

Japan

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REGULATORY FRAMEWORK

1. Please briefly set out the key environmental legislation and regulatory authorities in your jurisdiction.

The Ministry of the Environment has a major role in environmental administration and has exclusive jurisdiction over matters involving waste, environmental pollution, natural conservation and wildlife protection. It has joint jurisdiction with other ministries over:

- Global warming.
- Preservation of the ozone layer.
- Recycling.
- Control of chemical materials.
- Contamination of seawater.
- Protection of forests, green space, rivers and lakes.

Under many environmental laws, governors of prefectures are given authority to issue permits, and accept applications and notifications. This authority is often delegated to governors of municipalities (cities, towns or villages). Local governments (prefectures and municipalities) can also establish their own regulations.

Certain laws give local governments authority to establish their own local ordinances concerning environmental matters they are responsible for. Even without such express legal authorisation, local governments can establish local ordinances that are stricter or broader than the regulations under national laws, provided those ordinances are consistent with related laws.

REGULATORY ENFORCEMENT

2. To what extent are environmental requirements enforced by regulators in your jurisdiction?

Generally, if a substantial violation is known to the relevant regulator, the violation is rectified by the regulator's guidance or order.

However, illegal dumping remains a serious social issue. According to the 2009 White Paper on the Environment, there were around 100,000 tonnes or 400 cases of illegal dumping of industrial waste in 2007.

Measures such as tighter penalties, establishing and strengthening a manifest system (see *Question 11*) and joint patrols between the Regional Environment Offices (local offices of the Ministry of the Environment) and relevant local governments are being taken, but the results have not been particularly positive.

In addition, there are many violations of the regulations under the Building Standards Law concerning floor area ratio and building coverage ratio, which are important regulations for creating a desirable urban environment. The regulator is reluctant to take action to enforce these regulations, because of the large number of violations.

ENVIRONMENTAL NGOs

3. To what extent are environmental non-governmental organisations (NGOs) and other pressure groups active in your jurisdiction?

Environmental NGOs in Japan are not especially active. It has traditionally been seen as the role of government to promote the public interest. In addition, only governments can prosecute violations of environmental laws. Private persons, including environmental NGOs, cannot file lawsuits to correct such breaches unless their own rights have been infringed. This explains further why the powers of environmental NGOs are weak.

However, non-profit corporate reform has occurred recently to stimulate public interest activities by the private sector. The reform made the incorporation of non-profit companies easier.

ENVIRONMENTAL PERMITS

4. Is there an integrated permitting regime or are there separate environmental regimes for different types of emissions? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?

There are several statutes that regulate emissions. However, there is no integrated regime that regulates all emissions. Many environmental regulations prohibit emissions exceeding certain standards and require emitters to comply with those standards.



5. If there is an integrated permitting regime, please provide a brief overview of it, in particular:

- What permits are required and which regulator issues them?
- How long do permits last?
- Are there restrictions on transferring permits?
- What are the penalties for non-compliance?

There is no integrated regime that regulates all emissions (see *Question 4*).

WATER POLLUTION

6. Please summarise the regulatory regime for water pollution (whether part of an integrated regime or separate). In particular:

- What permits or other authorisations are required and which regulator issues them?
- Are any activities prohibited (such as causing or failing to prevent water pollution)?
- Can the regulator require a polluter to clean up or pay compensation for water pollution?
- What are the penalties for non-compliance?

The primary law concerning water quality control is the Water Pollution Control Law. This law regulates the emission of wastewater from factories and business establishments to public water areas (for example, rivers, lakes and marshes, gulfs, coastal areas and waterways) and penetration into groundwater.

If a specific facility is going to be installed that will emit substances likely to cause harm to human health, the governor of the relevant prefecture must receive prior notification. The governor can order changes or abolition of the submitted plan if the drains of a specified facility do not comply with effluent water standards. Breach of these orders can result in imprisonment or fines.

Facilities must comply with effluent water standards after installation. Specifically, certain substances affecting human health and preservation of the living environment are subject to emission concentration standards. In addition, in areas where many pollution sources exist such as Tokyo Bay, emission standards by total volume have also been set. Additional standards can also be implemented through local ordinances.

If there is emission of effluent water exceeding the effluent standards from the drains of a specific facility, imprisonment or fines can be imposed without issuing an administrative order. If there is violation of total volume standards or penetration into groundwater, orders for rectification are issued initially, and penalties can be imposed if the orders are not complied with.

