A Survey of Environmental Law and Policy in Japan

Shiro Kawashima

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A Survey of Environmental Law and Policy in Japan†

Shiro Kawashima††

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I. Introduction

Almost all noteworthy advances in the system of environmental protection in Japan have been made subsequent to accidents which had disastrous effects on human health and the environment. Although Japan was remarkably successful in developing a highly industrialized society shortly after World War II, it cannot continue its industrial and economic progress without giving proper attention to environmental protection.

On November 19, 1993, the Fundamental Act for Environment went into effect in Japan, replacing the Fundamental Act for Environmental Pollution Prevention of 1967 and absorbing the basic idea of the Natural Environment Preservation Act of 1972. This new law is labeled “fundamental” because it unites two separate policies into one basic approach on environmental pollution prevention and nature preservation. It also prescribes basic environmental protection measures that the Japanese government should follow, while also taking into account modern global perspectives. The Fundamental Act takes a new step towards the pursuit of comprehensive environmental pro-

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1 Kankyō Kihonhō (The Fundamental Act for Environment), Law No. 91 of 1993. See infra part III.C.
2 Kōgai Taisaku Kihonhō (The Fundamental Act for Environmental Pollution Prevention), Law No. 132 of 1967; Shizen Kankyō Hozenhō (The Natural Environment Preservation Act), Law No. 85 of 1972. See infra part III.A-B.
tection in Japan. However, despite its lofty goals, the content and practical application of the Fundamental Act warrant careful examination. Despite the enactment of the Fundamental Act for Environment, there remain many difficult problems to be solved. Therefore, this Article will survey the general history, law, and policy of the Japanese environmental protection system and discuss possible avenues of reform.

The scope of environmental protection in Japan spans the issues of the control of environmental pollution to the protection of natural, wildlife, cultural, and historical environments. This Article will primarily address the Japanese environmental pollution prevention system and its problems, while only briefly addressing other fields of environmental law. This is not because the latter occupy a subordinate position in Japanese environmental law, but because the present environmental pollution control system is a legacy of several tragic cases, and does not satisfactorily remedy the problems it confronts. Of course, the enactment of the Fundamental Act for Environment does not announce an official end to pollution, but we cannot understand the total Japanese environmental protection system without examining the current function of environmental pollution prevention and its system of remedies.

II. Historical Perspectives of Japanese Environmental Protection Policy and Law

A. Pre-World War II Period

It is impossible to indicate the exact point in Japanese history when popular consciousness of the destruction of the natural environment spurred the beginning of modern environmental protection. However, by the 1868 Meiji Revolution, a period of industrial revolution whose slogan was “increase of industrial products,” the consequences of such an all-out drive for industrialization could already be seen in the natural scenery of Japan.


4 The beginning of the Meiji era that overcame feudalism was the Copernican changing time. For instance, many former feudal lords voluntarily razed their own castles, which were historical treasures from the modern viewpoint, as a token of allegiance to the Emperor. Soon, many Buddhist temples and other products were destroyed or sold because the Meiji government had ordered a separation of Shintoism and Buddhism by declaring Shintoism to be the national religion. However, a short time later, the Meiji Government recanted its destructive policy and permitted the preservation of historical buildings and artifacts. Moreover, after several historic national treasures were sold to foreign countries, statutes were enacted which restricted the exportation of historical treasures. See Colloquy, Rekishi Teki Kankyô No Hô To Saisei [Protection and Reproduction of Historical Environment], 710 JURUSUTO 18, 21-22 (1980) (Keikichi Kihara speaking). See also Alan S. Miller & Curtis Moore, Japan and the Global Environment, 1 DUKE ENVTL. L. POL'Y F. 35, 36 (1991) (“In the Judeo-Christian tradition, man was placed above and apart from the rest of nature at creation. In
1. Environmental Dispute Cases

The Ashio Copper Poison case is an early example in the history of environmental protection in Japan where extensive local environmental pollution and suffering became a social problem. During a period of national prosperity and strength in the 1880s, water and soil pollution were damaging Yanaka Village, located in the Tochigi Prefecture. This community, nestled on the banks of the Watarase River, was downstream from Furukawa Mining Company, which maintained an ongoing copper mining facility. Furukawa Mining Company was one of the biggest mining companies in Japan at that time. The destruction of crops and the killing of fish caused by the water and soil pollution created by the mining company spurred the villagers to action. The villagers drafted a formal petition to the Minister of Agriculture and Commerce calling for the temporary closure of the mine in order to clean up the pollution.

During this time, Shōzō Tanaka, a representative of Tochigi Prefecture who was in favor of resolving the problem through formal dispute settlement, made an impassioned speech before the House of Representatives. He strongly called on the national government to protect the peoples' constitutional property rights and to revoke the license for Furukawa's mining operation. However, the Meiji government failed to adequately address the concerns of Shōzō Tanaka and the Yanaka Villagers. As a result, about two thousand villagers marched on the Imperial Household, demanding relief and the closing of the Ashio mine. The marchers were intercepted by the police, and a violent clash broke out. Police power finally suppressed the conflict, resulting in many injuries and the arrest of approximately one hundred marchers.

Criminal charges of sedition and incitement to riot were subsequently brought against those persons arrested in the march on the

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5 See F.G. Notehelfer, Japan's First Pollution Incident, 1 JAPANESE STUD. 351, 352 (1975); JULIAN GRESSER ET AL., ENVIRONMENTAL LAW IN JAPAN 413 n.3 (1981) (This is a comprehensive book on the Japanese environmental law system upon whose authority and information the author has heavily relied.).

6 Ibid., supra note 5, at 4-5.

7 Id. at 5.

8 Tanaka asserted that Article XXVII of Dai Nippon Teikoku Kenpō (The Constitution of the Empire of Japan of 1889 [Meiji Constitution]) protected the people from infringement of their property. See id. at 17. Article XXVII of the Meiji Constitution provided that:

1. The right of property of every Japanese subject shall remain inviolate.

2. Measures necessary to be taken for the public benefit shall be provided for by law.

9 See THE JAPANESE LEGAL SYSTEM 19 (Hideo Tanaka ed., 1976) [hereinafter Tanaka].

9 From the onset of the situation, Tanaka had implored the Yanaka villagers to refrain from the use of force and from marching on the Imperial Household. However, they rejected his exhortations. Dr. Kenneth Strong, Tanaka Shōzō: Meiji Hero and Pioneer Against Pollution, 67 JAPAN SOC'Y OF LONDON 6, 10 (1972).
Imperial Household. The Miyagi Court of Appeals dismissed the criminal case at its close in 1902, holding that a technical defect in the bill of indictment rendered it invalid. Meanwhile, Shōzō Tanaka had resigned from the House of Representatives. Still concerned with the environmental pollution caused by the Ashio Mine, Tanaka planned to make a personal appeal to the Meiji Emperor as he rode through the streets in his imperial carriage. This personal appeal was attempted but Tanaka was intercepted by an imperial guard before he could reach the emperor. The emperor was not even aware of his approach to the imperial carriage. Nothing came of Tanaka’s personal appeal save his imprisonment for blasphemy against the Emperor.

Rising public sympathy for the villagers and Tanaka forced the government to take some measures to alleviate and solve the water and soil pollution problems. Finally, the government condemned all polluted lands as an exercise of the governmental right of taking. Under the pretext of flood prevention, the government planned to create a vast reservoir on the land where Yanaka Village stood. The polluted lands were then flooded to become part of the reservoir. The villagers were thereby evicted with little or no compensation. Eviction of the villagers and construction of the reservoir were sweeping “remedies” implemented by the government for the purpose of resolving the political dispute.

Remarkably, the Ashio Copper Poison case came to a final resolution. The Meiji Constitution and the Mining Act of 1890 were thought to recognize the principle that the exercise of a property right should not infringe on the legal interests of others. However, the interests of pollution victims were routinely subordinated to those of the property right holders, particularly those of industrial companies.

In the pre-World War II era, there were several serious cases involving environmental pollution. One of the major civil cases was the Osaka Alkali Company case. The Osaka Alkali Company operated a copper refining plant that discharged sulfurous fumes into the air. The local farmers, suffering from heavy crop damage, sued the company for negligence based on the Civil Code of 1896. On December 22, 1916, the Great Court of Judicature (then the Supreme Court in Japan) held that the company was liable for the damages caused by its negligence.

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10 Gresser et al., supra note 5, at 7-8. For a general explanation of the judicial system under the Meiji Constitution, see Tanaka, supra note 8, at 53-54.
11 Strong, supra note 9, at 10.
12 After he was released from prison by the Meiji government due to “mental illness,” Tanaka spent the rest of his life visiting former Yanaka villagers and consoling them. He is regarded as the first Japanese official to take environmental problems seriously. Id. at 10.
13 Id. at 10-11.
14 Astonishingly enough, the final mediation settlement with the Furukawa Company was reached in 1974, almost a full century after the dispute began. Gresser et al., supra note 5, at 8.
15 Harada, supra note 3, at 31; Gresser et al., supra note 5, at 12.
16 Article 709 of the Japanese Civil Code provided that: “A person who violates intentionally or negligently the legal interests of another is liable to make compensation for dam-
Japan) established a general rule on negligence. This rule maintained that if a company had adopted reasonably available pollution control technology pursuant to the nature of the business of the company, it would not be held liable for negligence even if damage or injury to another occurred by chance. However, on remand the Osaka Court of Appeals held that the company had not used reasonably available pollution control technology and therefore should be liable for the damage.

This case shows that the judicial remedy for negligence depended greatly on a court's willingness to broadly construe such a general rule. The dependence upon judicial magnanimity for success proved to be a great weakness to environmental pollution plaintiffs. With the increasing rise of nationalism and militarism, the buildup of Japan's military arsenal and the industrialism behind it were given the highest priority among those national policies undertaken prior to World War II. In this period the general rule of "reasonably available pollution control technology" served as a hazard to damage suits brought by victims against industrial enterprise.

2. Legislation for Environmental Protection

In the pre-World War II period, there were several statutes which incorporated environmental pollution provisions. For example, such statutes normally included a provision that ordered a factory to stop its operations if it inflicted injury on a neighbor or infringed upon the public interest. These statutes, however, were mainly aimed at the regulation of factory operations from the standpoint of industrial police power, not direct environmental protection. Because the government had put primary emphasis on industrial development, the

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17 Judgment of Dec. 22, 1916, Daishinōin [Great Court of Judicature], 22 Daihan Minroku 2474 (Japan). For an interesting comparison with American courts' attempts to adopt the law of nuisance to the demands of economic development, see Morton J. Horwitz, The Transformation Of American Law, 1780-1860, 74-78 (1992). See also W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 88, at 629 (5th ed. 1984) ("[A]n industrial enterpriser who properly locates a cement plant or a coal-burning electric generator, who exercises utmost care in the utilization of known scientific techniques for minimizing the harm from the emission of noxious smoke, dust, and gas and who is serving society well by engaging in the activity may yet be required to pay for the inevitable harm caused to neighbors.").

18 Judgment of Dec. 27, 1919, Osaka [Court of Appeals], 1659 Shinbun 11 (Japan). In Japan, the Court of Appeals also performs the role of fact finder.

19 See Kikan Oyobi Kiki Torishimari Kisoku (The Steam Boiler Rule of 1889), Police Rule 21; Kögyō Jōrei (The Mining Act of 1890), Law No. 87; Kojyohō (The Factory Act of 1911), Law No. 46. For the translated text of these statutes, see Harada, supra note 3, at 91-92.

20 Harada, supra note 3, at 91-92.

21 Id. at 92.
B. Post-World War II Period

1. Environmental Policy and Law in the Early Post-World War II Era

During the Occupation period from 1945 to 1951, Japan experienced a variety of democratic reforms. The Meiji Constitution was completely revised and became the current democratic Constitution of Japan of 1946. Although there were no specific constitutional articles dealing with environmental protection, some articles were indirectly applicable. For example, the Constitution of Japan guarantees a right to the pursuit of happiness in Article XIII and the right to maintain the minimum standards for wholesome and cultured living of the people in Article XXV. Either of these two articles could be invoked as a constitutional basis for claiming the right to a decent and healthy environment.

