Chapter 29

Japan

Hideaki Ozawa

Ryoji Moroi

Nishimura & Asahi

1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in Japan and which agencies/bodies administer and enforce environmental law?

The principles of environmental policy under the Basic Environment Law are: (i) the enjoyment of environmental endowments and the succession thereof to future generations; (ii) the creation of a society which ensures sustainable development with a reduced environmental load; and (iii) the active promotion of global environmental conservation through international cooperation.

Environmentally-related affairs are either under the exclusive responsibility of the Ministry of the Environment or under the joint responsibility of the Ministry of the Environment and other Ministries.

Local governments are often granted the power to administer and enforce environment law under the related statutes. Additionally, local governments may regulate, administer and enforce environmental matters in their own areas by establishing local ordinances so long as such local ordinances do not contradict national laws.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

In the past, regulatory methods (e.g., direction, prohibition) were mainly used by government agencies in order to enforce environmental laws. However, recently not only regulatory methods but also the comprehensive method (e.g., planning, environmental assessments), the inductive method (e.g., bounty, labelling, information distribution), the consensual method (e.g., agreement) and the after-the-fact method (e.g., criminal or administrative penalty) have been taken concomitantly because of the limits of monitoring capabilities and administrative resources under regulatory methods, and because regulatory methods are not necessarily appropriate to deal with issues surrounding environmental risks.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

Under the Basic Environmental Law, the State makes efforts to provide the public appropriately with the necessary information on environmental conservation, including information relating to the state of the environment, for the protection of the rights and interests of individuals and legal entities. Thus, in practice, the Ministry of the Environment systematises and furnishes environmental information by posting environmental administrative information, various guidelines and the like on its website, or by publishing white papers on the environment.

The Information Disclosure Law, established in 1999, enables any person to require the disclosure of any information (including environmentally-related information) by administrative agencies. In particular, all persons (including legal entities, foreigners, etc.) are able to require that an administrative agency disclose documents, images and electromagnetic records which officials of the administrative agency prepared or obtained officially for the administrative agency, excluding the information below:

- information which reveals the identity of a particular individual;
- information which harms the legitimate interests of corporations, etc.;
- information which jeopardises national security, or relations with foreign countries, etc.;
- information that interferes with public safety and the preservation of order;
- information about discussions and deliberations within an administrative agency, or between administrative agencies, that may impede the frank exchange of views, neutrality of decision-making, etc.; and
- information which interferes with the appropriate operation of the administrative agencies.

If the administrative agency decides that the disclosure of any of the above is particularly necessary for the public interest, it may disclose the information.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

The prohibition of violations of environmental regulatory standards is mainly adopted in order to prevent environmental pollution. There are also some required permits related to the conservation of the environment. Environmental permits are often required when (i) business cannot be appropriately conducted without special skills or experience, in which case the government agency provides licences to qualified business entities and oversees the effective enforcement of regulations (e.g., collection, transport and disposal of waste); or (ii) only certain individuals are allowed to utilise

limited national resources for certain special objectives (e.g., the capture of rare species of wild animals, plants and the like for academic research, breeding, etc.).

Certain statutes have clauses which allow the transfer of a permit in cases of inheritance, corporate consolidation or corporate division, etc. with certain requirements. Without such clauses, transfer of a permit is, in general, impermissible.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

If applicants are not satisfied with an administrative decision refusing to grant an environmental permit, they may protest against the agency or bring an administrative litigation to court. The aforementioned protest will be reviewed by the administrative government agency itself or its supervising agency. Some statutes require such protests as a pre-condition to pursuing administrative litigation.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

The enterprises that are involved in certain infrastructural projects are required to conduct environmental impact assessments. There are thirteen projects listed under the Environmental Impact Assessment Law, including: construction of a national road; construction of a railway; construction of an airport facility; construction of a general waste disposal site; construction of an industrial waste disposal site; and the planning of ports and harbours. Large-scale projects, called Class-1 Projects, are always subject to assessment. A project that is smaller in scale than a Class-1 Project is referred to as a Class-2 Project. A Class-2 Project is subject to assessment if so determined through the screening procedure, which determines the necessity of assessment, taking into consideration factors such as a project's size and characteristics (how influential the project is on the environment) or a neighbourhood's circumstances (how vulnerable the neighbourhood is with regard to the change of environment to be caused by the project).

