Administrative Guidance in Japan

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One might say that Japanese administrative agencies govern "by lifted eyebrow."[1] They are able, by virtue of a wonderful device called administrative guidance (*gyōsei shidō*), to control, promote, and arrest a multitude of complex actions taken by both individuals and companies. All of this is generally accomplished without recourse to law or ordinance. The "lifted eyebrow" of an administrative agency is sufficient to effect the action. This essay examines the possible reactions of a party guided by an administrative agency and concludes that widespread compliance is not simply a product of cultural values promoting cooperation with essentially extra-legal governmental suggestions. The "lifted eyebrow" is indeed a legal action, backed up by credible threats of retaliation against the noncompliant party. Legal remedies to forestall retaliation, moreover, are sparse and for the most part untested.

Administrative guidance is a request for voluntary cooperation, given by an administrative body and directed at an individual, association, or other juristic person.[2] The administrative body may be any government ministry or agency. It is of little import who in the agency actually does the guiding or to whom in the company the guidance is given. Although arguments can be made that the higher ranking the official on either side the more important the guidance, any guidance that bears the agency's imprimatur, no matter who delivers it, is expected to be treated with equal deference by the receiving party.[3]

Government agencies usually guide informally and orally rather than by committing anything to paper or summoning the party to the agency. Sometimes a party is told specifically the actions it should take, and other times only a general outline is drawn, and the party is left to fill in the details.

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1. P. Davis, *Administrative Guidance in Japan* 21 (Sophia University Socio-Economic Institute Bulletin 41, 1972).

2. "Juristic person" is defined in the Civil Code (*Minpō*) (Law No. 89, 1896) arts, 33 *et seq.* [hereinafter cited as Civil Code]. The definition includes corporations if organized according to special provisions of the Code, and this essay deals primarily with the administrative guidance of corporations.

3. Even though such guidance is delivered by low ranking agency bureaucrats, they have the decision of a higher official backing them up. If a party were to ignore guidance because it was delivered by a low ranking bureaucrat, only to find out subsequently that it was ordered by a top level policy planner, it would be an embarrassing loss of face, so generally all guidance is considered equally.

Guidance can either be regulatory, adjusting, or advisory.[4] It may lack precise standards and detailed procedures. In all, administrative guidance may be formulated in any of six ways and may be executed in at least six different ways.[5] Whether the administrative guidance was delivered informally on the ninth tee, over drinks in a bar, or in the Vice-Minister's private office, the expectation of the agency is always the same. That is compliance, and failure to comply may precipitate retaliation.

Although administrative guidance has been distinguished from "legal acts" by the voluntary cooperation the former is intended to elicit, to view such compliance as significantly more voluntary than compliance with sanction-

4. Japanese scholars have been prone to discourse on whether administrative guidance needs a statutory basis or not; however, it seems clear that both guidance with a basis in law and guidance without one exist, and both will be considered equally herein. Whether the administrative guidance has an express statutory basis, an implied statutory basis, or lacks statutory basis makes no real difference in the relationship between parties and agencies. *Zadankai: Gyōsei Shidō no Kihon Mondai* (Round-table Discussion: The Fundamental Problems of Administrative Guidance), 342 *JURISUTO* 21-63 (1966). *See:* G. Thomas, *Administrative Guidance in Japan,* September, 1976 (unpublished thesis in Harvard East Asian Legal Studies Library) at 10-14 [hereinafter cited as Thomas].

5. Thomas enumerates the following methods of formulation:

I. The administrative guidance is formulated within the administrative organ itself, with little or no outside influence. This represents the ideal situation, where the organ is presumably acting objectively for the public benefit.

II. Policy and goals are initially formulated in or passed through an industry-wide association, representing the consensus of the entire industry or group of subject parties. The proposal, which is in essence "guide us to do the following," is then communicated to the administrative organ.

III. Similar to II, but not all members of the industry wish to participate in the concerted action. Therefore, the remaining members may seek the legitimization of an action by acquiring a government guidance, which would be applied to the entire industry, including the dissident members.

IV. A private lobby suggests that the administrative organ issue a guidance to a particular party.

V. The public, either individuals or groups of citizens, or the press, suggest policy and goals which they desire the administrative organ to attain.

VI. The policy and goals are hammered out in a joint business-government "consultative commission" (*shingikai*).

He further enumerates the following methods of execution:

I. The administrative organ notifies an industry by contacting the member parties through the appropriate industry association or other body.

II. A particular subject party is notified individually and directly.

III. A particular subject party is notified indirectly and through the appropriate association.

IV. The administrative organ notifies an entire industry of a guidance by contacting each member party individually and directly.

V. The administrative organ issues a circular which in substance constitutes an administrative guidance.

VI. The administrative organ holds a press conference, *etc.*, at which it publicizes its desired policies.

Thomas at 28-31.

backed "legal" edicts is to ignore the realities of modern Japanese society and government. Administrative guidance is no longer, if it ever actually was, a means by which administrative agencies supplement rule by law. Administrative guidance is much more than a simple agency request to a party which will evoke spontaneous and voluntary cooperation.

