After Minamata: Current Prospects and Problems in Japanese Environmental Litigation

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Lake Biwa is the world's third oldest lake. Its surface area of 685.49 kilometers and volume of 27.5 billion cubic meters make it Japan's largest lake. The rich waters of Lake Biwa have from antiquity been the source of life for people living along her shore and downstream, both as water for agriculture and for drinking...

Seafood from the fertile waters of Biwa has been feeding the people of Kinki throughout history. The annual catch now averages from 6,000 to 8,000 tons and as such is our country's second largest source of fresh water fish. Trout from Biwa are used to stock rivers and lakes all over Japan and represent 50% of the national total.

Biwa is important culturally as well. The topology and geology of the shoreline which dates from the ice age, its rare flora and fauna, and its fossils of mammoths and other prehistoric animals may hold the secret to the riddle of the formation of the Japanese archipelago and are extremely important to geologists and paleontologists. On the floor of the lake are archeological ruins, and in the waters of the lake itself are over 1,000 species of plants and animals, about 50 of which live only in Lake Biwa.1

On December 22, 1972, the Prime Minister of Japan gave final
approval to the Lake Biwa Comprehensive Development Project. The Project will drop the level of the lake a meter and a half, drawing water at the rate of 40 cubic meters per second for the use of Osaka and Kobe, two major downstream industrial cities. In addition, the Project contemplates construction of a waste water treatment plant on an artificially created island approximately 60 hectares in area, construction of dikes to cut off present bays and turn them into small artificially enclosed lakes, and building of an embankment and ring road on the newly exposed shoreline circling the lake.

During the entire course of negotiations concerning the increased utilization of Biwa, governmental planners gave essentially no thought to the environmental effects of the massive project. Equally little concern was shown for the social, cultural, and economic value of preserving Lake Biwa as perhaps the only remaining significant body of clean water, salt or fresh, convenient to urban Japanese. The parts of the

trial center of Japan, a triangle formed by the cities of Kyoto on the north, Osaka on the south, and Kobe (the largest city in Hyogo Prefecture) to the southwest.

The lake is shaped like a Japanese mandolin or biwa, hence its name (for those unfamiliar with this instrument, picture a swollen exclamation mark without the point). The neck of the mandolin points south toward Osaka and Kobe. Otsu, the capital of Shiga Prefecture, is located at the southern end of the lake just 10 kilometers east of Kyoto. The body of the mandolin, to the north, is much larger in both surface area and water volume than the southern section. Its shoreline is also considerably less developed than that around Otsu, which in recent years has experienced rapid industrial development.

Osaka and Kobe, located downstream from Biwa, ultimately depend on the lake for water for both household and industrial use. Although Kyoto to the north is much closer to Lake Biwa than either Osaka or Kobe, its dependence on water from Biwa is minimal (some drinking water is drawn from the northern sector through a series of aqueducts).

2. **BIWAKO KAIHATSUJIGYO NI KANSURU JIGYO JISSHI HOSHIN** (Implementation Plan for Projects related to the Lake Biwa Development Project) [hereinafter cited as Implementation Plan]. Construction Ministry River Development No. 71(5), published as Notification No. 107 of the Construction Ministry, Jan. 18, 1973; Construction Minister's Approval announced in Construction Ministry Notification No. 391, Feb. 28, 1973. The Project called initially for the expenditure of approximately $1.9 billion over the ten year period from 1972 to 1981 with the costs to be borne by the central government, the neighboring prefecture of Shiga, and the downstream prefectures of Osaka and Hyogo. For a detailed description of the Project's planning and development, see note 5 infra.

3. Implementation Plan, supra note 2. The specific amount to be taken was finally determined at a meeting on March 27, 1972, attended by the Construction Minister and the Governors of Shiga, Osaka, and Hyogo Prefectures. The Ministers of Finance and Home Affairs and the Chief of the Economic Planning Agency were also parties to the understanding (moshiawase) reached at this meeting. For discussion of the process leading up to this meeting, see note 5 infra.

4. Implementation Plan, supra note 2. The construction of the treatment plant, while undertaken as an integral part of the Comprehensive Development Project, was initially approved under the City Planning Law (Toshi Keikaku Ho), Law No. 100 of 1968, by the Governor of Shiga Prefecture and later incorporated into the Project. Shiga Prefecture Notification No. 110, Mar. 22, 1972. See also subsequent amendments at Shiga Prefecture Notification No. 71, Mar. 2, 1973, and Shiga Prefecture Notification No. 265, July 4, 1973.

5. The Project presented to the Prime Minister in December was the culmination of many years of pressure from development interests within the central government and the downstream industrial centers. The history of the drafting of the Project is described in
Project marked as environmental protection measures are limited to the
detail in both the plaintiffs' complaint, supra note 1, part 3, at 7-16, and the defendants' answer at 11-22, Tsujida v. Japan, Otsu District Court, 1976 U 31. Their accounts, although presenting different interpretations, are in substantial agreement on the facts. The following summary is based on the defendants' account and other government documents. Any contradictions with the plaintiffs' version have been resolved in the defendants' favor.

Exploitation of Biwa water for downstream industrial and urban expansion first began in the late nineteenth century as part of Japan's push to develop industrially and militarily. It was not until the first decade of the twentieth century, however, that substantial dredging, dam construction, and flood control projects began to lower the water level of the lake. Thereafter, the national government and downstream local governments drew up a series of development plans for the increased utilization of Biwa water. None of these plans were carried out in full, however, and the actual result of the completed construction appears to have been limited to a 0.5 meter drop in the water level and substantial prevention of future flood damage.

In the early 1960's legislative and administrative actions culminated in a 1965 Construction Ministry draft plan which would have divided the northern and southern sectors of the lake with a dam and allowed increased utilization of the water, lowering the water level by 1.4 meters in the south and by 3.0 meters in the north. This draft, like those which came before, was primarily a product of the efforts of the national government and the downstream prefectures of Osaka and Hyogo. Shiga Prefecture, which surrounds Lake Biwa and is significantly less industrial than Osaka and Hyogo, was concerned with the damage which might result from a large scale lowering of the water level. It urged reconsideration of the Construction Ministry's plans and the creation of a legislative scheme which would guarantee that environmental and developmental interests would be harmonized.