The first effort to protect the environment in the post-World War II era was the Tokyo Factory Pollution Prevention Ordinance of 1949. This ordinance was locally based and enacted in Tokyo Prefecture. It required new factories to obtain permits from the city governments. This reporting requirement enabled local governments to...
obtain information necessary to make determinations whether facto-
ries should be refitted in order to make them more environmentally
friendly. Similar ordinances were enacted in Kanagawa Prefecture in
1951, Osaka Prefecture in 1954, and Fukuoka Prefecture in 1955.30
However, because the local governments were inexperienced in con-
trolling environmental pollution, such ordinances were ineffective.31

One of the most extreme episodes of the national pollution prob-
lem of the early postwar period was the Edo River incident. In the
mid-1950s, the Honshū Paper Mill Company obtained a permit from
the Tokyo Metropolitan Government to operate a pulp factory along
the Edo River. In 1958, Edo River fishermen complained to the Hon-
shū Paper Mill Company that the factory waste it discharged was dam-
aging their fisheries.32 When the company failed to respond, several
hundred fishermen forced their way into the plant demanding repara-
tions. In the ensuing riot, sixty-four people were injured and over one
thousand policemen had to be summoned to quell the riot.33 In re-
sponse to the situation, the Cabinet proposed two relevant acts to the
Diet (the legislature in the Japanese government),34 the Water Quality
Preservation Act35 and the Factory Effluent Regulation Act.36 Both
acts passed without significant debate in the Diet in 1958, but later
proved ineffective. Because the established water quality standards ap-
plied only to certain designated areas, the water in undesignated areas
was soon polluted. Moreover, the designation process itself was politi-
cally capricious and haphazard.37 For example, the laws were so inef-
fective that three years after their enactment, the Edo River was still an
undesignated area.38 Even in the 1950s, the principle policy emphasis
in regulating factory operations was on industrial police power rather
than direct protection of the environment.

Although the Smoke and Soot Regulation Act39 was established at

30 Id.
31 For example, the terms of the ordinances were vague and the standards for factory
operations were either absent or unclear. Moreover, there were no penalties for violations.
See id.
32 Id. at 17; HARADA, supra note 3, at 92.
33 GRESSER ET AL., supra note 5, at 17.
34 For a discussion of the government system under the Constitution of Japan, see
Tanaka, supra note 8, at 36-43.
35 Kökyōyō Suiiki No Suishitsu Hozen Ni Kansuru Hōritsu (Water Quality Preservation
Act), Law No. 181 of 1958. This Act gave the national government the authority to establish
a water quality standard and to designate areas where the water quality should satisfy such a
standard.
36 Köjō Haisui Tō No Kisei Ni Kansuru Hōritsu (Factory Effluent Regulation Act), Law
No. 182 of 1958. This Act enabled the national government to regulate factory effluence
based on the water quality standard. For more information on the relationship between
these two laws, see GRESSER ET AL., supra note 5, at 17-18.
37 The selection process was inefficient in meeting its goal of pollution control because
the entire system was driven by political pressures, rather than the actual environmental and
industrial situation. See GRESSER ET AL., supra note 5, at 18.
38 Id. at 17-18.
39 Baien Kiseihō (Smoke and Soot Regulation Act), Law No. 146 of 1962. This Act gave
the national government level in 1962, this Act’s Purpose Clause embodied a common characteristic of environmental laws at that time. This clause directed that the government’s effort to prevent harm to public health should be “harmonized” with measures to promote sound industrial development.\textsuperscript{40} Industrial reconstruction and economic development were the primary goals, with environmental protection statutes being merely the products of a compromise among the related Ministries.\textsuperscript{41}

2. Environmental Dispute Cases and Their Legacy

The drive toward industrial reconstruction during the early post-World War II period caused serious pollution problems in the mid-1950s. People were thought to have viewed the smoke rising from the factories of the reconstructed cities with pride, because it symbolized the nation’s economic rebirth.\textsuperscript{42} However, in the 1960s, citizens were confronted with terrible scenes of victims of disease caused by environmental pollution, which radically altered their attitudes toward the polluting companies and the government.

The most important of the pollution cases in the 1960s were the so-called “big four” cases. These were the Kumamoto Minamata Disease case,\textsuperscript{43} the Niigata Minamata Disease case,\textsuperscript{44} the Toyama Itai-Itai Disease case,\textsuperscript{45} and the Yokkaichi Asthma case.\textsuperscript{46} All these cases finally

\begin{enumerate}
\item the national government the authority to establish an emissions standard on smoke and soot emanating from factory facilities. See Gresser et al., supra note 5, at 18. \textsuperscript{40}
\item Because there was no environment agency in the national government, environmental problems were chiefly dealt with by the Ministry of Health and Welfare. \textsuperscript{41}
\item As an interesting comparison regarding the discussion of the virtues of factory smoke during the midst of depression, see Bove v. Donner-Hanna Coke Corp., 254 N.Y. 403, 410 (1931) ("The pollution of the air actually necessary to the reasonable enjoyment of life and indispensable to the progress of society is not actionable, but the right must not be exercised in an unreasonable manner so as to inflict injury upon another unnecessarily."). \textsuperscript{42}
\item Judgment of Mar. 20, 1973, Kumamoto [District Court], 696 Hanji 15 (Japan). See Gresser et al., supra note 5, at 65. See also infra notes 48-63. \textsuperscript{43}
\item Judgment of Sept. 29, 1971, Niigata [District Court], 22 Kaminsha, Nos. 9 & 10., Extra No., at 1 (Japan). The Niigata Minamata Disease case was a damages action brought against the Shôwa Electrical Chemical Corporation. \textsuperscript{44}
\item Judgment of June 30, 1971, Toyama [District Court], 22 Kaminsha, Nos. 5 & 6., Extra No., at 1 (Japan). See Gresser et al., supra note 5, at 55. The Toyama Itai-Itai Disease case was an action for damages filed by victims who suffered from such intolerable pain that they would often cry out "itai-itai" ("it hurts, it hurts"). The disease was caused by the accumulation in bone tissues of cadmium that came from factory waste discharged by Mitsui Mining and Smelting Company. \textsuperscript{45}
\item Judgment of July 24, 1972, Tsu [District Court, Yokkaichi Branch], 672 Hanji 30 (Japan). See Gresser et al., supra note 5, at 105. The Yokkaichi Asthma case was an action for damages brought by air pollution victims who suffered from asthma caused by sulfur dioxides discharged from six companies, including several Mitsubishi system companies. For the details of these cases, see Gresser et al., supra note 5, at 37-124; Shigeto Tsuru, History of Pollution Control Policy, in Environmental Policy in Japan 13 (Shigeto Tsuru & Helmut Weidner eds., 1989) [hereinafter Environmental Policy]; Margaret A. McKean, Environmental Protest and Citizen Politics in Japan (1981); Julian Gresser, The Development of Pollution Control in Japan: An Historical Note, 1 Harv. Env. L. Rev. 541 (1976); Tomohel Taniguchi, A
resulted in a difficult and agonizing victory for the first plaintiff/victims who brought suit. Of particular interest is the Kumamoto Minamata Disease case because it is one of the biggest cases with respect to the number of victims and the amount of pollution. Unfortunately, at present there are a large number of victims from this case who have not obtained remedy due to delays in the litigation. It is also notable because the history of this case was accentuated by the persecution of the victims and its reflection of the typical mindset of industrial companies, governments, and the public concerning industrial development at that time.

In the mid-1950s, a terrible disease appeared in Minamata City in the Kumamoto Prefecture. Minamata Disease is said to be well known all over the world because of the 1971 publication of a popular photo book called "Minamata." This disease caused paralysis when methyl mercury affected the victims' nervous systems. Methyl mercury was contained in the effluent water discharged by the Chisso Corporation (Chisso), a chemical manufacturer. In the mid-1950s, some of the first victims of Minamata Disease were cats who ate contaminated fish. Many cats were seized with convulsions and died. A short time later, many people began to suffer from Minamata Disease.

Commentary on the Legal Theory of the Four Major Pollution Cases, 9 LAW IN JAPAN 35 (1976); Frank K. Upham, Litigation and Moral Consciousness in Japan: An Interpretative Analysis of Four Japanese Pollution Suits, 10 LAW & SOC'Y REV. 579 (1976).

See Judgment of June 30, 1971, Toyama [District Court], 22 Kaminshū, Nos. 5 & 6., Extra No., at 1 (Japan) (The Toyama Itai-Itai Disease case); Judgment of July 24, 1972, Tsu [District Court, Yokkaichi Branch], 672 HANT 30 (Japan) (The Yokkaichi Asthma case); Judgment of Sept. 29, 1971, Niigata [District Court], 22 Kaminshū, Nos. 9 & 10., Extra No., at 1 (Japan) (The Niigata Minamata Disease case); Judgment of Mar. 20, 1973, Kumamoto [District Court], 696 HANT 15 (Japan) (The Kumamoto Minamata Disease case).

See infra note 185 and accompanying text.

See, e.g., ISHIMURE MICHIKO, PARADISE IN THE SEA OF SORROW: OUR MINAMATA DISEASE 372-73 (Livia Monnet trans., 1990) ("Like the Ashio Copper Mine Pollution Incident, the Minamata Disease Incident clearly shows that the so-called prosperity advocated by Japanese capitalism can only be bought at the price of countless human lives. Minamata is without doubt a contemporary version of the tragedy of Yanaka Village."). See also Sadao Togashi, Zoku Minamata Byō Jiken [The Minamata Disease Case, Continued] (22), SHŪRAN DOKUSHO JIN, Sept. 13, 1993.

A disease with the same symptoms occurred simultaneously in Niigata City in Niigata Prefecture. For ease of identification, these cases are referred to as "Kumamoto" Minamata Disease Case and "Niigata" Minamata Disease Case.

See W. EUGENE SMITH & AILEAN M. SMITH, MINAMATA (1971).

The following is a description of the disease:
The nervous system begins to degenerate, to atrophy. First, a tingling and growing numbness of limbs and lips. Motor functions may become severely disturbed, the speech slurred, the field of vision constricted. In early, extreme cases, victims lapsed into unconsciousness, involuntary movements, and often uncontrolled shouting. Autopsies show the brain becomes spongiform as cells are eaten away. It is proven that mercury can penetrate the placenta to reach the fetus, even in apparently healthy mothers.

Id. at 18.

See also MICHIKO, supra note 49, at 81-82, 152-54; ISHIMURE MICHIKO, STORY OF THE SEA OF CAMELLIAS (Livia Monnet trans., 1983); NORIE HUDDLE & MICHAEL REICH, ISLAND OF DREAMS: ENVIRONMENTAL CRISIS IN JAPAN 102-07 (1987).
During this case, several events transpired that are worthy of special mention. In the early stages, local and national governments failed to marshal effective relief immediately, and politicians only pretended to assist the victims. Because the cause had not been discovered, people were terrified of contracting the strange disease. Destructive rumors destroyed the lives of fishermen and their families and also encouraged discrimination against the victims. As for the possibility of dispute resolution, mediation proved impractical. More disturbing was the abuse of mediation by Chisso. Chisso easily gained control of the negotiations, and made use of negotiation as a tactic to divide the victims into several groups at an early stage, and thus effectively dictated the terms of the settlement. One of these groups accepted the notorious and deceitful "Mimaikin" or "consolation" contract, which stipulated that the victims would make no further claims for compensation irrespective of any findings of Chisso’s ultimate responsibility in the future.

On March 20, 1973, the Kumamoto District Court found that Chisso not only knew of the hazards of its activities, but actively suppressed information pertinent to the discovery of the cause of Minamata Disease. The court quickly voided Chisso’s consolation contract as violative of public policy pursuant to Article 90 of the Civil Code of 1896 and ruled for the first 138 plaintiffs. In criminal court on March 22, 1979, the Kumamoto District Court sentenced both the president of Chisso Corporation and the manager of the factory to five-year prison terms with a three year suspension of sentence.

After several civil and administrative suits, the remaining victims suffering from Minamata Disease and the families of the dead victims are still pursuing several damage actions against the Chisso Corporation, Kumamoto Prefecture, and the national government. These trials have been extensively delayed. As of January, 1993, Chisso and
Kumamoto Prefecture had been expressing a desire to begin settlement negotiations, but the national government rejected them on the grounds that it was not negligent.