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

Environmental actions taken without the requisite permits or with permits that were obtained through dishonest means, and environmental violations, are constrained by all or some of the following measures:

a. the violator may be ordered to take necessary measures for environmental conservation, such as restoration to the original state;

b. the violator may be ordered to suspend the entirety or part of its business for a fixed period;

c. permits may be revoked; and

d. the violator may be imprisoned or fined, or subjected to both of these punishments.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

1. "Waste" is defined as garbage, bulky garbage, ashes, sludge, excreta, waste oil, waste acid and alkali, carcasses and other filthy and unnecessary matter whether in a solid or liquid form (excluding radioactive waste and waste polluted by radioactivity). In other words, waste is unnecessary matter, which cannot be bought or sold. Matter is judged by the court to be waste by comprehensively taking into consideration its nature, the method of its disposal, how it is usually treated before disposal, its level of marketability, and the intent of the business producing it.

2. Waste can be broadly categorised as either "general waste" or "industrial waste". Both categories include a sub-category of "specially managed waste".

   "Industrial waste" means waste categories such as ashes, sludge, waste oil, waste acid, waste alkali, waste plastics, and others that are specified by a cabinet order as a result of a business activity, as well as imported waste.

   "General waste" means waste other than industrial waste.

   "Specially managed waste" means such general waste and industrial waste which, as specified by a cabinet order, is explosive, toxic, infectious or of a nature otherwise harmful to human health or the living environment.

3. Business entities are under an obligation to dispose of industrial waste by their own means or to have an authorised disposal entity dispose of the waste at the business entities' cost.

On the other hand, municipalities must collect, transport and dispose of general waste. However, general waste from business activities (e.g., used papers from offices, or garbage from restaurants) must be appropriately disposed of by business entities. In practice, business entities carry the general waste to the municipal treatment facility by their own means or have an authorised transportation entity carry the general waste there. Subsequently, the municipalities dispose of the waste and charge business entities the costs fully or partially.

Standards on the collection, transport and disposal of specially managed general (or industrial) waste and the qualifications of the entity that is authorised to collect, transport and dispose of such waste are stricter than those of other general (or industrial) waste.

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

Business entities are allowed to store and dispose of their industrial waste on the site where such waste was produced, in accordance with the standards described below.

Business entities must store the industrial waste in accordance with industrial waste storage standards (such as creating an enclosure around the circumference of the industrial waste site, displaying a notice board, preventing dispersal, spillage and the like); they must not store the waste for longer than the time required to appropriately dispose of or recycle it; and they must not in principle store it in excess of a volume equal to fourteen times one day's treatment capacity of the facility.

Business entities must furthermore dispose of industrial waste following industrial waste management standards. In particular, the

business entities must prevent the scatter or leakage of industrial waste and must protect the living environment from bad odour, noise and vibration. The incineration of industrial waste must be carried out in a particular manner and using a specific structure. The landfill disposal of the waste must be performed in an appropriate manner depending on the type of industrial waste. For your information, it is noted that outdoor piles of waste left as a preliminary step towards landfill disposal may be viewed by the court to be illegal dumping if it is not deemed as a temporary placement considering the volume of the piles of waste, the period they are left for, etc.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

Even if a business entity transfers the waste to another person for disposal, if the industrial waste is disposed of in a manner that does not conform with disposal standards for such waste and if the living environment is damaged or threatened by such disposal, the mayor of the municipality may order the business entity to take the necessary measures within a specified timeline where both of the following conditions are met:

a. it is difficult for the party who disposed waste to take the appropriate measures to cure the situation due to its financial condition, etc.; and

b. the business entity that produced the waste did not fairly pay for the disposal of waste, or knew or could have known about the inadequate disposal.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

The basic policies of recycling statutes are the waste generator responsibility principle and the extended producer responsibility principle. However, they are not necessarily pursued completely in each statute. Namely, the kind of waste that business entities collect and recycle, and the party that must bear the expenses for the processes in relation to collection and recycling, depend on individual laws as shown below.

According to the Law for the Promotion of Sorted Collection and Recycling of Containers and Packaging: (i) consumers must separate and empty containers and packaging waste; (ii) municipalities must sort and collect containers and packaging waste at their own expense; and (iii) business entities (containers and packaging manufacturers or contents producers) must recycle containers and packaging waste by their own means or by using a designated corporation or recycling business entity. If the actual cost for recycling is lower than the prior estimated cost of recycling, the designated corporation or recycling business entity shall pay the municipality an amount in proportion to how much effort the municipality puts forth for recycling.