Administrative guidance is an outgrowth of a relationship between the paternalistic Japanese state and its subjects that has existed at least since World War II. Its growth has been fostered by the increased role in policy formation and execution given to administrative agencies in the last three decades and by the increased responsibility these agencies bear. In a nation beset by many multi-faceted problems, public and media sentiment demands swift action. Laws and ordinances are not always a sufficient means of coping with complicated economic and technical-scientific problems. Administrative guidance bridges the gap between the principle of administration according to law and "the positive duty of public administration to form the social order in response to the demands of the people, even if this means exceeding the law on occasion."[6]

Administrative guidance has grown so rapidly that the majority of government direction to both individuals and companies is presently given through the medium of administrative guidance rather than by "legal acts" (*hōteki kōi*). The Japanese Diet passes only about one hundred bills in a session, and these bills are primarily special measures designed to control immediate national problems. Instead of governing through the normal legislative process the government has come to rely on agency rule making, agency interpretation of existing laws, and administrative guidance. This choice of executive over legislative power has not been made without the consent of the people, for in Japan confidence in the ability of the bureaucracy to lead and govern is strong and mistrust of legislative motives is not uncommon.[7]

It is for reasons such as the above that administrative guidance has a legal quality about it, even if it has not yet risen to the level of a "legal act." Although scholars maintain that administrative guidance lacks a legal effect as does some case law,[8] recent scholarly opinion recognizes that administrative

6. Narita, "Administrative Guidance," 2 LAW IN JAPAN 45, 51 (1968) [hereinafter cited as Narita].

7. There is also a strong preference for executive rather than judicial power. This is manifest in a strong desire to avoid litigation. The Japanese routinely expect conflict resolution to evolve from the government, and the customary forms of such resolution are consensus, compromise, and conciliation rather than litigation. *See, e.g.:* Gelhorn, "Settling Disagreements with Officials in Japan," 79 HARV. L. REV. 685 (1966).

8. Hayashi, *Iwayuru gyōsei shidō ni tsuite* (Concerning Administrative Guidance) 14 *GYŌSEI TO KEIEI* (Administration and Management) 17 (1962). *See also:* 752 *HANREI JIHŌ* 30.

guidance is comprised of legal qualities.[9] One of Japan's most famous administrative law scholars has recently written that the traditional interpretation of administrative guidance as voluntary and non-legal may no longer be acceptable, particularly given the possibility of unfair guidance.[10] Moreover, administrative guidance usually looks like a "legal action." It has its own jurisdictional limitations and is occasionally provided for in law.[11] The more such guidance is used, the more it takes on the character of customary law. Relations between agencies and parties are governed by past examples and the more that administrative guidance is issued and followed, the more it governs.[12] The Japanese have a pervasive government-over-the-people consciousness and cooperation with the government reflects harmony, a virtue esteemed by the Japanese. Compliance with administrative guidance allows cooperation, while refusal breaks the harmony.

Most crucially, there is a fear that if parties do not comply with administrative guidance as if it were law, the agency will somehow "get them." Despite its professed voluntary nature, administrative guidance is often coercive rather than suggestive.[13] The psychological pressures urging compliance and the sense of duty to obey the government are undeniably influential. The legal nature of administrative guidance is best understood, however, by reference to the legal forces urging compliance. The remainder of this essay examines those forces.

Once administrative guidance has been issued there are several responses available to the guided company or individual. Traditionally, the guided party simply complies, perhaps with an eye on benefits promised by the agency in exchange for compliance. Even in the absence of a corporate response, however, shareholders may sue their directors should economic loss result from compliance. More problematic are the cases of refusal to comply, perhaps following an initial period of cooperation. In response to noncompliance, the government may elect to take any one of a number of retaliatory actions to coerce compliance. Finally, the guided party may attack the administrative guidance directly and legally.

9. Suginami and Kaneko, *Gyōsei Tetsuzuki-Gyōsei Sōshōhō* (Administrative Procedure-Administrative Litigation Law) 290 (1973).

10. Tanaka, *Gyōsei Shido to Ho to Shihai* (Administrative Guidance, Law, and Control), in *GENDAI SHŌHŌGAKU NO KADAI* (Themes in Modern Commercial Jurisprudence) 1447 (1975).

11. Narita at 54-55, 64-65. *See* note 70.

12. "This customary law may include practices and perceptions of respective rights, duties, and rules of the parties involved, which have evolved over time due to continuing experience." Thomas at 27.

13. Narita at 74.

COMPLIANCE: THE NORMAL RESPONSE

Compliance is the typical Japanese corporate response to administrative guidance. Normally, compliance is effected as soon as possible given the limitations of the industry to adapt to technological or economic directives. Agencies encourage voluntary compliance by giving adequate notice, making their directives flexible and allowing for corporate feedback and discussion. Occasionally, an agency may sweeten its directive with a promise of benefits if the company complies.

Usually, administrative guidance is preceded by some warning signal which puts the company on notice, so that steps towards compliance may already be well under way or at least off the drawing board by the time the directive is issued. Such warning signals include, but are not limited to, both formal and informal private conferences between government officials and industry representatives, government documents, testimony by government officials in the Diet or at administrative hearings, public sentiment, press articles and books, and *shingikai.*

Shingikai are conferences convened at the mutual convenience and desire of government and industry officials. The initiative may come from either government or industry, however the government is usually the initiating party. Participants almost always represent the opinions of government, industry, and the scholarly community, as well as those of consumer organizations.[14] The conference attempts to define a problem usually suggested in broad terms by the government and to develop a strategy for dealing with it. This strategy will often become the basis for administrative guidance and since these conferences are usually carried on regularly over a period of months or even years the companies involved are unofficially notified of the administrative guidance which will follow.

When administrative guidance relates to economic questions or business practices (such as pricing or advertising), the warning signals are not always available or clearly defined. Compliance, however, is still the norm, although the pressures for quick reaction are somewhat mitigated.

Administrative guidance is typically not a single action.[15] Usually, an initial broad directive is followed by repeated incremental instructions. This allows

14. *Shingikai* are convened to evoke an obstensibly neutral opinion acceptable to the majority. Although agency officials are not participants they often sit behind several of the experts who are often former agency officials. The same is true for industry which has its opinion expressed by experts sympathetic to its views, often because they are former corporate managers. In this fashion, both sides are represented without appearing overbearing or partial.