If there is groundwater penetration of certain substances categorised as hazardous substances, the governor of the prefecture can order the polluter to carry out purification measures. If the

polluter fails to comply, the polluter is subject to imprisonment or fines. In addition, if a person becomes ill or dies due to exposure to the hazardous substances specified in the Water Pollution Control Law, the violator is liable for the damages, irrespective of whether the violator was negligent.

AIR POLLUTION

7. Please summarise the regulatory regime for air pollution (whether part of an integrated regime or separate). In particular:

- What permits or other authorisations are required and which regulator issues them?
- Are any activities prohibited (such as discharging certain substances into the air without a permit or causing air pollution)?
- Can the regulator require the polluter to clean up or pay compensation for air pollution?
- What are the penalties for non-compliance?

The Air Pollution Control Law is the main law on air pollution. There are special regulations for automobiles (see *below, Automobiles*).

Air Pollution Control Law

This law regulates soot and smoke, particulates and volatile organic compounds (VOCs). Installation of a facility emitting soot and smoke requires prior notification to the governor of the prefecture. Governors of prefectures can order changes or the abolition of the submitted plans if they deem it necessary. Certain concentration standards have been determined for specific substances, and emissions of these substances from facilities cannot exceed these standards. In an area with substantial pollution, aggregate volume standards for sulphur oxide and nitrogen oxide can be set, and the aggregate volume per factory unit can be set by plans prepared by the governor of the prefecture.

Penalties can be directly imposed for non-compliance with emission standards. Governors of prefectures can also issue a rectification order or a temporary suspension order of the use of facilities. Anyone who breaches these orders is subject to imprisonment or fines.

If a person becomes ill or dies due to exposure to the hazardous substances specified in the Air Pollution Control Law, the violator becomes liable for this, regardless of whether that violator was negligent.

Automobiles

Certain automobiles (such as trucks, buses and diesel automobiles) used in specified areas that do not meet emission standards for nitrogen oxide and particulate matter will not pass automobile inspections, and will not be permitted to be operated in such areas (*Law Concerning Special Measures for Total Emission Reduction of Nitrogen Oxides and Particulate Matters for Automobiles*). In addition, certain large enterprises must prepare an automobile use management plan and submit an annual report on implementation of measures to reduce emissions.

Governors of prefectures can issue recommendations if the reduction of emissions is considerably less than the relevant standards. If the emitter does not follow the recommendations, the governor can make this fact public, or issue an order for the emitter to take certain measures. Anyone in breach of these orders is subject to fines.

The Tokyo air pollution suit involved more than 600 asthma and other patients claiming damages for injuries caused by car exhaust fumes against seven automobile manufacturers and the national government, the Tokyo Metropolitan Government and the Metropolitan Expressway Co. The matter was settled by the Tokyo High Court on 8 August 2007.

Under the settlement, the seven automobile manufacturers, as well as the other defendants, agreed to bear some of the patients' medical expenses. According to an official announcement by the Tokyo Metropolitan Government, the seven automobile manufacturers have agreed to bear JPY3.3 billion (as at 1 August 2010, US\$1 was about JPY86.5) of a JPY20 billion plan to subsidise the medical expenses of all asthma patients in Tokyo for five years, in addition to the JPY1.2 billion paid in the settlement.

CLIMATE CHANGE

8. Please provide a brief overview of emissions trading schemes in your jurisdiction, including any national targets and carbon allowances systems. Is your jurisdiction party to international agreements on this issue and how have they been implemented into your national law?

Japan is party to the Kyoto Protocol. Japan's emissions trading scheme started in 2005 as its Voluntary Emissions Trading Scheme.

Parties who can participate in the system are:

- Target-holding participants, who receive subsidies for the cost of facilities that reduce carbon dioxide emissions and an emissions allowance, in return for committing to a certain amount of emissions reduction.
- Transaction participants, who conduct transactions in emission allowances and establish accounts at the Ministry of the Environment's Voluntary Emissions Trading Scheme registry. They do not receive subsidies or an emissions allowance. Emissions allowance trading using the registry became possible from April 2007.

A target-holding participant receives an emissions allowance in the amount of the average of its emissions for the past three years, less the reduction target amount. A target-holding participant must return the emissions allowance equal to its actual emissions for the relevant year to the Ministry of the Environment. If it cannot do this, the participant must return the subsidies corresponding to the amount of emissions that it failed to reduce, as a penalty. It is possible to return the required allowance by buying an emissions allowance from other participants, and so avoid the penalty.