The legacy of the "big four" cases lies in the tremendous influences they have had on judicial, administrative, social, and political changes in attitude toward environmental protection. Because of the media's comprehensive coverage of the "big four" trials, the plaintiffs' concerns were quickly and effectively transmitted to the entire nation. Thus the public's awakening in the early 1970s reinforced changes in judicial thinking. In the "big four" trials, the judiciary had an important role as a last resort for the victims. The "big four" judgments accelerated the establishment not only of basic legal principles governing damage claims, but of a national compensation system for personal injury caused by environmental pollution. The legislature was stimulated to reform existing statutes and reenact a basic anti-pollution act.

III. Modern Framework of Environmental Protection Legislation

A. The Fundamental Act for Environmental Pollution Prevention

1. The Original Act of 1967

In the early 1960s, the national government began to see the need for a comprehensive pollution control policy. Several factors hastened its realization. The public's dissatisfaction with national environmental policy had persisted since the "big four" cases and people realized the continuing problem of transfrontier pollution involving several prefectures. Also, local government resentment mounted over the national government's preemption of local pollution standards.

At last, in 1967, the Fundamental Act for Environmental Pollution Prevention was enacted. This was the first comprehensive, nation-
wide environmental pollution control law in Japan. Essentially, it became a general charter for the prevention of environmental pollution. Therefore, its concrete and practical applications were deferred to subsequent legislative and administrative acts. The greatest expression of the government’s ambivalence, however, was the “harmony clause.” This clause gave industry a way to escape the strict intent of the Act by arguing that the particular environmental regulation or statute in question was violative of the “harmony clause.” In addition, this Act left uncertain two questions: (1) who would decide what measures were necessary to protect the environment, and (2) what cost should industry bear.

2. The Amended Act of 1970

While the national government continued to delay taking suitable measures to protect the environment, environmental pollution increased and became more serious. In 1967, the public, which had already been shocked by the “big four” cases, “was further alarmed by reports that residents around” traffic intersections in Tokyo “were being poisoned by lead and that Tokyo’s photochemical smog was suffocating children.” Also, growing international concern about environmental protection caused the Japanese public to call for drastic reform of the national government’s environmental policy.

In 1970, during the so-called “environmental pollution related” Diet debate, the “harmony clause” was eliminated. Elimination of the harmony clause exemplified a basic change in national environmental policy. At the same time, local governments were given the power to set their own special standards, applicable to a particular area, even after national environmental standards were established. Some local governments set up standards more restrictive than the national standards, and others created additional standards in areas the govern-

69 For a description of the legislative process, see GRESSER ET AL., supra note 5, at 19-24.
70 HARADA, supra note 3, at 18-24.
71 GRESSER ET AL., supra note 5, at 20-23. Article 1 of the original Act of 1967, supra note 68, had a sentence to the effect that efforts to prevent harm to public health should be “harmonized” with measures to promote sound industrial development. This harmonization meant that pollution controls should in no way harm industrial development. GRESSER ET AL., supra note 5, at 20.
72 The Special Measures Act of the Compensation for the Environmental Pollution-Related Health Injury of 1969 was enacted in order to immediately fulfill the demand of the Fundamental Act for Environmental Pollution Prevention. Kōgai Ni Kakawaru kenkō higai no kenshu ni kansuru tokubetsu sochihō (Special Measures Act of the Compensation for the Environmental Pollution-Related Health Injury), Law No. 90 of 1969. Because the national government had not formulated the “Polluter-Pays-Principle” at that time, the financing of remedies for the victims under this Act consisted merely of voluntary donations from all industries including non-polluters. GRESSER ET AL., supra note 5, at 287-88; HARADA, supra note 5, at 72.
73 GRESSER ET AL., supra note 5, at 25.
74 Id.; Tsuru, supra note 46, at 32-33.
75 For ordinances at the local government level, see infra part IV.B.1.
ment had neglected to regulate.\textsuperscript{76} The amended Act\textsuperscript{77} established the fundamental legal framework for environmental policy which was in effect until 1993. Article 1 of this amended Act articulated the purpose of identifying the responsibilities of industry and national and local governments with regard to preventing environmental pollution and determining the fundamental requirements for control measures.\textsuperscript{78} Article 2(1) defined the term “environmental pollution.”\textsuperscript{79} While this was a clarification of the meaning of environmental pollution, it also limited environmental pollution to any situation whereby human health and the environment was damaged by air, water, and soil pollution, noise, vibration, ground subsidence, and offensive odors.\textsuperscript{80} In response to this Article, measures to control each type of environmental pollutant were prescribed by individual laws.\textsuperscript{81}

The Act delineated the general responsibilities of industry, national and local governments, and citizens with respect to environmen-

\textsuperscript{76} Harada, supra note 3, at 150-51.

\textsuperscript{77} Kagai Taisaku Kihonho (The Fundamental Act for Environmental Pollution Prevention), Law No. 132 of 1967, amended by Law No. 132 of 1970 and Law No. 88 of 1971. For the selected translation of this amended Act, see Gresser et al., supra note 5, at 395-98.

\textsuperscript{78} Gresser et al., supra note 5, at 395.

\textsuperscript{79} Kagai Taisaku Kihonho (The Fundamental Act for Environmental Pollution Prevention), Law No. 88 of 1971, at art. 2(1). The term “environmental pollution” means: any situation in which human health and the living environment are damaged by air pollution, water pollution (including the deterioration of the quality and other conditions of water as well as of the beds of rivers, lakes, the sea, and other bodies of water . . .), soil pollution, noise, vibration, ground subsidence (except for subsidence caused by drilling activities for mining . . .), and offensive odors, which arise over a considerable area as a result of industrial or other human activities.

\textsuperscript{80} Id. The term “living environment” included “property closely related to human life, animals and plants closely related to human life, and the environment in which such animals and plants live.” Id. at art. 2(2).

tal pollution. First, industry had the responsibility of taking measures necessary to prevent environmental pollution resulting from its activities, to cooperate with local and federal governments, and to bear the necessary cost of environmental pollution control. Second, the national government had the responsibility to establish and implement fundamental and comprehensive policies for the prevention of environmental pollution. In order to prevent environmental pollution, the national government had to establish environmental quality standards and take measures to control emissions. Furthermore, the national government had to take necessary measures concerning land use and facility installation which caused environmental pollution. It was also tasked to establish systems for examination and inspection in order to monitor the deterioration of the environment. The national government was also responsible for establishing a dispute resolution system, and a system which made the efficient implementation of remedies for damage administratively possible. Third, local governments were to formulate and implement appropriate measures for preventing environmental pollution, while adhering to the policies of the national government. Fourth, the public also had to endeavor to reduce its environmental pollution in all possible ways.

As can be expected from the idealistic terms of this Act, its aspirations have not been completely accomplished. The weakness of this Act, even in the form of the amended Act of 1970, was that its ability to

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82 Kōgai Taisaku Kihonhō (The Fundamental Act for Environmental Pollution Prevention), Law No. 88 of 1971, at art. 22. To realize this aim the Enterprise Burden Act for Environmental Pollution Prevention Work Fund was enacted in 1970. Kōgai Bōshi Jigyōhyō Futanhō (Enterprise Burden Act for Environmental Pollution Prevention Work Fund), Law No. 133 of 1970. This Act imposed various pollution prevention and abatement costs on industry. Id. However, relatively smaller industries were to be given special consideration such as financial assistance and tax deductions. See Kōgai Taisaku Kihonhō (The Fundamental Act for Environmental Pollution Prevention), Law No. 88 of 1971, at art. 24.

83 Kōgai Taisaku Kihonhō (The Fundamental Act for Environmental Pollution Prevention), Law No. 88 of 1971, at art. 4.

84 Id. at art. 9(1).
85 Id. at art. 10.
86 Id. at arts. 11-13.
87 Id. at art. 21(1). To accomplish this goal, Kōgai Funsō Shorihō (The Environmental Pollution Dispute Resolution Act of 1970), Law No. 108 of 1970 was enacted. It includes the conciliation, mediation, arbitration, and quasi-judicial arbitration by the administrative entities. See GRESSER ET AL., supra note 5, at 325-47; NAKAYAMA, supra note 26, § 10.07[2].

88 Kōgai Taisaku Kihonhō (The Fundamental Act for Environmental Pollution Prevention), Law No. 88 of 1971, at art. 21(2). In 1969, the Special Measures Act was created; however, it was soon seen as ineffective. Therefore, in 1973, the Compensation Act for Environmental Pollution-Related Health Damage was enacted. Kōgai Kenkō Higai No Hoshō Tō Ni Kansuru Hōritsu (The Compensation Act for Environmental Pollution-Related Health Injury), Law No. 111 of 1973. See GRESSER ET AL., supra note 5, at 290-319; Yoshio Kanazawa, A System of Relief for Pollution-Related Injury, 6 LAW IN JAPAN 65 (1973). See also infra part IV.A.3.
89 Kōgai Taisaku Kihonhō (The Fundamental Act for Environmental Pollution Prevention), Law No. 88 of 1971, at arts. 5, 18.
90 Id. at art. 6.
achieve its purpose depended upon the effectiveness of the resulting concrete legislation and regulations. In addition, there were no provisions in the Act creating an independent agency dealing chiefly with environmental issues and it omitted a system for environmental impact assessments. Furthermore, this Act and the related individual statutes lacked provisions for private action by citizens.

B. The Natural Environment Preservation Act

Another big weakness in the 1970 version of the Fundamental Act for Environmental Pollution Prevention was its insensitivity to the necessity of protecting nature itself. Though the Natural Park Act had already been enacted in 1957, its emphasis was on the use of nature for sightseeing and recreation; the preservation of nature was only a secondary consideration.

Effective measures to protect the natural environment itself were introduced slowly during the 1970s. In 1972, the Natural Environment Preservation Act (NEPA) was enacted as a basic natural environmental protection law. This Act was created to supplement the Natural Park Act of 1957 and to promote the preservation of the natural environment, thereby contributing to the maintenance of wholesome and cultured living on behalf of present and future generations. The NEPA's basic directive was the preservation of the environment so that present and future generations could enjoy the blessings of nature.

The Natural Environment Preservation Act prescribed the general responsibilities of the national and local governments, industry, and the public, as did the Fundamental Act for Environmental Pollution

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91 See supra note 81 and accompanying text.
92 It was not until 1971 that the long expected Environment Agency was established. See infra part IV.A.1.
95 Shizen Kōenbō (The Natural Park Act), Law No. 161 of 1957.
96 Shizen Kankyō Hōzenbō (The Natural Environment Preservation Act), Law No. 85 of 1972.
97 Id. at art. 1. At first inspection, it might appear that the National Environmental Preservation Act (NEPA) is based upon a theory similar to the U.S. public trust doctrine. However, there is no such doctrine or its equivalent in Japan. For more on the doctrine of public trust, see generally Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine to the Management of Lands, Waters, and Living Resources of the Coastal States (David C. Slade ed., 1990); Joseph J. Kalo, Coastal and Ocean Law 69-159 (1990); Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich L. Rev. 471 (1970).
Prevention.\textsuperscript{98} Even so, the feasibility of this Act was limited. Similar to Article 3 of the Natural Park Act of 1957,\textsuperscript{99} the NEPA also had a provision regarding the rights of property owners.

After NEPA's enactment, the Environment Agency, which was established in 1971, attempted to synthesize all environmental laws including the Natural Park Act. It then sought to assert its regulatory power under these laws. This attempt failed in the face of stern opposition by the Ministry of Construction and the Forestry Agency, who feared usurpation of their power by the Environment Agency. The inability of the Environmental Agency to properly enforce the environmental protection laws has resulted in serious consequences. For example, the Natural Environmental Preservation Act does not apply to special scenic places which have already been designated as such by the Natural Park Act.\textsuperscript{100} However, it is difficult to protect these sites from destruction without designating them as preservation districts under the Natural Environmental Preservation Act.\textsuperscript{101} Another example of the problems caused by the Environmental Agency's lack of power is demonstrated when the Director General of the Environment Agency makes the decision to designate a portion of a national forest as a preservation district under the Natural Environmental Preservation Act. In order to do this, the Director General must get the consent of the Director General of the Forestry Agency.\textsuperscript{102} Consent from the Director General of the Forestry Agency is seldom forthcoming because the national forests represent an important financial source for the Forestry Agency. Any portion of the national forests designated as a protected area would cease to provide revenues to the Forestry

\textsuperscript{98} Shizen Kanyō Hozenhō (The Natural Environment Preservation Act), Law No. 85 of 1972, at arts. 4, 9-11.