15. There are some fields in which this is not always true. For example, in the tax field guidance is often given to individual taxpayers in a single directive rather than over a period of time or by periodic adjustments.

the agency to redesign its goals to conform with external influences such as market changes, public opinion and political pressures; internal pressures such as changes in agency philosophy or personnel; and with the results of the company's compliance to date or of the ongoing dialogue between the company, industrial representatives, and other relevant parties.

If compliance cannot be effected immediately, the company will traditionally alert the guiding agency to its problems while proceeding to take whatever steps it can to comply as soon as possible. In response to guidance calling for technological changes (such as a decrease in the lead quantity in gasoline), companies often inform the agency that the change will take place as soon as possible and then they proceed to comply. Often, the agency will offer to assist the company in whatever fashion it can to speed up compliance or will intervene with third parties, private or public, (perhaps by guiding them as well), to speed compliance.[16]

One of the government's most adaptable tools encouraging compliance resembles a "carrot" when contrasted to the "stick" of coercive measures. A promise of benefits often sweetens an agency directive and serves as a catalyst for compliance. For example, in the early 1960's the Japanese wheat industry market pricing mechanism fluctuated widely and the Ministry of Agriculture decided to control prices of wheat flour.[17] It guided the industry and sweetened its directive with a promise to extend low interest financing (an act within the Ministry's discretion) to those companies which complied. As a result the companies uniformly followed the administrative guidance. Many agencies are apt to offer the "carrot" in this fashion so as to encourage compliance when the company may feel that the guidance is not in its best economic interest.

Indeed, compliance is not always in the best interests of the company. From the standpoint of relations between the company and government and the business world, compliance is unquestionably the best choice. It may, however, be accompanied by economic difficulties. Lost profits, curtailed markets, and reduced corporate autonomy are not uncommon results of compliance. In fact, administrative guidance from the Ministry of International Trade and Industry (MITI) or the Fair Trade Commission (FTC) with regard to allegedly oligarchical or monopolistic practices may be the forerunner of consent orders which would cause divestiture or abandonment of a product line or trade practice worth millions of dollars in annual profit.[18]

16. For example, if an agency requests auto manufactures to produce automobiles which use lead-free gasoline, it will also guide oil companies to produce this gasoline and gasoline distributors to design stations to accommodate it.

17. Kawasaka, *Gyōsei Shidō no Jittai* (The Realities of Administrative Guidance), 432 *JURISUTO* 51-53 (1966).

18. Although the consent decrees themselves are not administrative guidance, the directives issued by the FTC in advance of such orders in order to guide a company out of practices which

Despite strong pressures to comply, a company may be induced to consider other responses in part because it may be unable to comply with impunity. If lost profits or similar disadvantageous results occur as a result of compliance, it would appear that even though a company has followed administrative guidance, its shareholders would have a right to bring an action. This action would be aimed at the directors.[19] Those stockholders who have owned stock continuously for six months may, if the company does not bring action within thirty days, sue the directors on behalf of the company for the economic loss to the company. If irreparable damage may result, the waiting period is waived.[20]

The directors' liability is premised on their taking an act which violated a law, ordinance, or the company's articles of incorporation.[21] So far, courts have never found compliance with administrative guidance to be an illegal act.[22] In a suit for lost profits, the shareholder must show that following administrative guidance violated an article of incorporation since to follow such guidance ordinarily violates no law or ordinance. Since compliance with administrative guidance is not mentioned in articles of incorporation, the shareholder must generally rely on the article which states that the directors' actions shall be in the best interest of the company.

In a suit of this nature the shareholder must allege that the directors, in following administrative guidance, caused the company economic harm. Even if compliance was held to be illegal, the burden is upon the shareholder to show that the economic damages are due to compliance with the guidance; and considering the multitude of factors that affect most companies' balance sheets the causation issue may be insurmountable.

A shareholder also has a right to sue its company's directors on behalf of the company for injunctive relief from an act that is not within the scope of the

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would be subject to consent decrees are administrative guidance. It is not uncommon for the FTC to warn a company through repeated guidance which practices it considers possible violations of the law.

19. Although it might appear that the shareholders would also have a right to bring a derivative suit against the guiding agency on the company's behalf, derivative suits are not generally brought in Japan. For an article that explains the reasons behind this tendency *see* Tanka & Takeuchi, "The Role of Private Persons in the Enforcement of Law: Comparative Study of Japanese and American Law," 7 LAW IN JAPAN 34 (1974).

20. Commercial Code (*Shōhō*) (Law No. 48, 1899) arts. 267(1), 267(2), 267(3). Directors who do not assent to the resolution that brings about compliance with the guidance must dissent in the minutes or they will also be liable. *Id.* arts. 266(2). 266(3).

21. *Id.* arts. 266(1), 266(5).

22. To understand why this is so, *see* S. Takakubo, *The Contribution of a Corporation to a Political Party — A Case in Japan* (1966), in which the author discusses a suit by shareholders against the directors of Yawata Seitetsu, one of Japan's largest steel manufacturers [hereinafter cited as Takakubo]. This case establishes a very narrow field of director's action which will be deemed illegal under Art. 266 of the Commercial Code, and the definition of corporate objectives is given a broad interpretation.

objectives of the company or violates any law, ordinance, or article of incorporation thereby giving rise to fear of irreparable damage to the company.[23] Even if the shareholder cannot show that compliance violated the articles of incorporation he may be able to show that it is an act outside the scope of the company's objectives. Again, the proof and causation problems remain a bar to prompt judicial action. Moreover, it seems that a director could find that compliance with administrative guidance is within the scope of corporate objectives if it merely serves to improve relations with the government.[24]

NON-COMPLIANCE: AGENCY REACTIONS AND CORPORATE REMEDIES

Despite strong pressures to cooperate, a company may elect not to comply with administrative guidance. This refusal may follow an initial period of compliance and may be the result of several concerns. These may only become evident after compliance has begun or may follow any one of the repeated and incremental directives which usually follow the initial broad directive.[25] Attempts at dialogue (a common method of ironing out a directive's initial wrinkles) may fail or reveal broader difficulties.

