of the Japanese Constitution, which permits local governments to enact their

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hoc consultation as necessary. Takeyoshi Kawashima, *Legal Consciousness of Contract in Japan*, 7 LAW IN JAPAN 1, 16-17 (1974).

30 Yamanouchi & Otsubo, *supra* note 25, at 226.

31 GRESSER, *supra* note 1, at 249.

32 GRESSER, *supra* note 1, at 248.

33 Yamanouchi & Otsubo, *supra* note 25, at 226.

34 Hidefumi Imura, *Administration of Pollution Control at Local Level, in* ENVIRONMENTAL POLICY IN JAPAN 60-61 (Shigeto Tsuru & Helmut Weidner eds., 1989).

own regulations.[35] Subsequently, article 14 of the Local Autonomy Law authorized local legislation "not inconsistent" with national law.[36] After World War II, a few local governments enacted environmental ordinances, but generally they were not effectively enforced.[37] Then during the 1960s, widespread dissatisfaction with ambient pollution levels, and the success of four famous environmental dispute cases,[38] caused a radical change in public attitude. Local governments, under pressure by citizen's groups to control the polluting industries in their jurisdictions, found that the national regulations were inadequate.[39]

The 1970 revisions to the Basic Law for Environmental Pollution Prevention[40] decided this clash over environmental authority, by clarifying that local governments have the power to promulgate their own standards. Today, while the national government sets goals and policies, and develops the baseline pollution control standards, prefectures enforce and implement the national standards. Local governments are allowed great discretion in environmental regulation, with power to pass their own, more stringent ordinances, develop industry-specific informal administrative guidance, or negotiate individual *kyōtei*.[41]

2. *Content of Government Commitments*

A municipality can make explicit or implicit promises in return for commitments from private enterprises. By and large, local governments control access to land, especially large tracts of land suitable for industrial development. For the last twenty years, prefectures and large cities in Japan

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[35] "Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law." Article 94 (Sup. Ct. of Japan, CONST. OF JAPAN, 1972).

[36] Article 14 of the Local Autonomy Law states: "Ordinary local public entities shall have the right to enact their own regulations concerning the subjects provided in art. 2(2), provided they are not inconsistent with the statutes and orders." *Chihō jichihō*, Law No. 67, as amended (1947).

[37] George F. Curran III, *Pacific Rim Environmental Regulation: A Western Perspective of Several Countries' Environmental Liability Laws*, 3 J. INT'L L.& PRAC. 47 (1994).

[38] These were the Kumamoto Minamata disease, Niigata Minimata disease, Toyama Itai-itai disease, and Yokkaichi Asthma cases. *See generally* Frank K. Upham, *Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits*, LAW & SOC'Y, Summer 1976, at 579; MCKEAN, *supra* note 1, at 20-70.

[39] Curran, *supra* note 37, at 3.

[40] Law No. 132 (1967), *amended by* Law No. 132 (1970) and No. 88 (1971).

[41] Shiro Kawashima, *A Survey of Environmental Law and Policy in Japan*, 20 N.C. J. INT'L L. & COM. REG. 231, 239 (1995).

have been "creating" prime land by filling in portions of the shoreline or even building complete offshore islands, which is then sold in exchange for significant concessions. Even when the city does not have land to sell, it nevertheless retains land use or land zoning powers, and therefore can bargain with access concessions.[42]

Another frequently used lever is access to the subsidized public service infrastructure, such as sewage treatment, water supply, or power, which is controlled by the local municipality. Because environmental control is so decentralized in Japan,[43] it is easy for the local government to directly link delivery of services to pollution control requirements.[44] The pre-permitting application and review process is relatively simple; the prefecture assumes that the developer will comply with all requirements. Thereafter, an elaborate monitoring, sampling and inspecting system assures on-going compliance.[45] Thus, obtaining building and environmental permits is an absolutely pivotal step, because it represents a promise of compliance with all environmental and land use laws and is the key to access for public services. A government agency can withold these services directly, by denying the permit; in some cases, a simple threat of delay or eventual retaliation can be sufficient inducement.[46]

Another primary bargaining instrument is the implicit promise of public support. Good public relations are essential in a society where a positive reputation brings both high quality employees willing to sign lifetime employment contracts and customers willing to conclude business

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[42] One of the first *kyōtei* to be developed was in response to the siting of a new power plant in Yokohama in 1964. Local citizens and city officials were concerned about the impacts of the proposal on the surrounding neighborhoods. The city inserted a clause into the Reclaimed Land Transfer Act, authorizing the enforcement of more stringent standards. *See* MCKEAN, *supra* note 1, at 149; GRESSER, *supra* note 1, at 248.

[43] Prefectures and municipalities are in complete control of permitting decisions, while the national government, unlike in the United States, is uninvolved. Thomas S. Mackey & Jim S. Hart, *A Comparison of U.S. and Japanese Environmental Laws Governing Emissions From Major Industrial Facilities*, 6 TRANSNAT'L LAW 579, 584 (1993).

[44] Compare the situation in the United States, where a new or expanding facility must obtain separate air, wastewater, stormwater, shoreline and hazardous waste management permits (as applicable), zoning approvals, and building permits, each individually negotiated with multiple parts of agencies at different levels of the local, state, and federal government.

[45] Mackey & Hart, *supra* note 43, at 584-85.

[46] "As a matter of public mentality, people fear that some disadvantage might be imposed on them tomorrow because they fight with the government officials today." 1964 REPORT ON ADMINISTRATIVE PROCEDURE (*Gyōsei tetsuzuki ni kan suru hōkoku*), *quoted in* Nathaniel L. Nathanson & Yasuhiro Fujita, *The Right to Fair Hearing in Japanese Administrative Law*, 45 WASH. L. REV. 273, 321 (1970).

deals based on a handshake. More dramatically, outraged citizens have been known to block the construction of unpopular facilities, especially during the early years of the environmental movement in Japan.[47] A company which maintains a positive relationship with the local government can expect it to act as a buffer for citizen complaints.[48] Companies frequently cite public approval as the most important reason for entering into *kyōtei*.[49]

C. *Uses of Kyōtei*

Kyōtei are typically used in three situations: when an existing regulatory structure is inadequate; when responsibility for pollution must be collectively assigned; and when there are transboundary disputes.

1. *To Fill Gaps in Regulation or Authority*

The most common situation in which *kyōtei* are used is when an existing regulatory structure does not meet the local government's concerns. One such "gap" occurs when a national statute or prefectural ordinance preempts a city or town's ability to control the polluting behavior of a particular business within its geographic jurisdiction. The city or town might be dissatisfied with the existing law's efficacy or its enforcement, and might want to tailor the law to reflect local environmental conditions or citizen sensitivities.[50] A *kyōtei*, which needs no statutory authority for

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[47] Vociferous anti-development activity continues in such highly publicized cases as the Kyoto Second Outer Circular Highway and Narita Airport, now nearing its second decade of protest. BARRETT & THERIVEL, *supra* note 12, at 19.

[48] For example, representatives from Shionogi & Co, Inc., an agrochemical manufacturing facility in Ako City, Hyōgo Prefecture, described the benefits of the city acting as mediator. They thought the city provided the citizens with an easy, effective means for complaint and action, while for the company, a way to avoid dealing directly with individual groups of angry neighbors. Furthermore, they thought it would be difficult to convince citizens of the safety and merits of proposed changes to the facility without a *kyōtei*. Interview with Takashi Wada, General Manager of Ako plant and Yoshinobu Nakamoto, Section Chief, Ako Department of Environmental Management, in Ako, Japan (Dec. 1992).