The form of those general responsibilities is the equivalent \textit{mutatis mutandis} under the Fundamental Act for Environmental Pollution Prevention previously discussed. \textit{See supra} notes 82-90 and accompanying text. Moreover, according to Article 12, the national government should create the Basic Policy for the preservation of the natural environment. Although this Basic Policy was announced in 1973, it was only a product of compromise between the Ministries of Agriculture and Forestry. For instance, the basic clause on the environmental impact assessment was eliminated. \textit{See Yamamura, supra} note 3, at 152-54.

\textsuperscript{99} Shizen Kōenhō (The Natural Park Act) established the foundation of the current national park system. Though the purpose of this law is not only to protect eminent natural scenery but also to promote its use for recreation and education of the people, there is a difficult conflict between the preservation of nature and honoring the interests of the titleholder desirous of developing his land. \textit{See Shizen Kōenhō (The Natural Park Act), Law No. 161 of 1957, at art. 3.}

\textsuperscript{100} Shizen Kanyō Hozenhō (The Natural Environment Preservation Act), Law No. 85 of 1972, at art. 22(2).

\textsuperscript{101} This problem arises because the Natural Environmental Preservation Act puts great emphasis on the preservation of nature, while the Natural Park Act is concerned primarily with its use. \textit{See supra} notes 95-97 and accompanying text. \textit{See also Yamamura, supra} note 3, at 141. Compare and contrast the U.S. National Park Service Organic Act, 16 U.S.C. § 1, 1a-1 (1988). \textit{See also Campbell-Mohn, supra} note 94, at 148-97.

\textsuperscript{102} Shizen Kanyō Hozenhō (The Natural Environment Preservation Act), Law No. 85 of 1972, at art. 14(9).
C. The Fundamental Act for Environment

1. Purpose and Basic Ideas

On November 19, 1993, the Fundamental Act for Environment took effect as a new comprehensive environmental management framework. It was formulated and implemented to facilitate the prevention of environmental pollution from the standpoint of nationwide and global environmental protection. This is the first law in Japan to unite the policies of environmental pollution prevention and natural environmental preservation. The Fundamental Act for Environmental Pollution Prevention was repealed and the Natural Environmental Preservation Act was amended mutatis mutandis.

The Fundamental Act for Environment prescribes the basic tenets for the formulation of policy for environmental preservation. Its purpose is to promote a comprehensive environmental policy, with the goal of preserving the natural environment for the enjoyment of present and future generations.

Three basic propositions are introduced under this Act. First, the Japanese people must realize that the environment must be preserved for future generations. Second, while industries and citizens should continue to strive for "sustainable development," such efforts should be made with as little "burden on the environment" as possible. Some difficulties in preserving the environment should be conquered in advance with scientific knowledge. Third, Japan must affirm-
tively address the concept of “global environmental preservation” and utilize its position as an economic power in cooperation with other nations.

Moreover, this Act prescribes actions that can be taken to promote environmental preservation. They include: (1) maintaining clean air, water, soil, and other natural elements; (2) securing not only a variety of species but a variety of natural environments; and (3) providing the populace easy access to nature.

2. Measures to Preserve the Environment

In order to fulfill the purpose of this Act, the national and local governments must take suitable measures to preserve the environment. In addition, industry and the public must also endeavor to decrease the burden on the environment.

First, the national government bears the responsibility of formulating and implementing the basic policy for environmental preservation. In this regard, the Act contains a provision that mandates the formulation of an Environmental Basic Plan by the national government. The national government must also take general legal and financial measures necessary to implement policies for environmental preservation, and submit an annual report to the Diet regarding the condition of the environment and any measures taken regarding it.

In addition, one of the other new provisions creates an environmental impact assessment system. Pursuant to Article 20, the national government must ensure that industry conducts an environmental impact assessment before embarking on any business activity.

Although this provision provides only an abstract proposal for the creation of an environmental assessment system, such a proposal is still important because it is a large step toward legislation at the national level in the

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111 The term “global environmental preservation”, in Article 2(2), means environmental preservation addressing such problems as global warming, destruction of the ozonosphere, pollution of the ocean, decrease of wildlife species, and other situations adversely affecting the earth. Id. at art. 2(2).

112 Id. at art. 14.

113 Id. at art. 6.

114 Id. at art. 15(1). This plan is to incorporate a goal of a desirable environmental condition and anticipate the role of the local governments, industry, and the citizens in reaching this goal. See id. at art. 15(2). See also KANKYÔ, ENACTMENT, supra note 105, at 10 (“This Environmental Basic Plan would be made by the end of 1994.”). For the Environmental Basic Plan, see generally Tadashi Otsuka, Kankyô Kihon Kekaku [The Environmental Basic Plan], 1041 JURISUTO 22 (1994).

115 Id. at art. 20.
area of environmental impact assessments.\footnote{Preparation of research on the environmental impact assessment system has begun inside the national government. See KANKYŌCHO, ENACTMENT, supra note 105, at 10-11.}

Moreover, this Act prescribes specific measures to be taken by the national government. First, to reduce the burden on the environment brought about by industry and public consumption, the government shall impose economic penalties on products that damage the environment, forcing the producers of these products to internalize the externalities of pollution.\footnote{Kankyō Kihonhō (The Fundamental Act for Environment), Law No. 91 of 1993, at art. 22.} These economic disadvantages can include an environment-related emissions tax and a charge and deposit system combined with a measure for financial assistance.\footnote{See KANKYŌCHO, ENACTMENT, supra note 105, at 11-12; KANKYŌCHO, OUTLINE, supra note 105, at 21.}

Second, this Act provides that the national government take measures to provide technological assistance to enable industry to develop production procedures more favorable to the environment. The government must also take necessary actions to encourage industries to utilize materials and products which are more friendly to the environment.\footnote{Kankyō Kihonhō (The Fundamental Act for Environment), Law No. 91 of 1993, at art. 24.} The national government must also promote environmental education and encourage private groups to perform activities helpful to the environment, such as recycling.\footnote{Id. at arts. 25-26; see also id. at arts. 27-30.} Those provisions stem from the realization that because modern environmental problems are often caused by ordinary business and daily life, all enterprises and citizens should cooperate to address environmental preservation.

Third, in the arena of global environmental preservation, the Fundamental Act for the Environment articulates several new instructions. The national government must endeavor to promote international cooperation in the pursuit of global environmental preservation.\footnote{Id. at art. 32(1). To accomplish this, the Act provides for the training of environmental specialists and the gathering and analysis of environmental information. Id. at art. 32(2).} To this end, the national government must also strive to cooperate internationally to promote the monitoring, observation, and measurement of global environmental conditions.\footnote{Id. at art. 33.} For example, through international cooperation mechanisms such as the Official Development Assistance (ODA) for developing countries, the national government must endeavor to take the preservation of the global environment into account. The national government must further ensure that international business enterprises are apprised of information useful to environmental protection.\footnote{Id. at art. 35(2).}

Although the Fundamental Act for the Environment is revolution-
ary in many ways, it does inherit many provisions and concepts from the Fundamental Act for Environmental Pollution Prevention and the Natural Environment Preservation Act. For example, under the Fundamental Act for the Environment, the national government must establish environmental standards with regard to environmental conditions relating to air, water, noise, and soil pollution.\textsuperscript{126} The precursor to this mandate was found in the Fundamental Act for Environmental Pollution Prevention. Also, the Fundamental Act for the Environment provides that the national government must act to resolve environmental disputes and provide an efficient remedy process for victims.\textsuperscript{127} This mandate also originated in the Fundamental Act for Environmental Pollution Prevention. Moreover, the Fundamental Act for the Environment prescribes that the national government must regulate emissions controls, land use, building allocation, and also promulgate regulations concerning the protection of nature.\textsuperscript{128} Again, the onus of this mandate was the Fundamental Act for Environmental Pollution Prevention. The national government must make comprehensive regulations to prevent environmental pollution and preserve the natural environment. The Fundamental Act for the Environment also inherits from the Fundamental Act for Environmental Pollution Prevention the basic principle that the polluter should pay the costs of its pollution.\textsuperscript{129} Also inherited from the Natural Environment Preservation Act is the concept that those who benefit by the environmental protection of the national and local governments should contribute to the funding of that protection.\textsuperscript{130}

Although the national government’s responsibilities have been discussed at length, the local governments also have a responsibility to formulate and implement comprehensive measures within the parameters of the policy of the national government.\textsuperscript{131} As stated earlier, industry has a duty to seek production methods and business activities that are less taxing on the environment.\textsuperscript{132} The citizenry must also strive in their daily lives to reduce the burden they impose on the environment and have the responsibility not only to preserve the environment as individuals, but also to cooperate with the government.\textsuperscript{133}

\textsuperscript{126} Id. at art. 16.
\textsuperscript{127} Id. at art. 31.
\textsuperscript{128} Id. at art. 21(1).
\textsuperscript{129} Id. at art. 37. This principle means that in certain environmental protection activity undertaken by the national and local governments, those who created the necessity for that environmental protection activity should bear its costs.
\textsuperscript{130} Id. at art. 38. This principle means that in certain environmental protection activity undertaken by the national and local governments, those who will gain the benefit from that activity should bear the costs of that activity.
\textsuperscript{131} Id. at arts. 7, 36.
\textsuperscript{132} Id. at arts. 8, 35(1), (3)-(4).
\textsuperscript{133} Id. at art. 9.
3. Comments and Prospects

The results produced by the Fundamental Act for Environment in preserving the environment cannot be evaluated until specific regulations are adopted and enforced. Only a short time has passed since its enactment. As stated earlier, the ultimate goal of the Japanese environmental protection system is to ensure that a safe and clean environment exists for future generations to enjoy, and the Fundamental Act for the Environment is a remarkably comprehensive and instructive program designed to accomplish this goal. Unfortunately, several problems still persist.

The provisions in the Fundamental Act for the Environment are very idealistic and abstract, with little concrete basis. As a result, it is very questionable whether the Environment Agency will be able to successfully implement the programs called for in the Act. For example, although this Act declares the importance of leaving a clean and safe environment for future generations, movement toward this goal will be difficult without legislation based upon some theory of the public trust doctrine or environmental right. Unfortunately, this Act takes no affirmative step toward introducing either of these theories into the current Japanese legal system. Moreover, the big problem of balancing environmental nature preservation and property rights remains. Added to this problem is the disjunctive nature of all the environmental acts including the Natural Environmental Preservation Act and the Natural Park Act.

Despite its obvious problems, it is remarkable that the Fundamental Act for Environment addresses international cooperation. The referral to international cooperation is widely viewed as a declaration that Japan will refrain from exporting pollutants and waste to foreign countries. This is striking because Japan has long been criticized as a country which has exported environmental pollution. The Asian

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134 One of the drafters proudly noted that even in the developed countries of the world there is no leading statute that is as comprehensive as the Fundamental Act for the Environment. Yoshitake Masuhara, Chikyū Kankyō Jidai Ni Taiši Suru Senshinkoku Hatsu No Horitsu Wo Seitei [Enactment of the First Law Among the Developed Countries to Correspond to the Global Environment Era], Toki No Ugoki, Feb. 15, 1994, at 23.

135 See supra notes 26, 97 and accompanying text. As a recent theory regarding environmental rights, for example, Professor Sax points out three basic precepts as the source of basic environmental rights: "(1) fully informed open decision making based upon free choice, (2) protection of all at a baseline reflecting respect for every member of the society, and (3) a commitment not to impoverish the earth and narrow the possibilities of the future." Joseph L. Sax, The Search for Environmental Rights, 6 J. Land Use & Envtl. L. 93, 105 (1990).

136 In the enactment of the Fundamental Act for Environment, Article 3 of the Natural Environment Preservation Act was not eradicated. See supra note 99 and accompanying text. See supra notes 128-25 and accompanying text.