Economic consequences provide the clearest motivations for non-compliance. A corporation may be influenced, however, by any of the following: a change in management; internal pressures unrelated to economic gain or loss; a change in corporate policy relating to governmental contacts; a change in the political or moral attitudes of directors, shareholders, or society as a whole. Moreover, an administratively guided company may in the course of its compliance break a law or be aware that compliance would entail doing so. The law transgressed may be anything from the Pharmaceutical Affairs Law[26] to a law on securities regulation or exchange. The gravity of the law and the repercussions which would follow its violation will undoubtedly temper the company's response to the administrative guidance. Since administrative guidance often calls for actions bordering on violation of existing laws (particularly with regard to trade practices falling under the Antimonopoly Law)[27] this is a problem companies often face.

23. Commercial Code art. 272.

24. *See generally:* Takakubo.

25. Bookkeeping methods of many companies would make realization of economic loss or gain impossible to calculate more often than once a month, once a quarter, or longer.

26. *Yakujiho* (Law No. 145, 1960) covers drug labeling, advertising, manufacture, and use, as well as other things.

27. Law Concerning the Prohibition of Private Monopoly and the Maintenance of Fair Trade (*Shiteki Dokusen no Kinshi oyobi Kōsei Torihiki no Kakuho ni kansuru Hōritsu*) (Law No. 54, 1947) [hereinafter cited as the Antimonopoly Law]. In a recent case twelve oil companies were indicted for conforming with what they claim was administrative guidance which they allege caused them to violate the Antimonopoly Law.

Potential illegality strengthens corporate resolve particularly after compliance has begun and the company has engaged in questionable conduct. This is especially true in the antimonopoly field. Prosecution is rare for such an action or even for actual violation of a law while being administratively guided; however, the stigma which attached through public awareness of the violation can be devastating.[28]

It is unlikely that a guiding agency will retaliate should a company refuse compliance to avoid violating the law.[29] Arguably, the guiding agency was unaware that compliance would violate any law;[30] and most likely, the agency will seek alteration of the law if possible or redesign its guidance to avoid illegality. If, however, the complying company either knowingly or unknowingly violated a law and was sued by a third party it could most likely not posit administrative guidance as a defense if administrative guidance is considered to have been entered into voluntarily. If administrative guidance is a legal action, however, the guided company might then be able to join the agency in the action as a codefendant.[31] If it were to lose a suit brought against it by a third party the company may have an action against the government to recoup the damages assessed against it or the damages incurred while enjoined from carrying out some activity.[32]

There are four major methods by which the government may seek to coerce

28. A recent example is the economic decline of Marubeni Trading Company in Japan after the release of information concerning its role in the Lockheed scandal. Japanese consumers react violently to law breaking of this nature, and this reaction is reflected in their buying patterns. Therefore, a company will do all that it can to avoid public awareness of any illegal actions.

29. Tax laws are often violated in minor ways due to faulty guidance given to a taxpayer by a local representative of the government. When a misrepresentation has been made and the taxpayer refuses to comply with the advice given, no action is taken to force compliance with the incorrect guidance. Although this is not the same case as a company receiving major economic guidance from the MITI, the pattern is analagous. The line between individual and agency guidance and mistake is very narrow.

30. If the guiding agency were aware that its guidance would force the company to take an illegal act then it would be violating the administrative principle of "priority of law" (*hōritsu no yūsen*). This principle holds that no act conducted by an administrative organ may violate any law. That is to say, an agency may not act so as to hinder the functions of any other national organs or violate any existing laws or ordinances. Narita at 64.

31. The procedure by which the agency can be joined as a codefendant is found in the Code of Civil Procedure (*Minji Soshōhō*) (Law No. 29, 1890). Article 76 provides that "[t]he parties of a suit may, during the pendency of the suit, give notice thereof to third parties entitled to intervene." The party may then intervene freely if it wishes or it may be forced in once the notice is given by Article 78 which provides that " . . . the person who had received notice of a suit shall be deemed to have intervened at the time he could have done so even though actually he did not intervene." There are no provisions exempting government agencies from this procedure.

32. An action may be brought under the State Redress Law (*Kokka Baishōhō*) (Law No. 125, 1947).

compliance and each is detailed below, along with the responses available to the guided company. Corporate responses to agency coercion are often grounded in the Administrative Case Litigation Act (ACLA),[33] and consequently overlap to some extent the direct attacks on administrative guidance discussed below.[34] The analysis presented represents only a cursory overview of the inter-relationship between coercion, compliance, and remedies, and the examples given are not exhaustive. Rather, the mechanics of the agency-company relationship and the interplay between administrative guidance, refusal, and coercion, are considered in the context of the following model, based on an actual case of administrative guidance.[35]

In the spring of 1965, Japan was caught in a recession which affected the entire economy and in particular the steel industry. At this time major steel manufacturers began to pressure the MITI to create an advice cartel[36] to control steel production. The MITI reluctantly agreed to act under its "Organization Law."[37] The MITI's Economic Policy Cabinet Conference (*Keizai Seisaku Kakuryō Kaigi*) met and, on July 26, 1965, MITI made a "departmental decision" (*shōgi kettei*) with regard to "Decreased Production Measures for

33. *Gyōsei Jiken Soshōhō* (Law No. 139, 1962) [hereinafter cited as ACLA], superceded the narrower and less efficient Law for Special Regulations Concerning Procedure of Administrative Litigations (*Gyōsei Jiken Soshō Tokureihō*) (Law No. 81, 1948).