[49] Interviews with Yasuo Kishi, Manager of Environmental Affairs, Kansai Electric Power Co., in Kobe, Japan (1993); Mr. Kuroda, Section Chief, Environmental Protection of Himeji City, in Himeji, Japan (1993); Tatuso Hiratani, Industrial Pollution Control Association of Japan, in Tokyo, Japan (1993).

[50] For example, the city may want more strict air emission standards for an urban power plant, but confronts the administrative problem that energy facilities are a major industry wholly under the regulatory influence of Ministry of International Trade and Industry. This was the situation in one of the first *kyōtei* to be developed, between Yokohama City and the Tokyo Electric Power Company, previously referenced

enactment, may fill this authority gap. The other type of "gap" is regulatory: a company is unregulated under national or prefectural laws because of its size or its type of emission, and the local government wants to negotiate a *kyōtei* to extend regulatory control over this previously unregulated source.

2. *To Assign Collective Responsibility*

In addition to meeting effluent standards (*i.e.*, quantitative limits for particular types of pollutants), companies located in designated geographical areas may be required to maintain conventional air and water pollutant levels within regional limits.[51] The prefecture must determine how the burden of this so-called area-wide total pollutant load control or "mass emission" system should be allocated among contributors.[52] Additional pollution from new facilities or expansions of existing facilities could exceed the area-wide limits. *Kyōtei* may be used to assign and re-assign collective responsibility for reducing the target pollutants. In some cases, a business association or lead company might take responsibility for negotiating which company or companies must reduce their pollutant levels.

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supra note 42. For a detailed description of this *kyōtei*'s development, see Michio Hashimoto, *Administrative Guidance in Environmental Policy: Some Important Cases*, *in* ENVIRONMENTAL POLICY IN JAPAN 252, 254-55 (Shigeto Tsuru & Helmut Weidner eds., 1989); GRESSER, *supra* note 1, at 248; McKean, *supra* note 1, at 149.

[51] ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), ENVIRONMENTAL POLICIES OF JAPAN 32 (1977). The U.S. Clean Water contains a similar dichotomous concept: water quality standards define the amount of a pollutant allowed in a particular water course, while effluent limitations describe the amount of pollution that can legally be released from a specific source. *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 252 (2d ed. 1994).

[52] *See* Yamanouchi & Otsubo, *supra* note 25, at 233 (example of how area-wide standard was calculated for Chiba Prefecture); GRESSER, *supra* note 1, at 255-6; BARRETT & THERIVEL, *supra* note 12, at 77.

3. *To Manage Transboundary Pollution*

Kyōtei enable some uniformity of control when a polluter's emissions cross jurisdictional boundaries. They can harmonize legal discrepancies between public entities, without the need to rely on the unresponsive national regulatory structure.[53] *Kyōtei* thus provide a useful complement to regulations, and function as a type of treaty or compact.

D. *Advantages*

Kyōtei allow the city or town to deal with a polluter in their community in a way that maximizes local control and flexibility. They do not require the vote of local legislative bodies, in contrast to pollution control ordinances which require legislative sanction.[54] Although initial *kyōtei* negotiation is time-intensive, proponents claim that it is less time-intensive than new legislation or regulation.[55] Also, subsequent enforcement is usually either unnecessary or significantly less resource-intensive because of decreased social resistance.[56]

There are numerous advantages for industry as well. Compared to a system of national standards, *kyōtei* provide a company with an unprecedented level of influence on how they are regulated, verging on self-regulation. Additionally, *kyōtei* are a socially-accepted means for local companies to publicly proclaim the positive steps taken to reduce their harmful environmental impact in the community.[57] This in turn helps their position during discussions with the city or prefecture on related or

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[53] GRESSER, *supra* note 1, at 267, 461 n.128.

[54] Yamanouchi & Otsubo, *supra* note 25, at 222.

[55] Estimates for the length of time required to conclude a *kyōtei* negotiation range from one year, for very complex projects, to only about a month. Interviews with Yoshinobu Nakamoto, Assistant Section Chief, Department of Environmental Management and Pollution of Ako City, in Ako, Japan (Dec. 1992); Mr. Kuroda, Section Chief, Environmental Protection of Himeji City, in Himeji, Japan (Dec. 1992).

[56] Common sense suggests that consensual mechanisms of lawmaking will always tend to have higher compliance levels. Mediation studies in the United States have proven this assumption. For example, studies of victim-offender mediation show that face-to-face negotiations can have a significant impact on the likelihood of offenders successfully completing their restitution obligation to the victim (81%), when compared to similar offenders who completed their restitution through court-administered programs without mediation. MARK S. UMBREIT, VICTIM MEETS OFFENDER 155 (1994).

[57] Interview with Mr. Asao, Vice President of Environmental Health and Safety, Daiseru Chemical Co., in Himeji, Japan (Nov. 1992-Feb. 1993); Takashi Wada, General Manager, Shionogi & Co., Ltd., in Ako, Japan (Nov. 1992-Feb. 1993).

unrelated matters.[58] Finally, a negotiated agreement, while not a freeze on regulation, does assure some degree of long term consistency and certainty—critical for business planning. Although the rules may change in the future, they will not change unexpectedly.

Additional advantages of the *kyōtei* system accrue to both the government and industry. Negotiation of a *kyōtei* provides a forum to examine the impact of all sources of pollution from one facility, functioning as a sort of multi-media audit.[59] Transaction costs and litigation expenses are reduced because both parties agree in advance on the expected requirements and compliance timetables. Perhaps most important, *kyōtei* discussions often form the basis for further negotiations that result in the development of a plant-wide pollution prevention plan.[60] These pollution prevention plans set performance goals for each site, and thereby stimulate innovation by creating an internal "market" for pollution prevention inside each plant.

III. LEGAL CHARACTERIZATION OF *KYŌTEI*

There are three views on the legal character of *kyōtei.* These characterizations can critically affect the enforceability of these agreements by Japanese (and potentially U.S.) courts. The first view is that they have little, if any, legal meaning, being essentially a social phenomenon; these may be termed "relational non-contracts." The second view is that they are a form of informal administrative action, an inordinately detailed, site-specific kind of bureaucratic advice. According to this view, *kyōtei* are like "soft regulations," which are an agency's policy directives, equivalent to rules, that limit the behavior of a regulated party. These may or may not be enforceable. The final view is that *kyōtei* are legally enforceable contracts.

One reason for the ambiguous legal nature of these agreements is that their structures and uses are so varied. From wholly private to wholly public, *kyōtei* form a continuum based on their particular composition and content.[61] At one end are those *kyōtei* negotiated between private actors,

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[58] *Id.*; Rehbinder *supra* note 19, at 161.

[59] The majority of agreements address wastewater management concerns; they also may address noise, air pollution, odor, fuels use, and so on. OECD, *supra* note 11, at 103.

[60] A pollution prevention plan focuses not only on the emission standards but how these standards will be met through changes in internal production processes. GRESSER, *supra* note 1, at 249.

