ARTICLES

JAPAN'S REGULATION OF LARGE RETAIL STORES:
POLITICAL DEMANDS VERSUS ECONOMIC INTERESTS

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1. INTRODUCTION

One of the most visible and hotly debated Japanese trade barriers in the 1990s was the Large-Scale Retail Stores Law ("LSL").

For years, no list of impediments to Japan's market was complete without a reference to the LSL. It was a leading topic in bilateral talks between Japan and the United States under the Structural Impediments Initiative. The LSL was also a key element in the U.S.-initiated film dispute in the World Trade Organization ("WTO"). In 1998, with little advance notice, Japan finally repealed the LSL, and enacted a replacement.

This Article examines the tight control that the Ministry of Economy, Trade and Industry ("METI") has exercised over retail-
ing since Japan's regulation of large stores began in 1937. Unlike its commanding role in the manufacturing sectors where it aggressively promoted large industrial firms, in the retail sector, METI has largely imposed regulations at the behest of the politicians. In particular, the powerful Liberal Democratic Party ("LDP") has insisted on protecting small retailers, who represent one of its most important constituencies. When called upon by the politicians to regulate large retail entities, METI responded forcefully, with regulations that curtailed the opening and operations of large stores. While METI has willingly imposed restrictions on large stores, it often delegates the responsibility of regulating these large stores to others. For years, METI effectively delegated its regulatory authority to small retailers themselves. The Ministry has shunned direct involvement in the messy and thankless task of balancing the competing interests of small retailers and large stores.

METI has demonstrated that it can act "with dispatch" when necessary "to retrieve authority and impose its own will on the distribution sector." In the late 1990s, METI acted decisively and swiftly when it feared that the LSL might be found to violate Japan's WTO commitments. Almost singlehandedly, METI orchestrated the repeal of LSL and the enactment of the Store Location Law ("SLL"). It developed the framework for the new regime and took responsibility for all the important implementing measures. As the initiator of the new policy, METI persuaded the ruling LDP and small retailers to accept it by developing an incentive package aimed at small retailers. This incentive package included funds for the revitalization of downtown shopping areas and authority for local governments to develop zones from which large stores could be excluded.


4 Daikibo Kouri Tempo Ricchi Hou [Large-Scale Retail Store Location Law], Law No. 91 of 1998 [hereinafter Store Location Law].
The new METI-designed SLL gives local governments the primary responsibility for the regulation of large stores, subject to important constraints. The new regime shifts the basis for store regulation from protecting small retailers to preserving the physical environment surrounding new stores. On its face, the SLL appears to represent a liberalization of large store regulation. However, given the history of store regulation, there is considerable skepticism and fear that the new system may be more onerous and costly than was the LSL. Whether the new regime acts as a liberalizing or conserving force will depend, at least in part, on the interests that METI believes must be promoted; that is, large stores or small stores, respectively. This issue will not be resolved in a political vacuum as long as the small retail sector remains an important constituency of the ruling LDP.

This Article is divided into five parts. Section 2 examines METI's regulation of large stores from its beginning in 1937 through the last half of the twentieth century. It illustrates how METI yielded to political demands for protection of small retailers, first from department stores and then from large-scale retail stores. METI's response led it to impose increasingly stringent regulations on large stores as it tailored the regulatory regime to meet the demands of the politically important small retailers.

Section 3 examines METI's response to foreign pressure (gaiatsu), especially from the United States, to liberalize large store regulations. In particular, it considers the role of both the United States-Japan Structural Impediments Initiative ("SII") and a case filed by the United States in the WTO in regard to the liberalization of large store regulation.

Section 4 traces METI's response to the fear of an adverse finding by a WTO panel. It details how METI masterminded the repeal of the LSL and the enactment of its replacement and controlled the development of the new store regime from beginning to end. This Section describes the provisions of the new SLL, as well as the measures that METI has put in place to implement it. It also considers the constraints on local governments and weighs their potential effectiveness. The conclusion arrived upon in this Article is that the new regime seems, at best, to be only a modest improvement over the old system. At worst, it may impose a far

5 See id.
more onerous, costly, and less predictable burden on large retailers.

2. METI'S REGULATION OF LARGE STORES

2.1. Political Basis for the Regulation of Large Stores in Japan

To understand METI's regulation of large stores over the past sixty years, one must begin with the relationships among small retailers, politicians, and the Ministry. Japan has been described as "a land of farmers and small business operators, where [the ruling] LDP politicians find their strongest support." Within the small business community, small retailers are an important political constituency due to their numbers and their influence in the local community. They account for fifty-five percent of employment in the retail industry in Japan (which in turn accounts for twelve percent of Japan's total employment and five percent of its gross domestic product), according to a recent study by the McKinsey Global Institute ("McKinsey Study").

As the "backbone of the Japanese neighborhood" and an important and predictable source of votes for the LDP, small retailers are assured of the politician's ear. They have been very successful in translating their political support into protection from their large competitors. A measure of their success has been their survival even though they are "extremely unproductive" (nineteen percent of that of the United States), according to the McKinsey Study. METI and its predecessors repeatedly imposed regulations on large stores in response to political demands for protection.
of small retailers. This type of response has been described by Ramseyer and Rosenbluth as an “example of the political logic underlying MITI’s policies.”

Ramseyer and Rosenbluth challenged the conventional wisdom that the Japanese bureaucracy is superior to the Diet, the Japanese parliament, because the bureaucracy develops and drafts most legislation and exercises broad discretion over its implementation. Rather than presenting the Diet as a tool of the bureaucracy, they offer the compelling argument that bureaucrats “faithfully implement [ruling party] policy preferences” in order to avoid adverse consequences. Politicians “ensure that bureaucrats remain responsive” through a variety of means. In the case of store regulation, that has meant that METI must restrain large retail stores so as not to unduly threaten the economic well being of small retailers. As long as its small retailer constituency is generally satisfied with the regulation of large stores, the Diet need not take action and can leave the regulation to METI.

Kent Calder has observed that “only rarely have the public policies of major nations been [so] systematically designed to serve the interests of small firms,” as they are in Japan. He points to the distribution sector as the “most dramatic case in point” of the Japanese political bias toward small businesses. The following Sections examine the measures that METI crafted to protect small retailers in response to political demands.

2.2. The Department Store Law

In 1937, the Imperial Diet enacted the Department Store Law (“DSL”) to respond to calls from small retailers for protection from

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13 Id. at 130.
14 Id. at 12-13.
15 Id. at 13 (noting for example that if METI were not responsive to the complaints of small retailers, the Diet could step in and refuse to support legislation offered by the Ministry or “overturn by statute any regulatory measures” adopted by METI).
16 Id. at 130.
17 Id. at 13.
19 Id. at 326.
competition from department stores. In contrast to its eager embrace of regulation of industrial sectors, Leonard Schoppa has noted that MCI "initially opposed" enactment of such a law out of concern that it would impede modernization of Japan's retail sector. But, when attempts by department stores to self-regulate failed, he concluded that MCI had "no choice but to insert itself into the high-stakes battle between small merchants and their new competitors." After two conservative political parties (the Seiyuukai and the Minseitou) drew up draft legislation, MCI intervened. Following consultations with Nihon shoukoukaigisho (the Japan Chamber of Commerce and Industry) ("JCCI"), MCI drafted its own legislation, which the Diet subsequently enacted as the DSL. Thus began a pattern that would be repeated over the following sixty years: regulation of large stores in response to the demands of politicians for protection of an important constituency.

The DSL was repealed in 1947 at the behest of the Supreme Commander of the Allied Forces during the Allied Occupation of Japan because it was "inconsistent" with Japan's new Antimonopoly Law. The DSL was re-enacted in the 1950s when small retailers again demanded protection from competition resulting from the economic recovery of the 1950s. Development of the new legislation had parallels with preparation of the first DSL in the 1930s. While political parties (this time the Japan Socialist Party and the Democratic Socialist Party) submitted member bills to the Diet, it was METI's bill, prepared in consultations with the Indus-

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21 See generally Johnson, MITI, supra note 2 (discussing the political structure of Japan and its policies).

22 Schoppa, supra note 20, at 149.

23 Id.

24 These were the major prewar political parties. Calder, supra note 18, at 56. The Seiyuukai was the dominant conservative political party from its foundation in 1900 until 1940. Id. at 166.

25 The Japan Chamber of Commerce and Industry serves as an advocate for small business. See Calder, supra note 18, at 338.

26 See Upham, supra note 20, at 268-69.

27 Schoppa, supra note 20, at 149. See also Upham, supra note 20, at 269 (discussing the history and structure of the Large Scale Retail Stores Law and other regulations associated with the retail sector).

28 See Upham, supra note 20, at 269.
trial Rationalization Council (Sangyou gourika shingikai), that the Diet enacted in May 1956 as the DSL.29

With the aim of ensuring business opportunities for small- and medium-sized retailers by regulating the business operations of department stores,30 the DSL prohibited the operation of a "department store business" with more than 1500 square meters ("m²") of retail space31 unless the store obtained a permit from METI.32 The Ministry could deny the permit if the department store would affect the business operations of small- and medium-sized retailers and pose a significant risk of injuring their interests.33 The DSL also authorized METI to regulate the dosing time and number of holidays of department stores.34 While the DSL centered regulatory authority in METI, it provided a safety-hatch for the Ministry. It authorized METI to ask the Department Store Council (Hyakaten shingikai)35 to work with the local Chambers of Commerce and local retailers to develop an "opinion" for the Ministry to use in determining whether to issue the permit.36 In this manner, METI could ensure that local interests had direct input into its determination, and also could diffuse responsibility for its permit decisions.

Over a fifteen year period, METI used the DSL to roughly balance the interests of small retailers and department stores. It did so by "preventing new entrants and guaranteeing the territory of existing branches," while protecting small merchants from unwanted competition.37 In the late 1960s, new superstores (suupaa) threatened both department stores and small retailers by creating separate legal entities, each below the DSL's 1500 m² threshold and operating on different sales floors of the same building but under a common corporate identity. In this manner, they evaded applica-

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29 Hyakkatenhou [Department Store Law], Law No. 116 of 1956; Upham, supra note 20, at 269.
30 Department Store Law, Law No. 116 of 1956, art. 1.
31 Id. art. 2.
32 Id. art. 3.
33 Id. art. 5.
34 Id. art. 8.
35 The DSL provided for the establishment of the Council. Id. arts. 11-16.
36 Id. arts. 5(2), 5(3). The DSL also authorized METI to make recommendations to department stores to not engage in business operations that could affect the business operations of small- and medium-sized retailers. Id. art. 9.
37 Upham, supra note 20, at 269.
tion of the DSL.\textsuperscript{38} METI addressed the new challenge by resorting to informal administrative measures in the form of a series of directives: a 1968 directive mandated that superstores obtain DSL permits;\textsuperscript{39} a 1970 directive required large stores to "make appropriate adjustments with the local retailers regarding new store expansion, advertising, bargain sales, number of days closed, and hours of operation;"\textsuperscript{40} and a 1972 directive required large stores to respect local business "customs" and to not "disturb the order in the retail market" by using aggressive sales promotions.\textsuperscript{41}

Despite METI's attempts to rein in superstores through such informal measures, by the 1970s, these stores had "emerged as among the largest of the retail chains."\textsuperscript{42} With branches throughout Japan, the superstores caused turmoil in the retail sector.\textsuperscript{43} As a consequence, METI turned to its Industrial Structure Council (Sangyou Kouzou Shingikai),\textsuperscript{44} which had played an integral role in

\textsuperscript{38} See id. at 269-70.
\textsuperscript{40} Concerning the Construction and/or Expansion of Specified Stores, Directive No. 1759 of Sept. 28, 1970, cited in WTO Panel Report, supra note 39, para. 5.296 n.302.
\textsuperscript{42} SCHOPPA, supra note 20, at 149.
\textsuperscript{43} Id.
\textsuperscript{44} The Industrial Structure Council is typical of the numerous formal and informal advisory or deliberative councils (shingikai) that the Japanese bureaucracy uses to develop policy proposals and other measures. See FRANK J. SCHWARTZ, ADVICE & CONSENT: THE POLITICS OF CONSULTATION IN JAPAN 52-58 (1998). Such councils are authorized by the National Government Organization Law, which provides:

Each administrative organ referred to in Article 3 [ministries and agencies] may establish by law or Cabinet Order collegial bodies to be in charge of deliberation of important matters, review of administrative appeals or other affairs deemed proper to be dealt with by conference of men of learning and knowledge and the like within the scope of its jurisdiction as provided for by law.

Kokka gyousei soshiki hou [National Government Organization Law], Law No. 120 of 1948, as amended, art. 8. In addition to the formal advisory councils (shingikai), there are also a number of informal, non-statutory advisory councils. These include roundtable conferences (kondankai) and study groups (kenkyuukai and ben-
the formulation of large store policy since its establishment in 1964. The Council had formed a Distribution Committee to handle METI requests related to distribution issues, including large store regulation. The Committee issued nineteen interim reports between 1964 and 1995. In its Tenth Interim Report, the Committee recommended replacing the DSL with a new law that would apply to all types of large stores, not just department stores.

2.3. Large Stores Law

Following the Distribution Committee’s recommendation, METI announced plans to relax large store regulation by replacing the DSL permit system with a notification system. Under the new system, stores would be free “in principle” to expand. According to Schoppa, METI hoped “that the freer competition would lead stores to modernize and pursue efficiencies.” METI had to temper its liberalization plans when its proposals brought “a barrage of criticism” from small retailers and political parties across the ideological spectrum, including the ruling LDP. Accomodating the interests of the small retailers was particularly pressing for the LDP, which was reeling from a December 1972 Lower House election “debacle,” where it lost seventeen seats to a twenty-four seat gain by the Communist Party.

As a result of the political intervention, METI modified its large store reform plans. It formally ratcheted down store regulation from a permit system to a notification system, but according to Frank Upham, a leading expert on the LSL, METI and the LDP promised small and medium retailers “that the notification system would operate ‘just like a permit system.’” METI’s regulation...
plans were constrained when, as Schoppa notes, METI “was forced” to add an adjustment (chousei) process that required large retailers to adjust their store plans to accommodate the demands of small retailers. This reform of large store regulation was, according to Calder, one of the “most important small business policy innovations” undertaken by the LDP in the early 1970s crisis period.

The resulting LSL, or Daitenho, enacted in 1973 and made effective in 1974, represented “very much a compromise” among competing interests: small retailers, large-scale stores, METI, and the LDP. Upham has described its formal procedures as “simple and straightforward.” Instead of regulating the type of store, e.g., department stores, the new LSL targeted the amount of retail floor space in a single building, regardless of the legal nature of the stores that it housed. Its purpose was to preserve business opportunities for small- and medium-sized retailers though adjustments of the business activities of large stores. The LSL required notifications (todokede) to be submitted to METI by developers wishing to construct a building with more than 1500 m² of retail space (“Article 3 notification”) and by prospective retailers of detailed plans for stores in the building (“Article 5 notification”).