According to the Law for the Recycling of Specified Kinds of Home Appliances: (i) consumers must deliver used appliances to retail distributors (where the collection, transport and recycling costs are borne by the consumers); (ii) the retail distributors must surrender them to appliance manufacturers; and (iii) the appliance manufacturers must recycle them.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

Administrative directions are outlined in the answer to question 2.4 above. Objections to administrative directions are outlined in the answer to question 2.2 above.

When there is a breach of environmental law, the violator can be liable for the damage they caused under tort law. There are three types of torts, namely an intentional tort, a negligent tort and a strictly liable tort. A person (tortfeasor) who causes damage to another person (victim) intentionally or negligently is liable to compensate for the resulting damage. If the damage was foreseeable at the time of the conduct, the negligence is established. Courts have a tendency to recognise negligence relatively easily to save victims if the damage is serious. Because it is difficult to establish negligence for certain results, some environmental statutes introduced torts with strict liability (see the Air Pollution Control Law, The Water Pollution Prevention Law, etc.). Causation can be an important issue when establishing tortious liability. According to case law, causation is strongly presumed if there is proof of epidemiological causation. If there are two or more tortfeasors who jointly cause one instance of damage, the tortfeasors are jointly and severally liable for the damage. A remedy of suspension is also allowed under tort if such a suspension may prevent further damage.

There are penalties with respect to violations of various environmental laws.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

Tortious liability is determined by checking whether the conduct constitutes a tort or not, even if the person has observed the environmental regulatory requirements.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Directors and officers of corporations undertake joint and several liability for damage to third parties if they failed to perform their duties intentionally or with gross negligence.

Directors and officers undertake joint and several liability for damages claims where the environmental wrongdoing causes damage to the corporation. As a general rule, approval by all stockholders may discharge them from liability, but when they have performed their duties in good faith and without gross negligence, an extraordinary resolution in a stockholders' meeting or a board meeting, or a contract between the company and directors or officers based on the articles of incorporation thereof, may partly discharge them.

Directors' and officers' liability insurance was authorised in 1993. A general insurance condition covers directors and officers against legal damages to third parties, dispute costs, including court costs, attorney fees, etc., and the dispute costs for winning in the case of stockholder litigation. A stockholder's litigation guarantee special contract covers directors and officers against liabilities and dispute costs for losing in the case of stockholder litigation. However, this

contract does not cover directors and officers against liabilities that result from the pursuit of their own interests or from criminal acts.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

When a company owns contaminated property, there are different implications from an environmental liability perspective, depending on whether a purchaser purchases the stock of that company or purchases the property itself. In the case of purchasing the stock of the company, environmental liability in relation to that property remains with the company, and the purchaser of the stock will not be liable for the company's act of contamination. However, the value of the company's stock will likely be affected by any liability arising from such act, notwithstanding whether the liability accrues before or after the sale.

On the other hand, when a purchaser buys the property itself, as a general rule, such purchaser will not inherit the environmental liability of the seller. However in certain exceptional cases, the purchaser might owe an obligation with respect to the contaminated property even if such obligation arose before the sale. This is because, as stated in question 5.1 below, the Soil Contamination Countermeasures Law provides that in certain cases a landowner may be ordered to remove pollutants irrespective of who caused the pollution, including in cases where the polluter cannot be identified.

A purchaser will assume the obligations or liabilities owed by the seller if the property is a part of a sale of the seller's business and the purchaser continues to use the business name of the seller.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

There are no environmental laws with respect to, and there is no case law finding, lender liability. However, a lender might become liable under tort in cases where the lender participated in the financing of a borrower if such lender effected the disposal of hazardous waste by the borrower and such disposal caused damage to a third party.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

In 1970, the government introduced regulation on soil contamination of farms by enacting the Anti-Farm Soil Pollution Law. In 1996, the Water Pollution Prevention Law was revised to control the pollution of groundwater. This was followed by the enactment of the Law Concerning Special Measures Against Dioxins in 2000.

In 2002, the Soil Contamination Countermeasures Law was enacted as general law with regard to soil contamination. Under this law, an owner, manager, or occupant (together, the "landholders") of land may assume the obligation to investigate the land to determine whether there is any contamination from the operation of a facility used in the process of making, using or disposing of a certain number of harmful materials. In addition, if there is a possibility that there may be a certain amount of pollution that is hazardous to people's health, the governor may order a landholder to investigate the contamination of the land.