[61] This concept of *kyōtei* on a continuum originated from Shibaike, *supra* note 11, at 87-88.

e.g., companies and citizens. These resemble pure private contracts, in that they are designed to benefit a small group of people, although in a domain (environmental pollution) typically managed for the public interest. At the other end of the continuum are *kyōtei* between a regulatory body (prefectures) and a regulated industry clearly within the prefecture's jurisdiction. These *kyōtei* look like conditional permits, regulations or merely administrative guidance. In the middle of the continuum are numerous variations, wherein the local government acts as a representative of citizen groups, or of regulatory agencies, or negotiates on its own behalf.

A. Kyōtei as Relational Non-Contracts

One view of *kyōtei* is that they are relational agreements, rather than legal instruments that define a right-duty relationship.[62] The primary goal of a such a relational agreement is to formalize and publicize the all-encompassing, dependent relationship between the polluting company and the local community (as represented by the government). Such agreements tend to have a high rate of compliance because of the relationship itself, rather than because the instrument is enforceable in a court of law. One commentor has noted:

> in a society where compliance by a plant operator with the formal norms is not in itself sufficient to be accepted by the local community, because the community has a primarily extra-legal value orientation, environmental agreements have the function of a local 'social contract' that makes the operator of the new facility a member of the community or concretises his obligations towards it.[63]

This view of *kyōtei* as a relational non-contract is particularly appropriate in situations where the private enterprise is subject to comprehensive, continuous economic and social regulation and support by

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[62] *See* J. TOSHIO SAWADA, SUBSEQUENT CONDUCT AND SUPERVENING EVENTS 225 (1968) ("Contracts [in Japan] are viewed not as a set of legal claims, but as an evidence of certain social or personal relations."); Kawashima, *supra* note 29, at 7 ("When a Japanese makes an agreement with another person, the goodwill and friendship that gave rise to the agreement is more important to him than the agreement itself.").

[63] Rehbinder, *supra* note 19, at 160.

the government. In this situation, a congenial long term relationship with the city or prefecture is essential.[64] Even when a business thinks that the government requests are unreasonable, it would be hesitant to poison its future relationship with the government by openly disputing in court the enforceability of the agreement. The business is more likely to pursue a politically-oriented solution, such as enlisting the support of its employees or the general public, appealing to other businesses in the community, or asking a favor of a local politician.[65]

B. Kyōtei as Site-Specific Administrative Guidance

A strong argument can be made that *kyōtei* are written responses to administrative guidance,[66] specifically crafted for a particular situation, with no force of law. Although frequently overlooked, much of the regulatory work in any country is accomplished through informal guidance or advice from an agency, solicited or unsolicited by the regulated party. In Japan, the widespread use of administrative guidance is legendary: it is used to implement nearly all bureaucratic policy, whether or not expressed in statute.[67] Even in the United States, with its emphasis on agency adherence to delineated procedures, the great bulk of government control of corporate behavior (including polluting behavior) is accomplished through informal agency action and mutual consent.[68]

Administrative guidance has been the subject of extensive comment by Western legal scholars,[69] because of the curious fact that although it is

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64 Surveyed industry officials have attested that they had the sense of being completely enveloped by the governmental presence, and expressed real concern about "displeasing." GRESSER, *supra* note 1, at 268.

65 Young, *supra* note 14, at 951.

66 Administrative guidance (*gyōsei shidō*) is the term used for this informal process by which a local or national government in Japan induces industry's voluntary cooperation and compliance. *See* Russell Allen Yeomans, *Administrative Guidance: A Peregrine View*, 19 LAW IN JAPAN, 125, 129-37 (1986) (extended analysis of translations of "*gyōsei shidō*," and differing interpretations of its meaning).

67 John O. Haley, *Administrative Guidance Versus Formal Regulation, in* LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY 107, 111 (Saxonhouse & Yamamura eds.,1986).

68 FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S.Doc. No. 8, 77th Cong., 1st Sess. 35 (1941), *quoted in* Alfred C. Aman, Jr., *Informal Agency Actions and U.S. Administrative Law—Informal Procedure in a Global Era*, 42 AM. J. COMP. L. 665, 667 (1994).

69 To name only four: Steven M. Spaeth, *Industrial Policy, Continuing Surveillance and Raised Eyebrows: A Comparison of Informality in Administrative Procedure in Japan and the United States*, 20

the primary means used to control corporate behavior, it often has no legal force or effect. The Japanese administrator, rather than using the "stick" of enforcement, achieves most regulatory goals through social pressure and/or "carrots" *e.g.*, financial incentives which reward compliance. The only limitation on an agency using administrative guidance is that it can not violate the law.[70]

1. Typical Bargaining Situations

Typically, informal guidance may stimulate voluntary business commitments in two situations. In the first, generalized agency advice or exhortations are given to the business community at large, and a particular business then agrees to adopt them, because it makes good economic sense, portrays a favorable public image, or both.[71] There may be an element of subtle social coercion, in that the advice is being promoted by a powerful regulatory agency. Nevertheless, in general the resulting actions appear truly voluntary (or as voluntary as any non-altruistic, compromise agreement can be), and therefore not likely to be challenged.

In the second situation, an agency gives advice to a specific business or a small number of similar businesses, usually in the context of a regulatory or quasi-regulatory action. The resulting negotiations may lead to a form of administrative equity (such as a waiver, exception or declaratory order) which the business voluntarily seeks out and which is then binding or strongly persuasive on the regulated party.[72] In contrast,

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OHIO N.U. L. REV. 931 (1994); Yoriaki Narita, *Administrative Guidance*, 2 LAW IN JAPAN 45 (1968); Yeomans, *supra* note 66; Young, *supra* note 14.

[70] Spaeth, *supra* note 69, at 934.

[71] Two recent U.S. EPA initiatives are examples. The 33/50 program is a voluntary pollution prevention initiative that seeks to achieve substantial reductions in the volumes of specified chemicals released or transferred off-site per year by industry. The EPA initially solicited 600 companies; eventually 1,135 companies pledged to reduce targeted pollution. *See* Margaret Rosegay & Mehran Massih, *Environment, Health and Safety Voluntary Programs*, 474 PRAC. L. INST./LIT 617, 619-21 (1993). The Environmental Leadership program provides special recognition to manufacturing companies that are committed to prevention-oriented environmental management that goes beyond mere compliance with regulations. Individual plants can be designated as Model Facilities if they meet certain criteria and subscribe to a Corporate Statement of Environmental Principles. *Id.* at 621-24.

[72] Exceptions, exemptions and waivers are voluntarily sought when the applicant wants to be released from a rule that would otherwise apply. The ensuing decision is then binding on that particular applicant. Declaratory orders and advisory opinions often involve an applicant's request for a determination as to whether a regulation applies to certain facts. The ensuing decision is not binding, but is persuasive agency action. Aman, *supra* note 68, at 672-76.

when a business seeks a license or permit, the advice often comes in the form of conditions which the agency suggests to the applicant, and to which the applicant then "voluntarily" agrees. The resulting commitments are thus the product of the subtle bargaining relationship between the agency and the business. They impose specific, individual requirements shaped by the needs of the particular regulated entity.[73] In such a situation, *kyōtei* or environmental protection agreements are simply written compilations of these suggestions, voluntarily adopted by the business.