Similar to the role of the Department Store Council under the DSL, the regional Large-Scale Retail Stores Councils (Daitenshin), comprised of merchants, consumers, and representatives of the

53 SCHOPPA, supra note 20, at 150.
54 CALDER, supra note 18, at 344-45. With the large store reform, the LDP was able to compensate its strategic interest group—the small retailers. Id. at 335-48.
56 SCHOPPA, supra note 20, at 150; see also Upham, supra note 20, at 270 (describing how negotiations from competing interests resulted in significant differences between LSL and its predecessor law).
57 Upham, supra note 20, at 271. It is not the intention of this Article to describe all of the formal and informal LSL procedures. For an excellent discussion of LSL procedures, see id. at 271-79; see also SCHOPPA, supra note 20, at 149-52 (outlining the development of the LSL).
58 See Upham, supra note 20, at 270.
60 The threshold was subsequently reduced to 500 m². See infra note 77.
61 Large Stores Law, Law No. 109 of 1973, art. 3.
62 Id. art. 5. Large retailers were also required to notify METI of their closing hours and number of holidays. Id. art. 9.
public interest, provided a report to METI on the store proposal.\(^6\) If, based upon the Council's report, METI determined that the operation of the new store would have a significant impact on small and medium retailers, METI could issue a recommendation (kankoku) that the prospective retailer adjust its plans by delaying the opening date or reducing floor space, daily hours or annual days of operation.\(^6\) Retailers were not obligated legally to follow METI's recommendation; and, unlike under the DSL, METI could not prohibit a store from opening.\(^6\) However, METI could convert its recommendation to an order (meirei) if the developer did not voluntarily abide by it and if METI determined that, without the adjustments, there was a risk of severe harm to the small- and medium-sized retail industry.\(^6\)

In establishing the LSL procedures, Allinson observed that METI "vacillated."\(^6\) The Ministry "worried about the direct political costs it might suffer if it intervened too intimately in such a controversial policy area."\(^6\) Also, METI lacked sufficient personnel and resources to become directly involved with all disputes between large stores and small retailers.\(^6\) Moreover, METI did not cherish the prospects of mediating all the disputes likely to arise between large stores and small retailers, which was far from its primary industrial policy responsibilities.\(^7\)

\(^6\) Id. art. 7; see also Upham, supra note 20, at 271 (stating that such persons had to report to METI before constructing a store with over 1500 m\(^2\) of space).

\(^6\) Large Stores Law, Law No. 109 of 1973, art. 7; Upham, supra note 20, at 271.

\(^6\) SCHOPPA, supra note 20, at 151. Even though it could not prohibit a large store from opening, Schoppa notes that METI could make "the difference between profit and loss for developers..." Id. It did so by tightening restrictions on store openings and dictating adjustments that generally resulted in reduced retail space and business hours and increased store holidays. Id. at 151, 155. For example, "MITI could force a store near a train station to close at 6 p.m., just as commuters were returning from work. It could also force it to cut the size of its store in half." Id. at 151.

\(^6\) Large Stores Law, Law No. 109 of 1973, art. 8. The recommendation that METI was authorized to issue is a form of administrative guidance that is based on specific statutory language and can be enforced through the issuance of a legally binding order. See Mitsuo Matsushita & Thomas J. Schoenbaum, Japanese International Trade and Investment Law 33-34 (1989) (explaining how the Japanese system of administrative guides operates).

\(^6\) Allinson, supra note 3, at 45.

\(^6\) Id.

\(^6\) Id.

\(^7\) See Schoppa, supra note 20, at 151-52.
METI resolved its dilemma by delegating to local chambers of commerce the task of working out the settlement of disputes between store developers and neighboring small retailers.\textsuperscript{71} It did this by issuing a directive instructing local Chambers of Commerce and Industry to establish Commercial Activities Adjustment Boards comprised of representatives of local retailers, consumers and academics.\textsuperscript{72} These Boards examined whether a new large store would have an "effect" on local retailers, and then negotiated necessary changes in the store plans with prospective retailers. The Boards conveyed their views up the chain—through the Chambers of Commerce to the \textit{Daitenshin} and on to METI.\textsuperscript{73} Through such measures, METI formalized the role of local retailers in determining adjustments of new stores and, in the words of Upham, "privatiz[ed] regulation."\textsuperscript{74} Upham concluded that, over the next fifteen years, METI "oversaw the creation of a system that erected barriers to entry into the retail industry far surpassing those of the [DSL] in everything but formal legal authority."\textsuperscript{75}

Only once during the first fifteen years of LSL implementation did the Diet take formal action to modify the LSL. It acted in order to halt the evasion of the LSL by retail chains, which were opening stores with less than 1500 m\textsuperscript{2} of retail space.\textsuperscript{76} In 1978, the Diet amended the LSL to reduce its threshold to 500 m\textsuperscript{2} and to give local governments responsibility for stores with 500 m\textsuperscript{2} to 1500 m\textsuperscript{2} of retail space ("Type II stores"); METI retained authority for stores exceeding 1500 m\textsuperscript{2} ("Type I stores").\textsuperscript{77}

\textsuperscript{71} Id.
\textsuperscript{72} SCHOPPA, supra note 20, at 152; Upham, supra note 20, at 273-74.
\textsuperscript{74} Upham, supra note 20, at 264. Eventually, METI would not accept a notification unless it was accompanied by a document setting forth the conditions under which the local merchants agreed to the new store's opening. Id. at 274.
\textsuperscript{75} Upham, supra note 20, at 272.
\textsuperscript{76} Id. The Diet passed a resolution in 1977 that called for action to protect small retailers who complained that nearly 1500 new stores were opened in the first five years of operation of the Large Stores Law. Id.
\textsuperscript{77} Partial Revision of the Law Pertaining to the Adjustment of Business Activities of Large-Scale Retail Stores, Law No. 105 of 1978, cited in WTO Panel Report, supra note 39, para. 5.309, n.313; see also Upham, supra note 20, at 272-73 (stating that, under the revised coverage system, "the former [1500 m\textsuperscript{2} stores] became 'class one' stores under the direct jurisdiction of MITI; the latter [500 m\textsuperscript{2} stores] became 'class two' stores under local government jurisdiction"). In 1992,
By the end of the 1970s, increased store openings coupled with "sluggish consumer expenditures" had prompted small retailers to call for a return to the DSL permit system. Because seeking Diet authorization would have generated "substantial opposition," Upham points out that METI resorted instead to administrative guidance, as it had under the DSL. In 1982, METI instituted a pre-notification explanation procedure and a pre-notification adjustment procedure that effectively circumvented statutory procedures. The pre-notification explanation procedure required builders of Type I retail stores and their primary tenants to explain their plans to local retailers before they were allowed to submit an Article 3 notification, rather than after, as the LSL intended. Similarly, the pre-notification adjustment procedure allowed the adjustment process to commence before, rather than after, the Article 5 notification, circumventing the four-month statutory limit on the formal adjustment process.

Upham has pointed out how METI's use of such administrative measures distorted the statutory process, distanced METI from its responsibility to serve as the final decision maker, and turned a process that was to take only seven or eight months between initial notification and store opening to one that often took seven or

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the dividing line was moved up to 3000 m² (6000 m² in designated large cities). WTO Panel Report, supra note 39, para. 2.26.

78 Upham, supra note 20, at 273.

79 Administrative guidance may be generally defined as an informal request or guidance issued by a government official to a private party asking for specific action or inaction in order to obtain an administrative objective through voluntary cooperation. See MATSUSHITA & SCHOENBAUM, supra note 66, at 31-32. Administrative guidance can take many forms, including "requests (youbou), directions (shiji), warnings (keikoku), suggestions (kankoku), and encouragements (kanshou)." Id. at 22. For extensive discussions of the origin and use of administrative guidance, see id. at 31-41; JOHNSON, MITI, supra note 2, at 242-74. Administrative guidance was subjected to procedural disciplines for the first time in Japan's Gyussi Tetsuzuki Hou [Administrative Procedure Law], Law No. 88 of 1993, arts. 32-36. Lorenz Kodderitzsch, Japan's New Administrative Procedure Law: Reasons for Its Enactment and Likely Implications, 24 LAW IN JAPAN 103, 126 (1991).

81 Upham, supra note 20, at 273.

82 WTO Panel Report, supra note 39, para. 2.29; Upham, supra note 20, at 273.

83 Upham, supra note 20, at 273.
eight years.\textsuperscript{84} There were even occasional “delays of ten years.”\textsuperscript{85} Nonetheless, METI’s regulation of large stores under the LSL was, under the Ramseyer and Rosenbluth thesis, “fully consistent with what one would expect of regulation by an elite bureaucracy regulating the market in the LDP’s electoral interest,”\textsuperscript{86} even if it did not meet, in Upham’s words, the expectations of a bureaucracy “regulating the market in the national interest.”\textsuperscript{87}

By the mid-1980s, METI’s regulation of large stores was under attack from a variety of sources. Large stores “complain[ed] about the arbitrary and often extended prior adjustment process” and small retailers were unhappy with the continuing expansion of large stores.\textsuperscript{88} Also, local governments were adopting ordinances that were stricter than central government regulation.\textsuperscript{89} Schoppa noted that a series of government-wide advisory councils “pointed to the Large Store Law as an example of regulatory excess that was limiting the growth of domestic demand.”\textsuperscript{90} For example, in a 1988 report, the Administrative Reform Promotion Council criticized, as Schoppa has described, “MITI for letting its administration of the LSL get away from the original purpose of the law.”\textsuperscript{91}

Debate on the large store regulation intensified in the mid-1980s when foreign complaints began to intrude on what had been predominantly a domestic issue. The LSL moved onto the U.S.-Japan trade agenda, where it would stay for the next fifteen years.\textsuperscript{92} The United States raised barriers posed by the LSL for the first time

\textsuperscript{84} Id. at 274.
\textsuperscript{85} SCHOPPA, supra note 20, at 150-51, 151 fig.6.1; Upham, supra note 20, at 271, 273-74.
\textsuperscript{86} RAMSEYER & ROSENBLUTH, supra note 12, at 130.
\textsuperscript{88} SCHOPPA, supra note 20, at 152.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 156.
\textsuperscript{91} Id. Earlier, the Maekawa Commission in its Report to the Prime Minister called for “streamlining of distribution mechanisms and conducting review of the various restrictions pertaining to distribution and sales.” THE REPORT OF THE ADVISORY GROUP ON ECONOMIC STRUCTURAL ADJUSTMENT FOR INTERNATIONAL HARMONY 10 (Apr. 7, 1986).
\textsuperscript{92} SCHOPPA, supra note 20, at 160-61.
in 1985 at U.S.-Japan Trade Committee meetings.\footnote{Id. at 160. The U.S.-Japan Trade Committee was an annual discussion of trade issues by the U.S. and Japanese governments. L. Jerold Adams, The Law of United States-Japan Trade Relations, 24 J. WORLD TRADE 38, 52 (Apr. 1990).} Beginning in 1986, the United States listed the LSL as a "trade barrier" in its annual report to Congress on foreign trade barriers.\footnote{SCHOPPA, supra note 20, at 160. For example, both the 1986 and 1987 reports criticized the limits on expansion by large retailers as "restrict[ing] U.S. manufacturers' distribution options" and thus forcing them "to sell through more expensive smaller stores or forego the opportunities in certain local markets." USTR, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 161-62 (1986); USTR, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 193 (1987). Also, in 1986-87, distribution issues in general, and the LSL in particular, were primary subjects of the U.S.-Japan "Structural Dialogue." SCHOPPA, supra note 20, at 160.}

To blunt the domestic and international criticism, METI convened a Joint Distribution Council (Ryuutsuu goudou kaigi), comprised of the Distribution Committees of the Industrial Structure Council and the Small and Medium Enterprises Agency's Policy Council.\footnote{See id. note 20, at 156.} Schoppa pointed out that the use of the two advisory councils reflected the division within METI of responsibilities for the distribution industry that corresponded to the competing interests of two METI constituencies—large stores and small retailers.\footnote{See id. The Industrial Structure Council's Distribution Subcommittee was organized by the Distribution Industry Division of METI's Industrial Policy Bureau, which, with its long ties to large retail chains, advocated modernization of the sector. Id. The other Distribution Subcommittee advised the Small- and Medium-Enterprises Agency, a METI agency charged with protecting the interests of small- and medium-sized businesses, including "mom and pop" shops. Id.} With both sides of the large store debate represented in the Joint Council, its recommendations would be expected to essentially balance the competing economic and political interests.\footnote{See id.}

In June 1989, METI developed a "Vision for the Distribution Industry in the 1990s," in which it proposed reforms of the retail regulatory mechanism. These included limiting the "prior explanation" phase of the adjustment process to eight months, setting a two-year limit on the entire process, and prohibiting local authorities from adopting regulations that were more stringent than the LSL.\footnote{See id. at 155-57.} METI planned to implement these reforms in September 1989 by again resorting to administrative guidance with the issuance of a notification (tsuutatsu). Schoppa concludes that imple-
mentation of the reforms would have represented "a significant move toward liberalization" of the LSL process. However, he casts doubt on "whether METI could have implemented them faithfully" given its continued reliance on procedures not set out in the law, such as the "prior explanation process." METI contributed to such skepticism by stating that its mission continued to be to "protect local retailers from any potential injuries to their business."

METI's implementation of the "Vision" was cut short when its plans received an "icy welcome" from two quarters. First, the Ministry of Home Affairs defended the constitutional right of local governments to adopt "their own ordinances regulating local commerce." Second, the LDP commerce zoku, a group of Diet members active in small business issues, turned against the "Vision" after the LDP suffered a major loss in the July 1989 Upper House election. Rather than further anger the small business community, already smarting from the introduction of a controversial new consumption tax, the zoku members urged METI to put the "Vision" on hold. However, as is discussed in the following Section, foreign pressure (gaiatsu) intervened to provide METI with the "cover" it needed to undertake broader reforms of the LSL.