137 See, e.g., Jun Ui, Pollution Export, in ENVIRONMENTAL POLICY, supra note 46, at 395; Nihon Bengoshi Renɡō Kai [The Japan Bar Association], Nihon No Kōai Yusshutsū to Kankyō Hara [Environmental Pollution Export and Environmental Destruction by Japan] (1991).
Rare Earth Corporation case provides an example of a Japanese company harming foreigners by exporting its pollution to a country with more lenient environmental standards than Japan. Exporting pollution through the extension of Japanese businesses to developing foreign countries is a cheaper and more convenient method of disposing of industrial waste and will be difficult to curtail. The absence of clear instructions in the Fundamental Act for the Environment regarding international environmental protection reduces its potential effectiveness in this area.

Of course, the enactment of a statute against environmental pollution does not insure that environmental pollution will immediately cease. This Act primarily prescribes the responsibility of the national government to protect the environment, but it is readily apparent that industry must also play a large role in environmental protection. In fact, all segments of society must play a large role in preserving the environment. The responsibilities of each segment of society must be measured by their relative ability to influence the pollution or preservation of the environment. The influence of industry cannot be emphasized enough. Moreover, if the public must share the burden of preserving the environment and cooperating with the government, they should be given rights that are proportionate to their responsibilities, such as the right to bring citizen suits and the right to participate in other aspects of the environmental policy-making process.

Furthermore, although the Fundamental Act for Environment prescribes many measures to preserve the environment, it is unclear whether prior legal scrutiny of any measure of the Act is permissible; nor is it clear who would undertake such legal scrutiny. This Act explicitly does not intend to extend the scope of judicial review. However, it might not be difficult to expect the judiciary to play a more important role in the field of environmental preservation than it has in the past because this Act contains several articles which implicitly consider as a factor citizen's administrative litigation.

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139 On July 11, 1992, the Ipoh High Court in Malaysia found that the Asia Rare Earth Corporation, a joint venture company, had been dumping radioactive waste produced in Malaysia adjacent to a small village and ordered this corporation to immediately close its refining operations. See The Judgment of the High Court of Malaysia at Ipoh, Civil Suit No. 185 of 1985. The Mitsubishi Kasei (then Japan's largest chemical company) group owns 35% of this corporation. Abnormal birth defect rates and a substantial increase in the cancer rate were found to have been results of this pollution. However, on December 23, 1993, the Supreme Court of Malaysia, the highest court, reversed and ordered damages to be assessed in favor of the corporation. See Kieran Cooke, Japan Company Wins Malaysian Minerals Appeal, FINANCIAL TIMES, Dec. 29, 1993, at 3.

140 Similar to the Fundamental Act for Environmental Pollution Prevention, the Fundamental Act for Environment contains in Article 2(3) a definition likewise limiting the types of "environmental pollution." Kankyō Kihonhō (The Fundamental Act for Environment), Law No. 91 of 1993, at art. 2(3). See supra notes 79-80.

141 See infra part V.A.4.
IV. Administrative Role in Environmental Protection

Generally, despite several efforts to reform the imperial bureaucracy during the Occupation, many pre-war bureaucratic systems remained intact. The Liberal Democratic Party (LDP) remained in power for a long period following World War II, and today is a major member in the present coalition government. As a result, the LDP holds tight control over the bureaucracy, despite the governmental goal of administrative neutrality. As can be expected, the political party in power exerts direct influence on the content of the environment related laws passed during its regime. The following section will address the administrative formulation and implementation processes of measures to counteract pollution. Although there are many systems through which the national and local governments attempt to deal with many different environmental problems, the following are examples of some of the most important systems.

A. Environmental Protection at the National Level

1. Environment Agency

During the 1950s, the national government was reluctant to establish an independent pollution control administration. Regulatory power over environmental problems continued to be haphazardly distributed among eleven Ministries and at least seven advisory councils. By the close of 1970, the United States, Great Britain, and Sweden had all established independent environment agencies, and the effect of these actions was not lost on Japan. Finally, the Environment Agency was established in Japan pursuant to the Environment Agency Establishment Act of 1971.

This Agency is an executive body, established under the Prime Minister's Office and headed by its Director General, who is a member of the Cabinet and holds the office of State Minister. In general, the LDP never appointed a person with a strong environmental background and political power to the Director General's position.

The principal advisory group for the Director General was the Central Council on Environmental Pollution Prevention. Later, the Natural Environmental Preservation Council also took over this...
role. These Councils consisted of professors, scientists, and other knowledgeable persons, and played a more active role in environmental policy making than the typical advisory body normally did. For example, they produced a report upon which the Fundamental Act for Environment was based. The Fundamental Act for Environment, replaced these two councils with the Central Environmental Council, which considers and examines the basic policy for the environment.

Despite the Environment Agency’s apparent role as the principal administrative guardian of the environment, it has generally been regarded within official circles as an upstart. This attitude is a product of the political circumstances extant at the time of its creation. Establishment of a new agency meant that some of the regulatory authority of other ministries or agencies would need to be curtailed. These agencies fought this unwelcome appropriation of power in several ways.

First, the competing agencies placed their own members in key positions of influence within the Environment Agency. These officials, who were certain to return to their original Ministry posts several years later, were apt to make decisions favorable to the position of their Ministry of origin.

Second, the traditional Ministries attempted to protect their own jurisdiction by limiting the Environment Agency’s enforcement power. Despite its statutory authority to establish the “environmental quality standard,” the principal function of the Environment Agency is to coordinate, rather than implement, environmental policy. The frustration of the environmental impact assessment statute was one of the incidents most symbolic of the handicapped power of the Environment Agency. The statute was prepared by the Environment Agency, but the Ministry of International Trade and Industry, the Ministry of Construction, the Ministry of Transportation, and the business world expressed opposition to it despite its limited content.

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148 Kōgai Taisaku Kihonhō (The Fundamental Act for Environmental Pollution Prevention), Law No. 88 of 1971, at art. 27; Shizen Kankyō Hozenhō (The Natural Environment Preservation Act), Law No. 85 of 1972, at art. 13.
149 Imamura, supra note 147, at 45-46; GRESSER ET AL., supra note 5, at 244.
150 GRESSER ET AL., supra note 5, at 244.
151 Kankyō Kihonhō (The Fundamental Act for Environment), Law No. 91 of 1993, at art. 41.
152 YAMAMURA, supra note 3, at 39-41; GRESSER ET AL., supra note 5, at 242.
153 GRESSER ET AL., supra note 5, at 234-41.
154 An example of the lack of the enforcement power of the Environment Agency is the fact that it took until 1987 to name Kushiro Wetland as a national park due to the lack of cooperation from related ministers. YAMAMURA, supra note 3, at 110-11.
155 See infra part IV.A.2.
156 GRESSER ET AL., supra note 5, at 276. For a comparison of the attitude of the business world with the paper which was published by Keidanren, see KEIDANREN [FEDERATION OF
1978, a bill containing a requirement for environmental impact assessments was reintroduced and submitted to the Diet. However, even citizen groups opposed it because it appeared that government approval of construction would still be easily obtained despite the strong possibility of environmental destruction. The environmental impact assessment statute eventually became null and void in the Diet.

Third, the influence of the Environment Agency was weakened by inadequate budget allocations. Nonetheless, the first Director General, Buichi Ōishi, was able to put forth active environmental policies despite funding shortages. For instance, he was successful in arresting the construction of a tourist road in the Oze Marsh and Mount Taisetsu, and he gave new hope of compensation to victims of Minamata disease. Unfortunately, few of his successors have shared his early pioneering spirit. For example, Shintaro Ishihara, a famous author with an avid interest in marine ecology, declared that the Environment Agency's "open door" policy of easy access to victims and environmentalists established during the Ōishi era had come to an end.

Despite the many problems facing the Environment Agency, many of its original officials are now seasoned administrators. Under the new Fundamental Act for Environment, it is expected that the Environment Agency will, in the future, play an active role in solving the problems of pollution victims and environmental preservation.

2. Formulation and Implementation of Standards for Environmental Protection

As in many countries, the environmental standards in Japan constitute an important part of the national and local governments' environmental protection program. There are two types of standards. One is an "environmental quality standard," establishing levels of pol-

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157 GRESSER ET AL., supra note 5, at 275-76; HARADA, supra note 3, at 189. "The statute draft ultimately put forth by the Environmental Agency was less expansive than earlier proposals; for example, under the Agency draft, an environmental impact assessment was required only after a formal industrial development plan already existed, and public involvement in assessments was minimal." GRESSER ET AL., supra note 5, at 276.

158 GRESSER ET AL., supra note 5, at 276.

159 There is presently no statute concerning environmental impact assessments at the national government level in Japan. However, through local ordinances, such assessments have been in de facto operation. For the actual utilization of environmental impact assessments in Japan, see BRENDA F.D. BARRETT & RIKI THERIVEL, ENVIRONMENTAL POLICY AND IMPACT ASSESSMENT IN JAPAN (1991); YAMAMURA, supra note 3, at 299-386; Tsunetoshi Yamamura, Procedural Aspects of Environmental Impact Analysis in Japan: A Proposal of Legal Policy, 2 EARTH L.J. 255, 256-59 (1976).

160 GRESSER ET AL., supra note 5, at 241.

161 Id. at 241-42.

162 YAMAMURA, supra note 3, at 41.

163 See KANKYÔCHÔ, ENACTMENT, supra note 105, at 16.
olution which an area may not exceed.\textsuperscript{164} The other is an "emission standard" which fixes the quantity of pollutants which may be discharged per unit of time.\textsuperscript{165}

The environmental quality standard is set by the national government. It is an administrative target upon which the national and local governments base many of their environmental policies. These policies include the establishment of emission standards, provision of administrative guidance\textsuperscript{166} for factories that discharge pollutants, city planning, and deciding policies as an environmental pollution control service. The emission standard is set by the national and local governments. If a factory's individual emission standard is insufficient to control pollution when combined with other factories in the area, a "total emission standard" for a designated area may be established.\textsuperscript{167} The emission standard is imposed on factory operators. Pursuant to the Air Pollution Prevention Act of 1968, factory operators who want to construct a facility must report this desire to the governor of the prefecture.\textsuperscript{168} After the construction plan is accepted, the operator must measure the quantity of smoke and soot emitted from the factory, report this information, and permit inspection of the factory.\textsuperscript{169} When a factory's operation violates an existing emission standard and poses a risk to human health or the environment, the governor can order the polluter to improve or to suspend its operations.\textsuperscript{170} Factory owners or operators who fail to perform these duties, or to comply with the governor's order, may be subject to imprisonment or criminal fines.\textsuperscript{171}

The most striking aspect of the Japanese administration's approach to enforcement is found in its preferred technique of "administrative guidance."\textsuperscript{172} Without employing direct and statutory coercive measures, the local governments, for example, had often improved polluting factories successfully by way of informal negotiation, discussion, and consultation.\textsuperscript{173} Although this administrative guidance itself

\textsuperscript{164} Kankyō Kihonhō (The Fundamental Act for Environment), Law No. 91 of 1993, at art. 16.
\textsuperscript{165} See, e.g., Taiku Osen Bōshihō (The Air Pollution Prevention Act), Law No. 97 of 1968, at art. 3; Suishitsu Odaku Bōshihō (The Water Pollution Prevention Act), Law No. 138 of 1971, at art. 3.
\textsuperscript{166} See infra notes 172-79 and accompanying text.
\textsuperscript{167} See, e.g., Taiku Osen Bōshihō (The Air Pollution Prevention Act), Law No. 97 of 1968, at arts. 5.2-5.3; Suishitsu Odaku Bōshihō (The Water Pollution Prevention Act), Law No. 81 of 1971, at arts. 4.2-4.5.
\textsuperscript{168} Taiku Osen Bōshihō (The Air Pollution Prevention Act), Law No. 97 of 1968, at arts. 6, 18.
\textsuperscript{169} Id. at arts. 16, 26.
\textsuperscript{170} Id. at arts. 14, 18.11.
\textsuperscript{171} Id. at art. 33.
\textsuperscript{172} See, e.g., GRESSER ET AL., supra note 5, at 233-34; Russell Allen Yeomans, Administrative Guidance: A Peregrine View, 19 LAW IN JAPAN 125 (1986); Michael K. Young, Administrative Guidance in the Courts: A Case Study in Doctrinal Adaptation, 17 LAW IN JAPAN 120 (1984).
\textsuperscript{173} GRESSER ET AL., supra note 5, at 234.
had no statutory status until the Administrative Process Act,\textsuperscript{174} it was thought to soften the effects of a rigid statute, and often helped the polluter to identify its own solution process. However, this doctrine of "administrative guidance" was not without its limitations and weaknesses, which included: (1) an absence of judicial review except in cases of clear abuse of discretion; (2) the danger of arbitrary or discriminatory application; (3) its vulnerability to political influence; (4) the potential for conflict with statutory policy; and (5) its incompatibility with international commerce foreign relations.\textsuperscript{175} To remedy these problems, the Administrative Process Act\textsuperscript{176} was enacted on November 12, 1993. This Act articulates some noteworthy provisions for administrative guidance. In order to promote administrative clarity and fairness, this Act requires that the official in charge of implementing administrative guidance: (1) shall insure that the purpose of administrative guidance is always accomplished through the voluntary cooperation of the addressee;\textsuperscript{177} (2) shall disclose the meaning, content, and the identity of the person with such responsibilities; and (3) shall furnish the document providing such information upon demand by the factory or persons subject to administrative guidance.\textsuperscript{178} This Act is scheduled to take effect on October 1, 1994, and it is expected to ensure fairness of administrative guidance in the environmental field.\textsuperscript{179}