2. *Enforceability of Site-Specific Administrative Guidance*

Japan's Administrative Process Act ("APA")[74] was passed in 1993, partly in an attempt to curb agency abuses of adminstrative guidance.[75] Prior to its passage, the judiciary often refused to review administrative guidance. The APA, while not setting up any absolute standards, does proclaim fundamental principles to apply for administrative guidance: compliance is voluntary, guidance must clearly state its content and aim and may not exceed statutory authority, and the administrative bodies must make procedural rules publicly available.[76] However, local government's administrative guidance, when not based on national statutes, is exempt from even this circumscribed level of judicial review.[77]

Because local government's *kyōtei* are specifically exempted under the APA, a court must rely on the pre-APA analytical structure to determine if judicial review of administrative guidance is appropriate.[78] First, only "administrative dispositions" and similar exercises of public power are justiciable under article 3(2) of the Administrative Case Litigation Law.[79] Second, Japan's Supreme Court has limited "administrative dispositions" to

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[73] Aman, *supra* note 68, at 677.

[74] *Gyōsei Tetsuzuki Hō*, Law No. 88 (1993).

[75] Lorrenz Kodderitzsch, Japan's New Administrative Procedure Law: Reasons for its Enactment and Likely Implications 11-12 (June 1993) (unpublished manuscript, available at University of Washington School of Law, Gallagher Law Library).

[76] *Id.* at 40-41.

[77] *Id.* at 26. Article 38 of the APA does admonish the local authorities to respect the spirit of the law when applying administrative guidance. *Id.* at 27.

[78] Ichiro Ogawa, *Judicial Review of Administrative Actions in Japan*, 43 WASH. L. REV. 1075, 1078-86 (1968) (reasonably clear discussion on this judicial inquiry).

[79] *Gyōsei Jiken Soshō*, Law No. 139 (1962).

those administrative acts that "immediately and directly create or delimit private rights and duties."[80] Because only a final and formal official act directly creates legal rights and duties, mere advice is held to be unrelated to any question of public law, and hence unreviewable by direct appeal. Courts often take at face value the assertion that a company "voluntarily" implemented the agency's advice.

However, courts may mitigate this result where the impact of the administrative guidance is severe or where the fiction of voluntary compliance is implausible. For example, in a 1972 case a plaintiff who wanted to build a gas station in a protected part of Kyoto was informed by the City Planning staff that extremely restrictive requirements would apply.[81] After withdrawing his application because he was unable to meet the stiff requirements, the plaintiff was outraged when another developer built a gas station in the same spot without meeting the requirements. The plaintiff sued for compensation, and the court held that the city's advice, although not illegal, did amount to an "exercise of public authority" under the National Compensation Law.[82] Thus, plaintiffs may have access to the courts, but only through damage actions.[83]

Finally, even if the *kyōtei* is found to be an "administrative disposition," the plaintiff must prove that the agency exceeded its scope of discretion in giving the advice. This is usually evaluated in terms of the authority granted to it by the relevant statute.[84] However, because relevant environmental statutes are often vague, it is possible to find even very specific administrative guidance falling within that discretion. If *kyōtei* are nothing more than written administrative guidance, the typically deferential attitude of the courts leaves both parties of a violated agreement without any legal recourse. The agency can not enforce compliance, and the private

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80 Decision of Feb. 24, 1955, Supreme Court of Japan, *quoted in* 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, 430 (1986).

81 Young, *supra* note 14, at 959. The gas station's proposed site was in a special area designated for its scenic beauty, and the city wanted the gas station's design to conform to aesthetic specifications.

82 Also called the State Redress Law, *Kokka Baishō Hō*, Law No. 125 (1947). Article 1 states that "when a public servant, in the course of his employment in an exercise of public authority of the state . . . causes harm to another person, either intentionally or negligently, then the state or public body has a responsibility for compensating the loss."

83 John O. Haley, *Japanese Administrative Law: Introduction*, 19 LAW IN JAPAN 1, 11-13 (1986) (use of damage actions to gain judicial review of administrative actions).

84 Upham, *supra* note 80, at 452.

enterprise can not recover damages for the impacts of unreasonable "requests."

C. *Kyōtei as Enforceable Contract*

Although *kyōtei* may be viewed as site-specific administrative guidance, it is more likely that they are enforceable private contracts. Widespread compliance with *kyōtei* provisions precludes a clear jurisprudential basis for treating *kyōtei* as contracts. As evidence, in the few reported cases, courts have tended to evaluate each clause of the agreements independently, and clauses which are clear, specific and reasonable were upheld as contractual obligations.[85] As further support for this contract view, courts in other countries have interpreted similar environmental protection agreements or covenants as private contracts.[86]

1. *Kyōtei Satisfy the Requirements of a Civil Law Contract*

At the risk of oversimplification, the Japanese civil law doctrine requires two criteria to create a contract. The first ("formation requisite") is mutual assent evidenced by reciprocal declarations of intention.[87] Unlike the common law approach, bargaining is not considered to be an essential

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[85] Shibaike, *supra* note 11, at 83. Shibaike reports, for example, that a court upheld a clause in a *kyōtei* between a town and an electric company which simply stated "no major facilities can be expanded without the town's consent."

[86] European countries have been actively experimenting with various forms of environmental contracts for many years. Government-polluter agreements in the former East Germany were treated as civil law contracts by the courts, despite the fact that the private enterprises were compelled to enter into the contracts on the basis of the 1965 Contract Act, and were subject to economic sanctions for nonperformance of the specified environmental improvement measures. *See* Peter H. Sand, *The Socialist Response: Environmental Protection Law in the German Democratic Republic*, 3 ECOLOGY L.Q. 451, 471-72 (1973). The Dutch Basic Metal Industry covenant, concluded in 1992, has been deemed by some commentors to be a civil law agreement enforceable by the courts, Peter J.J. van Buuren, *Environmental Covenants Possibilities and Impossibilities: An Administrative Lawyer's View in* ENVIRONMENTAL CONTRACTS AND COVENANTS, *supra* note 9, at 49, while others have said that it is not a civil law contract, Rene van Acht, *Comment to* ENVIRONMENTAL CONTRACTS AND COVENANTS, *supra* note 9, at 45. Denmark has addressed this controversy by passing legislation which gives the Minister of the Environment the authority to enter into civil law contracts with polluters. Ellen M. Basse, *Environmental Contracts: A New Instrument to Be Used in the Danish Regulation of Environmental Law, in* ENVIRONMENTAL CONTRACTS AND COVENANTS, *supra* note 9, at 220.

[87] WARREN L. SHATTUCK & ZENTARO KITAGAWA, U.S./JAPANESE CONTRACT AND SALE PROBLEMS 114 (1973) (course materials, available at the University of Washington School of Law, Gallagher Law Library) (explanation of the technicalities of Japanese contract formation, including the significant issues arising from untranslatable terms).

element, so courts do not need to find a mirror-image "offer" and "acceptance." Rather, the courts look for clear, reciprocal declarations of intent.[88] This intent to form a contract must be objectively manifested, tested by taking the perspective of the person who received the declaration of intention.[89]

Kyōtei appear to satisfy this requirement. Both parties consent to the agreement. The written nature of the *kyōtei*,[90] as well as the rather lengthy negotiations which typically preceed its formation, are persuasive evidence. Although a permit applicant may be somewhat at the mercy of the local government, one could argue that the applicant has waived her legal right to challenge by voluntarily accepting the condition or signing the agreement.