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99 Id. at 157.
100 Id.
101 Id.
102 See id. at 157-58.
103 Id. at 157. In the January 2001 central government reorganization, the Ministry of Home Affairs merged with the Ministry of Posts and Telecommunications and the Management and Coordination Agency to form the Ministry of Public Management, Home Affairs, Posts and Telecommunications. Cable 8723, Dec. 4, 2000, supra note 2, para. 4.
104 See SCHOPPA, supra note 20, at 156-58.
3. METI's Liberalization of Large Store Regulation

3.1. U.S.-Japan Structural Impediments Initiative

The U.S.-Japan SI

was launched in July 1989 to address structural problems in both Japan and the United States. The SI elevated the LSL to a prominent place on the bilateral trade agenda. It became, in Schoppa's words, "the most-publicized" structural impediment. The United States made abolition of the LSL one of its central SI demands. As interim steps, the United States sought the reduction, to six months, of the period for processing notifications, permission for large stores to add floor space for import sales without restrictions, and a prohibition on additional local governmental restrictions. Schoppa has pointed out that these were the first specific U.S. demands relating to the LSL.

The United States initially focused its arguments in the SI on the LSL's negative effects on the expansion of large Japanese retail stores that sold proportionately more imported goods than smaller

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107 Schoppa, supra note 20, at 147.

108 See id. at 163.

109 See id. at 160.
stores. The basic U.S. contention was "[s]ince larger retailers are usually more willing to risk introducing new products or aggressively promote imported product lines, limits on retail expansion effectively hinder the import of U.S. goods." The United States expanded its requests to include a market access argument when a major U.S. retail chain, Toys "R" Us, expressed its interest in entering the Japanese market with plans to open 100 stores.

In SII debates on the LSL, METI vigorously defended the LSL and refused to abolish it. At the same time, METI acceded to requests to liberalize the LSL process and took advantage of the SII process to implement several large store regulatory reforms that it had wanted to take under its "Distribution Vision." In the June 1990 SII report, the Japanese government set out a three-phase liberalization plan to, inter alia, "enhance the vitality of the distribution industry and to ensure smooth procedures for opening new stores." Schoppa said the results "promised to open the door much wider to large store expansion."

METI carried out the first phase of the SII reforms by issuing new administrative guidance to shorten the time for the adjustment process to eighteen months, exempt the addition of 100 m² of retail space for import sales from the adjustment process, relax closing hours requiring notification from 6:00 p.m. to 7:00 p.m., and slightly reduce the number of business holidays required of large stores (from "less than four days a month" to forty-four days a year). Implementation of phase two required the Diet to amend the LSL. It reduced the adjustment period to one year and enhanced "the clarity and transparency" of the adjustment process by abolishing the Commercial Activities Adjustment Boards.

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110 USTR, NATIONAL TRADE ESTIMATE REPORT OF FOREIGN TRADE BARRIERS 113-14 (1989); see also SCHOPPA, supra note 20, at 161-62 (explaining how the barriers that Toys "R" Us faced, as the first large American retailer seeking to enter the Japanese market, allowed the United States to finally make a direct argument that LSL blocked American retailers); Upham, supra note 20, at 267 (describing how Toys "R" Us' interest in direct participation in the Japanese market allowed the U.S. requests to include pressure on Japan to lift the LSL's barrier on the entry of foreign retailers into Japan).

111 SCHOPPA, supra note 20, at 161-62, 90; Upham, supra note 20, at 267.

112 1990 JOINT REPORT, supra note 106, at III-5.

113 SCHOPPA, supra note 20, at 164.


115 Id. at III-8, III-9; FIRST ANNUAL REPORT OF THE U.S.-JAPAN WORKING GROUP ON THE STRUCTURAL IMPEDIMENTS INITIATIVE Sec. III, 3(1) (May 22, 1991) [hereinafter FIRST ANNUAL REPORT]; SCHOPPA, supra note 20, at 175 (labeling the abolition of the
The Large Stores Council was to undertake the adjustment and, if necessary, request the Chamber of Commerce and Industry or the Commerce and Industry Association to report local opinions.\textsuperscript{116} METI promised in the third phase to review the LSL two years after implementing the amendments.\textsuperscript{117}

The SII liberalization of the LSL was essentially a "win-win" for both METI and the United States. The SII served METI's interests by providing the justification for adoption of many of the proposals in its 1989 "Distribution Vision."\textsuperscript{118} Schoppa has concluded it is unlikely that METI would have been able to liberalize the LSL in "the degree that it was or as quickly as it was without gaiatsu (foreign pressure)."\textsuperscript{119} The United States trumpeted LSL reforms as a major success of the SII process. It pointed in particular to Japan's reduction of the maximum period for the opening of a new store to one year, which previously had taken as long as ten years.\textsuperscript{120} The United States noted that the 1990 revision of the LSL "has largely been effective in reducing barriers to the establishment of retail outlets," even if it had not been successful in persuading Japan to abolish the LSL.\textsuperscript{121} Toys "R" Us opened its first store in Japan in 1991 and added seven more stores in 1992.\textsuperscript{122} The toy retailer opened its 100th store in Japan in December 2000.\textsuperscript{123}

\textsuperscript{116} First Annual Report, supra note 115, para. 2(2)(b).

\textsuperscript{117} See id.

\textsuperscript{118} See Schoppa, supra note 20, at 148, 155.

\textsuperscript{119} Id.

\textsuperscript{120} USTR, National Trade Estimate Report of Foreign Trade Barriers 136 (1991); Schoppa, supra note 20, at 12.


\textsuperscript{122} 1993 NTE, supra note 121, at 162. By 1992, large stores were opening in Japan at twice the rate of the latter half of the 1980s. Schoppa, supra note 20, at 50.

3.2. U.S.-Japan Deregulation Fora

When a new Administration was inaugurated in Washington in 1993, METI faced renewed pressure from the United States to remove remaining restrictions on the operation of large stores. Beginning in 1993, the United States engaged METI in bilateral discussions of the LSL process under the U.S.-Japan Framework for a New Economic Partnership ("Framework"). The bilateral deregulation discussions essentially coincided with the Japanese government's establishment of a five-year (Japan Fiscal Year ("JFY") 1995-99) Deregulation Action Program formulated in 1995.

Beginning in 1997, the United States made LSL reforms a priority under the U.S.-Japan Enhanced Initiative on Deregulation and Competition Policy ("Enhanced Initiative").

In January 1994, the U.S. government asked METI to remove restrictions on the hours and days of operation of large stores, limit the discretion of the Large-Scale Retail Store Law Committee (Daitenshin) to demand reductions in proposed retail areas as a condition of opening or expanding a store, and streamline the

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124 In July 1993, the U.S. President and Japanese Prime Minister agreed to a Joint Statement on the United States-Japan Framework for a New Economic Partnership "as a new mechanism of consultations." Joint Statement on the United States-Japan Framework for a New Economic Partnership (July 10, 1993), available at http://www.state.gov/www/regions/eap/japan/framework.html [hereinafter FRAMEWORK]. It established five areas of sectoral and structural consultations and negotiations, including Regulatory Reform and Competitiveness, aimed at the "reform of relevant government laws, regulations, and guidance which have the effect of substantially impeding market access for competitive foreign goods and services, including ... distribution." Id. at 2; see also 1994 NTE, supra note 121, at 143 (noting that the Framework addressed the issue of regulatory reform and competitiveness, which was considered a major barrier to entry to the Japanese market). The distribution issues were taken up in the Deregulation and Competition Policy Working Group. USTR, NATIONAL TRADE ESTIMATE REPORT OF FOREIGN TRADE BARRIERS 197 (1995).


126 Joint Statement on the U.S.-Japan Enhanced Initiative on Deregulation and Competition Policy Under the U.S.-Japan Framework for a New Economic Partnership (June 19, 1997) [hereinafter ENHANCED INITIATIVE] (stating its purpose "to strengthen the dialogue between and reinforce the efforts of their governments with regard to deregulation and competition policy").
store-opening process.\textsuperscript{127} In response, METI extended the mandatory closing time for large stores from 7:00 p.m. to 8:00 p.m., reduced the minimum number of days each year that a large store had to close from forty-four days to twenty-four days, and simplified the store-opening procedures.\textsuperscript{128}

In 1995 and 1996, the United States broadened its requests to include the phaseout of the LSL by the end of JFY 2000 (March 31, 2001) and the prevention of local governments from introducing new restrictions on large stores. As interim measures, the United States asked Japan to eliminate all restrictions on existing store operations, including hours of operations and number of days closed, and to further streamline the store-opening process.\textsuperscript{129} METI resisted further substantive changes, pending the review of the LSL, that it had promised under the SII of the effects of earlier liberalization. It assigned the task of conducting the review and reporting during JFY 1997 to the Distribution Subcommittees of METI's Industrial Structure Council and the Small- and Medium-Sized Enterprise Policy Council.\textsuperscript{130} The Ministry indicated that, after the advisory council deliberations, it would review the requests of the U.S. government, the European Union, and the American Chamber of Commerce to phase-out or substantially amend the LSL.\textsuperscript{131}

\textsuperscript{127} U.S. Government, Deregulation and Competition Policy Working Group, Proposed Measures to Be Taken by the Government of Japan 22 (Jan. 18, 1994).

\textsuperscript{128} 1994 NTE, supra note 121, at 173. The United States sought further streamlining of the large store process. \textit{Id.}; see also Submission by the Government of the United States to the Government of Japan Regarding Deregulation and Administrative Reform in Japan 9-10 (Nov. 15, 1994) (recommending the elimination of various restrictions and expediting the processing of large-scale retail store applications).

\textsuperscript{129} Submission by the Government of the United States to the Government of Japan Regarding Deregulation, Administrative Reform and Competition Policy in Japan 12-13 (Nov. 21, 1995); Submission by the Government of the United States to the Government of Japan Regarding Deregulation, Administrative Reform and Competition Policy in Japan 7-8 (Nov. 15, 1995) [hereinafter 1996 Submission]. In 1996, the United States also sought the elimination of all the LSL adjustment provisions relating to reductions of floorspace of large stores. \textit{Id.} at 7.

\textsuperscript{130} GOJ Deregulation Plan: Hits and Misses II, Cable 4476 from U.S. Embassy, Tokyo, to U.S. Dep't of Commerce, Wash., D.C., para. 4 (May 17, 1996) (on file with author).

\textsuperscript{131} GOJ's Revised 3-Year Deregulation Plan: Part 3: Autos/Auto Parts/Motorcycles, Distribution and Import Processing, Cable 3559 from U.S. Embassy, Tokyo, to U.S. Dep't of Commerce, Wash., D.C. (Apr. 23, 1997) (on file with author); MITI,
3.3. U.S.-Japan WTO Film Dispute

3.3.1. Section 301 Case

The United States ratcheted up pressure on METI to abolish the LSL when it played a new card and took the bilateral debate on the LSL to the WTO. That case began when the USTR initiated an investigation under Sections 301-309 of the Trade Act of 1974, as amended (“Section 301”), of allegations by a U.S. company, Eastman Kodak Company (“Kodak”). Kodak alleged that certain acts, policies, and practices of the Government of Japan denied access to the Japanese market for consumer photographic film and paper. Upon launching its investigation, the USTR requested consultations with the Japanese government, with expectations of negotiating a solution based upon its prior experience in disputes with Japan. However, this time the Japanese government refused to enter into substantive consultations, much less negotiate a resolution. Japan asserted that it would “not engage in considerations or negotiations on issues raised in the context of Section 301.” The Japanese government further contended that Kodak

Results of Review of Requests Received from International Sources (Mar. 31, 1997).

19 U.S.C. §§ 2411-2420 (1994). Section 301 is the primary authority for the United States to impose trade sanctions on its trading partners who fail to fulfill their commitments under trade agreements or who otherwise maintain unreasonable, discriminatory, or unjustifiable practices that burden or restrict U.S. commerce. It has been used principally as leverage to negotiate the removal of trade barriers. For a more complete description of Section 301, see Grier, supra note 105, at 4-10.

133 Initiation of Investigation Pursuant to Section 302 Concerning Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper, 60 Fed. Reg. 35,447 (July 7, 1995) [hereinafter Initiation of Investigation]. See also Petition of Eastman Kodak Company Pursuant to Section 301 of the Trade Act of 1974, as Amended, for Relief from Japanese Market Barriers in Consumer Photographic Film and Consumer Photographic Paper 2 (May 18, 1995) [hereinafter Kodak Petition] (alleging that the acts, policies, and practices of the Japanese government deprived Kodak of $5.6 billion in revenue since 1975).


135 See Grier, supra note 105, at 43-44.

136 Letter from Yoshihiro Sakamoto, METI Vice Minister for International Affairs, to Ambassador Ira Shapiro, USTR (Jan. 5, 1996), reprinted in Inside U.S. Trade, Jan. 12, 1996, at 22-23 [hereinafter Sakamoto Letter]. This was the first time Japanese officials refused to negotiate an agreement with the United States. They would not even participate in informal talks with the U.S. government.
should have taken its competition-related allegations to the Japan Fair Trade Commission ("JFTC"). The United States rejected Japan's contention that the JFTC handle the matter, pointing out that "the JFTC has already completed a review of this matter... and has determined that there is no basis for further investigation." Rather, the USTR insisted that METI "must play a central role in resolving this issue" since it had jurisdiction over the LSL.

Failing to engage the Japanese government substantively on the issues, the USTR concluded its Section 301 investigation. The USTR determined that the Japanese government had engaged in unreasonable practices with respect to the sale and distribution of consumer photographic materials that burden or restrict U.S. commerce. Rather than exercising its authority under U.S. law to impose sanctions, the United States initiated proceedings in the


Sakamoto Letter, supra note 136. Kodak alleged that Fujifilm had engaged in practices that were inconsistent with Japan's Antimonopoly Law, including resale price maintenance, vertical non-price restraints, and refusals to deal. KODAK PETITION, supra note 133, at 5-7; Initiation of Investigation, 60 Fed. Reg. 35,447 (July 7, 1995). The basis for this claim was a 1994 amendment of the Section 301 provisions that added as an "unreasonable" foreign government act, policy, or practice the denial of "fair and equitable market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market." 19 U.S.C. § 2411(d)(3)(B)(i)(IV) (1994).


The Section 301 statute requires the conclusion of an investigation within twelve months of its initiation, unless formal dispute proceedings in a trade agreement, such as a WTO agreement, have been invoked. 19 U.S.C. § 2414(a)(2)(B) (1994).


Where the USTR makes an affirmative determination that acts, policies, and practices of a foreign government violate or deny U.S. trade rights or are unjustifiable, unreasonable, or discriminatory and burden or restrict U.S. commerce, and the foreign government does not remove the measure or otherwise reach a satisfactory resolution with the United States, Section 301 authorizes retaliatory action. 19 U.S.C. § 2411(b)(1) (1994).
WTO on June 13, 1996. It requested three primary sets of consultations with the Japanese government.143

One consultation request centered on allegations relating to the LSL and other Japanese government measures affecting the distribution, offering for sale, and internal sale of imported consumer photographic film and paper.144 The United States alleged that the measures violated Japan's obligations under the General Agreement on Tariffs and Trade ("GATT") Article III (regarding national treatment obligation) and Article X (regarding publication and administration of trade regulations), and directly or indirectly nullified and impaired GATT benefits accruing to the United States under GATT 1994, within the meaning of GATT Article XXIII:1(a) and (b).145 In a second consultation request, the United States contended that the requirements and operation of the LSL violated the WTO General Agreement on Trade in Services ("GATS").146 The Japanese government accepted both consultation requests147 pursuant to its obligation under the WTO dispute settlement provisions.148 When subsequent consultations failed to resolve the is-

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143 USTR, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 225-26 (1997) [hereinafter 1997 NTE].
144 See id.
sues the United States requested formation of a WTO panel in the GATT case.