In addition to the emissions trading scheme, a new emissions trading scheme called Experimental Introduction of an Integrated Domestic Market of Emissions Trading began in 2008.

Participation is optional and participants voluntarily set their targets.

There are two types of participants:

- Participants who set their own greenhouse gas emission reduction targets (absolute target or intensity target) and try to achieve them. They can trade allowances, Kyoto credits (such as CER) and domestic credits.
- Trading participants who only intend to conduct emissions trade.

9. Are there targets to reduce greenhouse gas emissions from buildings in your jurisdiction? Is there legislation requiring buildings to meet certain minimum energy efficiency criteria? If yes, please give brief details.

There are no targets to reduce greenhouse gas emissions from buildings at national level.

The Tokyo Metropolitan government required the owners of certain large greenhouse gas emitters, including office buildings, to reduce greenhouse gas emissions from April 2010.

The target for the first compliance period (2010 to 2014) has been set at 6% or 8% (according to the type of the building) below base emissions, which will be determined based on the amount of emissions from the building in recent years.

The Tokyo Metropolitan Government plans to set subsequent compliance periods every five years with targets to reduce emissions during each period.

The building owners who must reduce greenhouse gas emissions can use certain Tokyo Metropolitan government-sanctioned credits to achieve their targets.

ENVIRONMENTAL IMPACT ASSESSMENTS

10. Please provide a brief overview of the requirements to carry out environmental impact assessments (EIAs) for certain projects (for example, construction of an oil and gas facility). In particular:

- What type of projects and impacts are covered?
- Are permits or other documents required before the project can start and which regulator issues them?
- What are the penalties for non-compliance?

EIAs are required by the EIA Law. There are also local ordinances established by certain local governments that require assessments. Local ordinances can be stricter than the EIA Law, as they can, for example, include more types of target projects, small-scale projects that are outside the scope of the EIA Law, and required procedures for public hearings and subsequent monitoring.

Screening

There are 13 project types that require EIAs under the EIA Law. These include:

- Roads.
- Dams.
- Railways.
- Airports.
- Power plants.
- Landfill sites for industrial waste.
- Reclamation.
- Land readjustment projects.

These projects are limited to those conducted by the government or those for which permissions are granted by the government. Of these, large-scale projects that can greatly influence the environment are classified as Class-1 Projects, and are always subject to assessment. Smaller scale projects are classified as Class-2 Projects, and the competent ministers individually determine whether to assess such projects.

Scope of an EIA

Once the target project is determined by screening, a document to determine the scope of the EIA is prepared. At this stage, the actual method of implementation is determined. The items to be evaluated are selected by business enterprises responsible for the target project, taking into consideration the opinions of the public and governors of local governments.

EIA implementation

Business enterprises then compile the results of their evaluation in draft environmental impact statements, and make these statements publicly available. During this period, explanatory meetings for local residents are held. Alternate proposals, if any, are examined at this stage. Business enterprises then prepare final environmental impact statements after examining the opinions of the public and governors of local governments.

Final environmental impact statements are then sent to and examined by the Minister of the Environment and the competent ministers with authority to grant permission for the project. The statements are then confirmed and made public. The project cannot start until final environmental impact statements are made public.

The competent ministers examine the statements in light of the environmental impact and determine whether to grant permission for the project. Because of this, business enterprises should not ignore various opinions given about their draft environmental impact statements when preparing their final environmental impact statements.

Penalties

As the EIA Law is a procedural law, there are no penalties such as fines for non-compliance. However, companies cannot obtain approval for their projects if they fail the assessment process.

WASTE

11. Please provide a brief overview of the regulatory regime for waste. In particular:

- **What permits or other authorisations are required and which regulator issues them?**
 - **What activities are prohibited (such as storing or disposing of waste without a permit)?**
 - **Do operators need to meet certain criteria (such as having sufficient financial means to operate landfills and other waste disposal sites)?**
 - **Are there special rules for certain types of waste (such as hazardous waste or electrical equipment)?**
 - **What are the penalties for non-compliance?**
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The Waste Disposal and Public Cleansing Law (Waste Law) is the main law relating to waste. General waste and industrial waste are treated differently under the Waste Law.