Once the formation requisite is satisfied, the contract remains invalid until the second criteria, "validity requisite" is met. This criteria encompasses concepts such as capacity, good faith, fraud, duress, mistake and so forth.[91] On the most fundamental level, these concerns are expressed by the broad good faith principles of article 1 of the Japanese Civil Code.[92] More specifically, a contract which is induced by threats of harm may be construed as wrongful under Civil Code article 96,[93] especially if the court is willing to expand the definition of harm to encompass economic harm. The court must be alert to this problem of duress, as there is potential for the municipality to exert undue influence while acting in its fiduciary capacity. Such a determination is clearly a fact-specific inquiry.

There is no civil law equivalent to the common law concept of "consideration." The civil law's emphasis on the reciprocal nature of the declarations of intent differs from the common law's focus on bargaining as the essence of contract. Thus, it is not necessarily problematic for an agreement to consist solely of the private enterprise's promise to comply with more strict environmental conditions, without specifying what the

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88 *Id.* at 152.

89 *Id.* at 160.

90 *But see* Sawada, *supra* note 62, at 182 (Contracts in Japan typically serve more as a memorandum of agreement between parties rather than as a legal document to be enforced.).

91 SHATTUCK & KITAGAWA, *supra* note 87, at 114.

92 THE CIVIL CODE OF JAPAN (1972) article 1 states: "(1) All private rights shall conform to the public welfare; (2) The exercise of rights and performance of duties shall be done in faith and in accordance with the principles of trust; (3) No abuse of rights is permitted."

93 THE CIVIL CODE OF JAPAN (1972) article 96 states in pertinent part: "A declaration of intention induced by fraud or duress may be avoided."

municipality will do in return. *Some* justification ("cause") for the municipality's actions, even if merely inferred, may be sufficient.[94]

2. *Are Kyōtei Violations of the "Rule of Law"?*

As described above, a court might void a *kyōtei* for lack of reciprocal/mutual intent or because it was negotiated under duress, depending on the specific facts of the case. On a more general level, using a private contract to further the administrative responsibilities of an agency creates a new issue: whether a private contract neglects the "rule of law."

Many Japanese commentators[95] have objected to *kyōtei*-as-contract because they think it violates the "rule of law."[96] If one agrees that privately negotiating a public law contract violates the rule of law, then the municipality must remedy this through one of two ways. It may pass an ordinance that authorizes the agreement as an official administrative action. While some cities and prefectures have passed ordinances authorizing the conclusion of *kyōtei*,[97] they are apparently uncommon.

Alternately, the negotiation process itself must provide sufficient opportunity for public input to make it substantially equivalent to a rule-making procedure. *Kyōtei* negotiations often provide significant opportunities for either formal or informal citizen involvement in decision-making.[98] As previously noted, some *kyōtei* consist solely of private enterprise-citizen negotiation, and even the private enterprise-local government negotiations often involve citizens groups as witnesses or

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94 SHATTUCK & KITAGAWA, *supra* note 87, at 217-18.

95 Shibaike, *supra* note 11, at 70 ("rule of law" in administrative guidance context), 84-85 ("rule of law" as applied to *kyōtei*, citing other Japanese commentators); Narita, *supra* note 69, at 60-64 ("rule of law" in administrative guidance context).

96 The "rule of law" is the belief that norms which affect the rights and obligations of citizens are only valid when crafted under a legislative or delegated mandate. Such a concern is raised whenever governmental decision-making has no substantive opportunity for public input, because of the assumption that the resulting decision lacks accountability. Critics of this "bartering rationality" are also concerned that it preserves inequality of application of the law, and prevents their structural reforms. *See* Gerd Winter, *Bartering Rationality in Regulation*, 19 LAW & SOC'Y REV. 219 (1985) (explaining bartering typologies, and criticizing the view that bartering is as legitimate as law).

97 Most ordinances simply direct a specific private enterprise to conclude an agreement. Others may specify substantive limits on the contents of *kyōtei*, or procedures to follow for public input. Shibaike, *supra* note 11, at 86.

98 Rehbinder, *supra* note 19, at 152.

parties. Given the lower due process expectations in Japan,[99] this level of involvement could approach or even exceed that provided during rulemaking. Where, however, the sensitive nature of the negotiation prevents even de minimus public involvement, a concerned citizen would need to resort to political pressure to invalidate or add specific clauses to the agreement.

If the issue is the failure of the municipality to enforce an existing *kyōtei*, citizens could potentially take direct action by suing as a third party beneficiary.[100] The citizens' groups would have to demonstrate that they have standing—that the agreement was developed with the intent to benefit them.[101] If the standing issue could be settled satisfactorily, the citizens would need only to show that the terms of the agreement were being violated in order to obtain the specific performance of the contract.[102]

D. *Judicial Enforcement of a Kyōtei Analog in the Land Use Arena: Outline Guidance*

Another foundation for a jurisprudential analysis of *kyōtei* can be analogized from the courts' treatment of "Outline Guidance."[103] Outline Guidance has been used in Japan since the 1950s by municipalities, in order to direct negotiations with real estate developers to control the height and design of high rise buildings. Although minimal national standards for building construction existed, the laws did not require any consideration of ventilation or sunlight. Local governments, constrained from developing their own regulations because of national preemption, and under considerable pressure from local citizens, developed their own building standards. The governmental agencies backed up these "voluntary"

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99 *See generally* Nathanson & Fujita, *supra* note 46 at 274-84 (historical background on constitutional basis for due process rights).

100 This option has an interesting analogy in the civil rights arena in the United States. *See generally* Arthur R. Block, *Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries*, 18 HARV. C.R.-C.L. L. REV. 1 (1983).

101 "Where a party to a contract has agreed therein to effect an act of performance in favour of a third person, such third person is entitled to demand such act of performance directly from the obligor." CIVIL CODE (1972) art. 537.

102 *But see* Shibaike, *supra* note 11, at 89 (discussion of Judgment of 1980, Sapporo District Ct., 37 HANREI JIHŌ 196, regarding group of fishermen who attempted to enforce a *kyōtei* as a third party beneficiary but was denied standing).

103 Outline Guidance is examined in depth in Young, *supra* note 14, at 926-33, 960-65.

requirements with threats to withhold vital water and sewage services, or the construction permit itself, if developers failed to negotiate in good faith.

Outline Guidance differs from *kyōtei* only in the role of the local government. With Outline Guidance, an agency does not directly participate in the negotiation, but encourages the developer and the surrounding residents to directly and privately bargain. The city simply tilts the power balance by giving the citizens an important bargaining chip: the building permit will not issued without the residents' consent. Direct involvement by residents is essential for Outline Guidance because the residential needs, patterns and preferences for sunlight and ventilation vary so much from one block to another. Nevertheless, Outline Guidance and *kyōtei* can be considered functionally equivalent, under the assumption that governments are simply representing citizens during *kyōtei* negotiatons.