3.3.2. GATT Case

The WTO Dispute Settlement Body ("DSB") established a panel on October 16, 1996. In the GATT case, the United States argued that the LSL was one of the "liberalization countermeasures" that the Japanese government had developed to "thwart foreign access to its market" to counter the effects of liberalization that Japan had taken to bring its economy into the global market. The United States contended that Japan had restricted the presence and operations of large stores by requiring adjustments, such as reducing floor space, delaying opening, or reducing the days and hours of operation, in order to ensure that small local retailers would not oppose the opening or expansion of a large store. According to the United States, the LSL's restraints on large stores constricted an important channel to the Japanese market for foreign manufacturers, as large stores are more likely to carry foreign products than small stores.

The Japanese government countered arguing inter alia, that the LSL "reflects long-standing Japanese policy... of regulating large stores to preserve a diversity of small, medium and large retailing competitors;" the LSL neither regulated the products large retailers

149 Press Statement, USTR, U.S. to Request WTO Panels on Film and Large Scale Retail Store Law (Aug. 12, 1996). Under WTO dispute settlement procedures, the United States became eligible on August 12, 1996, sixty days after its request for consultations, to request a panel. DSU, supra note 148, art. 4 para. 7 (noting that after sixty days the complaining party may request a panel).


154 WTO Panel Report, supra note 39, paras. 5.219-5.223; see USTR Oct. 15, 1996 Statement, supra note 151 (discussing the protectionist intent of the LSL).
could carry, nor took into account the products sold by a retailer "when determining whether and what adjustments are necessary;" and the LSL had been "significantly liberalized in recent years." The WTO panel, in its final report, dated April 3, 1998, concluded that "the United States has not demonstrated that the LSL of 1974, its amendment in 1979, or any implementing regulations or administrative measures, nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b)."

The United States did not appeal the panel decision to the WTO Appellate Body. Despite its loss, the United States cited subsequent moves by Japan to eliminate the LSL as one of the benefits of the WTO case.

### 3.3.3. WTO General Agreement on Trade in Services ("GATS")

Case

With regard to its GATS case, after the initial set of consultations on the LSL in July 1996, the United States requested further consultations with Japan, expanding its request to include other laws. The United States based its GATS consultation requests on

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155 WTO Panel Report, supra note 39, para. 10.213.

156 The WTO panel gave its Interim Report only to the U.S. and Japanese governments, as the parties to the dispute, on December 5, 1997. However, the panel did not make it available officially until April 3, 1998. Interim Report of the Panel (Dec. 5, 1997). WTO panels issue interim reports only to the parties to the dispute. DSU, supra note 148, art. 15. However, the parties often leak them to the press. Press Statement, USTR, Statement by Ambassador Charlene Barshefsky regarding the WTO Dispute on Photographic Film and Paper (Dec. 5, 1997).


158 USTR, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 240 (1998) [hereinafter 1998 NTE]. Under the DSU, parties may appeal "issues of law covered in the panel report and legal interpretations developed by the panel" to a standing Appellate Body. DSU, supra note 148, art. 17. Instead of appealing, the United States established an interagency monitoring and enforcement committee to review Japan's implementation of representations that it made to the WTO panel, including that it "prohibits practices that discourage the opening of large stores." Press Release, USTR, USTR and Department of Commerce Announce Next Steps on Improving Access to the Japanese Market for Film (Feb. 3, 1998).

159 U.S. GOVERNMENT, ASSESSMENT OF JAPAN'S IMPLEMENTATION OF SPECIFIC REPRESENTATIONS IT MADE TO THE WTO 2 (Aug. 19, 1998) [hereinafter ASSESSMENT OF JAPAN'S IMPLEMENTATION].

160 Letter from Booth Gardner, U.S. Ambassador to the WTO, to Minoru Endo, Japanese Ambassador to the WTO (Sept. 20, 1996), reprinted in INSIDE U.S. TRADE, Sept. 27, 1996, at 5-6; see also USTR Sept. 20, 1996 Statement, supra note 150 ("On a separate track, the United States will expand its GATS case . . . to shed..."
allegations that the Japanese government's application of the LSL and "related legislation, regulations, and administrative measures" were inconsistent with several GATS articles, namely Articles III (transparency in service measures), VI (domestic regulation), XVI (market access), and XVII (national treatment). In the consultations, the United States argued that by limiting the opening of large stores through the adjustment of large store plans to protect small retailers, the LSL served as a barrier to market access for film, as well as other imports. The United States took no further action on the GATS case after the second set of consultations in November 1996. It neither requested the formation of a WTO panel nor withdrew the case from the WTO.

Professor Sara Dillon has concluded that the GATS case was a "far more powerful argument" than the GATT non-violation argument. The LSL was particularly vulnerable under GATS Article XVI, which prohibits measures that limit the "number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economics needs test" as well as "the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test." The impact of

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161 First U.S. Request for GATS Consultations, supra note 146.
162 U.S. to Claim Store Law Violates Service Agreement, KYODO NEWS, Sept. 6, 1996.
163 See Barringer, supra note 136, at 473 ("After a single initial consultation with the Japanese government the U.S. formally advised the WTO last fall that it needed to rethink its case.... However, no further action was taken since the conclusion of those consultations in late 1996.").
164 Sara Dillon, Fuji-Kodak, the WTO, and the Death of Domestic Political Constituencies, 8 MINN. J. GLOBAL TRADE 197, 220 (1999). Dillon asserts that: "Under an agreement reached during preliminary Fuji-Kodak negotiations and outside the supposedly transparent legalities of the WTO, the U.S. obtained a Japanese commitment to abolish the Large Scale Retail Store Law," in exchange for the U.S. agreement to not pursue its GATS case. Id. at 199 (emphasis added); see also id. n.22 (addressing governmental negotiating in the WTO context). While Dillon offers an interesting thesis, the support she cites does not provide any evidence of such an agreement between the two countries. Moreover, the subsequent exchanges between the United States and Japan contradict that thesis. Dillon concludes that the Japanese government sold out its small business interests by agreeing to abolish the LSL in light of the strong possibility that a WTO panel would likely find that the law violated GATS. Id. at 200 n.7.
165 WTO General Agreement on Trade in Services, art. XVI(2)(a).
166 Id. art. XVI(2)(c).
the U.S. initiation of the GATS case on Japan's decisionmaking regarding the future of large store regulation is examined below.

4. METI'S DEVELOPMENT OF NEW LARGE STORE REGULATORY REGIMES

4.1. Preparations for a New Regulatory Regime for Large Stores

4.1.1. Joint Distribution Council

While the LSL was under international scrutiny at the WTO, METI laid the groundwork for a new regulatory regime. In May of 1997, the Ministry once again convened the Joint Distribution Council to conduct deliberations on the future of the LSL and other retail distribution issues. Nearly half of the thirty-eight member Council was made up of representatives of organizations across the spectrum of retail interests. METI did not allow the Council to develop a new large store regulatory policy on its own. Rather, METI exercised firm control of the Council to ensure that its recommendations were consistent with the Ministry's plans. Such actions substantiated frequently heard criticism that advisory councils often serve as little more than "rubber-stamps" for policy decisions of ministries and that they "cloak" non-transparent, bu-

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168 See Kodak/WTO/GATS: MITI Convenes Advisory Committee to Review Large Retail Store Law, Cable 5748 from U.S. Embassy, Tokyo, to U.S. Dep't of Commerce, Wash., D.C., para. 9, tbl.1 (July 2, 1997) [hereinafter Cable 5748, July 2, 1997] (on file with author). Retail-related organizations represented on the Council included the National Federation of Shopping Center Promotion Associations (Zenkoku Shoutengai Shinkou Kumiai Rengokai), the Japan Franchise Association (Nihon Franchise Chain Kyokai), Japan Voluntary Chainstore Association (Nihon Voluntary Chainstore Kyokai), National Federation of Small and Medium Enterprise Business Associations (Zenkoku Chusho Kigyo Dantai Chuokai), Japan Department Store Association (Nihon Hyakkaten Kyokai), National Federation of Shopping Centers (Nihon Shop Center Kyokai), Japan Federation of Industries (Zenkoku Shokakai Rengokai), Japan Speciality Stores Association (Nihon Senmon Ten Kyokai), Japan Retailing Federation (Zenkoku Kouri Shijo So-Rengokai), Japan Council of Shopping Centers (Nihon Shopping Center Kyokai), and the Japan Chamber of Commerce and Industry (Nihon Shoko Kaigisha). Id.
reacucracy-led, decision-making processes in an aura of independence and impartiality.  

At the Joint Council's first substantive meeting on June 19, 1997, METI largely controlled the meeting's agenda, presentations to the Council, interaction among the members, and information provided to them. In directing the conduct of the meeting, METI "essentially reduc[ed] the [Council] to spectator status." In addition, the presence of approximately thirty METI officials at the meeting reportedly discouraged any real deliberation by the members. The meeting was largely devoted to presentations by METI and local governments "on the bleak future of Japanese small retailers." Two of the five members allowed to speak during twenty minutes of "free time" were representatives of small business associations (JCCI and the National Federation of Shopping Center Promotion Associations). They criticized further deregulation of the LSL.

169 Id. para. 2; see also Advisory Councils: Responsibility and Personnel Selection Unclear, YOMIURI SHIMBUN, June 6, 1996, translated in Cable 5770 from U.S. Embassy, Tokyo, to U.S. Dept' of Commerce, Wash., D.C., (June 24, 1996) (on file with author) (discussing how the current operation of advisory councils has been called into question with respect to, for example, their decision-making process and appointment of former government agency officials to posts in advisory councils, despite the fact that such actions are prohibited); Eiko Oya, The Failings of the Government's Advisory Councils, JAPAN ECHO, Autumn 1996, at 15, 17 (discussing the view that the ministries decide what policies they want to promote and then bring in the councils to endorse their position in an effort to create the impression that they are responsive to the nation's interests).

170 See Cable 5748, July 2, 1997, supra note 168, paras. 2, 9, 24. In what the U.S. Embassy termed "an unusual move", METI allowed approximately seventy members of the public (selected by lottery) to attend the Council's June 1997 meeting as observers, including an economic officer from the U.S. Embassy. Id. para. 3.

171 Id. para. 4.

172 Id. para. 5. METI officials also served as the secretariat of the Council, as is typical of Japanese advisory councils. Id.

173 Id. para. 4. METI officials from the Small and Medium Enterprise Agency pointed out that, since 1982, the number of retailers with less than four employees had dropped from 1.4 million to 1.1 million. They also observed that the profit margins of small- and medium-sized retail stores had eroded due to "such factors as local economic stagnation... and inefficient business practices." Id. para. 8.

174 Id. paras. 4, 6, 7. The JCCI President contended that deregulation of the LSL had led to the closing of 8000 small stores each year since 1990. Id. para. 6. The JCCI is comprised of more than 2800 chapters, representing over one million members. Id. para. 7.
In October 1997, METI took steps to counter opposition to reform that had been expressed within the Council. The Ministry arranged for opinions from both domestic and international advocates for the repeal of the LSL to be recorded in the Council minutes.\footnote{The Large-Scale Retail Store Law: Are Its Days Numbered?, Cable 9568 from U.S. Embassy, Tokyo, to U.S. Dep't of Commerce, Wash., D.C. (Nov. 4, 1997) [hereinafter Cable 9568, Nov. 4, 1997] (on file with author).} METI asked the Council representatives of two industry associations, the Japan Chain Stores Association ("JSCA")\footnote{METI officials informed the JSCA representative on the Council that the Ministry had "highly evaluated" the Association's earlier submission advocating eventual abolition of all LSL restrictions, and asked the JCSA to submit an opinion paper to the Council on large store regulation. \textit{Id.} para. 3.} and Keidanren, to make submissions to the Council urging repeal of the LSL.\footnote{METI asked Keidanren to make an unqualified recommendation of repeal of the LSL, by dropping the condition that it be abolished "in stages," which was in a submission that Keidanren had made to the Council only one month earlier. \textit{Id.}} At the Council's October 27 meeting, in accordance with METI's script, the Keidanren representative called for repeal of the LSL. In addition, Keidanren urged elimination of other demand and supply control mechanisms, noting that METI had promised the Commission on Administrative Reform that the Ministry would discontinue such mechanisms. Keidanren further expressed its concern that local governments might enact stricter regulations if the LSL was repealed.\footnote{\textit{Id.} para. 9.}

To bring attention to foreign calls for reform, METI also asked both the U.S. Government and the European Union ("EU") to present positions on the LSL at the Council's October meeting.\footnote{\textit{Id.} para. 9.} In its presentation to the Council, the United States reiterated its advocacy of abolition of the LSL. It contended that "reform of the over-regulated retail sector could provide significant gains for the Japanese economy by enhancing consumer interests, increasing efficiency, and promoting economic activity."\footnote{\textit{Id.} MITI Request for U.S. Position on Large Scale Retail Store Law, Cable 200529 from U.S. State Department, to U.S. Embassy, Tokyo (Oct. 23, 1997) (on file with author). As an interim measure, the United States urged the immediate elimination of all restrictions on store hours and holidays. \textit{Id.}} The United States reiterated Keidanren's concern that local governments would fill-in behind the LSL with their own restrictive ordinances.\footnote{\textit{Id.}} It urged
the Japanese government to take measures to avoid such a result.\textsuperscript{182} The EU repeated its earlier request that Japan substantially ease the LSL.\textsuperscript{183} By arranging for opinions advocating repeal of the LSL to be included in the Council's record, METI was able to counter the opposition to LSL deregulation in the Council. This maneuvering provided METI with "cover" for its decision to abolish the LSL.\textsuperscript{184}

In early December 1997, three weeks before the Joint Council issued its interim report, the Japanese press reported that the Japanese government had decided to abolish the LSL, and replace it with a law designed to address environmental issues surrounding the opening of new stores.\textsuperscript{185} The reporting was substantiated when the Joint Council issued its December 24, 1997 Interim Report recommending the repeal and replacement of the LSL.\textsuperscript{186}

In place of the LSL, the Joint Council recommended enactment of a new law that would shift the purpose of large store regulation from the protection of small- and medium-sized retail stores to the preservation of the local living environment. It further recommended that responsibility for implementation of the new law be given to local governments, under common procedures and standards set by the central government. The Report went on to out-

\textsuperscript{182} Id.
\textsuperscript{183} Cable 9568, Nov. 4, 1997, supra note 175, para. 9.
\textsuperscript{184} Id.

line the basic procedures that should be incorporated into the new law. In its Report, the Council also pointed to the need for city planning measures that would restrict the use of land within certain areas.