Under an amendment to the Soil Contamination Countermeasures Law (the "Amendment to the Soil Contamination Countermeasures Law") that became effective on April 1, 2010, if a land owner develops a large area of land, the land owner is required, at least 30 days before beginning the development, to notify the governor of the relevant prefecture of the development. If the governor determines that the land may be contaminated and orders the land owner to investigate, the landowner must comply.

If the land is found to be contaminated and is to be cleaned up to protect the local residents, the governor may order the polluter to clean up the contamination, and if it is not appropriate to do so (e.g., in a case where the polluter cannot be identified), the governor may order the landholder to clean up the contamination even if the landholder was not the one who caused the contamination.

Thus, parties involved in land transactions are compelled to take a great interest in the existence or non-existence of soil contamination on the land.

5.2 How is liability allocated where more than one person is responsible for the contamination?

Under the Soil Contamination Countermeasures Law, an order may be issued to a person who is responsible for contamination to clean up the resulting pollution. When there is more than one person responsible for contamination, the order must make clear that the clean up shall be performed by the polluters in a manner that is proportionate to their responsibility for the contamination.

However, in cases of two or more polluters, an order to specify the clean up area for each person may sometimes seem absurd. Hence, if there is an agreement between the polluters to perform the clean up together, the order should be made so that the polluters jointly perform the clean up and incur the costs for such work at a rate that is proportionate to their responsibility.

Under the Civil Code of Japan, when a person is injured as a result of contamination caused by more than one person, such injured person can claim compensation from the polluters as a joint tortfeasor. The polluters would therefore be jointly and severally liable; however, between the polluters themselves, each polluter would owe compensation at a rate which is proportional to its respective individual responsibility.

5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

There is no law that addresses this kind of programme, but there is a city ordinance in Tokyo. In this ordinance, an owner of contaminated land is in certain cases required to prepare a programme to clean up the land in accordance with the regulations of the ordinance.

A regulator can require additional work if it finds that the submitted programme does not comply with the regulations.

An objection and a request for a change to this programme by an outside party on the basis that the programme is insufficient is unacknowledged. However, since the local government is responsible for public health, the local government is always interested in the programme and provides advice to landowners on preparing the programme.

It should be noted that even in the case where a landowner is not legally required to clean up soil contamination, the landowner often consults local governments about the measures to be taken for cleaning up such contamination.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

In the first scenario, when company B buys contaminated land from company A, which is the polluter, and company B takes de-pollution measures, company B may seek the contribution of company A: (i) based on the charge under the Soil Contamination Countermeasures Law (but only in the case where the order for the clean up is issued by the governor against company B); (ii) under liability for defect warranty of the Civil Code; or (iii) under the tortious liability of the Civil Code. There could be a dispute as to whether the pollution by company A constitutes a tort, as it is only ruining its own property. However, if company A polluted the land and left this polluted land on the market without taking any appropriate measures for clean up or the equivalent to protect public health, the release of the land might constitute a tort (but there is no citable judicial precedent).

In the second scenario, after company B buys the polluted land from company A, which is the polluter, and company B re-sells such land to company C, company C can claim against company B on the ground of defect warranty. But since company C was not in direct contract with company A, company C can only ask company A for a charge under the Soil Contamination Countermeasures Law, or on the grounds of tort.

In the third scenario, after company A sells the polluted land to company B with disclosure of the pollution and agrees to reduce the purchase price of the land on account of the pollution, company B sells such land to company C without taking clean up measures and without notifying company C of the pollution, and company C takes the clean up measures. In this case, whether company C can seek a monetary contribution from company A poses a significant question. Although there is no citable judicial precedent, it is reasonable to assume that the outcome would be the same as that stated in the second scenario above.

5.5 Does the government have authority to obtain from a polluter, monetary damages for aesthetic harms to public assets, e.g., rivers?

The Law of Landscapes, under which a landscape programme and other measures regarding landscapes are provided, was enacted in 2004 for the purpose of advancing the creation or preservation of good landscapes. This law authorises the administrative agencies of landscapes (prefectures and certain cities) to establish a programme of creation or preservation of good landscapes (a "landscape programme"). In areas to which this landscape programme applies, certain constructions and development actions are subject to a notification procedure. Failure to follow the procedure may incur penalties.

As the Law of Landscapes delegates authority to the administrative agencies of landscapes, their ordinances can provide various regulations and penal provisions.