Fortunately for our understanding of *kyōtei* enforcement, Outline Guidance has been challenged several times,[104] and the courts have taken a unique approach to interpretation. One of the best examples is *Yoshida v. Nakano Ward.*[105] There, the court first agreed that, as long as the developer's plans conformed to the law, the city could not refuse to issue a construction permit or supply water, based solely on the developer's refusal to comply with non-binding guidance. The court said that the city had nevertheless advanced the regulatory goals of the Construction Standards Law (*i.e.,* to establish minimum standards for the site and structure in order to protect life, health and property). The court then made a leap in logic, finding that the statute's public welfare purpose supported a generalized duty to attempt to resolve conflicts within the authorities' jurisdiction.[106] There were however, two requirements: the city had to base its decision on the "common sense of society,"[107] and both parties had to bargain in good faith. If the city refused to issue the permit, it might be liable for damages due to unnecessary delay. Thus, although the city could not directly condition the issuance of the permit or the provision of services on explicit

104 In addition to *Yoshida v. Nakano Ward, see also* Young, *supra* note 14, at 964 (discussing Judgment of 1979 (Nakatani Honten Gōmeigaisha v. Tokyo), Tokyo Ct. App., 955 HANREI JIHŌ 73); at 971 (discussing Judgment of 1975 (Yamaki Kensetsu Kabushiki Kaisha v. City of Musashino), Tokyo District Ct., 803 HANREI JIHŌ 18); at 983, n.151 (discussing Judgment of 1978 (Jurakuen Yūgen Kaisha v. Nakano Ward), Tokyo District Ct., 931 HANREI JIHŌ 79); and at 983, n.156 (discussing numerous cases).

105 Judgment of Sept. 21, 1977 (Yoshida v. Nakano Ward), Tokyo District Ct., 886 HANREI JIHŌ 15, *discussed in* Young, supra note 14, at 960-63.

106 Young, *supra* note 14, at 962.

107 Young, *supra* note 14, at 962.

standards for sunlight or ventilation, it could condition it on the parties' willingness to negotiate.

IV. LEGAL CHARACTER OF ENVIRONMENTAL PROTECTION AGREEMENTS

Environmental protection agreements, the U.S. counterpart of *kyōtei*, may also be characterized in three ways. First, they may be completely non-enforceable, as purely relational undertakings.[108] Second, they may constitute an informal agency action with enforceability dependent on the statute, limits to agency discretion, and the views of the court; this view is examined in the next section. Lastly, they may be contracts that are fully enforceable as negotiated. In order to understand whether the courts will enforce environmental protection agreements, this Comment will explore the judicial treatment of development agreements, the U.S. equivalent to Outline Guidance.

A. *Environmental Protection Agreements as Informal Advice*

The doctrinal structure of the Japanese courts in evaluating the legality of administrative guidance is closely paralleled by U.S. court reviews of informal advice. First, the court will often determine that the guidance is non-reviewable because it is not an "agency action,"[109] the equivalent of Japan's "administrative disposition." Second, even if it does qualify as an agency action, the court may find that the action is not ripe for review because it isn't final.[110] Finally, even if the action is deemed to be

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108 This aspect was discussed in the Japanese context, and will not be further explored here.

109 The U.S. Administrative Procedures Act defines an agency action as including the "whole or part of an agency rule, order or . . . failure to act." 5 U.S.C. § 551(13) (1994). An order is "the whole or part of a final disposition . . . of an agency in a matter other than rulemaking . . . ." 5 U.S.C. § 551(6) (1994).

110 The U.S. Administrative Procedures Act states that "final agency actions for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (1994). In *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the Supreme Court presented a methodology for determining ripeness for review: balance the fitness of issues for judicial determination against the hardship to the party if judicial review is withheld. A factor to consider in determining whether an issue is fit for review is the finality of the agency action. Courts often find that staff actions, such as interpretive letters and oral advice, are not ripe for review because they have no legal effect, are not authoritative, and might prompt the agencies to restrict the availability of informal advice. *Abbott Laboratories*, 387 U.S. at 148-49. *See, e.g., National Automatic Laundry and Cleaning Council v. Schultz*, 443 F.2d 689, 698-700 (D.C. Cir. 1971). Courts are reluctant to review informal advice even when the language seems to convey veiled threats to regulatees that they must conform to the agency's non-binding policy statements. *See,*

ripe for review, the courts might still find that the action falls within a permissible range of agency discretion under the relevant statutes.[111]

However, a U.S. court may be less tolerant of a local government's informal advice when that advice is marginally or wholly *ultra vires*.[112] Without authorizing legislation, local governments in the United States may find it difficult to emulate the success of local governments in Japan in extending their jurisdictions to new sources of pollution by "gap filling," using only their generalized supervisory authority. Although local governments in the United States typically lack the fully panoply of administrative authority held by federal and state agencies, it is possible that a combination of zoning authority, police power, local ordinances, and traditional common law nuisance principles could provide a sufficient basis for extending advisory jurisdiction over a wide range of environmental problems.[113]

B. *Environmental Protection Agreements as Contracts*

Common law contract theory requires some of the same elements (albeit with slightly different terminology) as civil law contracts. The element of voluntary consent remains critical, and in enforcing an environmental protection agreement a court will certainly inquire whether

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e.g., Pacific Gas and Electric Co. v. FPC, 506 F. 2d 33 (D.C. Cir. 1974). *See generally* Howard L. Vickery III, *Judicial Review of Informal Agency Action: A Case Study of Shareholder Proposal No-Action Letters*, 28 HASTINGS L. J. 307, 337-45 (1976); 2 KENNETH CULP DAVIS & RICHARD G. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 384-90 (3d ed. 1994).

111 Agency actions are unreviewable when they are "committed to agency discretion by law." Administrative Procedures Act, 5 U.S.C. § 706(a) (1994). However, the Supreme Court has narrowly read this language to mean that review is precluded only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)). In determining whether there is "law to apply," courts look at the governing substantive statute for a standard to evaluate any claim of arbitrariness. For U.S. environmental statutes, which tend to be prescriptive, it would almost always be possible to find law to apply. Courts also look at the precise allegations made by the plaintiff, and thus this test for reviewability begins to look like a decision on the merits and fully reviewable. *See generally* Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 653-57 (1985).

112 The state may delegate a portion of its powers for the protection of the property, health and comfort of the public to a muncipality. EUGENE MCQUILLIN ET AL., THE LAW OF MUNICIPAL CORPORATIONS § 9.01 (3d ed. 1988). Usually, though not always, such delegations are restricted to those matters of local concern. *Id.* § 4.13.

113 *See* Peter H. Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 STAN. ENVTL. L.J. 50, 66-80 (1993).

duress existed.[114] Both parties must exhibit an intent that the contract be binding, such as is demonstrated by putting it in writing.

Two common law contractual requirements which apply to environmental protection agreements, but which in Japan are subsumed under the general requirement of good faith, are consideration and pre-existing legal duty. In an environmental protection agreement, a reasonable argument can be made that both sides supply consideration. For the private party, consideration takes the form of compliance with stricter standards. The municipality's consideration may be less obvious, or may be merely implied, but as in Japan could include the promise of public support, access to land via zoning approvals, or provision of services.

These environmental protection agreements might be deemed invalid if either party actually has a pre-existing legal duty to do the negotiated act.[115] The court will examine whether the company, either directly or indirectly, is required under law to perform the type of actions which they are promising. If the agreement calls for conditions which are truly more stringent than the legal requirements, this should not be an issue. However, the court might find that the municipality had an implied duty to permit the development of facilities, or to provide necessary public services.[116] Most modern courts have moved away from the view that the business has a vested right, based on ownership alone, to receive a permit or services.[117] Whether or not a duty exists will depend on the enabling statutory language, in conjunction with the amount of discretion delegated to the service-providing or permit-issuing body.[118] Finally, even if there is no statutory pre-existing duty, the private enterprise might have a valid promissory

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114 "Undue influence is unfair persuasion of a party who is under the domination of a person exercising the persuasion. . . . If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim." RESTATEMENT (SECOND) OF CONTRACTS § 177 (1981).