4.1.2. METI's Decision to Abolish and Replace the LSL

After years of debate over the LSL, its end came swiftly and with little advance notice. There were arguably three primary factors behind METI's decision to repeal the LSL: (1) dissatisfaction of small retailers, as well as large retailers, with the LSL; (2) the United States' GATS complaint in the WTO; and (3) METI's stature as a proponent of deregulation.

Small- and medium-sized retailers were unhappy with the number of large stores that were being allowed to open under the LSL. They complained that the LSL was failing to protect them adequately from large store competition. Since Japan had begun easing large store regulations in 1990, there had been a nearly three-fold increase in notifications of openings of stores with floor space of 500 m$^2$ or more (from 794 in JFY 1989 to 2269 in JFY 1996). Also, large stores were not happy with the continued adjustments of the store plans; they were particularly unhappy with

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187 INTERIM REPORT, supra note 186, at 11-12.
188 Id. at 9, 10. The Council also noted that because of the increased importance of developing a healthy small- and medium-sized retail industry, assistance should be tailored to meet the industry's needs. Id. at 12, 13.
189 The U.S. Embassy reported in early November 1997 that it had just learned of METI's plans to abolish the LSL. Cable 9568, Nov. 4, 1997, supra note 175, para. 1.
189a Id. para. 5; TOKYO SHIMBUN, Dec. 3, 1997, supra note 185, at 7; ASAHI, Dec. 3, 1997, supra note 185. The number of small- and medium-sized stores was "dwindling rapidly," with the number of stores employing one to four people dropping ten percent between 1991 and 1994. INTERIM REPORT, supra note 186, at 4. The JCCI stressed the need to retain the LSL while strengthening the rights of local governments to restrict large stores. In a JCCI survey, over ninety percent of the 384 Chambers of Commerce and Industry pointed to adverse consequences that would result with the easing of the LSL. ASAHI, Dec. 3, 1997, supra note 185.
While some estimates set the typical reduction of retail space at around thirty percent, even according to METI's data, floor space reduction nationwide averaged over twenty percent, in the JFYs 1994 through 1996, for Type I stores (3000 m² and larger).

The most important factor behind the repeal of the LSL was METI's fears that it was not consistent with Japan's WTO obligations under GATS. METI's preoccupation with the GATS case was prevalent in its campaign to obtain support for its proposed store regulatory regime. METI repeatedly briefed the Council on the status of the GATS case. It even postponed early discussions by the Council of the future of the LSL, with hopes of having a clearer indication of whether the United States intended to seek a WTO panel in that dispute. In its Interim Report, the Joint Council specifically drew attention to GATS' prohibition against discrimination between domestic and foreign companies, as well as its ban on domestic restrictions that set limits on the number of service suppliers, by "giving consideration to economic demand, and limiting the overall output of services." The Council also remarked upon the U.S. complaint in the WTO that the LSL and related measures violated GATS.

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192 ASAHI, Dec. 3, 1997, supra note 185; see also Japanese Retailing—Barbarians at the Till, ECONOMIST, May 29, 1999, at 61 (citing restrictions on floor space as making it less attractive for large retailers to conduct business in Japan).


194 Cable 5348, June 19, 1997, supra note 167, para. 3. METI reported average floor space reductions of 24.5% in JFY 1994 and approximately 22% in JFY 1995-96. Id.

195 See ASSESSMENT OF JAPAN'S IMPLEMENTATION, supra note 159, at 2 (stating that "senior Japanese Government officials have acknowledged that [the LSL was repealed] because of concern that a WTO panel would very likely find the Large Stores Law in violation of the [GATS]"); available at http://199.88.185.106/TCC/DATA/commerce_html/assoc_docs/film1998.html; ASAHI, Dec. 3, 1997, supra note 185 (citing the WTO case as one of the factors behind the decision to repeal the LSL); see also U.S. to Claim Store Law Violates Service Agreement, supra note 162 (reporting that the government acknowledged it would have to abolish or modify the LSL if the WTO found it violated GATS).

196 See Cable 5748, July 2, 1997, supra note 168, paras. 2, 9 (referring to the decision in the WTO film case); Cable 9568, Nov. 4, 1997, supra note 175, para. 10 (noting discussions among Japanese officials seeking clarification of the status of the WTO/GATT panels and the LSL).

197 INTERIM REPORT, supra note 186, at 6.

198 Id. The Joint Council made no mention of the GATT case, even though by the time it issued its Interim Report, the WTO panel had issued its Interim Report. See discussion, supra note 156.
Outside the Council, METI repeatedly pointed to the GATS' ban on domestic restrictions as well as the pending GATS case in its efforts to garner support for abolishing the LSL.199 Later, in describing the new store regulatory regime, METI stressed that it abolished the supply-demand considerations that had been at the heart of the LSL.200 From these actions, one can concur with Dillon that the United States' initiation of the GATS case, along with its prolonged pendency, "pushed Japan" to abolish the LSL.201

A third but less significant factor involves METI's stature as a deregulation proponent. METI believed it would appear "decisive and committed to deregulation" by acting on "a high profile issue" like the LSL.202 Also, it was reported that METI had assured the Prime Minister and the Administrative Reform Conference (Gyousei kaikaku kaigi) that the Ministry would alter its guidance of industries when it was transformed into the industry ministry, as part of the central government's reorganization in January 2001.203 The Joint Council also included a section on promoting deregulation in its Report.204

These factors offer a cogent basis for repeal of the LSL; however, they do not explain why METI insisted on enactment of a replacement law, rather than leaving large store regulation in the

199 See, e.g., MITI/MOC, Daikibo Kouri Tempo Ricchi Hou Ni Tsuite, CONCERNING LARGE-SCALE RETAIL STORE LOCATION LAW 2 (Apr. 1998) [hereinafter MITI/MOC ZONING DOCUMENT] (citing the GATS ban on "domestic restrictions on the number of service suppliers, aimed at economic demand, and on output of services," as well as the GATS case). METI used this document in a "propaganda" role, in particular in meetings with small- and medium-sized retailers as a means of gaining their support for METI's plans to abolish the LSL. MITI Defends Use of Zoning Document, Cable 8591 from U.S. Embassy, Tokyo to U.S. Dep't of Commerce, Wash., D.C., para. 4 (Oct. 23, 1998) [hereinafter Cable 8591, Oct. 23, 1998] (on file with author).

200 SECOND JOINT STATUS REPORT UNDER THE ENHANCED INITIATIVE ON DEREGULATION AND COMPETITION POLICY 16 (May 3, 1999) [hereinafter SECOND JOINT REPORT].

201 Dillon, supra note 164, at 237.

202 Cable 9568, Nov. 4, 1997, supra note 175, para. 5; see also NIHON, Dec. 2, 1997, supra note 185 (stating that the Japanese government had decided abolition of the LSL was "absolutely necessary to expedite economic structural reform advocated by [then] Prime Minister Ryutaro Hashimoto").

203 Cable 9568, Nov. 4, 1997, supra note 175, para. 5; see Chuuou shouchou-ra kaikaku kihon hou [Central Government Basic Reform Law], Law No. 103 of 1998.

204 INTERIM REPORT, supra note 186, at 5. For example, the Council referenced a May 1995 Cabinet Decision (Action Plan for Reform and Creation of the Economic Structure) that called for "drastic deregulation in every sector in order to correct Japan's high cost structure." Id.
hands of local governments. Here, two explanations that Schoppa
offered to explain as to why METI did not abolish the LSL during
Sil would seem particularly apt. Specifically, he asserted that: “To
do away with the law would mean MITI would lose all of its influ-
ence over the retail sector. It would also have no way of stopping
local governments from passing even stricter regulations . . . .”205
Both of those reasons appear equally valid in this context.

First, as much as METI might like to portray itself as a propon-
ent of deregulation, it does not have a history of giving up juris-
diction over entire sectors. Moreover, METI has acknowledged
that it fought to keep control of large store regulation.206 Second,
METI had long been concerned with the adoption by local gov-
ernments of stringent regulations.207 The United States had sought
curbs on local government regulation of large stores since the SI.208
More recently, in the Joint Council, both the U.S. government and
Keidanren expressed concerns regarding unfettered local govern-
ment regulation of large stores.209

After METI had decided on the course of the new store regime,
it worked with the LDP to address the ruling party’s concerns to
ensure Diet approval of its plan. To ameliorate opposition to the
new regime, METI worked out a comprehensive package of incen-
tives and other measures.

4.1.3. Consensus-Building with the LDP

To bring its large store regulatory plans to fruition, METI had
to scale a “final wall” by gaining the support of the LDP, for whom
small retailers continued to be an influential constituency.210 To do
so, METI used both positive and negative arguments related to the
international community’s interest in Japan’s distribution sector.
METI emphasized that repealing the LSL “would raise Japan’s in-
ternational profile as a country willing to liberalize its internal
economy, even at the expense of a politically strong yet economi-
cally vulnerable constituency.”211 At the same time, the bureau-

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205 SCHOPPA, supra note 20, at 165.
206 See infra note 230 and accompanying text.
207 See supra notes 98-101 and accompanying text.
208 See supra note 108 and accompanying text.
209 See supra notes 178-182 and accompanying text.
210 Cable 9568, Nov. 4, 1997, supra note 175, para. 12.
211 Dillon, supra note 164, at 235.
racy pointed out that if the United States were to prevail in its GATS case, "Japan's international reputation for maintaining an open domestic market would suffer."

On December 23, 1997, the day before the Joint Council issued its Interim Report, the LDP convened a joint conference of several of its advisory boards to finalize its views on large store regulatory reform. A number of Diet members looked at the issue through their election lens, as they had done repeatedly. They pointed to potential "trouble" for the LDP in the upcoming Upper House election in July of 1998 "[u]nless something is done to wipe out the uneasiness felt by medium- and small-size retailers" with the successor to the LSL, including its lack of specificity. The Conference recognized that although the LSL (and its predecessor, the DSL) had served for sixty years "as the central pillar for small stores," the LSL was no longer functioning, as a result of deregulation. The LDP conference adopted a "Resolution on Revision of the Large-Scale Retail Store Law," in which it recognized the pivotal role of medium and small-size retailers in local communities and the "severe management environment" facing them. It called for reform of city planning mechanisms and measures to revitalize distressed downtown shopping districts as a condition of LDP support of METI's proposals.

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212 Id. The latter point was reiterated when the Secretary General of the LDP's Policy Affairs Research Council stated his understanding that the new regime proposed by METI would effectively exempt Japan from possible WTO sanctions. LDP Position on LSRSL Reform, Cable 254 from U.S. Embassy, Tokyo, to U.S. Dept of Commerce, Wash., D.C., para. 5 (Jan. 13, 1998) [hereinafter Cable 254, Jan. 13, 1998] (on file with author).


214 Id.

215 Id. It contended that most new stores are given permission automatically, with slight reductions in floor space in some cases. Id.

216 Id. para. 10.

217 Id.; see also Cable 9568, Nov. 4, 1997, supra note 175, para. 13 (anticipating that METI would use revitalization programs to obtain LDP's support for elimination of the LSL).
4.1.4. Elements of Large Store Legislative Package

In early 1998, the Japanese government compiled a three-part legislative package to replace the LSL. They are: (1) the Large-Scale Retail Store Location Law (Daiten-Ricchi Ho), which is described in the following Section; (2) revisions to the City Planning Law, and (3) the Town Revitalization Law. METI had laid the foundation for these measures at meetings of the Joint Council, and the Joint Council’s Interim Report had duly recognized the importance of these measures. The City Planning Law revisions and the Town Revitalization Law in effect compensated small retailers for the protection that they were forfeiting with the repeal of the LSL.

On May 27, 1998 (the same day that it enacted the SLL), the Diet amended the City Planning Law, effective in November 2001.

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219 Store Location Law, Law No. 91 of 1998.

220 Toshi Keikaku Hou [City Planning Law], Law No. 100 of 1968.

221 Chushin Shigaichi Kasseika Hou [Town Revitalization Law]; Cable 929, Feb. 5, 1998, supra note 218, para. 3.

222 Cable 9568, Nov. 4, 1997, supra note 175, para. 13.

223 INTERIM REPORT, supra note 186, at 12-13; see also Cable 9568, Nov. 4, 1997, supra note 175, para. 13 (noting that such programs would not only benefit the LDP’s small and medium-sized constituency, but it would also appeal to the LDP’s powerful construction industry supporters who would benefit from government funds provided for such projects).

224 Cable 9568, Nov. 4, 1997, supra note 175, para. 14 (noting that small and medium-sized retailers seek local restrictions “to compensate for the protection they would lose” with the repeal of the LSL); Cable 8591, Oct. 23, 1998, supra note 199, para. 7 (expressing concerns with central government support of means of undercutting “gains promised by elimination of the [LSL]”); see also MITI/MOC ZONING DOCUMENT, supra note 199 (describing how, with the legislative changes, local jurisdictions could restrict the establishment of stores over a certain size by creating “small to medium-size store areas”).
The MOC had prepared the revisions to the City Planning Law, which is under its jurisdiction. Prior to the amendment, the City Planning Law specified twelve different "land use designated districts." They were divided into three categories: residential, commercial, and industrial. The City Planning Law also provided for eleven "special-use districts" or zones, including school zones, retail store zones, and office zones. Local governments could not go beyond these classifications and none of the classifications specify the size of retail business allowed in the zone. The 1998 amendments abolished the classifications of Special Land Use Districts and authorized local governments to create their own unique special-use zones, such as "small and medium retailer only" zones, as well as districts in which the location of large stores will be encouraged.

The Town Revitalization Law, that was developed by both METI and MOC, annually provides one trillion yen (U.S.$7.7 billion) to revitalize traditional town centers. The funds are distributed based on proposals prepared by local governments or other town management organizations to revitalize downtown areas.