34. ACLA provides for direct challenges to administrative actions by "appeal-type suits" (*Kōkoku-soshō*, art. 3) as well as collateral challenges in ordinary administrative suits (*Tojisha-soshō*, art. 4). "People's actions" (*Minshū-soshō*, art. 5) which are brought by an individual to vindicate a public rather than personal interest, and "Organ suits" (*Kikan-soshō*, art. 6) which are brought to test the relative jurisdiction of public bodies are also allowed. However, the relief sought by a company faced with coercive agency actions will normally be in the form of an "appeal-type suit." Such a suit may be utilized with regard to any of the four means by which the government seeks compliance. It is not necessary for a party to exhaust its administrative remedies before making use of the ACLA. Ogawa, "Judicial Review of Administrative Actions in Japan," 43 WASH. L. REV. 1075, 1091-92 (196) [hereinafter cited as Ogawa].

35. For a more thorough account of the case which follows *see:* 56 *DAIYAMONDO* 88 (1965); *EKONOMISUTO*, Dec. 7, 1965, at 25; 338 *JURISUTO* 56-57 (1966).

36. These were cartels created under administrative guidance of the MITI with the acquiescence of the FTC. They were intended to allow a combination of industry, MITI and public representatives to flexibly restrict and harmonize diverse actions in the best interest of the nation without complying with time consuming and complex formal application procedures. By 1965 they had almost completely disappeared due to changes in public opinion as well as increased competition within the business community and FTC criticism. M. Yoshino, *Japan's Managerial System*, 169-70, (1968). [hereinafter cited as Yoshino].

37. The Organization of the Ministry of International Trade and Industry Act (*Tsusho Sangyo Setchihō*) (Law No. 275, 1952) [hereinafter cited as MITI ORG. LAW]. The specific provision utilized was Article 3 (i) (ii). It provides for the promotion, improvement, and regulation of production, circulation, and consumption of industrial goods. Most organization laws give a scope to the actions of a particular agency without providing actual substance to the actions which is usually prescribed in various administrative operations law.

Ordinary [Rolling Use] Steel Ingots'' (*futsūgo-atsunobeyō-kōkai*).[38] The MITI directed eighty-five companies through administrative guidance not to exceed production levels. These levels were communicated to the companies in subsequent guidance, and other measures were taken to effect this guidance.[39]

At the outset, all of the companies complied and the guidance was extended into the third quarter of 1965. New limits were placed on the companies on November 13, 1965. Sumitomo Metal Mining Company (*Sumitomo Kinzoku Kōgyō*) was expanding its production capacity just prior to the original guidance. When production levels were imposed again in November it refused to comply, contending that the MITI's guidance wrongfully interfered in its ''managerial rights'' and would cause the company economic loss. The MITI retaliated in an effort to coerce compliance.[40]

Agency Reaction: ''Going Public''

The administrative agency's most common means of compliance enforcement would be ''going public'' with news of Sumitomo's refusal to set its production levels in accord with Ministry guidance. The agency, in this case the MITI, may do this in one or more of several fashions depending on such circumstances as the extent of Sumitomo's recalcitrance, the susceptibility of Sumitomo to public pressure, relations between Sumitomo and other companies in the industry, popular mood and sentiment, *etc.*

The most detrimental course of action from Sumitomo's standpoint would be the release to the news media of the administrative guidance, its purpose, the fact that all other companies in the industry are complying, and Sumitomo's refusal to comply. The guidance would be rhetorically explained in terms of the great need to stabilize production during recession. Corporate compliance would be cast as a prerequisite to enhanced general welfare. Under these circumstances publication and broadcast would force most companies to back down from their initial refusal to comply.[41]

Alternately, the MITI could release news of Sumitomo's refusal to other companies in the industry, especially those affected by the same administrative guidance but which have agreed to comply. In an industry controlled by a few

38. Narita at 58.

39. The MITI set as a standard for the second quarter of 1965 the separate average production value for the last two quarters of 1964, less ten percent. It also set import quotas based on the prescribed production levels. *Id.*

40. Sumitomo's refusal persisted until January 11, 1966. During this period the MITI put enormous direct and indirect pressures on Sumitomo, and these are outlined in Narita at 58 and in Yoshino at 174.

41. Although this is the normal reaction, there always remains the possibility of a sympathetic public reaction uniting the public and industry and aligning them against the government. This reaction is much more likely to occur now than in 1965.

large companies (such as the steel industry) the pressure to conform may be extreme when exercised by companies whose cooperation on other matters crucial to Sumitomo cannot be guaranteed with regularity.[42] In spite of the competition between them, companies in Japan, like individuals, have a strong sense of group consciousness which supports this sort of peer pressure.[43]

Finally, disclosure could be made to *Keidanren*,[44] industry panels, members of the Sumitomo conglomerate,[45] banks which hold Sumitomo's notes, its underwriters and so on.These institutions are likely to have influence over Sumitomo which they may choose to exert rather than find themselves in disfavor with the MITI.

Sumitomo's remedies to disclosure by an administrative agency are limited. It may sue the newspapers and broadcast networks for damage to its reputation;[46] for economic damages resulting from publication of its dealings with the government, for example, loss of contracts or reduced sales;[47] and for injunctive relief against further broadcasting and publication.[48] Truth is a defense to actions based on damage to reputation,[49] and Sumitomo cannot

42. It is not uncommon for many top management personnel in Japanese industry to have been schooled together or to have been connected through some sort of university alumni program. The bonds that are created in this informal "Old Boys" network are very strong, and much industrial decision making is based on the contacts. Cooperation, whenever possible, is thus normal within an industry, and the steel industry is no different in this respect.

43. "Generally speaking the Japanese like group action. It is extremely difficult for a Japanese to transcend the group and act independently. The reason would seem to be that a Japanese feels vaguely that it is treacherous to act on his own without considering the group to which he belongs, and feels ashamed, even, at doing something on his own." T. Doi. *The Anatomy of Dependence* 54 (1974).