115 "The performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain." RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

116 State and local laws in the United States often contain a "duty to serve" provision which directs privately-managed utilities to connect eligible users; such laws may need to be amended to clarify that the duty to serve can be conditioned on compliance with an express agreement. *See, e.g.*, MCQUILLIN, *supra* note 112, § 34.89.

117 "[W]hile some courts and commentators persist in the traditional view that there exists an almost inviolate right to develop . . . it would be more accurate to say that . . . the private development right contracts as the public exercise of the police power expands." Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L. J. 625, 632 (1978).

118 *Id.* at 638-39.

estoppel claim if significant preparations have been made prior to denial of permit or services.[119]

C. *Judicial Enforcement of an Environmental Protection Agreement Analog in the Land Use Arena: Development Agreements*

It is possible to infer from the U.S. courts' approaches to development agreements and similar land use arrangements whether environmental protection agreements may be enforced. Development agreements are a form of land use exaction[120] limiting the uses of new residential or industrial developments. In exchange for these limitations, municipalities promise to grant the zoning status which might otherwise be denied, preserve regulatory status for a particular period of time, or provide certain municipal services.[121] "Development agreement" as a term of art refers to those agreements negotiated in states with authorizing statutes;[122] however, similar negotiations can also occur without state statutory authority in the form of annexation agreements, settlement agreements or stipulated judgements.

Development agreements, like *kyōtei*, possess a hybrid contractual-regulatory legal character. An examination of the relevant legislative

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119 The strength of the promissory estoppel claim will depend on whether the permit or service relates to the government's proprietary or sovereign activities, the conduct of the permittee and whether recognition of the claim implicates important public policies. *Id.* at 650-53.

120 Land use exactions are techniques used by local authorities to compel a developer to exchange land, money, materials or services for permission to develop. On-site exactions require the developer to provide for amenities within the development, such as sewers, streets or open space, while off-site exactions typically require improvements on land adjacent to the property. Michael H. Crew, *Development Agreements After Nollan v. California Coastal Commission, 483 U.S. 825 (1987)*, 22 URBAN LAW. 23, 23-26 (1990).

121 *Id.* at 27.

122 Several states and countries have passed legislation specifically authorizing the use of development agreements. The following state descriptions are available: California (CAL. GOV'T. CODE § 65864 - 65869.5) (1996) (Gov't), *discussed in* Eric Sigg, *California's Development Agreement Statute*, 15 SW. U. L. REV. 695, 703-07 (1985); Florida (FLA. STAT. ANN. § 163.3220-43 (1986)), *discussed in* David S. Goldwich, *Development Agreements: A Critical Introduction*, 4 J. LAND USE & ENVTL. L. 249, 254-57 (1989); Hawaii (HAW. REV. STAT. 46-121 to 46-132(1986)), *discussed in* Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 997 (1987); Nevada (NEV. STAT. 278.010-201 (1985)), *discussed in* Wegner, *supra*, at 998. Washington's statute (WASH. REV. CODE 36.70B.170-210 (1995)) is too new to have developed commentary. Denmark and Belgium have both passed similar legislation. *See* Hubert Bocken, *Covenants in Belgian Environmental Law, in* ENVIRONMENTAL CONTRACTS AND COVENANTS, *supra* note 9 at 57-71; Jesper Jorgensen, *Legislation on 'Eco-contracts' in Denmark, in* ENVIRONMENTAL CONTRACTS AND COVENANTS, *supra* note 9, at 73-85.

language, circumstances of use and expectation of the parties reinforces the view that development agreements are functionally contracts.[123] On the other hand, the purpose and effect of the agreements is distinctly regulatory in nature.[124] Unfortunately, like *kyōtei,* it may take some time for the legal character of development agreements to be entirely clarified by the courts, due to a similar tendency towards widespread compliance.[125]

1. Threshold Question: Procedural Concerns

The secretive nature of development agreement negotiation may raise questions of due process and equal protection, both in terms of the means used to adopt the agreements, and the options for affected citizens in challenging their implementation.[126] Such concerns parallel those raised with *kyōtei* concerning the violation of the "rule of law." Development agreement statutes typically define basic procedures for notice and hearing for affected landowners. Localities without statutes may be wise to enact an ordinance that mimics these procedures, as well as laying out eligibility requirements, modification procedures, and so forth.[127]

2. Threshold Question: Applicability of the Contracts Clause and Reserved Powers Doctrines

Another complex threshold question which looms over development agreements is the legitimate basis for the municipal authority to bind future government actions. If the government's commitments limit future environmental regulatory actions (precisely the sort of certainty the private enterprise is seeking), then the development agreement might be invalid under the reserved powers doctrine.[128] The reserved powers doctrine is

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123 Wegner, *supra* note 122, at 999-1000. Another commentator has concluded that development agreements are "simply a species of public contract." Goldwich, *supra* note 120, at 251.

124 Wegner, *supra* note 122, at 1000-01.

125 Sigg, *supra* note 122, at 712; Crew, *supra* note 120, at 28.

126 Wegner, *supra* note 122, at 1008.

127 The League of California Cities has developed a model ordinance for development agreements. Wegner, *supra* note 122, at 1009.

128 The reserved powers doctrine, first enunciated by the U.S. Supreme Court in *Stone v. Mississippi,* 101 U.S. 814 (1880), states that a government agency cannot contract away its right to exercise its police power to protect the health, safety, and welfare of the public. *See* Goldwich, *supra* note 122, at 257-62 (discussion of reserved powers doctrine as it pertains to development agreements).

itself in tension with the contracts clause,[129] which limits the power of states to modify their own or other contracts.[130]

This Comment cannot elucidate all aspects of these doctrines as they apply to development agreements; that task is left to others. It appears that a court's characterization of the public-private relationship will influence whether or not it finds the agreement to be contractual in nature; this characterization involves an analysis of the legislative language, purpose and effect of the government action, and the parties' expectations and considerations.[131] Once it is deemed to be a contract, the court may base its determination that the local government has bargained away its reserved powers if the agreement lacks clear authority, the private enterprise's expectations are reasonable, or the government action had an adverse effect on the public interest.[132] If the government refuses to comply with the agreement, the court may either deem it a routine breach, or may find that the government has unconstitutionally "impaired" its obligations when non-compliance is "substantial."[133] Some governmental police power actions that impair private contracts may nevertheless be allowed, if the actions are found to be "reasonable and necessary."[134]

Development agreement statutes have been carefully crafted to answer these constitutional challenges. For example, while the California statute authorizes any party to the agreement to enforce it against subsequent contrary regulations, it also acknowledges the validity of any other non-conflicting regulations, provides for periodic review and allows

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129 The contracts clause declares that "No State shall . . . pass any . . . Law impairing the obligation of Contracts . . . ." U.S. CONST. art. I, § 10.

130 In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Supreme Court set a higher standard of review for public contracts (contracts between states) and a more deferential standard for private contracts (between state and private entity). Some have seen this lack of constitutional protection for private contracts as part of a jurisprudential trend against the valuing of contracts, whereby individuals are not seen as autonomous actors responsible for their own decisions, but only as holders of certain prescriptive rights and obligations not subject to contractual modification. *See* Thomas W. Merrill, *Public Contracts, Private Contracts and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597, 624 (1987).