4.2. The Large-Scale Retail Store Location Law

4.2.1. METI's Development of Legislation

As the previous Section illustrated, METI played the commanding role in deciding that the LSL should be repealed and in developing the elements of a new store regulatory system. METI

227 Cable 929, Feb. 5, 1998, supra note 218, para. 11.
228 Id. paras. 9-11; Dillon, supra note 164, at 240 n.131; BNA, June 3, 1998, supra note 224, at 952. The Joint Council discussed revitalization programs. Cable 9568, Nov. 4, 1997, supra note 175, para. 15.
229 Cable 929, Feb. 5, 1998, supra note 218, para. 9; MCKINSEY STUDY, supra note 6, ch. 4, at 13.
continued to dominate the development of the new system by first drafting the new SLL and then the measures necessary to implement it. In drafting the legislation, METI ensured that its control of retail sector regulation would continue. First, it “fought hard to keep the [new] Law under its jurisdiction.” It acknowledged that other ministries or agencies might have been involved in administering the law, such as the MHA and MOC. However, METI continued to control large store regulation. While METI may shun direct involvement in the regulation of large stores, it clearly had no intention of relinquishing the authority that it had exercised over the retail sector for sixty years.

Second, METI “deliberately” assigned to itself the development of the implementing measures. Also, when it drafted the legislation, METI intentionally did not disclose the contents of key implementing measures, in particular the standards by which large stores would be evaluated in the new system, in order to avoid “endless debate” and, one might add, challenges to its plans. By disclosing only the broad framework of the new regime and providing no formal opportunity for public participation in drafting the legislation, METI continued to firmly control the development of the new regime.

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231 *Id.*


233 Cable 1808, Mar. 10, 1998, *supra* note 230, para. 3. MOC, with its responsibility for implementation of the City Planning Law and other land use planning measures, would have been another reasonable choice to oversee large store regulation.

234 *Id.* para. 4.

235 *Id.* paras. 12-13.

METI submitted draft legislation to the Diet on February 24, 1998. The Diet deliberations on the legislation were reportedly the longest ever on legislation under METI's jurisdiction, due to its "politically charged nature." Three months after METI submitted the draft legislation, the Diet enacted the SLL on May 27, 1998, without making any changes to METI's draft. At the same time, the Diet abolished the LSL, with both laws becoming effective on June 1, 2000.

4.2.2. Provisions of the SLL

The SLL differs from the LSL in four important respects. First, the SLL shifts the purpose of large store regulation from protection of small and medium retailers, the raison d'être of the LSL, to preservation of the environment in the vicinity of large stores. Second, the SLL removes direct responsibility for its implementation from METI to local governments. Third, the SLL prohibits local governments from taking into account "the economic needs" of the area surrounding a new store, which was allowed under the LSL, and limits consideration of the opening of large stores to factors related to the preservation of the environment in the vicinity.

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238 The Lower House deliberated twenty-two hours and the Upper House eighteen hours. Id.

239 The Lower House passed the large store legislation on May 8, 1998 and the Upper House followed suit on May 27, 1998. Id. It was officially promulgated on June 3, 1998. METI's drafting of the legislation typified the legislative process in Japan, where ministries draft between seventy-five to ninety-five percent of all legislation passed by the Diet, and the Diet makes minimal substantive changes. RAMSEYER & ROSENBLUTH, supra note 12, at 29.

240 MITI's LSL Transition Period to "Freeze" Large Store Openings, Cable 834 from U.S. Embassy, Tokyo, to U.S. Dep't of Commerce, Wash., D.C., para. 4 (Feb. 2, 1999) (on file with author).

241 Store Location Law, Law No. 91 of 1998, art. 1; Large Stores Law, Law No. 109 of 1973, art. 1. Both laws set out a general purpose of fostering the sound development of the retailing sector and the national economy. Id.

242 The SLL places the authority for the establishment and expansion of all large stores covered by the Law in the hands of forty-nine local governments (forty-seven prefectures and twelve Designated Cities). Store Location Law, Law No. 91 of 1998, art. 5. Under the LSL, local governments had authority only for stores with retail space of between 1000 m² and 3000 m². Cable 1808, Mar. 10, 1998, supra note 230, para. 6.

243 Store Location Law, Law No. 91 of 1998, art. 13.
of the new store. Fourth, the SLL only allows local governments to recommend adjustments by developers, in sharp contrast to LSL which authorized METI and local governments to compel large retailers to make adjustments to address competitive concerns of local retailers.

The SLL requires store developers to submit a notification (todokede) to prefectural governments or Designated Cities (hereinafter referred to collectively as "prefectures") at least eight months before establishing or expanding a new large store with retail space exceeding 1000 m². The SLL directs METI to "estab-

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244 Id. art. 4.
245 Id. art. 9.
246 See Large Stores Law, Law No. 109 of 1973, art. 8 (authorizing the Minister of International Trade and Industry or the Prefectural Governor to delay the opening date of the store or to order a reduction in floor space); see also Cable 1808, Mar. 10, 1998, supra note 230, para. 10 (noting that under the LSL new store owners could be ordered to make changes to their plans but such an order would not be authorized under the SLL).
247 Under the SLL, only developers of large stores are required to file a notification. Store Location Law, Law No. 91 of 1998, art. 5. This is unlike the LSL, which also required retailers in the proposed building to file notifications. Large Stores Law, Law No. 109 of 1973, art. 5. The SLL allows prefectures to require retailers operating businesses in large stores to submit reports but only to the least extent necessary for implementation of the SLL. Store Location Law, Law No. 91 of 1998, art. 14. A Cabinet Order limits that information to the opening date of the retail business, its location, retail floor space, and business operation methods. Daikibo kouri tempo ricchi hou shikourei [Large-Scale Retail Store Location Law Enforcement Ordinance], Cabinet Order No. 327 of 1998, art. 4:2 (Oct. 16, 1993) [hereinafter SLL Cabinet Order].
248 SLL responsibilities assigned to prefectural governments are to be performed by Designated Cities where a new store is within a Designated City's jurisdiction. Store Location Law, Law No. 91 of 1998, art. 15. These are cities with populations over 500,000, designated by Cabinet Order, pursuant to the Chihou jichi Hou [Local Autonomy Law], Law No. 67 of 1974, as amended [hereinafter Local Autonomy Law].
249 Store Location Law, Law No. 91 of 1998, art. 5. The notification must include the following information on the planned store: (1) name and address, developer and retailers; (2) opening date; (3) total floor space; (4) location and capacity or size of its facilities (parking lots, loading and unloading facilities, and garbage handling facilities); and (5) operations, including business hours (opening and closing times), hours of operation of parking and delivery facilities, and number and location of parking entrances and exits. Id. art. 5:1(3)-(4); Daikibo kouri tempo ricchi hou shikou bisoku [Large-Scale Retail Store Location Law Enforcement Rules], METI Ordinance No. 62 of June 10, 1999, revised by Ordinance No. 91 of Nov. 6, 1999, art. 3 [hereinafter SLL Ministerial Ordinance]. METI has also prescribed the documents that must be attached to the notification. Id. art. 4.
250 SLL Cabinet Order, Cabinet Order No. 327 of 1998, art. 2 (pursuant to Article 3:1 of the SLL). "Retail space" excludes bars and restaurants but includes
lish and publish guidelines” that large store developers are to consider\textsuperscript{251} and that prefectures are to use in presenting opinions\textsuperscript{252} and recommendations to store developers.\textsuperscript{253}

Within two months of filing the notification, the developer generally must hold at least one explanation meeting\textsuperscript{254} to describe its store plans to the public.\textsuperscript{255} The submission of a notification triggers a four-month public review process that enables interested parties to submit their views on measures they believe the developer should take to preserve the environment.\textsuperscript{256} Interested parties include local residents, businesses, Chambers of Commerce and Industry, and other industry associations and cities governing the store site.\textsuperscript{257}

Within eight months of the notification, the prefectural government must provide the developer with its opinion on the store plans, after it considers the views of local governments and the

\begin{itemize}
\item Prefectural governors can raise the threshold for stores in a specific district to the extent necessary and sufficient to maintain the living environment. Store Location Law, Law No. 91 of 1998, art. 3:2.
\item Prefectural governors may determine that an explanation meeting is not necessary and instead require the developer to post a notice summarizing the notification on the store site. Id. art. 11:2. This is a significant departure from the practice under the LSL where as many as fifteen to twenty explanation meetings could be required.
\item The prefecture then must make public a summary of these views for one month. Id. art. 8:3.
\end{itemize}
If the prefecture has no views on the plans, the process ends and the developer may proceed with its store plans. However, when a prefecture provides comments on the impact of the store on the neighboring environment, the developer must submit a Voluntary Coordination Plan indicating whether or not it intends to change its original plans to address the concerns. For the following two months, the developer may not open the store. If the prefecture finds the developer's Plan sufficient to protect the environment, the developer can proceed.

If the developer and the prefecture do not reach agreement on an adjustment of the plans in the two months after the developer submits its Voluntary Coordination Plan, the prefecture may issue a recommendation (kankoku) to the developer to modify its store plans. However, before doing so, the prefecture must determine that the Voluntary Coordination Plan will have a significantly adverse effect on the environment in the vicinity of the store and that it fails to duly reflect the prefecture's views. METI has indicated that the types of recommendations prefectures can make include: (1) the need to provide adequate parking spaces or facilities to avoid traffic jams; (2) the location of store entrances and exits to avoid obstruction of the flow of customers to and from nearby shopping districts; and (3) sufficient guards to prevent customers from causing traffic jams.

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253 Id. art. 8:4. The prefecture must make its views public for one month. Id. 8:6. The Ordinance prescribes additional details, including publication of the views of prefectures. SLL Ministerial Ordinance, METI Ordinance No. 62 of June 10, 1999, revised by Ordinance No. 91 of Nov. 6, 1999, arts. 5, 14, 15, 17.

259 Store Location Law, Law No. 91 of 1998, art. 8:5.

260 Id. art. 8:7; see also MITI OUTLINE, supra note 253, at 5 (flow-charting and explaining articles 5-9 of the SLL).

261 Store Location Law, Law No. 91 of 1998, art. 8:9.

262 Id. art. 8; MITI OUTLINE, supra note 253, at 5.

263 Store Location Law, Law No. 91 of 1998, art. 9:1. The prefecture must make its recommendation within two months of the submission of the Voluntary Coordination Plan, and the recommendation must be made public. Id. arts. 9:1, 9:3. Before making a recommendation, the prefecture must hear the views of the city with jurisdiction over the proposed store site. Id. art. 9:1; see also MITI Explains "Location Law" to U.S. Retail Firms, Cable 988 from U.S. Embassy, Tokyo, to U.S. Dept of Commerce, Wash., D.C., para. 14 (Feb. 8, 2000) [hereinafter Cable 988, Feb. 8, 2000] (on file with author).

264 MITI OUTLINE, supra note 253, at 2.
A developer may respond in one of two ways to the prefecture’s recommendation. The developer can modify its plans or ignore the recommendation and proceed with the store opening. The local government can inform the public that the developer has no justifiable reason for not following the recommendation. Prefectures may not convert their recommendations to an order, as under the LSL. Moreover, the store-opening process cannot be halted, even if a developer ignores a local government’s recommendation, as long as the developer has complied with the procedures set out in the SLL. The processing period, from the submission of the notification to the presentation of views by local governments, is set for eight months. Assuming that there are no disputes, the developer may proceed with its store plans. Even if there are disputes, processing should not exceed twelve months, which includes time for the developer to prepare a Voluntary Coordination Plan and for the local government to prepare its recommendation.

4.3. Environmental Guideline

4.3.1. METI’s Development of the Guideline

METI retained extensive discretion in determining the guidelines by which new large stores will be evaluated, which is a key element in SLL implementation. The SLL only directs generally that the guidelines address matters related to the arrangement of store facilities and store operations, including the convenience of

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265 Store Location Law, Law No. 91 of 1998, art. 9:4; see also MITI OUTLINE, supra note 251, at 5 (explaining articles 5-9 of the SLL).
266 Store Location Law, Law No. 91 of 1998, art. 9:7; Cable 988, Feb. 8, 2000, supra note 263, para. 15; Cable 1808, Mar. 10, 1998, supra note 230, para. 10.
267 Cable 988, Feb. 8, 2000, supra note 263, para. 22.
268 MITI OUTLINE, supra note 253, at 5 (providing a flowchart for the operation of articles 5-9 of SLL; indicating how long each step of processing takes); Cable 988, Feb. 8, 2000, supra note 263, para. 15; see also Cable 1808, Mar. 10, 1998, supra note 230, para. 7 (noting that the new law shortens the processing period from twelve to ten months). After a large store has opened, it is subject to certain obligations when it changes facilities or business operations that affect the environment. See Store Location Law, Law No. 91 of 1998, art. 6; see also MITI OUTLINE, supra note 253, at 6 ("After the opening of large scale retail stores... a store opener has to undergo the procedures [of the SLL] again when it changes store facilities or business operations which affect the living environment except for minor changes."); SLL Cabinet Order, Cabinet Order No. 327 of 1998, art. 4 (detailing conditions under which prefecture can require developer to report).
local residents and neighboring commercial enterprises, such as sufficient parking facilities and the prevention of the deterioration of the environment due to noise and other factors.\textsuperscript{269} It is an improvement over the LSL, which provided no guidance or standards as to when a proposed store might have a significant impact on nearby small- and medium-sized retailers and thus trigger demands for adjustments to the store plans.\textsuperscript{270}

METI's development of the guidelines with the Joint Distribution Council coincided with moves by the Japanese bureaucracy to address criticisms of its rulemaking process. Japanese ministries and agencies were criticized for generally formulating regulations in a "black box", with little, if any, advance public notice or public participation.\textsuperscript{271} The U.S. Administrative Procedure Act has required such advance notice and public input for more than fifty years.\textsuperscript{272} To address these deficiencies in its regulatory system, in March 1999, the Cabinet adopted a "Public Comment Procedure" that became effective April 1, 1999.\textsuperscript{273} Also, METI adopted a trial

\textsuperscript{269} Store Location Law, Law No. 91 of 1998, art. 4:2(2).

\textsuperscript{270} Id. art. 7; see also Cable 9568, Nov. 4, 1997, supra note 175, para. 5 (noting dissatisfaction with the lack of transparency in the review process under the LSL).

\textsuperscript{271} 1998 NTE, supra note 158, at 202. The Administrative Reform Conference (Gyousei kaikaku kaigi) in its December 1997 report to the Prime Minister had also recommended that Japan adopt a notice and comment process. See Jean Heilman Grier, Is Japan's Regulatory System Becoming More Transparent and Accountable?, in THE 6TH INTERNATIONAL CONFERENCE ON JAPANESE INFORMATION IN SCIENCE, TECHNOLOGY, EDUCATION AND COMMERCE 5 (Stockholm, Swed., Sept. 1999) [hereinafter GRIER STOCKHOLM CONFERENCE PAPER] (on file with author).