In 1968, the Construction Ministry, in response to the concerns of Shiga Prefecture, withdrew its 1965 draft and proposed instead a 2.0 meter lowering over the entire lake with no separation of the northern and southern sectors. Shiga Prefecture in turn published a series of position papers urging that any development plan include as a primary goal the preservation of Biwa's natural environment. Despite Shiga's expressed desire to be involved, it was not included in planning bodies formed in 1970 and 1971 by downstream and central government entities. These planning groups presented an implementation scheme at a meeting on March 27, 1972, of the Minister of Construction and the three Governors of Shiga, Osaka, and Hyogo. The understanding (moshiawase) reached at that meeting specified the amount of water to be taken from Biwa (40 cubic meters/second), the allowable decrease in water level (1.5 meters), procedures to be followed in periods of water shortage, and measures to be taken to compensate those damaged by the Project's implementation.

Upon the law's passage, the Governor of Shiga completed a formal draft of the Comprehensive Development Project and submitted it to the prefectural assembly which approved it in October and forwarded it to the Prime Minister who in turn approved it on December 22, 1972. The final Comprehensive Development Project is essentially identical in content to the original memorandum draft C.D.P. of March 27, 1972, and the earlier plans drafted by the Ministry of Construction in conjunction with the downstream prefectures of Osaka and Hyogo. The import of the Diet debate and the revision of the government draft
construction of the sewage treatment plant on the artificial island and the development of parks, roads, and marinas for recreation in previously undeveloped and relatively inaccessible areas of the lake.

There was no serious attempt to assess environmental consequences or to determine whether alternative methods of meeting future water needs were available. This neglect came in spite of clear signs that industrial and residential development along the southern shore of the lake had already resulted in increasing organic and heavy metal pollution which threatens to turn that portion of the lake into a dead sea.6

In March 1976, some 1,200 residents of the Kinki area filed a civil tort action in the District Court of Otsu, the capital of Shiga Prefecture, demanding a permanent injunction against any further construction associated with the Project.7 The plaintiffs presented several theories upon which injunctive relief could be based, but they relied chiefly on the failure of the defendant public bodies to carry out an environmental impact assessment.8 They cited the increase in water pollution, the of the Special Measures Law are not significantly reflected in the C.D.P. (The complaint in the Biwa case claims that the final plan is "identical" to earlier drafts. The answer does not deny this allegation and states that its content "has its origin" in the earlier drafts.)

The plaintiffs' interpretation of these facts is roughly as follows: the original plan agreed upon at the March 27, 1972 meeting had been drawn up with little or no consideration for environmental problems; the Diet, aware of this deficiency, revised the Special Measures Law to force its correction; nevertheless, the formal plan submitted to the Prime Minister by the Governor of Shiga was identical to the earlier drafts.

6. Defendants' answer at 13, admits plaintiffs' allegation that the pollution of Lake Biwa had reached a "critical state" by 1972. For an assessment of pollution's effect on Biwa fisheries by the Shiga Prefecture Association of Fishermen's Unions, see Asahi Shimbun, Sept. 21, 1977, at 23 (all citations to Asahi Shimbun concerning the Biwa litigation are to the Shiga Prefecture edition). Also see Pollution Problems of Lake Biwa and Their Legal Countermeasures (English language pamphlet published jointly by the Kyoto Bar Association and the Environmental Protection Committee of the Federation of Japanese Bar Associations, Kinki District). This pamphlet is the product of a conference on the pollution of Lake Biwa held by the bar associations of the Kinki area (Osaka, Kobe, Kyoto, Shiga, and Wakayama) in November 1976. The Japanese Environment Agency considers Biwa to be one of Japan's "most critical" lakes in terms of organic substance pollution and claims that potentially irreversible eutrophication is a serious danger. JAPAN ENVIRONMENT AGENCY, QUALITY OF THE ENVIRONMENT IN JAPAN 148-50 (1976).

7. Plaintiffs did not seek a provisional disposition, equivalent to a preliminary injunction in common law jurisdictions, because they felt that temporary relief would take as long to secure as a permanent injunction. Interview by the author with Yasuhiro Orita, lead attorney for the plaintiffs (Nov. 9, 1977). For a discussion of the considerable difficulties involved in obtaining injunctive relief in Japan, particularly in suits against the government, see text accompanying notes 41-66 infra.

The delay in bringing suit is attributable to several factors, including doctrinal problems involved in suing the government when a challenged activity is still in an early stage. See text accompanying notes 74-88 infra. More important, however, was the defendants' own hesitation in implementing the Project. It appeared for a time that it would not be necessary for plaintiffs to sue. For a chronology of the litigation and a discussion of the delay in implementation, see Asahi Shimbun, Mar. 27, 1977, at 2, Sept. 12, 1977, at 2.

8. Since there is no general statutory duty to carry out an environmental impact as-
decrease in aquatic life, the loss of recreational and scenic areas, the destruction of archeological sites, and the adverse effect on plaintiffs' health which would allegedly occur if the proposed Project were implemented.

This Article uses the Biwa case to illustrate the important procedural and substantive difficulties currently facing environmental lawyers in Japan. Aside from the magnitude of the challenged development plan and the number of plaintiffs, the facts in the Biwa case present an unusually broad array of legal issues that are at the very forefront of the doctrinal development of Japanese environmental law. For this reason, the case provides a concrete and comprehensive vehicle for inquiry into the nature of Japanese environmental litigation today.

The Article also examines the special procedural issues raised in administrative cases that attorneys for the plaintiffs in Biwa attempted to avoid by bringing the case as a civil action, as well as the substantive question of the applicability of Japanese civil tort doctrine to this type of environmental problem. The distinctions between civil and administrative cases will be highlighted. However, before current issues are presented in detail, some historical perspective for the Biwa litigation and other contemporary environmental cases is provided through an examination of the development of Japanese environmental law over the last decade.