131 Wegner, *supra* note 122, at 965.

132 Wegner, *supra* note 122, at 967-68.

133 Wegner, *supra* note 122, at 968-70.

134 *Id.* at 974. The "reasonable and necessary" standard originated in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), and was further defined in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

for subsequent modification.[135] These are intended to show that, rather than relinquishing all its police powers, the municipality is exercising its police powers through the agreement.[136] Development agreements crafted without the benefit of an authorizing statute may have some difficulty convincing the court that the municipality has not surrendered control of its municipal functions. However, applying the constitutional lessons of the contracts clause, a clear public purpose and a demonstration of the necessity of the act may help the court in finding a valid and enforceable agreement.

3. *Legality of Bargaining Tools*

Once these threshold questions have been resolved, courts will likely adopt a case-by-case approach in evaluating the legality of the contract, again looking in terms of whether there is adequate authority, the expectations of the parties and the governmental interests.[137] As in Japan, the courts would focus on whether the agreement is generally beneficial or adverse to the public interest, and whether it compromises the government's discretion.

a. *Provision of public services*

Municipalities in the United States traditionally have had considerable discretion in deciding the boundaries of the service areas when siting facilities in newly developing areas.[138] Further, they have authority to impose conditions relating to the operation of the facility, especially insofar as it may affect the service provided. Courts examining the imposition of these collateral conditions in government contracts sometimes distinguish between "governmental" and "proprietary" functions.[139] Applying this distinction, courts have upheld collateral conditions in government contracts with private parties that involve the provision of services, as long as the

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135 Sigg, *supra* note 122, at 715 and accompanying notes.

136 Sigg, *supra* note 122, at 716.

137 Wegner, *supra* note 1220, at 1006.

138 *See generally* Barbara A. Ramsay, *Control of the Timing and Location of Government Utility Extensions*, 26 STAN. L. REV. 945 (1974).

139 Governmental functions and powers are those which are used to administer the affairs of the state, promote the general welfare and serve the public at large. Proprietary functions and powers relate to the provision of services (often utility services) to customers in a manner analogous to private sector entities. Wegner, *supra* note 119, at 1004.

government is functioning in its proprietary capacity. Because private concerns have traditionally been involved in providing water services, courts have upheld these contracts because of their "proprietary" nature. On the other hand, when the action is viewed as a "governmental" function (*e.g.*, provision of roads or sewage services) the contracts have been overturned.[140] A court applying this distinction to a development agreement could easily find a simple breach of a proprietary contract in case of non-compliance by either party.[141]

b. Access to land: zoning changes

When the government action in the development agreement is a promise to change or continue a zoning practice, another complex constitutional doctrine, the takings clause,[142] must be considered.[143] Two Supreme Court cases[144] have outlined strict limitations on these government actions. The court looks to find a legitimate public purpose that allows the government to entirely prohibit the proposed use, continued profitable use of property for the landowner, and a clear nexus between the restriction imposed and the purpose of the government act. Further, these criteria must be met even when the landowner voluntarily agrees to or suggests the condition.[145] Carefully crafted development agreements should nevertheless withstand the court's takings inquiry even when these

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140 Japanese courts make identical distinctions when evaluating government contracts. *See, e.g.*, Judgment of Dec. 8, 1975 (*Yamaki Kensetsu Kabushiki Kaisha v. City of Musashino*), Tokyo District Ct., 803 HANREI JIHÔ 18, *translated in*, GRESSER, *supra* note 1, at 216, 217-18; *see also* Young, *supra* note 14, at 971-73. In that case, the court held that sewage services were an exercise of governmental authority, while provision of water was not a governmental function, but a private law contract.

141 Wegner, *supra* note 122, at 1028.

142 The takings clause states that ". . . nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

143 See extended discussion in Crew, *supra* note 120, at 31-42.

144 In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Commission demanded a public easement across the Nollan's beachfront property, with the purported legitimate state interest being to diminish the house's blockage of the ocean view from the roadway. The Court held this to be an unconstitutional taking because there was no nexus between the required easement condition and the purported state interest. Then, in *Dolan v. City of Tigard*, 114 S.Ct 2309 (1994), the Court quantified this nexus by holding that there must be a "reasonable relationship" between the condition imposed by the city and impact of the proposed development, in the form of a "rough proportionality." *Id.* at 2313. In *Dolan*, the Court found the necessary relationship between the conditions imposed (storm drainage and bike path easements) and legitimate state purposes (prevention of flooding and reduction in traffic congestion).

145 Crew, *supra* note 120, at 37.

limitations are imposed, and should assure that the agreement achieves its purpose while minimizing harm.[146]

4. *Implications for Environmental Protection Agreements*

The evolving American jurisprudence on development agreements does begin to resemble the Japanese courts' views of Outline Guidance, and lead to the conclusion that environmental prevention agreement could be developed and enforced within certain constraints. First, the courts might look more favorably on agreements conducted with good faith and in which there is "real" consent, as expressed in the expectations of the parties. Second, the negotiation boundaries must not exceed the "common sense of society": the agency's own interest is valid as long as it furthers the welfare of all groups, not just special interests. In the U.S. context, the statement of public interest must be clear. Thus, a written policy which conditions the provision of public services or grant of a permit on collateral factors is preferable to an informal discussion; a comprehensive plan that has undergone authoritative review is preferable to the written policy; and a statute would trump them both.

V. CONCLUSION

The Japanese experience with *kyōtei* has reportedly been a positive one for all concerned. It appears to be a pragmatic, effective and nimble alternative to the behemoth of command-and-control regulation in the United States. Environmental protection agreements will, however, face a series of legal hurdles and undoubtedly some social resistance in order to be applied in the United States. Their hybrid administrative-contractual nature may be viewed with suspicion by conservative judges. Further, it is difficult to determine whether the notoriously malleable "reasonableness" standards of the contracts clause, reserve powers and takings doctrines would help or hinder judicial acceptance of environmental protection agreements.

Another hurdle is the widespread notion that government actions which follow detailed and public procedures produce better, fairer results. The Administrative Procedures Act is grounded on this belief, and U.S.

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146 Crew, *supra* note 120, at 55.

citizens are conditioned to expect significant opportunities for input. They tend to view anything else as a "sweetheart deal" between industry and government. Passage of authorizing state statutes or local ordinances would assist to dispel this perception.

The remaining barrier is mistrust of local governments. Over the last twenty years, counties and municipalities were perceived as ineffective guardians of environmental health, because of the presumption that local economic interests put pressure to compromise environmental standards. However, historically, municipalities were the source of the first environmental laws and at common law had a duty to protect public health.[147] Local authorities now bear most of the responsibilities for air pollution monitoring and control, wastewater treatment and pre-treatment, solid waste management and recycling, and even hazardous waste controls.[148] Furthermore, the trend is towards increasing decentralization. The fact that environmental protection agreements are voluntary, and that they are designed to impose conditions beyond the legal requirements, should lessen the degree of mistrust in local government abilities to effectively negotiate environmental protection agreements.

Bargaining is inevitable in the regulatory world. Environmental protection agreements, modelled on *kyōtei*, would bring that bargaining out into the open, and make the bargains more enforceable.

147 Lehner, *supra* note 113, at 54.

148 David L. Markoff, *The Role of Local Governments in Environmental Regulation*, 44 SYRACUSE L. REV. 885, 892 n.14 (1993).