44. *Keidanren*, or the Federation of Economic Organizations, was established in 1946 and currently is comprised of over one hundred organizations and one thousand leading corporations. It is led by the nation's most prominent business people and is the leading advocate of Japanese industry. It often makes policy recommendations to the government through one of its many standing and special committees.

45. Many Japanese companies are members of conglomerates dominated by a bank, a trading company, or another major concern, and Sumitomo is one of the nation's largest. These conglomerates have been the subject of much comment and criticism since World War II and for a description and analysis of their composition and practice, *see:* Yoshino at 129-48.

46. Civil Code arts. 709, 710, 723.

47. *Id.* arts. 709, 710.

48. *Id.* art. 723.

49. Truth is a defense to a criminal action for defamation brought under Article 230 of the Criminal Code (*Keihō*) (Law No. 45, 1907) which provides that "A person who defames another by publicly alleging facts shall, regardless of whether such facts are true or false, be punished. . ." The defense is found in Article 230-2 which provides that "When the act. . .is found to have been committed solely for the benefit of the public and regarding matters of public concern and when, upon inquiry into the truth or falsity of the facts, the truth is proved, punishment shall not be imposed." Generally, in a tort action under the Civil Code an analogy is drawn to these provisions.

controvert the truth of its refusal to comply. Sumitomo is precluded from alleging imposition on a right to privacy since corporations are not recognized to have such rights.[50]

Furthermore, Sumitomo will have trouble fitting economic damages under the appropriate article of the State Redress Law[51] and causation may be difficult to show. It can allege that releasing the news to the media was a disposition under the ACLA.[52] This, however, would seem to stretch the Act greatly. Even if it were allowed to bring suit under this Act its remedies would be limited. Sumitomo's suit for injunctive relief would probably come too late to give it relief from the coercion.[53]

Were the MITI to release news of Sumitomo's non-compliance to other companies, *Keidanren* or industry panels, Sumitomo might allege that such selected release is an attempt to force Sumitomo into concerted movement with the other companies in a manner which would be an unreasonable restraint to trade in violation of the Antimonopoly Act.[54] This position, however, will fail if the MITI can show that it advised individual firms only on their own business and did not foster concerted movement. Moreover, a third party suing Sumitomo under the Antimonopoly Act would have to prove that there was collusive action and a liaison of wills between the companies involved. Clearly, there was no liaison of wills among the reluctantly guided firms.[55]

Agency Reactions: Unrelated

The MITI may attempt to coerce compliance by acting to Sumitomo's detriment in areas unrelated to administrative guidance. For example, the

50. Privacy of individuals with the exception of certain public officials and prominent personalities in certain situations enjoys a general blanket protection under the Constitution and case law. Companies resemble the exceptions more than the individuals. With the exception of something such as a trade secret their privacy is not protected.

51. The State Redress Law art. 1 provides for relief when the "right of another" has been violated, but it will be difficult for a company to prove that it had a right not to have its refusal publicized.

52. ACLA art. 3(2).

53. The coercive force of publication is a function of the initial impact it has on the public, for non-compliance is restricted by the disdain of public opinion. An interesting counterpoint to the problems facing a company which is injured by an agency's "going public" are the few laws which require that the agency do this. The Department Store Act (*Hyakkatenhō*) (Law No. 116, 1956) art. 9(2) and Local Autonomy Act (*Chichō Jichihō*) (Law No. 67, 1948) art. 8.2 and two emergency regulations, the Adjustment of Petroleum Supply and Demand Acts, (*Sekiyu Jukyu Tekiseikahō*) (Law No. 122, 1973) arts. 7(4), 9(2), 10(3), and the Emergency Measures for Stabilization of the People's Livelihood Act (*Kokumin Seikatsu Antei Kenkyu Sochihō*) (Law No. 121, 1973) arts. 6(3), 7(2) require that the suggestions made to a party be made public.

54. Antimonopoly Law art. 3.

55. Yuasa Timber Co., Ltd. and 67 Others, FTC Decision of August 30, 1949; Nippon Oil Co., Ltd. and 10 Others v. FTC (Tokyo High Court, November 9, 1956). *See also*: Narita at 67.

MITI might alter Sumitomo's import licenses or quotas of raw materials, or its export licenses or quotas of finished steel products. Provisions for ministerial discretion in import and export licensing[56] and quotas exist in statutes governing the MITI's operations. The MITI must act carefully, however, for despite its discretionary power there are certain limits beyond which actions would be clearly abusive. General principles of administrative law demand that any discretionary action not violate the public good (*kōeki gensoku*), or principles of proportionality (*hirei gensoku*),[57] and equality (*byōdō gensoku*). The last of these is crucial in this context, for restrictions on import and export quotas could easily violate the principle of equality.[58]

If such an action is taken by the MITI, Sumitomo may sue under the ACLA provisions which allow revocation of administrative decision.[59] Showing actual damages, however, will be difficult. Moreover, Sumitomo must show a relationship between statutorily mandated discretionary MITI actions and its own refusal to comply with administrative guidance on an issue outwardly unrelated to these MITI actions.

The MITI may also retaliate by requesting another Ministry to take action to coerce Sumitomo. Such indirect action is less likely than direct action by the MITI, given interagency rivalries and the tendency of other agencies to expect some consideration in return.[60] If such an agreement can be effectuated, however, the proof problems faced by Sumitomo become even more difficult to overcome.

Rather than seek damages, Sumitomo may seek injunctive relief under the ACLA to stop the Minister's discretionary actions.[61] It is unlikely that such a course of action will be effective. Sumitomo must allege first that the Minister's actions may cause it "irreparable harm,"[62] and this will be difficult to substantiate. The burden remains on Sumitomo to show that the Minister's actions were an abuse of discretion, and in any case injunctive relief may not come soon enough to prevent major harm to Sumitomo.