I

THE HISTORICAL CONTEXT

Environmental pollution has become a major social problem in Japan over the last two decades. This problem has had its most dra-
matic manifestation in areas such as Minamata and Yokkaichi where water and air pollution, respectively, reached levels as yet unexperienced in most other nations. As the government failed to deal adequately with these problems, victims sought compensation for pollution-related diseases through the courts. The widespread social and political movement that supported these suits reached its apex as plaintiffs won what were commonly known as "the big four" pollution cases between 1971 and 1973.11 These trials and the extrajudicial

Republic of Korea, and Belgium. Its mountainous terrain (only 25% of the country has a slope of less than ten degrees) forces an even greater concentration of both population and production. This situation is graphically illustrated by Organisation for Economic Co-operation and Development statistics on selected economic indicators measured per square kilometer of inhabitable area:

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<th>G.N.P.</th>
<th>Industrial Output</th>
<th>No. of cars</th>
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<tr>
<td>Japan</td>
<td>6.05</td>
<td>1.93</td>
<td>303</td>
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<tr>
<td>U.S.</td>
<td>0.32</td>
<td>0.08</td>
<td>26</td>
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<tr>
<td>Netherlands</td>
<td>3.10</td>
<td>0.58</td>
<td>138</td>
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Statistics cited in K. Fujikura, A. Morishima, and J. Gresser, Transnational Environmental Law, sess. 1, at 1-20 (unpublished class materials on file at the East Asian Legal Studies Library of Harvard Law School) [hereinafter cited as K. Fujikura, et al.]. Although not excusing pollution disasters such as the Minamata and Niigata mercury poisoning cases, these factors eloquently point out the social and economic pressures which leave Japan almost no margin for error in environmental protection.

11. Decision of June 30, 1971, Tōyama District Court, 635 Hanrei Jiho 17, aff'd by Decision of Aug. 9, 1972, Nagoya High Court, 674 Hanrei Jiho 25 (Tōyama Itai-Itai disease case); Decision of Sept. 29, 1971 (Niigata Minamata disease case); Decision of July 24, 1972, Tsu District Court, Yokkaichi Branch, 672 Hanrei Jiho 30 (Yokkaichi industrial asthma case); Decision of Mar. 20, 1973, Kumamoto District Court, 696 Hanrei Jiho 15 (Kumamoto Minamata case). Partial translation of cases available in K. Fujikura, et al., supra note 10. The doctrinal basis of these cases is discussed in Taniguchi, A Commentary on the Legal Theory of the Four Major Pollution Cases, 9 LAW IN JAPAN 35 (1976); their sociological and cultural background is considered in Upham, Litigation and Moral Consciousness in Japan: An Interpretative Analysis of Four Japanese Pollution Suits, 10 LAW AND SOC'Y REV. 579 (1976); and their political impact is examined in a chapter by M. McKean entitled Pollution and Policymaking, in Policymaking in Contemporary Japan 201-38 (T. Pempel ed. 1977) [hereinafter cited as McKean] and also in C. ENLOE, THE POLITICS OF POLLUTION IN A COMPARATIVE PERSPECTIVE 221-63 (1975) [hereinafter cited as ENLOE]. It should be noted that the judgments in these cases came after the government's major legislative response and were somewhat anticlimactic in comparison to the movements accompanying them. See Upham, supra, at 583-88, 606-12.

This Article employs a method of citation for reported cases similar to that used by Japanese lawyers and recommended in H. TANAKA, THE JAPANESE LEGAL SYSTEM 31 (1976). The name of the court and the date of the decision will be given along with a citation to the most readily available reporter. Whenever there exists an English translation, citation will be made to the translation as well. Most of the cases discussed in this Article are well-known among environmental lawyers in Japan and are referred to orally by descriptive names such as those for the "big four" given above. In textual discussions of the cases, therefore, these descriptive names will be used unless they are well-known by some other name in the United States.
movements which accompanied them had tremendous political and so-
cial impact, contributing substantially to a considerable change in the
government's attitude toward environmental protection.12

As the social movement surrounding these cases grew, the govern-
ment ceased denying the existence of pollution problems or their causal
connection with industrial expansion and began to take measures
aimed at providing relief to victims and preventing future disasters
similar to those in "the big four" pollution cases. Beginning in the late
1960's, these efforts culminated in the December 1970 extraordinary
Diet session. This "Pollution Diet," as it is now known, passed a series
of amendments and new laws designed to protect and maintain envi-
ronmental quality.13 Perhaps most indicative of the political mood of
this period was the unanimous vote of the Diet to eliminate a clause in
the Basic Law for Environmental Pollution Control14 which had lim-
ited environmental protection efforts by its requirement that a balance
be struck between considerations of economic growth and environmen-
tal preservation.

Laws passed by the Pollution Diet, and since, have established an
administrative structure for dealing with environmental problems,15
but legislation has stopped short of instituting any environmental plan-
ning program or system for anticipating effects of proposed develop-
ment. No legal or administrative structure for comprehensive
environmental planning has been established. Nor is there any re-
quirement that public or private developers consider environmental
factors in their planning of particular projects or programs. Although a
1972 Cabinet Understanding extolling environmental protection gave
rise to an informal system of environmental assessments within some
governmental agencies, such as the Construction and Transport Minis-

12. For studies of the effect these trials and their accompanying extrajudicial move-
ments (shimin undō) had on the central government's attitudes toward environmental protec-
tion, see both McKean and Enloe, supra note 11. Both authors trace the rise of the
antipollution movement in Japan and cite the environmental legislation of the late '60's and
early '70's as a rare example of Japanese public policy being formed outside the traditional
channels of policymaking—the central bureaucracy and the ruling and conservative Liberal
Democratic Party. They contend that the bureaucracy and the L.D.P. were forced by electo-
oral losses and public pressure to act legislatively to defuse the issue. See McKean, supra
note 11, at 202-14, 224-34; Enloe, supra note 11, at 238-41, 245-53.
13. See McKean, supra note 11, at 227.
For a discussion of the symbolic importance and political background of the amendment,
see McKea, supra note 11, at 217-19, 228.
15. Concern for pollution victims resulted in the establishment of a means for non-
judicial resolution of health-related damage disputes. Kōgai Kenkō Higai Hoshō Hō (Pollu-
tion-Related Health Damage Compensation Law), Law No. 111 of 1973. See Gresser, The
1973 Law for the Compensation of Pollution-Related Health Damage: An Introductory Assess-
ment, 8 Law in Japan 91 (1975). The Environment Agency, charged with general coordina-
tion of antipollution measures, was also established in 1971. Kankyōchō Setchi Hō (Environment Agency Establishment Law), Law No. 88 of 1971.
tries, the assessments are discretionary with the agency. There is no legally enforceable duty which would give Japanese environmentalists an opportunity to challenge an assessment’s adequacy in the courts, similar to the NEPA requirement in the United States.