Whilst they are aimed at creating or preserving good landscapes mainly by regulating the development of land or the construction of buildings pursuant to the Law of Landscapes and local ordinances, some local ordinances regarding landscapes provide penal provisions for dumping waste or vandalising an area with graffiti.

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

An administrative agency has the power to gather information to fulfil its duties. The Ministry of the Environment or local governors under national laws and/or local ordinances have the power to gather information regarding environmental pollution, which includes the production of documents, the taking of samples, site inspections, the interviewing of employees, etc. The laws and local ordinances regarding environmental pollution provide the terms and conditions under which the Minister of the Environment or local governors can collect information regarding environmental pollution, and penal codes are also provided to make the terms effective.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

Under the Soil Contamination Countermeasures Law, landowners are under an obligation to report the fact of pollution to the governor only when soil contamination is found as a result of a legally compulsory investigation (the legal obligation to investigate is discussed further in question 7.2 below). On the other hand, when soil contamination is found as a result of a voluntary investigation, landowners are able to report the fact to the governor. Please note, however, that some local governments have a local ordinance that requires a factory owner using specific harmful materials to report soil contamination when it has discovered soil contamination.

However, when pollution spreads to the neighbouring lands as a result of the landowner having created and left the pollution, and the landowner does not report this fact to the governor, compensation may be claimed against the polluter under the doctrine of tort by the neighbours whose land was polluted as a result of the discharge of pollution. Therefore, such landowners are often forced to dispose of the pollution even though they have no legal obligation to report. Because it is not easy to decide what kind of disposal is appropriate, it will often be advantageous for the landowners to report the pollution and follow the instructions of the local authority.

On the other hand, even if one is not a polluter, one may still be subject to a claim for compensation from victims, under the doctrine of tort, for an omission, for example in the case where the pollution spreads to the neighbouring lands, and it is assumed that the neighbours suffer from health problems as a consequence, and one does not report the pollution to the governor.

The landowner of the contaminated site, therefore, regardless of whether it is the polluter or not, is sometimes forced to report the fact of pollution to the local authority.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

Under the Soil Contamination Countermeasures Law, the legal obligation to investigate soil contamination is provided only in

Articles 3, 4 and 5. Article 3 concerns the investigation of land when a factory using specific harmful matters ceases its operation, Article 4, which was added by the Amendment to the Soil Contamination Countermeasures Law, concerns the investigation of land when large areas of land of 3,000 square metres or more are developed, and Article 5 concerns the investigation of land with potential soil contamination that could damage people's health. However, actions to order an investigation under Article 5 are strictly limited for the following reasons.

The risk of health problems from soil contamination is classified in two groups. The first is the risk of contamination of drinking water through underground water pollution. The second is the risk of polluted soil through earth being ingested or touched directly. The former risk only targets soil contamination that might cause the pollution of drinking water, and the latter risk only targets places where people may enter. Other risks that might result from soil contamination are not considered risks for the purpose of investigation, and so the situations in which the investigation under Article 5 will be exercised are limited.

In addition to the above, under certain local ordinances, a developer is required to conduct an investigation of land for contamination when the developed land area is larger than the certain area regulated by the applicable local ordinances (e.g., 1,000 square metres) even if it is smaller than the specified area by the Soil Contamination Countermeasures Law (3,000 square metres).

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

In Japan, when the property for sale does not have the quality, function or safety which can be reasonably expected for such kind of property, the purchaser can claim that the seller is liable for such a defect, based on the defect warranty doctrine in the Civil Code. An agreement that the seller will not bear any liability for a defect can be made, provided, however, that such agreement is ineffective if the seller does not disclose previous knowledge of a defect to the purchaser. Seller's liability does not accrue when the purchaser knew about the defect at the time of the agreement, and therefore a disclosure of the defect to the purchaser will protect the seller from this liability. In recent land transactions, there has generally been a tendency for sellers to disclose their awareness of any contamination of the land. In addition, liability for a defect can occur not only in transactions of land but also in transactions of stocks of the company holding the land. Therefore, in a case where the value of the company depends on the value of such land, the stock transaction can also require the careful review of any defects in the land.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

It is possible to use environmental indemnities via contract to limit the risk of actual or potential environmentally-related liabilities. However, it is impossible to discharge the indemnifier's potential liabilities with respect to third parties by using an environmental indemnity, because an environmental indemnity via contract between the parties is inoperative against third parties.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

If there is a possibility that a company will assume environmental liability, the company must list such liability as a footnote on the balance sheet. In other words, if the environmental liability corresponds to contingency liability (which is not yet an actual liability, but which becomes an actual liability upon fulfilling certain conditions), the content and amount of money must be listed as a footnote to the balance sheet.