\textsuperscript{273} Kisei no settei matawa kaihai ni kakaru iken shoiku tsuzuki [Public Comment Procedure], Cabinet Decision of Mar. 23, 1999. The Procedure requires central government administrative entities (gyousei kikan) to give notice to the public of proposed regulations, to provide an opportunity for the public to submit comments on them, and to take the comments into consideration when they prepare the final regulation; agencies to which the Procedure applies include the Cabinet, the Prime Minister's Office, ministries, agencies, commissions (jinkai-kai), and their subdivisions. Id. § 1 n.5. Regulations covered by the Procedure include cabinet orders (seirei), ordinances of the Prime Minister's Office (furitsu), ministerial ordinances (shoret), and notifications (kokuji). Id. § 1 n.2. For an elaboration of the development and content of the Procedure, see GRIER STOCKHOLM CONFERENCE PAPER, supra note 271, at 7-25.
policy that generally requires its advisory councils to use a “notice and comment” process.\textsuperscript{224}

The U.S. Government pressed METI to allow interested parties to participate in the Joint Council’s development of the environmental guidelines and other implementing measures.\textsuperscript{275} METI refused to bring the Joint Council’s development of the SLL guidelines under its new advisory council policy.\textsuperscript{276} It also resisted applying the new Public Comment Procedure. METI eventually relented in discussions with the United States under the Enhanced Initiative.\textsuperscript{277} It agreed “to facilitate the consistent, transparent, and predictable application” of the SLL by, inter alia, using the Public Comment Procedure in developing the Guideline, ministerial ordinances, additional cabinet orders, and other measures to implement the SLL.\textsuperscript{278}

In accord with METI’s commitment, the Joint Council solicited public comments on the draft guidelines, as well as on an explanatory document that laid out the rationale for the SLL and the Council’s recommendations.\textsuperscript{279} Even though over 100 parties, in-

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\textsuperscript{275} SUBMISSION BY THE GOVERNMENT OF THE UNITED STATES TO THE GOVERNMENT OF JAPAN REGARDING DEREGULATION, COMPETITION POLICY, AND TRANSPARENCY AND OTHER GOVERNMENT PRACTICES IN JAPAN 36 (Oct. 7, 1998) (setting Japan’s adoption of a public comment process as a priority in talks under the Enhanced Initiative on Deregulation and Competition Policy) [hereinafter SUBMISSION BY THE GOVERNMENT, Oct. 7, 1998]. Because the United States had little opportunity for input into the development of the SLL, it was particularly insistent that Japan allow public input into its guideline development process. Cable 837, Feb. 3, 1998, supra note 236, paras. 3, 5.

\textsuperscript{276} Cable 7076, Sept. 2, 1998, supra note 274, para. 2.

\textsuperscript{277} ENHANCED INITIATIVE, supra note 126.

\textsuperscript{278} See SECOND JOINT REPORT, supra note 200, at 17. Earlier, the Cabinet had issued an Order setting the threshold for the Law’s coverage at 1000 m\textsuperscript{2} in retail space. SLL Cabinet Order, Cabinet Order No. 327 of 1998, art. 4.

\textsuperscript{279} See MITI Seeks Comments on Draft LSRLL Guidelines, Cable 3631 from U.S. Embassy, Tokyo, to U.S. Dep’t of Commerce, Wash., D.C., para. 2 (May 7, 1999) (on file with author). It set a thirty-day comment period for both documents, until May 20, 1999. Id. Later, the Joint Council solicited public comments on a draft ministerial ordinance implementing various provisions of the SLL. Cable 5812, July 15, 1999, supra note 254.
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cluding the U.S. Government and foreign and domestic retailers, submitted detailed comments on the drafts, METI and the Joint Council finalized the guidelines and explanatory document only days after the public comment period ended. They made only minor changes in both documents. This led the United States to charge that METI's treatment of the public comments "call[ed] into question the credibility of the public comment process." METI's actions suggest that its use of the Public Comment Procedure was "only a pro forma exercise in which the outcome (the final regulation) is predetermined."

4.3.2. Content of the Guideline

On June 30, 1999, METI adopted a "Guideline Related to Items that Should Be Taken into Consideration by Persons Who Establish Large-Scale Retail Stores" ("Guideline"). It provides detailed standards in four areas: parking, traffic, noise, and waste disposal. The Guideline sets out responsibilities of store developers, as well as "the basis" on which prefectures and local residents are to evaluate proposed large stores.

Traffic and Parking. With regard to traffic and parking, the Guideline addresses the need for a store developer to avoid, or at least alleviate, inconveniencing local residents and businesses as a result of increased traffic that will follow the opening of a new store. To that end, the Guideline directs developers to address

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280 USTR, Submission of Comments by the Government of the United States on the Government of Japan's Guideline Established Under the Large-Scale Retail Store Location Law (DAITEN-RICHI HO) 6, 7 (May 20, 1999) [hereinafter U.S. Comments on Guideline].

281 JOINT COUNCIL, DAIKIBO KOURI TEMPO RICCHI HOU DAI 4 JO NO SHISHIN (AI) NO SAKUTEI NI ATTATE [ESTABLISHMENT OF GUIDELINE IN ARTICLE 4 OF THE LARGE-SCALE RETAIL STORE LOCATION LAW] (May 31, 1999).

282 USTR, Access to Japan's Photographic Film and Paper Market: Report on Japan's Implementation of Its WTO Representations 6 (June 9, 1999); see also GRIER STOCKHOLM CONFERENCE PAPER, supra note 273, at 22-24 (noting that the shortcomings in the public comment procedures may undermine their effectiveness).

283 GRIER STOCKHOLM CONFERENCE PAPER, supra note 273, at 13.

284 METI, DAIKIBO KOURI TEMPO O SETCHEI SURU MONO GA HAIRYO-SUBEKI JIKO NI KANSURU SHISHIN [GUIDELINE RELATED TO ITEMS THAT SHOULD BE TAKEN INTO CONSIDERATION BY PERSONS WHO ESTABLISH LARGE-SCALE RETAIL STORES], Notice (Kokji) No. 375 of June 30, 1999 [hereinafter GUIDELINE].

285 Id. at 1.

286 Id. at 3.
five issues: (1) automobile parking spaces;\(^{287}\) (2) location and structure of parking lots;\(^{288}\) (3) parking spaces for bicycles;\(^{289}\) (4) facilities for delivery vehicles;\(^{290}\) and (5) appropriate routes for access to the store.\(^{291}\) Developers are to provide parking spaces sufficient to meet a store's most crowded one-hour peak of the year.\(^{292}\) The Guideline also sets out the formula and assumptions that developers should use to calculate the parking spaces that will be needed.\(^{293}\) Where due to "special conditions" use of the formula would not be appropriate, other calculation methods may be used if the developer provides "a clear rationale" based on data from similar stores.\(^{294}\)

In addition to providing sufficient parking spaces, developers must take measures to prevent a queue of automobiles waiting for a parking space. They can do so by adjusting the number and location of entrances and exits to parking facilities or providing an area on the store premises for automobiles to wait for a parking space. Other options include dispersing parking locations, assigning employees to direct traffic into the parking facilities, and separating paths for automobiles and pedestrians.\(^{295}\) Developers are expected to select from the measures in the Guideline "in a rational manner."\(^{296}\)

Noise. The Guideline requires developers, in cooperation with their retail tenants, to take appropriate measures to prevent or alleviate noise that accompanies the location or operation of a large

\(^{287}\) Id. at 4-7.

\(^{288}\) Id. at 7-9.

\(^{289}\) Id. at 9-10. Store developers are to provide bicycle parking to meet a one-hour peak. Because the parking spaces needed for bicycles will vary significantly from store to store, the Guideline concluded that it would be inappropriate to establish a uniform standard. Id. at 10.

\(^{290}\) Id. at 10-11.

\(^{291}\) Id. at 11-13.

\(^{292}\) Id. at 4.

\(^{293}\) Id. at 4-7.

\(^{294}\) Id. at 4. "Special conditions" include stores of a special nature such as furniture stores where the number of daily customers is expected to be lower than the typical store and areas in which the use of cars is excessively low or high. Id. at 4-5.

\(^{295}\) See id. at 7-9. Additional parking and traffic measures that developers are to take include measures to prevent delivery trucks from causing traffic congestion around the store and to establish appropriate routes for access to a store, such as maps to parking lots. Id. at 10-12.

\(^{296}\) See id. at 7, 11.
store. They are to take into account the type of noise, where and when it is generated, the conditions of the surrounding area, and existing laws and regulations. Developers are to consider noise when they select store facilities and decide on their location. The Guideline also lists specific measures that may be taken to alleviate noise generated by store deliveries, public relations and advertising activities, facilities attached to the store, and waste collection.

Developers must select the measures that they intend to take to prevent or alleviate noise. Then, they must estimate three types of noise that will be generated by the new store and evaluate whether the measures they have selected will be appropriate. Three noise categories exist: (1) fixed noise that remains at a constant level over time (e.g., freezers and air conditioning and ventilation equipment); (2) fluctuating noise (e.g., cars within a store's lot, idling of delivery trucks and waste collection); and (3) shock noise (noise of a short duration resulting from such activities as pushing handcarts). The Guideline prescribes estimation and evaluation methods that developers are to use, unless special factors make such methods inappropriate. In such cases, the developer can use another method for which he can provide a rationale.

The Guideline requires developers to make efforts to keep the overall noise levels below standard levels set out in the Environmental Agency's Environmental Noise Standard. With respect

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297 Id. at 14.
299 Id. at 14. For example, they should not face facilities and equipment toward residential areas. Id.
300 Id. at 15. The measures include construction-related measures, such as "using noise-free materials for floors and walls" of the delivery facility, and measures related to store operations, such as prohibiting delivery vehicles from idling. Id.
301 Id. Measures include the placement and volume of loudspeakers. Id.
303 Id. at 17. To alleviate noise from freezers, air conditioners, and ventilation equipment, developers may use low-noise equipment and installation of walls. To address noise from parking lots, developers may consider construction of enclosed parking facilities. Id. at 16.
302 Id. at 17.
304 See id. at 17-18.
305 See id. at 19-20. The standard referred to is the Environmental Quality Standard for Noise, Environmental Agency Notification No. 64 of Sept. 30, 1993,
to “night-time” noise resulting from store operations and the use of its facilities and equipment, developers are to attempt to keep the noise levels below the “Regulated Night-Time Standards under the Noise Prevention Law.”

Waste. The waste provisions in the Guideline apply to the storage, transportation, and disposal of waste produced by the retail establishments operating within a store. Developers must calculate waste storage capacity using the calculation formula set out in the Guideline. The three categories of waste for which they must make calculations are paper, cans and bottles, and garbage and other types of waste. The calculations will also depend upon the type of retail store generating the waste; that is, general, clothing, food, or housing and consumer goods. As with the other environmental factors, the Guideline also identifies measures developers should consider. These include the frequent collection of waste and the selection of proper garbage collectors.

The Guideline requires store developers to provide the results of, as well as the basis for, estimations that they use to determine parking lot space, loading and unloading facilities, noise prevention measures, and garbage-handling facilities. They must make estimates using “rational” methods.

4.3.3. Critique of the Guideline

The Guideline generated severe comments from both the U.S. Government and the European Commission (“EC”). Both commented to METI that the Guideline appears to convert the SLL from a notification system to an approval system. It does so by requiring developers to conduct extensive research and prepare extensive documentation to prove, before they open a large store, that they have met all the environmental standards.

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306 GUIDELINE, supra note 284, at 19.
307 Id. at 22.
308 See id. at 22-26. Additional waste considerations include the placement and structure of the waste disposal facility. Id. at 26-27.
309 See id. at 27. The Guideline also requires developers to follow local waste disposal laws and local regulations in disposing of garbage. Id. at 22.
310 Cable 988, Feb. 8, 2000, supra note 263, para. 12.
that such a store will meet the standards in the Guideline. The United States argued that stores should be allowed to respond to environmental problems that arise after they open.

The United States also raised the concern that the Guideline imposes obligations on store developers that exceed existing legal requirements and that do not have to be met by existing stores and other types of commercial enterprises. METI responded that the Guideline is intended to impose higher standards for parking, noise, and waste on new stores than those which already exist.

The solicitation of public comments on the draft Guideline and ministerial ordinance increased the transparency of the process, even though METI treatment of the public comments did not significantly improve the public’s input into the final Guideline. Interested parties could only complain to METI about its conduct concerning the rulemaking process, as there is no basis in Japanese law for judicial review of rulemaking procedures. Since the Cabinet adopted the Public Comment Procedure as an administrative measure (a Cabinet decision), it is not reviewable under Japan’s Administrative Case Litigation Act.

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311 U.S. COMMENTS ON GUIDELINE, supra note 280, at 5. EUROPEAN COMM., EU COMMENTS ON THE DRAFT OF A GUIDELINE TO BE ESTABLISHED UNDER THE NEW LARGE SCALE RETAIL STORE LOCATION LAW, ARTICLE 4, 2 (May 1999) (pointing to the “significant amount of ex ante information to accompany a notification”); see also MITI Responds to Embassy’s Retail Store Guidelines Questions, Cable 818 from U.S. Embassy, Tokyo, to U.S. Dep’t of Commerce, Wash., D.C., para. 12 (May 13, 1999) (on file with author) (stating that the process set out in the Guideline “establishes a de facto approval system”).

312 U.S. COMMENTS ON GUIDELINE, supra note 280, at 5. The United States pointed out that the draft Ministerial Ordinance underscored concerns that the new large-store opening process may create a de facto prior evaluation system rather than an ex post facto verification system. SUBMISSION OF COMMENTS BY THE GOVERNMENT OF THE UNITED STATES ON THE JAPANESE MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY’S PROPOSED MINISTERIAL ORDINANCE UNDER THE DAIHEN-RICCHI Ho 1 (July 30, 1999).

313 See U.S. COMMENTS ON GUIDELINE, supra note 280, at 5-6 (citing the noise provisions as an example of such requirements). According to the United States, based on its discussions with the Japanese Environmental Agency, the “requirement that large store openers research and estimate potential noise levels is unique... [other large facilities—such as bowling alleys, parking garages, and even most factories—are not required to do the same.” Cable 5812, July 15, 1999, supra note 254, para. 15.


315 See Gyousei jiken sosho hou [Administrative Case Litigation Law], Law No. 139 of 1962, as amended.
4.4. Local Government Implementation of the SLL

This Section considers the apprehensions surrounding local government implementation of the new SLL, the constraints on local governments, as well as METI’s authority to ensure compliance with the new SLL.

4.4.1. Apprehensions Regarding Implementation of the SLL

The provisions of the SLL have been described as seemingly “innocuous.” However, sixty years of experience with Japan’s protection of the economic interests of small retailers through regulation of large stores have left their mark. There is deep skepticism regarding the SLL. Large retailers have two principal concerns. First, they fear the potential abuse of the SLL to continue protecting the business interests of small- and medium-sized retailers under the guise of environmental protection. Second, they are concerned with the inconsistent application of the new SLL by local governments across Japan, and the adoption of more stringent local measures.