Furthermore, in the current period of economic recession in Japan, there are frequent signs that the assessments are halfhearted at best and pro forma in many cases. The value of these informal assessments is further lessened by the agencies’ extreme reluctance to open up the assessment process to substantial participation by environmentalist groups.

The failure to provide for environmental planning is compounded by the narrow scope of the government’s antipollution efforts. Perhaps because of their tragic experience with pollution disease and injury, Japanese have tended to equate environmental problems with the prevention of harm to human health and their antipollution statutes reflect

16. Cabinet Understanding on Environmental Conservation Measures Pertaining to Public Works, discussed and translated in Yamamura, Procedural Aspects of Environmental Impact Analysis in Japan, 2 Earth L.J. 255, 257 (1976). The understanding provides that: “local and national administrative agencies [should] require developers of public works to survey preliminarily such matters as the impact of the project, protection measures, alternatives, etc., and [should] require them to adopt appropriate measures designed to minimize environmental disruption.” Id. at 257.

17. National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1976). NEPA mandates that the federal government take action only after all environmental consequences and alternative actions have been considered. Id. § 4332. An environmental impact statement is required for all “major federal actions significantly affecting the quality of the human environment.” Id. § 4332(2)(c).

Japanese lawyers and legal scholars are familiar with NEPA and generally admire its requirement of an environmental impact assessment. See Yamamura, supra note 16. The government, on the other hand, is more attuned to recent criticisms of NEPA as dilatory and ineffective, such as those of Bardach and Pugliaresi, The Environmental Impact Statement vs. the Real World, 49 Pub. Interest 22 (1977).

18. Some specific statutes have been passed or amended to require some form of assessment process, but these measures have been severely criticized as fragmented and insufficient. See Yamamura, supra note 16, at 258-59.

19. See the discussion of the Tomakomai regional development plan and the assessments done in conjunction therewith. Id. at 259-63. See also Katsura eki Shūhen Seibei ni Tomanau Kankyō Yosoku Chōsa Hōkokusho ni tsuite no Ikensho (Statement on the Report on Environmental Forecasts Accompanying the Consolidation of the Katsura Station Area), prepared by the Pollution Countermeasures Committee of the Kyoto Bar Association; ‘Nishiki no Hama Kankyō Seibei Keikaku’ ni tsuite no Ikensho (Statement on the Plan for Environmental Consolidation of Nishiki Beach) (prepared by the Osaka Bar Association).

AFTER MINAMATA

this preoccupation. Thus, the definition of environmental pollution in the Basic Law is limited to “any situation in which human health and the living environment are damaged by air pollution, water pollution, noise, vibration, ground subsidence, and offensive odors.” “Living environment” is in turn limited to “property closely related to human life, and animals and plants closely related to human life and the environment in which such animals and plants live.” Moreover, environmental assessments that are carried out reflect this narrow concept of pollution.

The lack of an adequate system for comprehensive environmental planning or assessment is one of the major issues in Japanese environmental law. The increasing material affluence of Japanese society with its accompanying increase in leisure time has led a sizable segment of the population to demand an environmental planning policy that goes beyond problems of human health to the consideration of aesthetic, cultural, and recreational values. This concern finds expression both in the growing number of suits filed by local residents seeking injunctions against the construction of public facilities and in the trend among local and regional governments to pass ordinances requiring environmental assessments of all proposed projects.

Nationally, attention has focused on the struggle between environmental interests (represented by the Environment Agency, opposition parties, and the Japanese Federation of Bar Associations) and development interests (represented by the Construction and Transport Ministries and the Ministry of International Trade and Industry) over whether or not the Cabinet should introduce a bill requiring environmental assessments and, if so, how strong that bill should be. Because

21. The focus on human health to the point of neglecting protection of the natural environment is a major theme of this Article. This focus is reflected in the early passage of legislation to aid pollution victims, e.g., the Kōgai ni Kakaru Kenkō Higai no Kyūsai ni Kansuru Tokubetsu Sochi Hō (Law on Special Measures for the Relief of Pollution-related Injury to Health), Law No. 90 of 1969, and in the failure of the government even to propose an environmental impact assessment law.

22. Law No. 132 of 1967, ch. 1, art. 2(I).

23. Id. art. 2(2). It is of course true that biological theory treats the entire ecosystem as a complex network of mutually interdependent organisms and, therefore, supports considering virtually all ecological deterioration as “closely related” to human health. This interpretation, however, has not yet become the prevailing legal view in Japan. See text accompanying notes 143-72 infra.

of the Environment Agency’s low status within the Japanese bureaucracy, however, a bill would only be introduced after its provisions have been weakened considerably. In fact, a draft made public by the Environment Agency early in 1978 was so diluted that many environmentalists and lawyers felt it would be worse than no statutory requirement at all. One reason that the lawyers can take this position is their success in recent years in convincing Japanese courts to develop an assessment requirement.