3. Partial Cancellation of the National Victim Compensation System

After the big four cases, the Compensation Act for Environmental Pollution-Related Health Injury was enacted in 1973.\textsuperscript{180} This Act was put forth to answer the demand for quick collective relief by the local governments. Under this Act, the pollution victims, who were classified based on designated areas,\textsuperscript{181} were examined by a special Health

\textsuperscript{174} Gyösei Tetsuzuki Hō (The Administrative Process Act), Law No. 88 of 1993. See infra note 175 and accompanying text.


\textsuperscript{176} Gyösei Tetsuzuki Hō (The Administrative Process Act), Law No. 88 of 1993.

\textsuperscript{177} Id. at art. 32.

\textsuperscript{178} Id. at art. 35.

\textsuperscript{179} See, e.g., Tadashi Naka, Gyösei Tetsuzuki Hō [The Administrative Process Act], 1039 Jurisuto 49, 51-52 (1994).

\textsuperscript{180} Kögai Kenko Higai No Hoshō Tō Ni Kansuru Hōritsu (The Compensation Act for Environmental Pollution-Related Health Injury), Law No. 111 of 1973, at arts. 2, 4. See supra note 88.

\textsuperscript{181} Those areas were classified as a "class I area" or a "class II area." Class I areas included Tokyo Metropolitan Districts, Chiba-City, Kawasaki, and Amagasaki; class II areas included Minamata, Niigata-City, and Toyama-City. Class I areas are distinctive in that they contain large numbers of asthmatics caused by air pollution. Class II areas are designated as such as a result of the many people who suffer from other diseases caused by pollution. To recover medical costs, class I residents must show only that they suffer from asthma and that they have lived or worked in the area for the required amount of time. Class I residents need not show any causation between their disease and the pollution. However, class II residents
Damage Certification Council consisting of medical, legal, and other experts. Upon official certification, the victims are eligible for reimbursement for medical expenses. The polluters must pay the total costs of the medical expenses in proportion to their contribution to the overall pollution.182 Although this system might have played an important role, all of the class I areas were canceled in 1988 despite strong opposition.183 Even so, in 1988 complex air pollution cases were pending in the courts in the cities of Chiba-City, Osaka Nishiyodogawa, Amagasaki, and Nagoya. As for the class II areas, especially in the Minamata cases,184 compensation or litigation is greatly delayed due to the difficulty in both identifying victims' diseases and finding causation to the pollution.185

B. Environmental Protection at the Local Level

After World War II, the prefectures were reformed in the hopes of encouraging greater autonomy. In general, high budget deficits at the local government level resulted in the national government maintaining tight control over local fiscal affairs through subsidies given to local governments.186 One outstanding exception to the national government's domination has been the local governments' venture into the area of pollution control and natural environmental preservation.187 During the 1950s, the local governments followed the national targets for economic growth and thereby attracted large factories.188 However, they gradually realized the severe adverse health effects resulting from industrial pollution and began to establish more stringent standards than those set nationally.

who seek compensation must show causation between the pollution and their disease. See Kōgai Kenko Higai No Hoshō Tō Ni Kansuru Hōritsu (The Compensation Act for Environmental Pollution-Related Health Injury), Law. No. 152 of 1973, at arts. 2, 4. See also Harada, supra note 3, at 76-79; Gresser et al., supra note 5, at 285-323.

182 With regard to the Minamata Disease case, in order to prevent the Chisso from going bankrupt as a result of claims for damages and compensation, the national government and Kumamoto Prefecture provided financial assistance measures to Chisso beginning in 1978. Nomura, supra note 62, at 78-79. Recently, the Japanese government voted to provide three billion yen in loans to Chisso. See Government to Extend 3 Billion Yen Loans to Chisso, JAPAN ECONOMIC NEWSWIRE, Sept. 30, 1994. For an interesting example of an American case on mass torts claims and bankruptcy, see In re Johns-Manville Corp., 36 B.R. 727 (Bankr. S.D.N.Y.), appeal denied, 39 B.R. 234 (S.D.N.Y. 1984).

183 The class I areas were cancelled because the national government believed that the air pollution in those areas had subsided to such a degree that it was no longer possible for people to contract asthma as a result of air pollution. See Nomura, supra note 62, at 73-74.

184 See supra notes 61-63 and accompanying text.

185 For example, there is no clear standard on what symptoms constitute the Minamata Disease. Cf. Kazuo Ushiomi, Kumamoto Minamata Byō [Kumamoto Minamata Disease], 900 JURISUTO 96, 97 (1988).

186 Gresser et al., supra note 5, at 245.

187 Id.

188 Id. at 245.
1. Ordinances

Local ordinances enable the local governments to cope with environmental problems. A few local governments began to pass pollution control ordinances in the 1960s, most notably the Tokyo Metropolitan Environmental Pollution Prevention Ordinance of 1969 (The Tokyo Ordinance). The Tokyo Ordinance "provided the greatest impetus for local legislation." It introduced the supremacy of environmental conservation over economic growth.

After 1969, the trend toward decentralization of pollution control was accelerated all over Japan. Many local governments provided newer or more stringent regulations than the national level. For example, several local governments have ordinances requiring an environmental impact assessment. Other unique ordinances specifically protect such things as coastal zones, fireflies, trees along the road, and reed fields. Moreover, there is a local ordinance prohibiting the sale of organic synthetic detergents containing phosphorus in order to prevent the deterioration of the water quality of Lake Biwa. Another local ordinance establishes a "national trust" endowed for the protection of scenic and historic sites. Such ordinances have been ruled to be constitutional.

2. "Guidelines"

In addition to the powers of the national government, local governments may also promulgate "guidelines" for land development. For example, the Kawasaki guideline was instituted by the city administration in 1964, requiring land developers to insure that their land development would not harm the environment. In addition, in order to receive a building permit, land developers had to obtain the city's approval of their environmental preservation measures before the construction of a building or industrial facility could begin. Other types of guidelines have incorporated the use of water supply suspension

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189 HARADA, supra note 3 at 150; GRESSER ET AL., supra note 5, at 246.
190 GRESSER ET AL., supra note 5, at 246.
191 For details and other ordinances, see id. at 246-47; HARADA, supra note 3, at 147-64; Hidefumi Imura, Administration of Pollution Control at Local Level, in ENVIRONMENTAL POLICY, supra note 46, at 54.
192 HARADA, supra note 3, at 148-50.
193 See supra notes 155-57 and accompanying text.
194 See supra note 3, at 247.
196 HARADA, supra note 3, at 140-41.
197 GRESSER ET AL., supra note 5, at 249-52.
198 Id. at 251-52.
sanctions.\textsuperscript{199} Despite their uncertain legal status, guidelines have become widespread, due in large part to great popular approval.

3. Pollution Prevention Agreement

Since the pollution prevention agreement between the city and industry in Yokohama in 1964,\textsuperscript{200} strategies for environmental pollution prevention have increased in several ways.\textsuperscript{201} First, through negotiation, it is possible to specify more detailed pollution controls that are more compatible with local conditions.\textsuperscript{202} Second, the negotiation process regarding terms of the agreements often enables the local government to assist a factory in developing an environmental pollution prevention plan.\textsuperscript{203} After the negotiations are concluded, the agreement terms become a basis for administrative guidance.\textsuperscript{204} Third, citizen participation promotes the democratization of corporate and government decision making.\textsuperscript{205}

V. Judicial Role in Environmental Protection

The rules for monetary remedies available to pollution victims were greatly developed by the courts in the “big four” cases. These judgments transformed the victim’s outrage into specific legal doctrines, and have profoundly influenced the subsequent conduct of the victims, industry, bureaucracy, and the Diet.\textsuperscript{206} However, environmental pollution cases continue to come before the court in large numbers. Given the type of remedies requested in the 1950s to 1970s, the plaintiffs’ primary concerns were the recovery of damages.\textsuperscript{207} During this time, the national and local governments were rarely defendants. Presently, however, national and local governments are often named as

\textsuperscript{199} A water suspension sanction is imposed when a land developer violates a guideline. Should that occur, the local water company cuts off the water service to the violator’s buildings. However, on November 8, 1989, in the Musashino City case, the Supreme Court held that a water supply suspension sanction was illegal according to the Water Supply Act Article 15(1). \textit{See} 710 \textit{HANTA} 274 (Japan). For other types of guidelines, see GRESSER ET AL., \textit{supra} note 5, at 252; Yoshikazu Shibaike, \textit{Guidelines and Agreements in Administrative Law}, 19 \textit{LAW IN JAPAN} 63, 66-76 (1986).

\textsuperscript{200} This was an agreement between Yokohama City, Kanagawa Prefecture, and the Tokyo Electric Power Company over the City of Yokohama’s sale of reclaimed city land to the power company. “In the contract, the company promised to meet strict standards for dust, SO\textsubscript{2}, and noise, to install stipulated pollution control equipment, to use low sulfur oil and coal, to permit city officials to inspect its facilities, and to observe all future municipal instructions for pollution prevention.” GRESSER ET AL., \textit{supra} note 5, at 248. If the contract was violated, “the city was authorized to undertake pollution abatement at the company’s expense.” \textit{Id.}

\textsuperscript{201} \textit{Id.} at 248-49.

\textsuperscript{202} \textit{Id.} at 249.

\textsuperscript{203} \textit{Id.}

\textsuperscript{204} See \textit{supra} part IV.A.2.

\textsuperscript{205} GRESSER ET AL., \textit{supra} note 5, at 249; \textit{see also} Shibaike, \textit{supra} note 199, at 76-89. For examples of pollution control agreements, see GRESSER ET AL., \textit{supra} note 5, at 399-404.

\textsuperscript{206} GRESSER ET AL., \textit{supra} note 5, at 132.

\textsuperscript{207} \textit{Id.} at 124-32. The “big four” cases were all damage suits filed against polluting companies.
defendants, and the recent concerns of plaintiffs are extending to environmental preservation.\(^{208}\) Frequently the remedy sought is a temporary and/or permanent injunction against the pollutant.\(^{209}\)

The Japanese judicial system consists of civil and criminal divisions.\(^{210}\) The administrative litigation system is included in the civil division.\(^{211}\) Some problems inherent in the civil and administrative litigation processes are important in light of their expected functions of providing remedies and environmental protection and will therefore be discussed below.\(^{212}\)

A. Administrative Litigation

The administrative court system, long separate from the civil court system, was abolished during the Occupation reforms.\(^{213}\) However, a strong traditional distinction still exists between public and private law.\(^{214}\) The administrative litigation process is governed by the Administrative Litigation Procedure Act of 1962\(^ {215}\) as a specific law of civil procedure.\(^ {216}\)

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\(^{208}\) YAMAMURA, supra note 3, at 415-25.

\(^{209}\) Currently, it is notable that there are many cases in which plaintiffs seek both damages and injunctions.

\(^{210}\) See generally Akira Mikazuki, A Comparative Study of Judicial Systems, 3 LAW IN JAPAN 1 (1969); Tanaka, supra note 8, at 48-53.