Concepts of waste

Waste is defined as filth or undesirable objects in solid or liquid form such as garbage, bulky refuse and combustion residue. Whether an object is undesirable is determined by comprehensive consideration of the occupant's intention and the object's characteristics. Because this decision is not necessarily easy, it may be disputed.

General waste disposal

General waste means waste other than industrial waste. Disposal of general waste is conducted by municipalities as an administrative service. Municipalities can dispose of general waste on their own or can engage contractors. The engagement and disposal standards with which municipalities and general waste disposal contractors must comply are regulated.

Disposal contractors of general waste must obtain a licence from the governors of municipalities. To obtain a licence, the applicant must show it has proper facilities and is able to continuously perform its obligations under the licence. There are certain disqualifications from obtaining a licence, including if the applicant:

- Was sentenced to imprisonment or a more severe penalty, and five years have not elapsed since the day on which the execution of the sentence was completed or the sentence no longer applied.
- Had obtained the licence under the Waste Law and five years have not elapsed since the date of the licence revocation.

Illegal disposals can result in orders for suspension of business, or, for severe breaches, licence revocation.

Installation of general waste disposal facilities requires permission from governors of prefectures. To obtain permission,

simple assessment procedures concerning the living environment must be conducted, and living environment impact survey reports setting out the results submitted.

Industrial waste disposal

Industrial waste is waste created in connection with business activities. The types of waste considered industrial waste are set out in the Waste Law. In principle, industrial waste must be disposed of by the business enterprise discharging that waste. However, it is common for businesses to pay others to dispose of their waste. The Waste Law regulates disposal, storage and engagement standards.

An industrial waste disposal contractor must obtain a licence from the governors of prefectures. The licence standards for industrial waste disposal contractors are becoming stricter. In addition, to encourage able contractors, an evaluation system for determining excellence of industrial waste disposal contractors was established in 2005. Certain incentives, such as simplification of certain procedures, have been given to contractors rated as excellent, and waste discharging enterprises can select these contractors.

Installation of industrial waste disposal facilities requires the permission of the governors of prefectures. As with the installation of general waste disposal facilities, to obtain permission, simple assessment procedures concerning the living environment must be conducted, and living environment impact survey reports setting out the results submitted.

To prevent illegal dumping, a manifest-check system exists. Business enterprises discharging industrial waste must deliver a management ticket (manifest) describing the type, volume and so on of their waste, on engagement of delivery or disposal of it. The manifest must move between the contractors with the movement of the waste. On final, appropriate disposal of the waste, a document acknowledging disposal must be sent to the waste discharging enterprises. By using this system, business enterprises can track and confirm whether there has been appropriate disposal of the waste.

Special management waste

This is waste designated as having a likelihood of explosion, toxicity, infection or causing other damage to the health or the living environment of humans.

Strict disposal and storage standards are imposed on special management waste.

A special management industrial waste disposal contractor must also obtain a licence for its activities, which is separate from the business licence for the disposal of industrial waste.

Penalties

The following are punishable by imprisonment of up to five years and/or fines up to JPY10 million:

- Operating without a licence.
- Installing waste disposal facilities without permission.
- Violating orders, for example, to suspend business.

- Violating orders to take certain measures.
- Illegal dumping.
- Illegal incineration.

Reports and on-site inspections

Local government governors or the Minister of the Environment can require a person who conducts or seems to conduct waste disposal to prepare a report on matters deemed necessary.

Local government governors can conduct on-site inspections of business establishments or the disposal facilities of persons who dispose of waste or of any material that may become waste.

Restoration to original state

In relation to general waste, governors of municipalities can order persons who conducted a disposal, or who entered into an engagement not in compliance with the engagement standards, to undertake restoration measures.

In relation to industrial waste, governors of prefectures can issue restoration orders to any of the following:

- Persons who make inappropriate disposal.
- Persons who entrust waste not in compliance with the engagement standards.
- Persons who violate the manifest system.
- Persons who make demands for, or who abet the three activities listed above.
- Business enterprises discharging industrial waste, if the persons who make inappropriate disposal do not have adequate funds, and the enterprises:
 - did not pay the appropriate fees to such persons; or
 - knew or could have known about the inappropriate disposals.

If persons who made illegal disposals are unknown or do not have adequate funds, governors of local governments can take restoration measures instead.