The development of a judicial environmental assessment requirement has come through a series of environmental protection cases which differ considerably from the pollution cases symbolized by the big four. These newer cases, directed at discrete local problems, have been much less publicized than the big four cases and the national anti-pollution movement which accompanied them. The issues have shifted from compensation for severe physical injury to the prevention of pollution and the preservation of a certain quality of life for the plaintiffs. The shift in focus has given rise to a new set of defendants: public

25. The Environment Agency is not a separate ministry but an agency within the Prime Minister’s Office. For an English description of the Environment Agency’s status vis-à-vis the other ministries and agencies, see ENLOE, supra note 11, at 231-58-62. A bureaucratic consensus must be reached before government sponsored environmental legislation can be submitted to the National Diet. This means that more powerful agencies such as the Ministry of International Trade and Industry (MITI) and the Construction and Transportation Ministries have a virtual veto power over proposed legislation. As of fall 1979, these ministries have succeeded in blocking legislation establishing a legally binding general duty to conduct environmental impact assessments. Their objections to the draft legislation prepared by the Environment Agency have centered on public participation and the scope of the duty. MITI is generally opposed to public participation, especially public hearings, and wants to exclude power plant construction and other energy-related projects from the scope of the bill’s assessment duty. INT’L. ENVT’L REP. 467-68 (Jan. 10, 1979). Although it remains unclear it appears unlikely that the Environment Agency will be able to introduce a bill to the Diet in the near future.

26. An example of the problems a weak statute might create was provided recently by the assessment process involved in the construction of a bridge between Honshu, the largest of the four main islands of Japan, and Shikoku, the smallest of the four. The bridge will traverse the Seto Inland Sea at a point within the Seto Inland Sea National Park, which means an assessment is required by the Natural Parks Law (Shizen Koen Ho), Law No. 16 of 1957. An assessment is also required by the provisions of the Seto Naikai Kankyō Hozen Rinji Sochi Ho (Law for Temporary Measures for the Preservation of the Environment in the Seto Inland Sea), Law No. 110 of 1973, virtually the only statute requiring an assessment on a regional basis.

Despite the overlapping requirement and the spectacular scenic beauty of the area, the assessment was made only after final plans were completed. The report stated that the “subtle and elegant beauty of the scenery will be lost” by the intrusion of the “mammoth” bridge and that the route chosen for the bridge was particularly susceptible to such damage. Faced with a fait accompli, the committee was powerless to do anything more than recommend minor changes in the bridge’s design, construction technique, and so forth. See Asahi Shimbun, June 14, 1978, at 1. It is expected, therefore, that any bill introduced to the Diet would be so weak that the opposition parties would vote against it. Japan Times, Apr. 8, 1978, at 2.

27. See note 11 supra and accompanying text.
entities, which are either governmental units or public development corporations and associations. The relief requested has become almost exclusively injunctive. The plaintiffs and lawyers have also changed. Whereas the plaintiffs in the big four cases were generally rural, unsophisticated, and economically hard-pressed, the plaintiffs in cases like Biwa are more likely to be urban, politically sophisticated, and economically independent. The lawyers, formerly ideologically motivated labor lawyers often affiliated with the Communist Party, now tend to perceive their role as protecting a non-ideologically defined public interest in the preservation of the environment. Although devoted to the environmental movement, they maintain a diverse practice and resist identification with any political party.

As a result of the evolution from issues of private law compensation to issues of public law injunctions, environmental litigation now involves a whole new series of doctrinal problems. Although lawyers still tend to choose a civil rather than administrative cause of action, the emergence of public defendants has increasingly meant confronting or circumventing highly restrictive aspects of Japanese administrative law. While civil tort law remains the major vehicle for environmental

28. See notes 1-8 supra and accompanying text.
29. For a discussion of the attitudes and political affiliations of the lawyers in the earlier pollution cases, see Upham, supra note 11, at 600-05.
30. Extensive interviews in 1977 and 1978 by the author with lawyers involved in environmental litigation in the Kinki and Kanto (Tokyo) areas.
31. Non-criminal litigation in Japan is governed generally by the Code of Civil Procedure (CCP), Law No. 29 of 1890, but if the defendant is an administrative agency acting in an official capacity, the litigation, at least theoretically, falls under the Administrative Case Litigation Law (ACLL), Law No. 139 of 1962, which supplements and supersedes in part the CCP. The provisions of the ACLL are distinctive enough from those of the CCP to enable one to talk in terms of two separate causes of action, one administrative, governed by the ACLL and the CCP, and one civil, governed solely by the CCP. Although both administrative and civil litigation are handled by the same court system, i.e., there is not a separate system of administrative courts as in Germany, France, or prewar Japan, the district courts in large cities are divided into civil and administrative sections. If one wishes to file an administrative action, therefore, he must do so in the administrative section of the appropriate district court since a civil section court will not hear an administrative action.

It is not inaccurate to refer to different administrative and civil “forums” as well as to different causes of action, and the expressions administrative forum and administrative cause of action will be used interchangeably in this Article. However, these terms do not reflect a jurisdictional split, but rather a bureaucratic split in the internal organization of the district courts. Whether a case is administrative or civil is often difficult to determine, and yet, because of the more restrictive aspects of the ACLL, it may be critical to a plaintiff’s success. See text accompanying notes 40-71 infra.

The origin of this division lies in the sharp distinction developed by European and other civil law jurisdictions between administrative litigation and other forms of non-criminal litigation. In France and Germany, for example, this distinction has meant an entirely separate court system for administrative cases. The historical development of the Japanese way of handling administrative cases and specifically the influence of European models is discussed in note 34 infra.

32. Because of the restrictive aspects of the ACLL, see text accompanying notes 43-120
litigation, the absence of severe physical injuries in more recent environmental suits has shifted the focus from issues of negligence and legal causation to questions concerning the scope of interests protected by tort law in Japan. Since the lawsuit no longer turns on past events, the problems of legal causation have become ones of legal prediction, of assessing the risk of harm in a given project. Since such substantive prediction is extremely problematical, judges have begun to impose procedural requirements for the implementation of a potentially destructive project.

These issues are the focus of the rest of this Article. Section II considers administrative law problems. Although the courts have developed procedural requirements in administrative cases to deal with the potential environmental consequences of governmental action, the main discussion focuses on the reasons plaintiffs' lawyers generally seek to characterize their cause of action as civil rather than administrative. Section II also examines how the courts treat civil cases which have many administrative characteristics. In Section III, the coverage of tort law in the environmental field is discussed. That section explains how the courts have gradually expanded a traditionally narrow scope of protected interests to include aesthetic, cultural, and psychological factors in local environmental cases dealing with neighborhood preservation and the quality of life. As in the administrative field, the courts have developed a requirement that some assessment of the environmental impact of planned actions be made and that affected citizens at least have an opportunity to air their grievances and fears before actual construction begins. Section IV returns to the Biwa case and examines its place among these recent developments. Section V looks at future prospects for considering environmental issues in governmental planning.