These concerns were fueled by local government preparations of local ordinances to carry out their new responsibilities under the SLL. Extensive press reporting pointed to a number of potential problems with the ordinances. These include standards that are

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316 Maki Hishikawa, Tokyo Takes on Superstores—Again, ASIAN WALL ST. J., Mar. 8, 2000, at 12.
317 Cable 988, Feb. 8, 2000, supra note 263, para. 6; see 1998 NTE, supra note 158, at 201.
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strict than METI's Guideline,319 requirement of prior consultations before a notification is filed,320 and higher costs because of extensive documentation requirements.321 There are also fears that local governments would not be able to resist the pressures from local retailers to curtail large store competition.322 Reassurances by METI that the SLL will make it easier to open new stores have not been alleviated the concerns.323

4.4.2. Constraints on Authority of Local Governments Under the SLL

The question of whether the fears of large retailers were unfounded will depend, at least in part, on the ability of the central government to ensure proper implementation of the SLL by local governments. Japan's unitary system authorized local legislatures to enact their own ordinances (jorei) and chief executive officers of local governments to issue regulations (kisoku), "so long as they are not contrary to the laws enacted by the Diet" or the orders of the national government.324 While the Japanese Constitution generally recognizes "the principle of local autonomy"325 and the right of local governments "to manage their property, affairs, and administration,"326 in fact, most "important items of local government are regulated by national statutes."327

319 See, e.g., Uncertainty Looming, supra note 318, at 14 (discussing the need for deregulation).


322 See Hishikawa, supra note 316.

323 Id.

324 KENPO [Constitution], art. 94 (Japan); THE JAPANESE LEGAL SYSTEM 37, 57 (Hideo Tanaka ed., 1976).

325 KENPO [Constitution], art. 92 (Japan).

326 KENPO [Constitution], art. 94 (Japan).

327 THE JAPANESE LEGAL SYSTEM, supra note 324, at 44; see also Local Autonomy Law, Law No. 67 of 1974, art. 14.
As a national statute regulating local government, the SLL both
gives authority to and takes authority from local governments.
Enactment of the SLL gives local governments exclusive authority
to review store plans and then make recommendations. At the
same time, the SLL ostensibly curbs local authority in three im-
portant ways.

First, the SLL restricts local governments' review of large store
plans and recommendations to developers with respect to envi-
ronmental factors, based on METI's environmental Guideline.328

Second and more important, the SLL prohibits local govern-
ments from taking into account "the economic needs" of a par-
ticular area in evaluating proposed stores plans.329 METI says this
means: "Local governments ... cannot use any supply/demand
adjustment mechanism."330 This provision is the counterpart of the
repeal of the LSL and is intended to ensure that Japan is not again
vulnerable to claims of violating its GATS obligations. Third, local
governments cannot stop a store from opening. At the end of the
process, all a local government can do is to recommend adjust-
ments to a developer in the interest of preserving the environment.
If the developer ignores the recommendation, the local government
lacks the authority to compel the adjustment or halt the project.331

The effectiveness of these formal constraints on local governments
will depend on the ability of the central government, namely
METI, to ensure compliance.

4.4.3. METI's Authority over Local Governments

To ensure that the local jurisdictions do not use the SLL and
other measures to "unfairly restrict competition by large retailers,"
the U.S. government asked METI, inter alia, to retain authority
over local governments. Specifically, the United States urged

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328 Store Location Law, Law No. 91 of 1998, arts. 8:4, 9:1; see also SECOND JOINT
REPORT, supra note 200, at 17 (stating that MITI will "closely monitor local gov-
ernments' implementation of the Law").

329 Store Location Law, Law No. 91 of 1998, art. 13; see also MITI OUTLINE, su-
pra note 253, at 2 (explaining that the new law aims at "maintaining the living en-
vironment of areas within the vicinity of large scale retail stores"); SECOND JOINT
REPORT, supra note 200, at 16 (stating that Japan enacted the SLL "from the view-
point of abolishing supply/demand adjustment concerning the opening and op-
erating of large-scale retail stores and preserving the living environment sur-
rounding such stores").

330 MITI OUTLINE, supra note 253, at 5.

331 See supra note 267 and accompanying text.
METI to establish a formal process at the central government level for hearing and acting on retailers’ complaints if local governments unreasonably restrict large retail stores.\(^{332}\) METI would only commit to “[t]ake appropriate measures, as necessary, based on the Local Autonomy Law, including giving technical advice and recommendations to local governments, to facilitate resolution of complaints from any interested party regarding the application of the Law.”\(^{333}\)

While the central government may intervene if local governments do not act in accord with national law, its ability to do so is circumscribed by the Local Autonomy Law.\(^{334}\) That Law authorizes the central government to make recommendations to a local government that is not appropriately complying with a law.\(^{335}\) Only in exceptional cases is the Prime Minister authorized to take more forceful action.\(^{336}\) Under the Local Autonomy Law, METI, as the drafter of the SLL, assumes responsibility for its implementation.\(^{337}\) However, METI has said that central government intervention in local government SLL implementation would not be preemptive; it would only be made after a local government improperly makes a commercial adjustment.\(^{338}\)

METI has contended that only Yokohama and Sendai have adopted standards that are more stringent than its Guideline.\(^{339}\) For example, Yokohama City, on April 11, 2000, introduced an “Implementation Outline” for the SLL that set parking standards for large stores, located within 100 meters of a train station, and with retail space of 20,000 m\(^2\), at 660 parking spaces, significantly


\(^{333}\) Second Joint Report, supra note 200, at 17. In response to the U.S. request that the Japanese government establish a dispute settlement process, MITI established nine contact points—one in its headquarters in Tokyo and one in each of its eight regional bureaus—“to receive and facilitate resolution of complaints from any interested party regarding the application of the Law.” Id.; see also Cable 938, Feb. 8, 2000, supra note 263 (noting that METI would establish contact points to ensure uniform enforcement of the SLL).

\(^{334}\) Local Autonomy Law, Law No. 67 of 1974, art. 14(1); Cable 837, Feb. 3, 1998, supra note 236; The Japanese Legal System, supra note 324, at 57.

\(^{335}\) Local Autonomy Law, Law No. 67 of 1974.

\(^{336}\) Id.

\(^{337}\) Cable 837, Feb. 3, 1998, supra note 236, para. 8.

\(^{338}\) Id.

greater than the 242 parking places prescribed by the Guideline.\textsuperscript{340} In both the Yokohama and Sendai cases, METI claimed that, after scrutiny and discussions with the governments, the Ministry had concluded that their measures were within the latitude of local governments under the Guideline.\textsuperscript{341} As to other local measures that the press reported to be inconsistent with METI's Guideline or procedures, METI asserted that they were merely voluntary.\textsuperscript{342}

METI has stated that should local governments establish standards that are stricter than those in the Guideline, "[METI] has the responsibility to clarify such standards and ensure that they do not go beyond the requirements of the national law."\textsuperscript{343} In several instances, METI requested changes in local government implementing materials.\textsuperscript{344}

METI reportedly told small- and medium-sized retailers that the new regulatory regime would make store openings more difficult and would allow them to restrict the operations of large stores.\textsuperscript{345} A survey in June 1998 revealed that nearly thirty percent of the surveyed municipalities planned to establish special zoning areas that would enable them to decide whether or not to allow large retail stores and over eleven percent planned to restrict the opening of large stores.\textsuperscript{346}

Under the Ramseyer and Rosenbluth thesis, an important element in determining the latitude that METI will allow local governments in their application of the new SLL will depend upon the LDP. Before the Lower House election in July 2000, in which the

\textsuperscript{340} Id.; see also Yokohama City to Set up Own Standards for Application of Large-Size Store Location Law; First Case Among Local Governments Throughout the Nation; Much Stricter Standard for Capacity of Parking Lots, Nihon Keizai Shimbun, Apr. 11, 2000, at 5, translated in Cable 2608 from U.S. Embassy, Tokyo, to U.S. Dep't of Commerce, Wash., D.C. (Apr. 11, 2000) (on file with author).

\textsuperscript{341} Cable 3148, May 2, 2000, supra note 339, para. 11.

\textsuperscript{342} Id. para. 13.

\textsuperscript{343} Cable 988, Feb. 8, 2000, supra note 263, para. 19.

\textsuperscript{344} Three days before the June 1, 2000 implementation of the SLL, METI requested three local governments (Fukuoka Prefecture, Kumamoto Prefecture, and Fukuoka City) to make certain changes to their store opening manuals. LSRLL: Kyushu Local Governments Perplexed by MITI's Last-Minute Changes to Store-Opening Manuals, Cable 109 from U.S. Consulate, Fukuoka, to U.S. Dep't of Commerce, Wash., D.C. (June 14, 2000) (on file with author).


\textsuperscript{346} BNA, June 3, 1998, supra note 225, at 951.
LDP suffered heavy losses in urban areas, conservative elements of the Party had indicated that they wanted to re-examine large store regulation (with the suggestion that they might tighten it). Late in 1999, a group of LDP politicians created a “Committee to Reconsider Deregulation”, which is “calling for revisions in government-sponsored deregulation programs.” By March 2000, this Committee had grown to around 165 members, slightly less than half of the LDP’s total membership in the Diet. They are concerned with the impact of deregulation on small business, in particular with “complaints from small retailers about increased competition from supermarkets and discount stores.” As the LDP prepares for the upcoming July 2001 election in the Upper House, which the LDP does not control, the Party can be expected to continue to give close attention to the interests of its small retailer constituency. It remains to be seen whether the LDP will seek measures that would increase its electoral support among consumers in urban areas. Consumers are generally more concerned with lower prices and convenient shopping than with protecting the country’s “mom and pop” stores. If the LDP’s reliance on the small business constituency were to soften, one could expect that METI would assume a less tolerant attitude toward recalcitrant local governments that regulate large stores too stringently.

5. CONCLUSION

For sixty years, METI (and its predecessors) has regulated large retail stores. It initially opposed the enactment of the first law, the DSL, out of concern that such a law would impede modernization of the retail sector. When the politicians insisted on measures to protect their important small retail constituency, METI took the initiative to design and implement the regulation. This became its modus operandi. When called upon by the politicians to impose regulations in order to protect small retailers from their large competitors, METI willingly, even willfully, designed stringent regulatory measures.

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348 Mulgan, supra note 7, at 42.

349 Id.

350 Id. at 43.
When the DSL had outlived its usefulness, METI devised the LSL as a means of liberalizing store regulation by moving from the permit system of the DSL to a notification system. However, the Ministry was forced to retreat from this liberalization movement and add an adjustment process that became the bane of large retailers. When the LSL failed to satisfy small retailers, METI demonstrated the zeal that it could bring to regulation in the interest of placating the important LDP constituency. It did not hesitate to resort to administrative guidance that exceeded the strictures of the law, and effectively delegated LSL authority to the players, thus "privatizing" large store regulation. METI's response to large store regulation, as discussed above, fits the Ramseyer and Rosenbluth model of bureaucrats who "faithfully implement LDP policy preferences" out of self-interest.\(^{351}\)

When Japan was faced with the threat of a finding that the LSL violated its international trade obligations in the WTO, METI orchestrated and firmly controlled the LSL's repeal and replacement. METI used the deliberations of its advisory council as a cover to put before the public its new store regulatory proposal. It persuaded the LDP and small retailers to accept the new SLL by developing an attractive legislative package, which included funds for the revitalization of downtown shopping areas and authority for local governments to develop zones from which large stores could be excluded.

The new SLL placed the day-to-day responsibility for large store regulation in the hands of local governments. However, METI incorporated constraints on local governments. It limited its scrutiny of new stores to environmental factors and prohibited consideration of an area's "economic needs." Accordingly, local governments cannot consider the impact of a new store on local retailers. Nor can local governments, under the SLL, halt the opening of a store that has complied with the procedures in the Law or force a developer to adjust its store plans.

METI determined the details of the new regulatory regime. It reluctantly increased the transparency of, and accepted public comments on, the measures it adopted to implement the SLL. However, these moves had little effect on the final measures.

On its face, the SLL appears to be a major improvement over the LSL from the perspective of large retailers. However, from

\(^{351}\) RAMSEYER & ROSENBLUTH, supra note 12, at 12-13.
their long experience with the LSL, large retailers are skeptical regarding how the new SLL will be implemented. Their skepticism is based on two primary fears. First, they fear local governments will use environmental protection as a guise for protecting the local retailers. Second, they are concerned with inconsistent application of the SLL by local governments. Such an application would render the store-opening process more difficult and burdensome. In addition, because of the sensitive relationship between the central government and local governments, large retailers are uncertain as to whether and how METI will respond if a local government inappropriately impedes the opening of a new store.

METI has been cagey regarding the new regulatory regime. It has sought to reassure large retailers that the local governments will properly follow the SLL and promised to monitor their activities and help resolve complaints. But, when two local governments (Yokohama and Sendai) developed local measures that were regarded as more stringent than the SLL, METI found justifications for them. Moreover, it was METI that put together the three-part store regulatory package that “could be used indirectly by small stores to limit the business operations of their prospective large store competitors.”352

While METI has been the mastermind and primary mover behind this latest regulatory policy, the politicians must not be forgotten. If small retailers become unhappy with the new store regulations, the LDP may have little choice but to demand that METI tighten the regulations. Another side of the political equation is the role of the consumers who are more concerned with lower prices and convenient shopping than with protecting the country’s “mom and pop” stores. In light of the LDP’s severe losses in urban areas in the June 2000 Lower House election, it remains to be seen whether the LDP will take a more lenient stance toward large stores as a means of garnering the support of the urban voters in future elections, including in the Upper House election in July 2001.

For these reasons, at this time, the new SLL appears to be “much less of an unequivocal victory for retail market liberaliza-

352 Cable 929, Feb. 5, 1998, supra note 218, para. 4; see also YOMIURI, May 30, 2000, supra note 218 (explaining that, while METI was doing away with the statute explicitly designed to protect small retailers, each of the new three-part regulatory laws could be used to the small retailers’ advantage in minimizing the impact from large store competition on their own operations).
tion than was originally thought.\footnote{Yomiuri, May 30, 2000, supra note 218, at 45.} However, it is too early in its implementation to reach a firm conclusion. Given the low productivity of Japan’s retail sector, which is pulled down by the “mom and pop” stores, it would be in Japan’s overall interest to reduce the inefficiencies in the small retailing sector and promote large stores. But it remains to be seen whether the traditional forces for the protection of small retailers will prevail over liberalization proponents concerned with the overall health of the retail sector.