ASBESTOS

12. Please provide a brief overview of the regulatory regime for asbestos in buildings. In particular:

- **What activities are prohibited?**
- **What are the main obligations (such as investigating the presence of asbestos and risk assessments for employees) and who is liable to carry them out?**
- **What permits or other authorisations are required and which regulator issues them?**
- **What are the penalties for non-compliance?**

Asbestos cannot be used in buildings. The owner of a building that contains asbestos (from when its use was allowed) does not

have to renovate the building, but must take necessary steps to prevent the spread of asbestos fibres. In particular, if a building contains sprayed asbestos that may be easily dispersed in the building, and the owner has employees in the building, failure to take appropriate preventative measures is punishable by imprisonment of up to six months or a fine up to JPY500,000.

A contractor that intends to demolish a building must:

- Check whether the building has asbestos.
- Prepare a work plan to prevent damage to the health of labourers caused by asbestos if the building has asbestos.
- Notify the relevant authority of the construction work in advance.

A person who fails to do this is subject to imprisonment or a fine.

A landlord must keep his building in good repair (*Civil Code*). If asbestos is dispersed in the building, this is a condition that must be repaired and the landlord must take appropriate measures to prevent this. Failure to do so is default under the lease by the landlord.

In addition, if the building is used by third parties, such as hotel guests, the occupier or owner of the building is liable for damage incurred by those third parties due to any defect of the building, which includes asbestos dispersal in the building (*Civil Code*).

CONTAMINATED LAND

13. Please provide a brief overview of the regulatory regime for contaminated land. In particular:

- Which regulator is responsible and which legislation applies?
- In what circumstances can a regulator require the investigation and clean-up of contaminated land?
- What are the penalties for non-compliance?

The governor of each prefecture is responsible under the Soil Contamination Countermeasures Law (SCCL), which is the national law relating to contaminated land. The municipalities and prefectures can also regulate soil contamination by establishing their own local ordinances.

An owner, manager or occupier of land (collectively, a landowner) with a factory where specific hazardous materials have been manufactured, used or disposed of, must investigate the land (*SCCL*):

- When the factory ceases operations.
- If the competent regulator deems that there is a risk of contamination that may harm human health, and orders an investigation by the landowner.

If a landowner makes changes to the character of a large area of land, the landowner must notify the governor of each prefecture at least 30 days before beginning the changes. If the governor determines the land as possibly contaminated and orders the landowner to investigate, the landowner must comply.

If the land is found (in mandatory investigations conducted under the SCCL) to be contaminated to an extent regulated by the SCCL, the land is made a designated area. Under the SCCL, the

designated area is divided into two areas based on whether there is a risk of contamination that may harm human health:

- *Yo-sochi-kuiki*, where some measures such as the removal of contamination must be undertaken due to a risk to human health.
- *Keishitsu-henko-ji-yo-todokede-kuiki* is an area which is contaminated, but may not harm human health without a change in the condition of the land. A landowner is only required to notify the governor of each prefecture when it makes changes to the character of the land.

The regulator can order the landowner of *yo-sochi-kuiki* to clean up the contamination. However, if the polluter is clearly different from the landowner, and the regulator deems it appropriate, the order is imposed on the polluter.

If an obligation under the SCCL to investigate soil contamination or to clean up soil contamination is not performed, the landowner or polluter is subject to imprisonment of up to one year, or a fine up to JPY1 million.

Under the SCCL, any person who takes contaminated soil out of the designated areas must delegate disposal of the contaminated soil to authorised contaminated soil disposal companies.

14. In relation to liability for contaminated land:

- Which party is liable for carrying out or paying for environmental investigation and clean-up?
- Can an owner or occupier who has not caused contamination be liable for investigation and clean-up of contamination on their land?
- Can previous owners or occupiers be liable for contamination they have caused in the past?
- Are there limits on liability or ways for a party to limit its liability?

The landowner can be liable under the SCCL for carrying out or paying for environmental investigation and clean-up, except where a polluter other than the landowner is ordered to clean up the contamination (*see Question 13*).

If the land is contaminated by dioxin, the soil contamination is cleaned up by the governor of the prefecture and the polluter pays the costs of doing this. Dioxin is regulated by a special statute.

An owner or occupier who has not caused contamination can be liable for the investigation and clean-up of contamination (*SCCL*). A previous owner or occupier cannot be liable for contamination unless it caused contamination while being the owner. There are no limits on liability or ways for a party to limit its liability, if the liability derives from the SCCL.