Further, it should be noted that, for example, if company A, which is an owner of land with contaminated soil and is faced with the risk of assuming an environmental liability, transfers the land to company B, company A is not necessarily released from its liability. If company A caused the contamination, it is not released from liability arising from the fact that it caused the contamination. Even if company A did not cause the contamination, if company A controls company B and if it seems unlikely that the transfer between company A and company B is an arm's length transaction in the market, then company A can be liable as a manager of the land under the Soil Contamination Countermeasures Law.

A company can dissolve voluntarily by a majority vote at the shareholders' meeting. However, the dissolution does not necessarily mean that the company is released from its liability. If company A already assumed such liability for a third party at the time of dissolution, even after the liquidation there exists a risk that the third party would try and get its shareholders, such as its parent company, company C, to surrender the wealth obtained as a result of the liquidation of company A. Furthermore, if company A's environmental problems are deemed to have been caused while it was under the control of company C, there is a possibility that company C would assume liability for a third party as a joint tortfeasor with company A.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

In principle, a parent company cannot be held liable for pollution caused by a subsidiary company. However, if for example a subsidiary company violates an environmental law and the company assumes tortious liability, and the violation is caused by the control of the parent company, the parent company might assume the same liability with the subsidiary company, as joint tortfeasors. If the subsidiary is just a sham or if it is deemed that the parent company has misused the subsidiary in order to violate an environmental law, the violation of the subsidiary company is deemed to be the violation of the parent company due to the theory of piercing the corporate veil, and the parent company can be held liable for pollution.

A victim of pollution caused by a foreign company in a foreign country can file litigation against its parent company in Japan. Whether a parent company in Japan can be held liable for pollution caused by a foreign subsidiary company in a foreign country would be judged in accordance with the corresponding foreign law in a Japanese court.

8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?

The Whistleblower Protection Act (the "WPA") became effective

on 1 April 2006. Under the WPA, if a worker discloses information which is in the public interest about a violation of the law to persons within a company, to an administrative agency, or to persons outside the company, under certain conditions the dismissal of the whistle-blower will be invalidated and deemed unfair treatment on the grounds that disclosure was made in the public interest. Laws subject to the WPA are those that safeguard the lives, bodies and property of citizens, including any law which protects the environment.

8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?

Under the Japanese Civil Procedure Code, lawsuits via class action are not allowed, and are therefore not pursuable.

Additionally, under the Japanese legal system, penal or exemplary damages are not allowed and therefore not pursuable, even though the judgment about monetary evaluation of non-economic damage is to a certain extent at the court's discretion.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in Japan and how is the emissions trading market developing there?

Japan's Voluntary Emission Trading Scheme

In 2005, the Environment Ministry started Japan's Voluntary Emissions Trading Scheme ("JVETS"). There are two types of participants in JVETS, participants receiving subsidies ("Participants A") and participants not receiving subsidies ("Participants B"). Both participants have target set and receive an emissions allowance in its average amount of respective emissions for the past three years, less the reduction target amount, and can trade emissions allowances (such as allowances permitted under JVETS or CER under the Kyoto Protocol) with other participants. On the other hand, the Ministry offers subsidies to Participants A for their installation of new facilities which lead to a reduction in global greenhouse gas ("GHG") emissions. After the final trading period, if a Participant A cannot reduce the actual GHG emissions to, or below, the total amount of emissions allowances allocated to such a Participant A plus any amount that it has acquired by trading, the subsidies to such Participant A will be revoked.

Experimental introduction of an Integrated Domestic Market of Emissions Trading

In addition to JVETS, an 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 permitted under this scheme, Kyoto credits (such as CER) and domestic credits.
- Trading participants who intend just to conduct emissions trade.

Voluntary Action Plan prepared by Nippon Keidanren

In addition to the above, the Japan Business Federation (Nippon Keidanren), consisting of dominant Japanese companies, set up a target in which the participating companies will make efforts to keep the average amount of emissions of CO2 from the industrial sector and energy conversion sector during the fiscal period 2008-2012 below the level of the 1990 fiscal year. If it is difficult to achieve the target through only voluntary and additional efforts, the participating companies can use the Kyoto credits created by the Clean Development Mechanism ("CDM") and the Joint Implementation ("JI") in the Kyoto Mechanisms to achieve the target. Therefore, with the purpose of achieving the target, Japanese companies actively facilitate the CDM and the JI, and consequently obtain Kyoto credits from abroad.