\(^{211}\) Tanaka, supra note 8, at 43.

\(^{212}\) In Japan, the field of environmental disputes is one of the categories in which disputes are frequently resolved by alternative dispute resolution, mainly according to the Environmental Pollution Dispute Resolution Act, Law No. 108 of 1970. See GRESSER ET AL., supra note 5, at 325-47; Yoshikazu Sagami, Kogai Hunsō Shōritō (The Environmental Pollution Dispute Settlement System), in ENVIRONMENTAL POLICY, supra note 46, at 196-206. See also Yasuhei Taniguchi, Dispute Settlement Framework, in ZENTARO KITAGAWA, 7 DOING BUSINESS IN JAPAN, XIV, at 1-4 to 1-6 (1982).

\(^{213}\) Today, in Japan, it seems that environmental criminal law does not necessarily play an important role. See generally Hiroshi Oda, The Role of Criminal Law in Pollution Control, in ENVIRONMENTAL POLICY, supra note 46, at 183-94; Ryuichi Hirano, Penal Law Protection of the Natural Environment in Japan, 13 LAW IN JAPAN 129 (1980).

\(^{214}\) GRESSER ET AL., supra note 5, at 133. See KENPO [Constitution] art. LXXVI.

\(^{215}\) (1) The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.

\(^{216}\) (2) No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.

\(^{216}\) Id. See also Tanaka, supra note 8, at 43.

\(^{217}\) Ichiro Ogawa, Judicial Review of Administrative Actions in Japan, 43 WASH. L. REV. 1075, 1076 (1968); GRESSER ET AL., supra note 5, at 133.

\(^{218}\) Gyōsei Jiken Soshōhō (The Administrative Litigation Procedure Act), Law No. 139 of 1962.

\(^{219}\) This means the administrative litigation process may also be governed by civil procedure, as a general law, without special provisions. Id. at art. 7. Therefore, some of the problems in civil litigation may also arise in administrative litigation. For an outline of the administrative litigation process in Japan, see Shuichi Okamura, Administrative Complaints and Administrative Litigation, in ZENTARO KITAGAWA, 7 DOING BUSINESS IN JAPAN, XIV, at 9-1 to 9-47 (1982).
1. "Official Act"

Fundamentally, only litigation concerning "official acts" are governed by the Administrative Litigation Procedure Act, which employs public law principles that are significantly different from those in private litigation. This Act and practices have apparently inherited some measure of the previous administrative hostility toward judicial review.

In general, the usefulness of this Act has been limited, partly because there is no obvious standard with which to identify an official act, and partly because many Japanese jurists and scholars have been unwilling to permit the liberalization of public law. As a result, it is very difficult for citizens to decide under which procedure to sue the government, either via an administrative or civil suit. The Osaka International Airport litigation is a case in point that demonstrates the difficult and confusing choice of possible actions facing plaintiffs. In this case, the plaintiffs chose to use civil procedure when bringing damage and injunction suits to prevent noise pollution. After a twelve-year dispute, the Supreme Court in 1981 permitted the recovery of a portion of the damages sought, but dismissed the injunction because the plaintiff-petitioners had mistakenly chosen civil rather than administrative procedure. The reason for this denial of injunctive relief was because such an injunction would have resulted in an impermissible interference in the administrative authority of the airport management and aviation administration.

2. Standing

The standing doctrine continues to restrict judicial review. Under the orthodox view, plaintiffs must establish having "the right recognized by statute" in addition to proving a causal relationship between the contested administrative act and the alleged adverse effect on the plaintiff's legal interests. "The right recognized by statute" means a legal interest created by statutory provisions vesting an administrative agency with the duty and authority to protect a personal interest. The doctrine also distinguishes between the legal interests of private individuals and those shared by the general public that may incidentally be adversely affected by an official act. These general pub-

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217 GRESSER ET AL., supra note 5, at 133.
218 Id.
219 Id. at 164-67.
221 See GRESSER ET AL., supra note 5, at 133.
222 See, e.g., Ogawa, supra note 214, at 1087.
223 See Gyosei Jiken Soshōhō (The Administrative Litigation Procedure Act), Law No. 199 of 1962, at art. 9.
224 See HARADA, supra note 3, at 260-61.
lic interests are often called reflex interests.\textsuperscript{225} Traditionally, the courts have not recognized the standing of a party with only a reflex interest.

In lower courts, however, the requirement of standing has sometimes been construed liberally. For example, in the Ikata Nuclear Power Plant case,\textsuperscript{226} in which local residents challenged the Prime Minister's granting of permission to construct a nuclear power plant, standing was construed liberally.\textsuperscript{227} But in the context of environmental protection cases, most courts are inclined to hold that residents have only reflex interests and thus do not have standing.\textsuperscript{228} Moreover, in considering cultural interests, in the 1989 Iba Ruins case, the Supreme Court held that the scholars engaged in studying Iba Ruins had no standing to challenge the administrative cancellation of the ruins’ status as a Historic Site.\textsuperscript{229} However, one of the few exceptions to the narrow construction of standing in environmental protection cases is the Nikko Tōshōgū Cedar Tree case.\textsuperscript{230} Here, the Nikko Tōshōgū Shrine sought to revoke an administrative act permitting road expansion. It is notable that the Tokyo High Court pointed out that preservation of scenic, historical, and cultural sites of value should be given the utmost consideration by administrative agencies because they enhance the people’s ability to enjoy a healthy and cultural life.\textsuperscript{231} This case is interesting in that the court suggested that scenic, historic, and cultural interests could be considered in construing the issue of standing.

Recently in 1989, the Supreme Court in the Niigata Airport case construed the matter of standing more liberally than ever before.\textsuperscript{232} Here, local residents challenged the Minister of Transportation's
granting of permission for the opening of a new cargo air line. The Supreme Court held that it was permissible to take into consideration not only the statute itself, but all other related statutes and regulations with the same common purpose when construing the matter of standing.\textsuperscript{233} This is noteworthy because the Supreme Court took a step towards a liberal interpretation of the standing requirement.

3. \textit{Ripeness}

Another principal barrier in the administrative litigation procedure is the ripeness doctrine, or proof of a judicially reviewable administrative act.\textsuperscript{234} Here, the focus is on whether an official act is in the nature of a disposition.\textsuperscript{235} If not, the case is dismissed.

In Japan, this requirement has been interpreted very narrowly.\textsuperscript{236} For example, the Supreme Court has held that only official acts that “directly create rights and duties of specific individuals” satisfy this requirement.\textsuperscript{237} Pursuant to this definition, intra-agency supervisory orders and approvals may not be challenged, because they do not directly create rights and duties of specific individuals.\textsuperscript{238} For example, in the Narita Shinkansen case, the Tokyo District Court\textsuperscript{239} dismissed the citizens’ challenge to the Minister of Transportation’s formal approval of the official plan of construction for the Narita Shinkansen Line.\textsuperscript{240} Thus, administrative guidance, environmental quality standards, and emission standards are difficult to bring before the court.\textsuperscript{241} Moreover, most government plans and policies, no matter how formal or final, have been deemed judicially unreviewable.\textsuperscript{242} For instance, a city plan which has the possibility to deteriorate the environment is not subject to judicial review at its creation stage, because the requirement of ripeness is not met until construction has

\begin{footnotesize}
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\item[\textsuperscript{233}] Judgment of Feb. 17, 1989, Saikōsai [Supreme Court], 43 Minshū, No. 2, at 56 (Japan). The analysis for standing applied by the court was “the right recognized by statute” standard. However, this holding took into consideration all pertinent statutes and regulations in applying this standard.
\item[\textsuperscript{234}] GRESSER ET AL., \textit{supra} note 5, at 134.
\item[\textsuperscript{235}] Gyosei Jiken Soshōhō (The Administrative Litigation Procedure Act), Law No. 139 of 1962, at art. 3(2).
\item[\textsuperscript{236}] See Upham, \textit{supra} note 220, at 236 (“[b]y American standards the definition of shobunsei [ripeness] is extremely narrow”).
\item[\textsuperscript{237}] See, e.g., Judgment of Feb. 23, 1966, Saikōsai [Supreme Court], 20 Minshū, No. 2, at 271 (Japan).
\item[\textsuperscript{238}] GRESSER ET AL., \textit{supra} note 5, at 134.
\item[\textsuperscript{239}] Judgment of Dec. 23, 1972, Tokyo [District Court], 691 Hanji 8, aff’d, Judgment of Oct. 24, 1973, Tokyo [High Court], 722 Hanji 52 (Japan).
\item[\textsuperscript{240}] GRESSER ET AL., \textit{supra} note 5, at 207. The court held that at the approval stage of a construction plan, it is not yet certain who will become an interested party when the plan is finally executed. Therefore, the plan and its official approval must be considered as abstract in nature. \textit{Id}.
\item[\textsuperscript{241}] See \textit{supra} part IV.A.2.
\item[\textsuperscript{242}] HARADA, \textit{supra} note 3, at 257-58.
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begun.\textsuperscript{243}

4. Prospects After the Enactment of the Fundamental Act for Environment

Generally, the enactment of the Fundamental Act for Environment\textsuperscript{244} may have an influence on the attitude of courts addressing environmental disputes. In particular, the Act's basic policies may encourage courts towards construing the standard for standing and ripeness more liberally. Factors which could favor making citizens' suits possible even with only a reflex interest are the basic notions of environmental management, its preventive method, the national government's responsibility to formulate and implement the basic plan for environmental preservation, and the citizens' responsibility to endeavor to preserve the environment.\textsuperscript{245} Even the infringement of a reflex interest might show the failure of the government to adequately conserve the environment, and thus provide a citizen standing to sue. In addition, there is a possibility that this Act will also make the ripeness standard more liberal. According to the notion of preventive environmental protection, it is believed that the responsibility of the citizens to decrease the burden on the environment could provide standing to sue at an earlier stage than before. Apart from the liberalization of standing and ripeness, preventive suits and duty-imposing suits\textsuperscript{246} might be easier to bring under the Fundamental Act for Environment.\textsuperscript{247} Moreover, the Administrative Process Act will encourage the courts to enlarge the scope of the judicial review of administrative guidance.\textsuperscript{248}

B. Civil Litigation

In general, the Japanese civil judicial system, like Germany's, does not permit class action suits, pretrial discovery, jury trials, or punitive damages, and it has only a limited permanent injunctive remedy.\textsuperscript{249} Even so, civil cases have brought many rewards in the environmental litigation field. Although the standing barrier in civil cases is less formidable than in administrative litigation, civil procedure presents sev-

\textsuperscript{243} See, e.g., Judgment of Apr. 22, 1982, Saikōsai [Supreme Court], 36 Minshū, No.4, at 705 (Japan).
\textsuperscript{244} See supra part III.C.
\textsuperscript{245} These factors might suggest the public trust doctrine and the private attorney general theory, although the drafters deny that this is the effect of this Act. See supra part III.C.3.
\textsuperscript{246} See, e.g., Naohiko Harada, \textit{Preventive Suits and Duty-Imposing Suits in Administrative Litigation}, 9 \textit{Law in Japan} 63, 69 (1976). A duty-imposing suit is a suit brought to impose an affirmative duty on the administration to confer a benefit on the plaintiff. \textit{Id}.
\textsuperscript{247} In addition, it seems that its enactment makes it possible both to change the burden of proof of illegality and to make the standard of administrative discretion control more clear.
\textsuperscript{248} See supra part IV.A.2.
\textsuperscript{249} See Minji Soshōhō (The Civil Procedure Act), Law No. 29 of 1890.
general obstacles for citizens to overcome. Generally, there are many problems in environmental civil procedure, but only a few special matters are discussed here.

1. Creative Function and its Limitation

Because Japan inherited a civil law tradition, it is generally said that the Japanese legal system does not contain the concept of equity. However, even the relatively conservative Japanese courts have sometimes played creative roles in environmental litigation.