A buyer often requires a seller to check the level of soil contamination at the time of sale (*see Question 21*). Therefore, in most cases where contaminated land is investigated and cleaned up, that investigation or clean-up is voluntary, rather than performed as an obligation under the SCCL.

15. Can a lender incur liability for contaminated land and is it common for a lender to incur liability? What steps do lenders commonly take to minimise liability?

It is not common for a lender to incur liability for contaminated land. In theory, a lender can be liable if it is deemed to be a landowner under the SCCL (*see Question 13*), although there is no case law precedent for this.

If, for example, an owner of land transfers the land to a lender as security for a loan, the lender becomes a landowner. In addition, if the lender controls the use of the land, the lender may become a landowner because it may be deemed a manager of the land.

Lenders do not generally take any special steps to minimise this liability.

16. Can an individual bring legal action against a polluter, owner or occupier (for example, for damage caused by the movement of contamination onto his land)?

A private individual can take legal action against a polluter for damage caused by the movement of contamination on to his land under the law of tort, but cannot take legal action against an owner or occupier who has not caused the damage.

TRANSACTIONS

17. In what circumstances can a buyer inherit pre-acquisition environmental liability in:

- An asset sale?
 - The sale of a company (share sale)?
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Asset sale

Because a buyer becomes the landowner, the buyer is subject to the liability of a landowner under the SCCL (*see Question 13*). The buyer does not inherit the environmental liability of a polluter under tort law.

Share sale

The landowner (the target company) does not change after the sale of shares of a company, and the buyer of the shares assumes the position that the seller had as shareholder of the target company, including any environmental liability.

18. In what circumstances can a seller retain environmental liability after:

- An asset sale?
 - A share sale?
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Asset sale

Because a seller loses its interest in the land after the sale, the seller ceases to be liable as a landowner after the sale under the SCCL. However, the seller can still be liable for any contamination it caused before the sale (*see Question 13*). In addition, if the

seller transfers its contaminated land to a buyer controlled by the seller (to avoid liability under the SCCL) and the buyer is not able to cover the liability, the seller may still be liable as a landowner under the SCCL.

Share sale

Because the seller of shares in the company loses its interest in the shares after the sale, the seller is separated from any liability of the target company after the sale. However, the seller cannot be relieved from liability under tort law after the sale, if the seller committed a tort through the target company that causes the contamination. This liability may arise where the seller controls the operation of the target company.

19. Does a seller have to disclose environmental information to the buyer in:

- An asset sale?
 - A share sale?
-

Asset sale

Except where local ordinances specifically provide (for example, an ordinance of Kanagawa prefecture requires a seller that is a business, using particular toxic substances, to disclose their use), a seller of contaminated land is not obliged to disclose environmental information but is subject to hidden defect liability under the contract law theory of the Civil Code (*see Question 21*).

The seller and the buyer can agree to exempt the seller from this liability. However, this agreement is null and void if the seller is either:

- Aware of the contamination at the time of the sale.
- A person who engages in the business of real estate transactions and the buyer is not such a person (*see also Question 22*).

Share sale

A seller of the shares in a company that owns contaminated land is not obliged to disclose environmental information, but may be subject to hidden defect liability against the buyer under the contract law theory of the Civil Code, if the environmental information affects the sale price of the shares. The seller and the buyer can agree to exempt the seller from this liability. However, if the seller is aware of the contamination at the time of the sale, such an agreement is null and void.

20. Is environmental due diligence common in an asset sale or a share sale? If yes:

- What areas are usually covered?
 - What types of environmental assessments are available?
 - Are environmental consultants usually used? If so, what issues should be covered in an engagement letter (for example, limit on consultant's liability)?
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Areas covered

Environmental due diligence is common in both an asset sale and a share sale. If land is included in the transaction, soil

contamination and asbestos are covered in the due diligence. If the company is a manufacturing company, its conduct as a manufacturer is comprehensively covered.

Types of assessment

Assessment by an environmental consultant is available for soil contamination and asbestos issues. A buyer of the shares in a company usually reviews environmental reports prepared by the company, including reports under the requirements of the international environmental management systems standard, ISO 14001.

Environmental consultants

Environmental consultants are usually retained by the seller to investigate soil contamination and asbestos issues. Consultants tend to limit their liability to the seller. The buyer usually hires environmental consultants if it wishes to obtain a report that it will rely on. Usually, such a report only covers soil contamination or asbestos. For other issues, the buyer tends to interview the persons in charge of environmental issues at the company.