All of the emissions allowances as described in the above three schemes are traded between their participants or through an intermediate agent. A trading market like a securities exchange has not been established at this point in time.

Tokyo Metropolitan government schemes

The Tokyo Metropolitan government requires the owners of certain large greenhouse gas emitters, including office buildings, which have used more energy than the equivalent of 1,500 kilolitres of crude oil for the previous three successive years, to reduce greenhouse gas emissions from April 1, 2010. The target for the first compliance period (April 2010 to March 2014) has been set at 6% or 8% (according to the type of the building) below base emissions, which will be, in general, determined based on the amount of emissions from the building in recent years.

In order for the owners of the large buildings to fulfil the requirement, they are permitted not only to reduce greenhouse gas emissions from their respective buildings, but also to trade in certain Tokyo Metropolitan government-sanctioned credits (the "Tokyo Credits"). They cannot use the Kyoto credits (such as CER) to accomplish their targets.

In cases where the owners of the large buildings cannot meet their obligations for greenhouse gas emission reductions, they will be punished and may be ordered to obtain additional amounts of the Tokyo Credits according to a formula that multiplies the amount of the unfulfilled obligation by 1.3. Furthermore, in cases where the owners of the large buildings fail to obtain these additional Tokyo Credits, the Governor of Tokyo may obtain them in place of the owners and subsequently may charge the cost of such purchase to the owners.

Trade of the Tokyo Credits will fully begin from April 2011.

9.2 What is the overall policy approach to climate change regulation in Japan?

As described in question 9.1 above, in Japan, there is no nationwide mandatory emissions trading scheme but there exist only some nationwide voluntary emission trading schemes. This is because these voluntary schemes have to date had results to some extent. As people tend to have a favourable image of companies who have reduced greenhouse gas emissions, many companies have voluntarily tried to reduce them. Moreover, there are many companies who have strived to reduce greenhouse gas emissions under their policies of corporate social responsibility. Therefore, the necessity of a nationwide mandatory cap and trade scheme was always passed over when it was argued.

However, on September 22, 2009, at the United Nations Summit on Climate Change, attended by leaders from more than 90 countries, Prime Minister Yukio Hatoyama promised that Japan would aim to reduce CO2 emissions by 25% by 2020 compared to its 1990 levels on the condition that all of the major global economies would join Japan in setting ambitious targets for CO2 reduction. Besides, the first regional mandatory emissions trading scheme, Tokyo Metropolitan government schemes started from April 1, 2010.

Under such circumstances, in order to promote global warming countermeasures based on the said promise made by Hatoyama, the necessity of a nationwide cap and trade scheme again became a strongly argued issue. It is still discussed in the current government.

10 Asbestos

10.1 Is Japan likely to follow the experience of the US in terms of asbestos litigation?

Japan is not likely to follow the experience in the US in terms of asbestos litigation for several reasons. First, the period during which workers were exposed to asbestos without adequate protection and, correspondingly, were more likely to become ill seems to be shorter than that of the US. Second, the public workers' compensation system is well established in Japan. Furthermore, large companies often compensate their workers in addition to the compensation that workers may obtain under the workers' compensation system. Thirdly, punitive damages are not allowed in Japan. Therefore, it is not likely that people who were exposed to asbestos but have not become ill will take legal action and seek damages. Fourthly, an act that enables asbestos-affected patients to recover certain expenses, including medical expenses, was enacted in 2006. A new fund for the implementation of this act was created, and required contributions from all business entities. Certain companies that used a large amount of asbestos in the past are required to contribute a certain additional amount.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

If a building is in such a condition that persons are threatened to be exposed as a result of asbestos blowing from the building, the owner is obligated under the Civil Code to take appropriate measures (including the removal of the asbestos) to prevent the asbestos from being blown from the building, if the owner is a landlord. Furthermore, under the Civil Code, if the building is used by a third party, such as guests of a shopping centre, the occupier or the owner of the building is liable for the damage incurred by the third party due to any defects of the building (the owner becomes liable if the occupier took the necessary care to prevent the damage). Accordingly, it is necessary for the occupier or the owner to take the above-mentioned measures to prevent harm to a third party caused by asbestos in the building. Finally, if the building contains sprayed asbestos, and if there is a threat that such sprayed asbestos may be blown from the building, a failure to take appropriate preventative measures may be subject to criminal punishment.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in Japan?