First, the right to sunlight merits consideration. Historically, the Japanese people have been concerned with assuring the access to sunlight. Sunlight-related lawsuits increased significantly in the late 1960s and the early 1970s because people were affected by the construction of tall buildings. In 1972, the Mitamura case was brought in Tokyo for damages due to the obstruction of ventilation and sunlight. The Supreme Court held that ventilation and sunlight were necessary for a comfortable and healthy life, and therefore deserved legal protection. Although the court's opinion did not explicitly recognize a right to sunlight, it encouraged residents to pursue remedies, including injunctions. This issue arose out of citizens' reactions to the loss of the urban amenities sacrificed during the post-World War II reconstruction period. In spite of a strict catalogue of codified rights, it is noteworthy, considering the role of the court in environmental protection, that the court in the Mitamura case effectively created a right to sunlight and remedies for the encroachment on that right.

The second example of the court's creativity is the formulation of a duty on the part of businesses to complete the equivalent of an environmental impact statement. Several judicial decisions, in judging the legality of certain actions, have taken into consideration whether defendants should have conducted an investigation equivalent to an environmental impact statement, despite the absence of statutes requiring

250 For an outline of civil procedure in Japan, see Yasuhei Taniguchi, Civil Litigation, in ZENTARO KITAGAWA, 7 DOING BUSINESS IN JAPAN, XIV, at 10-1 to 10-87 (1982).
252 GRESSER ET AL., supra note 5, at 139.
253 Id. at 141-43.
254 The Judgment of June 27, 1972, Saikósai [Supreme Court], 26 Minshū, No. 5, at 1067 (Japan).
255 See GRESSER ET AL., supra note 5, at 139-43. See also Upham, supra note 220, at 254-56; Kazuki Sono & Yasuhiro Fujioka, The Role of Abuse of the Right Doctrine in Japan, 35 L. Rev. 1037, 1052-54 (1975).
256 See GRESSER ET AL., supra note 5, at 143-44.
such a statement and apart from local ordinances that might require it.\textsuperscript{258} For example, in the Ushibuka Human Waste Treatment Plant case,\textsuperscript{259} the plaintiffs sought a preliminary injunction to prevent the plant's construction. The Kumamoto District Court\textsuperscript{260} decided that the defendant should have conducted an expert survey regarding the tidal direction and speeds in the vicinity of the contemplated site, and that the defendant should have undertaken an ecological investigation of the influence of waste water on fish and clams.\textsuperscript{261} It is notable that a decision like this, though merely casuistic, nevertheless fills a void in the law. But the necessity of an environmental impact assessment statute cannot be fulfilled by such a decision.\textsuperscript{262}

Generally, ordinary citizens have strengthened their negotiating power against powerful industries and the governments through the judicial process. As a result, the judicial process and remedies have been indispensable in establishing fair procedures and opening government decisions to public scrutiny. However, one must remember the conservative, restrained character of the Japanese judicial system. The Japanese courts ordinarily focus only on the dispute resolution aspect, unlike the U.S. courts which focus not only on dispute resolution but also policy-making.\textsuperscript{263} In fact, the Japanese courts have often explicitly avoided getting into judicial policy-making. For example, in the Osaka International Airport case,\textsuperscript{264} the Supreme Court avoided making a judgment on the soundness of the administrative policy of the airport by dismissing the injunction before the trial.\textsuperscript{265}

2. \textit{Hostile Attitudes Toward Permanent Injunction}

The judicial system is supposed to allow the creation and development of a remedial process suitable to implementing permanent injunctions. However, despite judicial innovations in environmental protection, problems still remain. For example, one of the substantive problems is a debate over what right can give rise to an injunction: a real property right, personal right, environmental right, or other com-

\textsuperscript{258} See supra notes 117-18 and accompanying text.
\textsuperscript{259} Gresser \textit{et al.}, supra note 5, at 162-64.
\textsuperscript{260} Judgment of Feb. 27, 1975, Kumamoto [District Court], 772 Hanji 22 (Japan).
\textsuperscript{261} Gresser \textit{et al.}, supra note 5, at 163.
\textsuperscript{262} Id. at 201-02. On the other hand, it is rather difficult for the administrative litigation process to exercise a creative function in Japan. Id.
\textsuperscript{263} See Abram Chayes, \textit{The Role of the Judge in Public Law Litigation}, 89 Harv. L. Rev. 1281 (1976) (discussing the difference between traditional litigation and the new public law litigation that judges engage in); Owen M. Fiss \& Doug Rendleman, Injunctions 528 (2d ed. 1984).
\textsuperscript{264} For this district court judgment and higher court judgments, see Gresser \textit{et al.}, supra note 5, at 164-95.
\textsuperscript{265} See supra notes 219-20 and accompanying text. See also Upham, supra note 220, at 260-67 (describing the Lake Biwa case). The Lake Biwa case was dismissed before trial by the Judgment of Mar. 8, 1989, Otsu [District Court], 35 Shômu Geppô, No. 8, at 1450 (Japan).
plex rights. Moreover, the courts have sometimes held that public interest in the use of a public facility outweighs the plaintiff's private interest in question.

Apart from substantive problems, there are also several procedural obstacles. Despite the relative availability of temporary injunctions, the courts have seldom ordered a permanent injunction in the context of environmental suits against large corporations and public utilities. For example, plaintiffs seeking an injunction against factories which emanate excessive levels of noise have often lost because of procedural problems. This occurs partly because the content of such a complaint is too vague to properly inform the defendant what he is defending against, and partly because the remedies sought by the plaintiff are too complex for the court to implement.

The Civil Procedure Act of 1890 does not explicitly require strict specificity in complaints. Even so, in the 1991 Osaka Nishiyodogawa case, the Osaka District Court held that a complaint seeking an injunction was dismissed due to vagueness even though it stated that defendants should not be permitted to make more than 0.02 ppm density of NO₂ per day, a seemingly precise standard. Moreover, in the Kawasaki Steel Company case, the Chiba District Court held that even if the court should issue an injunction ordering the defendant to maintain a specific density of NO₂ less than a certain standard, the court could not implement such a vague decision with direct or indirect coercive measures. In the Route 43 case, residents sought a permanent injunction to prevent traffic noise. Initially, they lost because their complaint was held to be vague. On appeal in 1992, the Osaka High Court held that because the remedy sought was clear to the

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266 Gresser et al., supra note 5, at 135-36; Upham, supra note 220, at 248-54.
267 For factors which the Japanese courts have taken into consideration in assessing whether to issue an injunction, see Gresser et al., supra note 5, at 137.
268 The suit for provisional relief is based on the Civil Provisional Remedy Act of 1989. Minji Hozenho (Civil Provisional Remedy Act), Law No. 91 of 1989.
269 Compare actions in the United States where injunctive relief is more freely granted.
271 See Minji Soshōhō (The Civil Procedure Act), Law No. 29 of 1890.
272 Kawashima, supra note 270, at 68.
273 Judgment of Mar. 29, 1991, Osaka [District Court], 1383 Hanji 22 (Japan).
274 Judgment of Nov. 17, 1988, Chiba [District Court], Hanji, Heisei 1 Nen 8 Gatsu 5 Nichi Go 161, 219 (Japan).
276 See Minji Soshōhō (The Civil Procedure Act), Law No. 29 of 1890.
278 Judgment of Feb. 20, 1992, Osaka [High Court], 1415 Hanji 3 (Japan).
defendants and the court could coerce the decision indirectly by awarding money damages, the plaintiffs' complaint seeking an injunction against traffic noise exceeding specified noise limits during a certain period of the day was legitimate. While this decision is clearly a step in the right direction, it is unclear whether this decision created a precedent on the required amount of specificity in a complaint. Therefore, the courts' generally hostile attitude toward permanent injunctions may not have been truly been changed within the Japanese civil judicial system.

3. Environmental Litigation and the Tentative Draft for Civil Procedure Reform

The reform of civil procedure in Japan is progressing in a direction which will make civil procedure more easily accessible and understandable to the public. This reform should also make provisions of civil procedure more adaptable to the demands of a modern society. The first tentative draft for civil procedure reform was announced officially on December 20, 1993. As this project totally reforms the current civil procedure governing the civil litigation process on a variety of trans-substantive cases, this reform is sure to have certain influences on environmental civil procedure because the reformed Act will be applied to it. Again, this draft is only tentative, but it is said that some basic lines have been hammered out. Some tentative matters having a notable influence on the environmental litigation process deserve mention.

First, in order to ensure a speedy trial and to effectively find issues and arrange evidence for trial at the pretrial/early trial stage, this draft proposes several alternative methods: (1) the method used to locate issues and arrange evidence in the early trial stage; (2) the method utilized to locate issues and arrange evidence in the pretrial stage; and (3) the method used to arrive at issues and arrange evidence via affidavits, depositions, or telephonic testimony without requiring the personal appearance of parties at the courthouse. These methods are expected to serve as countermeasures against many of the current delays of trials, including delays common in environmental litigation.

279 Id.
281 Id.
283 See Tentative Draft for Civil Procedure, at art. 4.3.1., 1042 JURISUTO 48, 50 (1994).
284 See Tentative Draft for Civil Procedure, at art. 4.3.2., 1042 JURISUTO 48, 50-51 (1994).
285 See Tentative Draft for Civil Procedure, at art. 4.3.4., 1042 JURISUTO 48, 51 (1994).
However, several problems might remain, such as: 1) the nonexistence of a rule and standard on how to choose one of the aforementioned methods; 2) the uncertainty of the permissibility to amend the issues that comprise the real dispute; 3) the due process problem of the possibility of an ex parte hearing of the plaintiff or defendant by a judge in deciding the issues of the case; 4) confusion surrounding the methods used for encouraging settlement; and 5) the constitutionality of deciding issues affecting the public when the court is not open to public observation.  

Second, with only a limited system of document production in Japan, the citizens often have difficulty gathering evidence during environmental litigation, whereas companies and the governments have comparatively more materials which the citizens need for trial. To solve this problem, the draft proposes some directives which enlarge the scope of the holder’s duty to produce documents. Thus, it could make such documents more accessible to citizens than they are presently.

Third, to promote speed and efficiency in mass litigations, an increase in the number of the judges trying the case (five-judge trial) and a delegated judge to hear witnesses are proposed in this draft. However, the feasibility and fairness of these proposals are doubtful because it is questionable whether the increase in the number of judges would really accelerate the trial. Moreover, I believe that cross-examination should be guaranteed and that, as a rule, witnesses should be examined in a public trial according to the demands of fair civil proceeding.

Fourth, one of the most important points that this draft ignores is the consideration of a suitable formulation process for permanent injunctions. Injunction is the most effective way to prevent environmental pollution and to preserve the environment itself. Even after the enactment of this draft for civil procedure reform, permanent injunctions will still not be readily accessible for citizens because there are few plans relating to the reform of injunctive relief.

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287 Article LXXXII of the Constitution of Japan of 1946 declares:

(1) Trials shall be conducted and judgment declared publicly.

(2) Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein the rights of people as guaranteed in Chapter III of this Constitution [Rights and Duties of the People] are in question shall always be conducted publicly.

Kenpo [Constitution] art. LXXXII (Japan). See also Tanaka, supra note 8, at 82.


290 Kawashima, supra note 251, at 18.

291 Id. at 16-18.
VI. Conclusion

In modern Japanese society, there are many environmental problems which are difficult to solve. In this sense, Japan is still only a developing country with respect to environmental protection, the practice of relieving victims of pollution, and environmental preservation from the normative viewpoint. Therefore, the governments and industry should continue attempts to thoroughly and completely eliminate environmental pollution and provide adequate remedies to victims of pollution.

The Fundamental Act for Environment includes the term "sustainable development" which expresses the goal that society develop without irreparable environmental destruction. This declaration, along with the idea that future generations should inherit a comfortable environment, should be seen as an expression of a basic change in national environmental policy from a primary guarantee of the freedom of industry and the respect of property rights to respect for human dignity in the practice of environmental law. However, one should not expect the radical overnight development of concrete environmental protection measures as a result of the enactment of the Fundamental Act for Environment, in light of the decades of priority given to industrial and economic development by the LDP Government. Therefore, the judiciary, as a result, should play a more important role than it does today in order to realize the policy goals of the Fundamental Act for Environment. If this were done, the Japanese people would be able to peacefully co-exist with nature and the environment. Instead of one of the most productive and wealthy societies in the world, future generations of Japanese might instead inherit the much more valuable gift of a mentally affluent and healthy life.

292 See supra note 109 and accompanying text.