56. Foreign Exchange and Foreign Trade Control Act (*Gaikoku Kawase oyobi Gaikoku Bōeki Kanrihō*) (Law No. 228, 1949) arts. 52, 48.

57. For a discussion of whether this principle applies to administrative guidance, *see* Narita at 67-68.

58. All three principles are discussed at length in Tanaka, *Gyōseihō Sōron* (General Remarks on Administrative Law) 294-95 (1957).

59. ACLA art. 3(3).

60. This type of coercion is probably the least likely to occur. Requests for this sort of assistance are strictly informal and records are never kept. For example, MITI might ask the Ministry of Finance to guide a bank to make loans harder to obtain for a certain customer in exchange for a promise by the MITI to encourage a customer to refrain from borrowing at a time when the Ministry of Finance is attempting to coerce compliance from a bank on some matter.

61. ACLA art. 25 provides for injunctive relief under certain conditions. Article 30 gives the court power to revoke any discretionary disposition.

62. *Id.* art. 25(2).

Agency Reactions: Related

The MITI may seek compliance by following up administrative guidance with a related agency action.[63] The MITI officials have traditionally done this in one of three ways.

Most often there is already a broadly worded law in existence which covers the area in which compliance is sought. In this case there might be a law allowing the Minister to set steel production levels.[64] Acting under law would be extremely formal and giving orders pursuant to a law is not in keeping with societal values.[65] Administrative guidance is usually issued as an alternative to acting under the specific statute. Moreover, such a statute may provide that a Minister must first take certain actions such as publishing notice, conducting a hearing, seeking certain information from the affected company, or testifying before a Diet Committee.[66] As a result, the Minister may prefer to avoid this formal procedure.[67] Sumitomo, however, may also wish to avoid these legal formalities (out of a general antiformalism, fear of disclosure or desire to avoid setting a precedent) and the mere possibility of a Minister's setting production levels may often induce compliance.

Should these options be unavailable, the MITI may propose a new bill to the Diet which would force Sumitomo to fix its production level as requested or would give the Ministry discretion to do so. A bill may clear the Diet in as little as six months if it has general support from the public, rendering this a more practical course of action than being forced into litigation which might drag on for years, during which time Sumitomo may continue to resist compliance or

63. It is standard policy within the MITI and other Ministries to attempt guiding a company before taking a legal act, and if a Ministry submits its decision to take a legal action to the Cabinet's Bureau of Legislation (*Naikaku Hōseikyoku*) the Bureau will first ask the Ministry if administrative guidance has been used before it will proceed with a legal action.

64. This assumes that such a law would not be unconstitutional.

65. Narita at 53 suggests, "from the people's viewpoint, it is undeniably more advantageous to comply with suggestions and warnings and to reform than to be faced with grim administrative dispositions and prosecution: for, without losing their honor or Social Confidence, (*Shakaiteki Shinyō*), the people can ascertain the policies and intentions of administrative authorities, attach limited conditions, and assert their personal claims and objections through the process of consulting with administrative agencies."

66. Consider the Architectural Standards Law (*Kenchiku Kijunhō*) (Law No. 201, 1950) which states that Local Government officials can order buildings which are in violation of the law to be repaired or removed. The officials are therefore allowed to issue warnings and suggest repairs through administrative guidance but they will have to show that the law is violated before they can force repairs to be made.

67. Consider laws in the pollution or health fields which include listings of dangerous chemicals or products which may not be used in the manufacture or sale of certain items. When the Minister wishes to add an item to these open ended lists, it is done by Ministerial Ordinance if he does not have other means available to him under law.

the issue may become moot. Since a measure enacted by the Diet may only be challenged on constitutional grounds,[68] the imminence of such a measure is apt to induce compliance. Compliance, even at this late state, would be more reflective of societal norms than continued refusal.

Sumitomo may respond to these related legal steps by making its position known in the course of Diet debate or during administrative hearings accompanying a Minister's act. Sumitomo is also free to mobilize a lobbying effort to prevent the MITI from acting.

Agency Reactions: Judicial

Lastly, the government may take Sumitomo to court in an effort to coerce compliance.[69] The MITI may claim its authority to issue administrative guidance has a statutory basis. For example, the MITI may claim that it has authority to guide Sumitomo by virtue of its "Organization Law" which allows it to "promote, improve, and regulate production of industrial goods." Or, the MITI may claim that it is acting in accord with one of several other broad general authority laws that are subject to varied interpretation.[70]

Such a coercive act would affirm the legal nature of administrative guidance. In response to the MITI's suit for enforcement, Sumitomo can seek revocation of the administrative guidance under the ACLA. It may also sue for revocation,[71] but such a suit will not suspend the action unless Sumitomo can also show that suspension of the action is "urgently necessary to avoid irreparable damage."[72] Even if this is granted, suspension will only be allowed if it can be shown that there will be no serious influence on the public welfare.[73]

Corporate Remedies: Attacking the Administrative Guidance

This paper has suggested that Sumitomo would be able to implement the ACLA and attack the guidance directly, and that this may be done either by

68. The relevant passages are "All people shall have the right to maintain the minimum standards of wholesome and cultured living," *KENPŌ* (Constitution) art. 25(1), and, "The right to own or to hold property is inviolable." *Id.* art. 29(1).

69. Action may be instituted under the Administrative Proxy Law (*Gyōsei Daishikkōhō*) (Law No. 43, 1948) or by request to the Public Procurator's Office if criminal sanctions apply.

70. *See, e. g.*, Medium and Small Enterprise Modernization Promotion Law (*Chushō Kigyō Kindaika Sokushinhō*) (Law No. 64, 1963) art. 7 and Petroleum Industry Law (*Sekiyugyōhō*) (Law No. 128, 1962) art. 10(2).