There are several types of environmental insurance, such as "Environmental Impairment Liability Insurance", "Ground Pollution Cleaning Cost Insurance", "Ecology Countermeasures Cost Insurance", "Industrial Waste Disposal Generator Liability Insurance", and "Electric Appliance Recycling Insurance".

It is important that companies collect information about various sorts of environmental laws, and establish compliance in order to observe such laws. But it is not necessarily the case that it is easy to eliminate all environmental risk. Therefore, whilst the role of insurance as compensation for environmental liability is small at the moment, it can be expected to grow considerably.

11.2 What is the environmental insurance claims experience in Japan?

The number of court judgments holding companies liable for damage in pollution litigation is not insignificant. However, few Japanese insurance companies sell insurance goods that can offset such risks, and few companies buy them.

12 Updates

12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in Japan.

Although, on November 1, 2009, a law concerning non-fossil energy sources became effective, which requires that electric utilities buy surplus electricity generated by solar power systems installed in residences and companies at fixed prices for ten (10) years, a new a fixed price buy-back programme for all renewable energy (not limited to surplus electricity generated from solar power systems) is being discussed in the Japanese government.

The Waste Disposal and Public Cleansing Law was amended in May 2010 and it will become effective from April 1, 2011. Pursuant to this amendment, obligations on the producers of waste have been expanded. Namely, a producer of waste must file with the governor before it stores industrial waste outside the site where it is produced. Additionally, when the producers of waste delegate the transport and disposal of the industrial waste, they must make efforts to verify the condition of the transport and disposal.

Hideaki Ozawa

Nishimura & Asahi
Ark Mori Building
1-12-32 Akasaka, Minato-ku
Tokyo 107-6029
Japan

Tel: *+81 3 5562 8500*
Fax: *+81 3 5561 9711~9714*
Email: *info@jurists.co.jp*
URL: *www.jurists.co.jp*

PARTNER since 1996
Admitted: Japan 1980; New York 1992.
Education: Columbia University School of Law (LL.M., 1991). Legal Training and Research Institute of the Supreme Court of Japan. The University of Tokyo (LL.B., 1978; Master of Engineering, 1985).
Professional Experience: Dewey Ballantine, New York, 1991-1992.
Practice Areas: Real Estate, Environmental Law, Construction Law.
Papers/Publications: Author: Asbestos in Buildings and the Law, Hakuyosha, 2006; Soil Contamination Countermeasures Law, Hakuyosha, 2003; U.S. Condominium Laws, Hanrei Times, Vols. 997, 999, 1999; Very Deep Underground Use System as a Bypass, Jichi-Kenkyu, Vol. 74, No. 9, 1998. Co-Author: Japan Chapter, ICLG: Environment Law 2010; Japan Chapter, ICLG: Real Estate 2010; Tokyo's Greenhouse Gas Regulation and Emissions Trading, Hakuyosha, 2009; Japan Chapter, PLC: Cross-border Environment Handbook 2009/2010; Corpus Juris Finance Update, Shojihomu, 2006; Corpus Juris Finance, Shojihomu, 2003; Memories of Cities, Hakuyosha, 2002; Fixed Term Building Leases, Jyutaku-shimpo-sha, 2000.
Languages: Japanese and English.

Ryoji Moroi

Nishimura & Asahi
Ark Mori Building
1-12-32 Akasaka, Minato-ku
Tokyo 107-6029
Japan

Tel: *+81 3 5562 8500*
Fax: *+81 3 5561 9711~9714*
Email: *info@jurists.co.jp*
URL: *www.jurists.co.jp*

ASSOCIATE since 2008
Admitted: Japan 2007.
Education: Legal Training and Research Institute of the Supreme Court of Japan (2007). Keio Law School (J.D., 2006). The University of Tokyo (LL.B., 2004).
Practice Areas: Real Estate, Real Estate Finance, Environmental Law, Capital Markets.
Papers/Publications: Co-author: Japan Chapter, ICLG: Environment Law 2010; Tokyo's Greenhouse Gas Regulation and Emissions Trading, Hakuyosha, 2009; Japan Chapter, PLC Cross-border Environment Handbook 2009/10.
Languages: Japanese and English.

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Managing Partner: Mr. Akira Kosugi

Languages Spoken: Japanese, English, Chinese (Mandarin) and French

Total number of lawyers: 474

Email: info@jurists.co.jp