21. When are environmental warranties and indemnities usually given and what issues do they usually cover in:

- An asset sale?
- A share sale?

Asset sale

Under the contract law theory of the Civil Code, a seller is liable for hidden defects in the object being sold (for example, land) to the buyer. As a result, a buyer is usually not too concerned about the terms and conditions of general environmental issues.

However, buyers of land are very concerned about the specific issues of:

- Soil contamination, due to the SCCL (*see Question 13*).
- Asbestos, particularly since the regulations became stricter in 2005 (*see Question 12*).

Therefore, it is now common for the buyer to require a seller of land or a building to give warranties and indemnities concerning soil contamination and asbestos.

Share sale

In the sale of shares in a large company, the buyer usually requires the seller to give warranties and indemnities about environmental matters generally, and particularly that the company does not violate any environmental laws and has no disputes concerning environmental issues.

22. Are there usually limits on environmental warranties and indemnities, for example, time limits or financial caps?

There are usually time limits on environmental warranties and indemnities. However, under the Real Estate Transaction Business Law, a person who engages in real estate transactions cannot set time limits of less than two years after delivery of the real estate for liability for hidden defects derived from the contract law theory of the Civil Code.

REPORTING AND AUDITING

23. Do regulators keep public registers of environmental information (for example, of environmental permits or contaminated properties)? What is the procedure for a third party to search those registers?

Making designated areas public

The governors of prefectures publicise contaminated areas found in mandatory investigations under the SCCL as designated areas (*see Question 13*). They also prepare and make available for inspection information ledgers on designated areas.

However, the number of incidents of soil contamination found during voluntary investigations is much larger than the number found in mandatory investigations under the SCCL, because mandatory investigations are only undertaken in limited circumstances. Soil contamination found in voluntary investigations does not have to be reported to local governments, and so is not available to the public, except when some local governments set out the obligation to report in ordinances. Some companies conduct voluntary disclosure of soil contamination discovered during voluntary investigation, for corporate social responsibility purposes.

If land is found to be contaminated to an extent regulated by the SCCL because of voluntary investigations by the landowner, the land can be made a designated area (*yo-sochi-kuiki* or *keishitsu-henko-ji-yo-todokede-kuiki*) on the landowner's application (SCCL). The governors of prefectures publicise contaminated land which has been made a designated area on application, and prepare information ledgers on designated areas, which they make available for inspection.

Chemical substance management

Business enterprises must monitor and notify the government of the (*Pollutant Release and Transfer Registers Law*):

- Volume of their emissions into the environment.
- Movement of chemical substances outside their business establishments.

The government calculates the total of notified data for each substance by type of business and by area, and publishes this. If a person requests data on an individual business establishment, this must also be disclosed.

Substances that may affect human health or animal and plant life (or that easily form such substances by chemical change), and substances that damage the ozone layer, must be reported. Business enterprises handling designated substances of a certain scale are subject to these obligations (*Pollutant Release and Transfer Registers Law*).

Business enterprises handling designated substances must, when transferring the designated substances, provide information on the condition and handling of the chemical substances in writing to the other party (*delivery of Material Safety Data Sheet (MSDS)*).

Disclosure of information by governments

Generally, anyone can request publication of information held by governments, under laws or local ordinances on information disclosure. Environmental information can sometimes not be disclosed if, for example, it is likely to damage the competitive position of a company. However, this information must always be made available to the public if this is necessary for the public interest.

24. Do companies have to carry out environmental auditing? Do companies have to report information to the regulators and the public about environmental performance?

Companies are not required to conduct environmental auditing or submit environmental reports. These audits and reports are currently only done voluntarily. However, there is a recent tendency for large companies to prepare environmental reports and make them public, to show their concern for the environment. Environmental reports are sometimes included in companies' corporate social responsibility reports.

The Ministry of the Environment provides guidelines for environmental reports and lists the following to be set out in them:

- Basic matters (for example, the business of the company).
- Management policies on environmental preservation.
- Environmental management (for example, environmental management systems, research and development for the environmentally adopted design of products and services, and public interest activities on the environment).
- Activities to reduce environmental impact.

Companies can also disclose environmental information in their:

- Business reports, prepared at the end of each business year under the Companies Act.
- Securities reports (in the material matters section about the business) made under the Financial Instruments and Exchange Law, which requires the continuous disclosure of corporate information by issuers of listed securities.

25. Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)?

If there is an environmental incident at a company's facilities, the person who operates the facilities must take emergency measures and notify the governor of the prefecture of the incident (under various legislation, including the Air Pollution Control Law, the Water Pollution Control Law, and the Waste Disposal and Public Cleansing Law).

26. What powers do environmental regulators have to access a company's documents, inspect sites, interview employees and so on?

Environmental regulators have no general investigative authority. However, under various individual laws, they can both:

THE REGULATORY AUTHORITY

Ministry of the Environment

Main activities. The Ministry of the Environment plays a major role in the environmental administration and has exclusive jurisdiction over matters involving waste, environmental pollution, natural conservation and wildlife protection. The Ministry has joint jurisdiction with other ministries over other environmental issues.

W www.env.go.jp/en

- Require companies to report and/or submit materials on certain matters.
- Conduct on-site inspections of the company.

INSURANCE

27. What types of insurance cover are available for environmental damage or liability and what risks are usually covered? How easy is it to obtain environmental insurance and is it common in practice?

In recent years, insurance has become available for:

- Damage arising out of incidents such as air pollution, groundwater pollution and soil contamination.
- Damages arising out of environmental pollution due to contracted works with environmental risks, such as soil contamination purification work.
- Purification costs incurred by landowners due to administrative orders under certain laws and regulations such as the SCCL.
- Personal and non-personal damage, such as personal injury to neighbouring residents due to soil contamination and groundwater pollution.

These kinds of environmental insurance are not commonly obtained because the insurance available is limited and the premiums are expensive.

TAX

28. What are the main environmental taxes in your jurisdiction (for example, tax on waste disposal, carbon tax and tax breaks for carrying out clean-up of contaminated land)? For each tax, please briefly state how it is calculated, who pays it and the tax rates.

Environmental policy using taxes is still developing, and the introduction of environmental taxes, particularly a carbon tax, is being debated.

There are some local governments that impose environmental taxes in relation to the following:

- **Forest preservation tax.** Some prefectures (for example, Tottori, Ehime and Kochi) collect forest preservation taxes, which they add on to prefecture tax by enacting an ordinance. This tax is imposed because all prefecture inhabitants benefit from the forest, and tax revenues are allotted for the maintenance and preservation of forests.
- **Industrial waste tax.** This tax has been introduced in many prefectures. It aims to reduce the volume of industrial waste disposed of at final disposal sites, and prevent inflows of industrial waste from other prefectures, by charging tax based on the volume of the industrial waste disposed of at the sites.

REFORM

29. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.

As the first commitment period of the Kyoto Protocol started in 2008 and the G8 Hokkaido Toyako Summit was held in Japan in July 2008 (with a predominant theme of environment and climate change), the further acceleration of the reduction in carbon dioxide emissions is currently the main environmental issue in Japan.

Prompted by the G8 Hokkaido Toyako Summit, in March 2008 the national government established an advisory panel on global warming, composed of well-informed individuals. One of the matters they are looking at is the practical implementation of emissions trading schemes in Japan. In September 2009, the then Prime Minister Yukio Hatoyama addressed the target reduction in greenhouse gases for 2020, and set a target of a 25% reduction from the 1990 levels in a speech at the United Nations. The government is currently working on legislation to implement the plan. The introduction of an environmental tax (carbon tax) is currently being examined. A proposal in November 2004 to include targets for all fossil fuels and electricity was postponed due to strong resistance from industry.

Promotion of 3R (that is, the “reduce, re-use and recycle” principle) is considered an important measure for reducing waste. From 1 April 2007, businesses that use large quantities of containers and packaging must implement reduction programmes including:

- Setting goals to rationalise the use of their containers and packages.
- Imposing a fee for their containers and packages.
- Distributing eco-bags instead of using plastic bags.

In addition, businesses that use more than 50 tonnes of this packaging must now report on their activities to the government.

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Recent transactions

In June 2010, the Supreme Court issued its first judgment in relation to latent defect liability for soil contamination. The court ruled that the seller in the case was not contractually liable for fluorine soil contamination, which was not regulated at the time of the sale. Nishimura & Asahi represented the seller.

Qualified. Japan, 2009

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NISHIMURA & ASAHI



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Our commitment to professionalism and client service has facilitated the firm in becoming one of Japan's leading providers of domestic and international corporate and business legal services.

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