71. ACLA art. 3(2).

72. *Id.* art. 25(2).

73. *Id.* art. 25(3).

bringing a suit for revocation of a disposition,[74] or for revocation of a decision.[75] Both of these actions are "appeal-type suits." These suits can be brought with regard to any action coming under the exercise of public authority by the MITI.[76] Such a definition implies a "legal act" by the agency[77] which includes administrative guidance.

Sumitomo also has the option to demand an investigation into the agency's disposition,[78] but such a demand does not preclude a suit for revocation from being simultaneously instituted.[79] Even when a company is required to demand an investigation, it may file for revocation prior to a decision with regard to the investigation if tremendous damage might otherwise occur or if it has a justifiable reason.[80] In such a suit the MITI is the defendant[81] and Sumitomo has three months to file from the day it became known that the disposition was made.[82] Statutory procedural requirements regulate jurisdiction,[83] venue,[84] ancillary jurisdiction,[85] consolidation of actions,[86] and the intervention of third parties,[87] and the government.[88] The suit for revocation does not suspend the disposition unless there is an urgent need to avoid irreparable harm.[89] If suspension is not in the public welfare,[90] or an objection by the Prime Minister is made within prescribed statutory limits,[91] then suspension is not allowed.[92] Furthermore, the ACLA clearly provides that a Court may revoke any discretionary disposition made by an administrative agency acting beyond the purview of its discretion.[93]

The ACLA allows Sumitomo to change the nature of its suit to one for in-

74. *Id.* art. 3(2).
75. *Id.* art. 3(3).
76. For discussion relating to "public authority," *see* Narita at 72-73.
77. ACLA art. 3(2).
78. Demands for investigation are made under the Administrative Exceptions Review Law (*Gyōsei Fufuku Shinsahō*) (Law No. 160, 1962).
79. ACLA art. 8.
80. *Id.* 8(2).
81. *Id.* art. 11.
82. *Id.* art. 14.
83. *Id.* art. 12.
84. *Id.*
85. *Id.* art. 13.
86. *Id.* arts. 16, 18, 19, 20.
87. *Id.* art. 22.
88. *Id.* art. 23.
89. *Id.* art. 25(2).
90. *Id.* art. 25(3).
91. *Id.* art. 27.
92. For a discussion of the Prime Minister's power to permit agency action in spite of a request for suspension, *see* Ogawa at 1093.
93. ACLA art. 30.

demnification from the state.[94] If Sumitomo does sue the government for damages, it does so by virtue of the State Redress Law which allows any juristic person to sue the State for damage done to it by the State or its agents.[95] This law applies whether the action causing the damage was legal or not. To win damages, however, it is necessary to prove that the action was taken in the "execution of public authority" and that there was either malicious intent or negligence involved.

In our model, Sumitomo has yet to suffer damages and could not utilize the Act. Even if continued refusal were to create the necessary damages it would probably be impossible to show that the administrative guidance was malicious. Moreover, scholars cannot agree on whether or not administrative guidance is an "execution of public authority," as required by the State Redress Law, making it unlikely that Sumitomo will be granted relief.

Considering the hurdles that stand between the complaint under the ACLA and eventual relief, a company which has decided to attack administrative guidance directly under the ACLA should attempt to enjoin the agency before any damages occur. It is not likely, however, that an injunction would be issued except in a case where the guidance is a wanton abuse of discretion or creates clearly irreparable harm with no public benefit. Therefore, most companies face long and expensive litigation with the possibility of growing damages as long as administrative guidance remains unenjoinable. Even if the company were successful in enjoining the administrative guidance, it would still not be free from the agency's yoke, for although the injunction prevents the agency from urging compliance or issuing further incremental guidance on the same subject, the agency remains able to implement coercive measures aimed at bringing about compliance or penalizing the company for refusing compliance and seeking an injunction.

As a result, an attack on the administrative guidance itself, although feasible, is probably futile. Although coercive measures may be delayed, relief from neither the guidance nor the consequent damages will be possible. A company (such as Sumitomo) which is aware that economically deleterious guidance is about to be issued needs a weapon with which to attack the guidance before it is issued. Such a suit would preempt administrative action and serve as "a suit for preventive declaratory judgment" (*yobōteki-kakunin-soshō*). The ACLA does not make clear whether such a suit (not generally acceptable) is permissible in this case. It does indicate, however, that a suit to challenge administrative acts (*kokōku-soshō*) includes any "litigation of dissatisfaction relating to the exercise of public power. . ."[96] Under this

94. *Id.* art. 21.
95. *Kokka Baishōhō* (Law No. 125, 1947), art. 1.
96. ACLA art. 3(1).

comprehensive definition a suit for preventive declaratory judgment seems possible. Cases have held that if future injury is reasonably certain to result a suit will be allowed.[97]

CONCLUSION

As much as a company might wish to run its own affairs unhindered by agency requests, the compulsions to conform and to comply are strong. More than simple social values induce compliance with the raised eyebrow of Japanese administrative guidance. The government's arsenal of coercive weapons is substantial, and a company's remedies are sparse and for the most part untested. Not only is it difficult to attack administrative guidance, the chances of success are minimal and the attendant risks are great.

Administrative guidance is one of the Japanese government's most effective means of controlling the nation's population and corporations. It is effective because it is followed, and it is followed both because to do so supports an established pattern of traditional social values and because the guided parties fear that their remedies are inadequate to handle the coercive actions that might follow refusal. The coercive actions supporting administrative guidance resemble the Damoclean sword which hung upon a hair. At present no company is anxious to find out if or when it will fall.

97. *See, e.g. Hirano v. Minister of Construction*, 7 GYŌSAI REISHŪ 1881 (Tokyo High Ct., July 18, 1956).