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infra, environmentalist plaintiffs have tried to avoid bringing administrative causes of action. Instead they have preferred to litigate these actions civilly by characterizing them as tort actions based on the Civil Code, Law No. 89 of 1896, arts. 709-724. By doing so, they avoid altogether the provisions of the ACLL. See text accompanying notes 43-71 infra.

33. The problem of risk assessment is of course well known in the United States as well. The series of cases involving the Reserve Mining Company's Lake Superior taconite plant in Silver Bay, Minnesota, has focused American attention on this problem in a way that may parallel the Biwa case in Japan. See Reserve Mining Co. v. United States, 498 F.2d 1073 (8th Cir. 1974); Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975). Both cases share an identical problem: the amount of weight courts should give to risks to human health which are as yet scientifically unprovable by traditional standards of judicial proof. For a discussion of the Reserve case, see, e.g., Reserve Mining: The Standard of Proof Required to Enjoin an Environmental Hazard to the Public Health, 59 MINN. L. REV. 893 (1975).
AFTER MINAMATA

II
ISSUES ARISING IN THE CONTEXT OF ADMINISTRATIVE ENVIRONMENTAL SUITS

A. Special Problems in Suing Public Entities in Japan

While, as in the United States, the role of government in economic development has made it increasingly necessary for the state to be the defendant in environmental litigation, challenging official action presents special problems in Japan. These problems stem from the strong distinctions between public and private law which have survived the elimination of the separate administrative court system and other postwar legal reforms. Litigation concerning official action is governed, at least in theory, by public law principles that differ significantly from those applicable to private law litigation. These principles are embodied in the Administrative Case Litigation Law (ACLL) which provides the forms and conditions for administrative litigation.

For a discussion of these reforms, see Ogawa, Judicial Review of Administrative Actions in Japan, 43 WASH. L. REV. 1075 (1968).

Although this Article does not include a general review of administrative law developments in Japan, a brief discussion of the historical context of administrative litigation in Japan may be useful to the reader. The bureaucratic leaders of Meiji Japan (1868-1911) generally adopted western legal forms not out of any particularly perceived need for them, but rather because Japan was striving to become a modern state and western law was equated with modernity. Nevertheless, the bureaucrats were determined that changes should not significantly interfere with their control of the nation, seen as absolutely essential to Japan's military and economic development. This determination bore directly on the scope of challenge to the legality of administrative action that could be tolerated. While the government was willing to honor the abstract idea of "administration by law," the idea of losing any significant degree of control was anathema.

Under these circumstances it is understandable that the Japanese adopted the continental model of a system of administrative courts entirely separate from the civil judiciary and located within the bureaucracy itself. Although a separate administrative court system need not mean subservience to the bureaucracy, witness the French Conseil d'Etat, this was certainly the intended result in Japan. As Hideo Wada explains: "It was inevitable that an administrative court established under these conditions and requirements would function not so much to provide relief for the citizenry as to ensure the realization of the bureaucratic administration's goals or to vindicate its position." Wada, The Administrative Court Under the Meiji Constitution, 10 LAW IN JAPAN 1, 3 (1977).

In Japan there is no tradition of effective independent review of administrative actions. In the absence of such a tradition, Japanese lawyers tend to rely upon the more familiar tool of the Civil Code, especially since such reliance has frequently proven successful in combating government action. There is also a tendency toward conservatism in legal scholarship regarding administrative law. This reflects, as one might expect, a carryover from the restrictive doctrines of the past. Reinforced by the German origins of much of Japanese administrative law theory, this conservative scholarship tends to respect strict procedural barriers limiting the circumstances under which challenges may be brought. Although considerably more open in some respects than Japanese administrative law, present German administrative law is still rather restrictive. In standing, for example, German and Japanese environmental plaintiffs seem to face similar problems. See Rehbinder, Controlling the Environmental Enforcement Deficit: West Germany, 24 AM. J. COMP. L. 373, 381-86 (1976). For an excellent survey of the prewar Japanese administrative courts, see Wada, supra this note.

Law No. 139 of 1962. See note 31 supra.
The provisions of the ACLL and the tradition of bureaucratic hostility toward judicial control of administrative action have in the past significantly limited the usefulness of administrative law in controlling official action.\textsuperscript{36}

Despite some relaxation in recent years, a series of procedural and substantive doctrines in administrative law continues to limit the availability and effectiveness of judicial review of administrative action.\textsuperscript{37} These problems include: restrictions on the granting of injunctions, the principle of "free discretion" which effectively precludes all review in some cases,\textsuperscript{38} doubts as to the power of the courts to order specific administrative action, questions as to the applicability of due process requirements to administrative action, and a European view of the separation of powers doctrine that inhibits close judicial scrutiny of administrative action.\textsuperscript{39}

\begin{itemize}
\item \textsuperscript{36} See note 34 supra.
\item \textsuperscript{38} The principle of "free discretion" (\textit{jiy\=u sairy\=o}) is deeply intertwined with the general doctrines of administrative law in Japanese scholarship, and a thorough analysis is well beyond the scope of this Article. For present purposes, if choice of action is considered within an agency's "free discretion," statutory discretion is often so broadly interpreted that judicial review is effectively if not literally precluded. S. IMAMURA, \textit{GY\=OSEIHO NY\=UMON} (Shinpan) (Introduction to Administrative Law (New Edition)) 82-90 (1975). For an English account not specifically directed at free discretion but illustrative of the problems, see Hashimoto, \textit{The Rule of Law: Some Aspects of Judicial Review of Administrative Actions}, Law in Japan 243-61 (A. von Mehren ed. 1963).
\item The doctrine of "free discretion" becomes extremely important in actions attacking an administrative agency's assessment of scientific fact, what in Japan are called "science trials" (\textit{kagaku saibin}). The most dramatic recent case in Japan was the highly publicized Ikata nuclear plant siting case, Decision of Apr. 25, 1978, Matsuyama District Court, 891 Hanrei Jih\=o 38 (1978), in which the court characterized the agency's assessment of nuclear safety as "discretionary" and, therefore, only subject to very limited judicial scrutiny. For a discussion of the role of "free discretion" in the \textit{Ikata} case, see Sat\=o, Genshito Setchi Kyoka no Sairyo Shobunsei (The Licensing of Nuclear Plants as in the Nature of a Discretionary Disposition), 891 Hanrei Jih\=o 17 (1978).
\item \textsuperscript{39} Because of their particular importance in environmental litigation, questions concerning injunctive relief are discussed below, but a general treatment of each of these principles is beyond the scope of this Article. Much has recently been published about Japanese administrative law. See generally Hashimoto, \textit{The Rule of Law: Some Aspects of Judicial Review of Administrative Actions}, Law in Japan 239 (A. von Mehren ed. 1963); Ogawa, Judicial Review of Administrative Actions in Japan, 43 Wash. L. Rev. 273 (1970); Nathanson and Fujita, \textit{The Right to Fair Hearing in Japanese Administrative Law}, 45 Wash. L. Rev. 273 (1970); Ogawa, \textit{Several Problems Relating to Suits for the Affirmation of the Nullity of Administrative Act}, 6 Law in Japan 73 (1973); Yamanouchi, Administrative Guidance and the Rule of Law, 7 Law in Japan 22 (1974); and Harada, \textit{Preventive Suits and Duty Imposing Suits in Administrative Litigation}, 9 Law in Japan 63 (1976). General Japanese language treatises used in this Article include J. TANAKA, SHIMPAN GYOSEI HO (Administrative Law, New Edition); S. IMAMURA, supra note 38; Yamamura, \textit{Gyosei Sosho} (Administrative Litigation),
\end{itemize}
Injunctive relief, an important remedy in environmental litigation, is not always available in administrative cases. Article 44 of the ACLL removes the power that a court otherwise has under the Code of Civil Procedure to grant a "provisional disposition," roughly equivalent to a preliminary injunction. The ACLL substitutes its own equivalent of a preliminary injunction, but standards for issuance of this "suspension of execution" are stricter and more complex than those for the provisional disposition. Since most plaintiffs in environmental litigation now seek injunctive relief, the unavailability of the provisional disposition has been a major reason for environmentalists to avoid the administrative cause of action.

Two other procedural issues, standing and justiciability, are of

in Kōgai Gyousei Hō Kōza (Lectures on Pollution Administration) 3 (Y. Yamada and Y. Narita eds. 1976) [hereinafter cited as Yamamura].

40. ACLL, Law No. 139 of 1962, art. 44: "The provisional disposition provided by the Code of Civil Procedure shall not be applied to an administrative agency disposition or other exercise of public power."

41. The major Code of Civil Procedure provisions regarding provisional dispositions are arts. 755 and 760 [Japanese S.Ct. trans.]:

Art. 755: Provisional dispositions may be granted in respect to the subject matter of the dispute when there is danger that a change in circumstances will render it impossible or materially difficult to realize the rights of one of the parties.

Art. 760: Provisional dispositions may also be granted for the purpose of provisionally fixing the state of affairs with regard to disputed relations of right, provided that it is necessary especially to avert material damage to the lasting relation of rights, to prevent an imminent violation thereof, or for any other reason.

42. Article 25 of the ACLL reads in pertinent part [Japanese S.Ct. trans.]:

(1) Institution of a suit for revocation of a disposition shall not preclude the effect of the disposition, the execution of the disposition, or the continuance of procedure. (2) In the event that a suit for revocation of a disposition is filed, and it is urgently necessary to avoid irreparable damage which may be brought about by the disposition, the execution of disposition, or continuance of procedure, the court may upon application suspend, in whole or in part, the effect of the disposition or the continuance of the procedure (hereinafter referred to as "suspension of disposition") by way of decree; provided, that suspension of the effect of the disposition shall not be granted if the suspension of execution of the disposition or the continuance of procedure may attain the same purpose. (3) Suspension of execution shall not be granted when it threatens to have a serious influence upon public welfare, or it seems there is no justification on the merits.

Article 27 of the ACLL further complicates injunctions by giving the Prime Minister a veto over suspensions of execution [Japanese S.Ct. trans.]:

(1) When there is an application under Article 25(2) above, the Prime Minister may register his opposition with the court. The same may be done after the issuance of a suspension of execution. (2) Reasons for the opposition must be given. (3) In regard to the above reasons, the Prime Minister must demonstrate that there is a danger of serious influence on the public welfare should the effect of the disposition, the execution of the disposition, or the continuance of the procedure be suspended. (4) When there is a (1) opposition, the court may not issue a suspension of execution, and when a suspension of execution has already been issued, it must be revoked.

Aside from the stricter statutory provisions governing suspensions of execution, there is the psychological hurdle of convincing reluctant judges to enjoin administrative activity in a legal culture that frowns upon such judicial intervention in governmental activity. For a fuller discussion of the legal foundation of injunctive relief in Japan, see K. Fujikura, et al., supra note 10, sess. 12.
special relevance to environmental litigation in the administrative area. First, however, to aid in understanding current litigation, this Article discusses plaintiffs' efforts to avoid entirely the strict provisions of the ACLL by bringing their cases as civil actions.

1. Plaintiffs' Choice: The Erosion of the Public Law/Private Law Distinction

In a case where plaintiffs have standing, the challenged action is ripe for review, injunctive relief is available or unnecessary, and substantive problems such as discretion do not preclude or unduly narrow review, the administrative form of action offers a simple and conclusive vehicle for challenging governmental action. It may also provide an excellent opportunity to generate publicity and public support since lawsuits against the government garner considerable attention from the Japanese media. In many environmental cases, however, especially those like Biwa where the plaintiffs' interests are more purely environmental rather than pecuniary or physical, standing and ripeness make the administrative forum risky at best. Restrictions on injunctive relief may further complicate the plaintiffs' position. As a result, many lawyers bring environmental cases as tort actions and thereby avoid altogether the application of the ACLL. Their success with tort actions has significantly affected environmental and administrative law.

The ACLL's applicability to a particular case depends upon whether the agency action constitutes "an administrative disposition or other exercise of public power"43 or whether it is simply factual or proprietary behavior not directly related to public law questions.44 If the challenged action is an exercise of public power, the ACLL applies and a civil action must be dismissed; if not, the plaintiff may bring a civil action.

It is an unsettled question in Japanese law whether the ACLL applies to suits challenging the construction or operation of such public facilities as highways, sewage or garbage treatment centers, airports, or port facilities. For a time, it appeared that plaintiffs could be caught in a "Catch 22" situation; in either forum the defendant would claim the other was appropriate.45 Since the administrative and civil sections of

43. ACLL, Law No. 139 of 1962, art. 3(1).
44. The distinction between an exercise of public power and factual or proprietary behavior can be described as that between policymaking and its implementation. At the extremes, the distinction is easy to understand. The policy decision whether or not to build a garbage incinerator, for example, is clearly the former while the work of a bulldozer on the site is clearly the latter. When one moves from these extremes, however, the distinction blurs rather quickly. See text accompanying notes 43-71 and note 45 infra.
45. See Kimura, Izumi Shi Kasōba Kensetsu Jiken: Kōkyō Shisetsu no Minjiteki Sashidome (The Izumi City Crematory Case: Civil Injunctions of Public Facilities), 43 JURISTO 134 (May 1974); Sawai (Untitled commentary on the Hanshin expressway case),
each district court are bureaucratically separate, reliance on the wrong form of action means that plaintiffs risk not only application of private or public law doctrines that they would rather avoid, but also the dismissal of the entire case with an implied reference to the other section.46 Since judicial machinery is no quicker in Japan than elsewhere—it took more than one year for the court to decide that the Biwa case could proceed as a civil action—a switch in characterization could mean a case would never be decided on the merits.

In recent years, however, this problem has been greatly alleviated. The administrative forum, at least in lower court decisions regarding the environment, is now more open to plaintiffs on the standing issue,47 and courts on the civil side are quite willing to grant injunctive relief against the government in cases that apparently involve the exercise of public power.

Perhaps the leading case in this area is the Osaka International Airport case decided by the Osaka High Court in 1975 and now before the Supreme Court on appeal.48 This civil case was brought by area residents asking for compensatory and injunctive relief against the

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Kimura and Sawai cite the same two cases as examples of the plaintiffs' predicament. The first is a 1964 Supreme Court case, Decision of Oct. 29, 1964, Supreme Court, 18 Minshū 1809, which held that a local government's construction of a garbage disposal plant was a private law matter and that an administrative action brought pursuant to the ACLL was not appropriate since the activity was factual or proprietary and not subject to the ACLL. Conversely, in Decision of Sept. 22, 1965, Otsu District Court, 16 Gyōhan 1557, the district court held that highway construction involved the exercise of public power, and therefore the court rejected as inappropriate a civil suit challenging the construction and requesting a provisional disposition. Prof. Wada, supra note 34, at 8, indicates that prewar litigants faced precisely the same problem, although at that time the choice was between two courts with differing jurisdictions rather than two causes of action.

46. At this point it might be useful to outline the structure of the Japanese judicial system. At the top is the Supreme Court with 15 justices who sit either as the grand bench or as three petty benches of five justices each depending on the nature of the case. At the next level are eight High Courts (plus 6 branches) followed by 50 District Courts (plus 244 branches). There are also 575 Summary Courts which handle minor criminal and civil suits and 50 Family Courts (parallel to the District Courts but organizationally distinct) which handle domestic relations cases and juvenile offenses. With some exceptions, both civil and administrative cases generally begin at the district court level with an appeal of right to the appropriate high court. Appeal to the Supreme Court, however, is somewhat limited. See H. Tanaka, supra note 11, at 48-54.

47. Plaintiff's standing in administrative cases is determined by article 9 of the ACLL which requires that a person have a "legal interest" in the administrative act before he may challenge it judicially. This language has been and continues to be construed rather narrowly, but some district courts have adopted a slightly broader view in recent environmental cases. See text accompanying notes 89-118 infra.

48. Decision of Nov. 27, 1975, Osaka High Court, 797 Hanrei Jiho 36 (the Osaka Airport case). The appeal has not yet been concluded as of fall 1979.
State in its capacity as operator of the airport. The plaintiffs alleged that aircraft noise caused them various types of harm cognizable under the tort provisions of the Civil Code and the State Compensation Law, the equivalent of the United States Federal Tort Claims Act.

The defendant presented several arguments relying on administrative law principles that would deny any judicial review, even in an administrative suit, but its hardest pressed argument was that the ACLL applied and, therefore, no injunctive relief was available. The court easily rejected most of the public law defenses. It determined that the location and operation of the airport was unreasonable, unsafe, and without regard for the plaintiffs' rights and that the plaintiffs had suffered physical and psychological injuries cognizable under tort law.

The defendant argued that the plaintiffs' request for a partial injunction was equivalent to asking the Minister of Transportation, who had direct responsibility for airport management, to issue or change the regulations concerning the airport's operation and that a civil court had no authority to issue an order requiring an administrative agency to take any affirmative administrative action. To do so, claimed the defendant, would violate the principles of both the ACLL and the separation of powers doctrine.

The court dealt with these arguments by denying that public law governed the relationship of the parties. It distinguished the management of relations between users of the airport and the Transportation Minister from the effects of the airport's establishment and operation on nonuser third parties. In the former instance the court conceded that public law would govern, but felt that the latter should not be interpreted as the exercise of public power. It went on to find that:

the operation of the State managed airport has infringed the private law rights of surrounding residents. The demand for injunctive relief is a request for the cessation of the infringing behavior. In such circumstances, the relationship between the State and the plaintiffs is chiefly a private law relationship, and nothing should be allowed to interfere with the plaintiffs' exercise of their private law cause of action.

The court's reasoning is reminiscent of American cases dealing with

49. The Osaka Airport is the only major airport serving the Kinki region, Japan's second largest population center.
50. Law No. 89 of 1896, arts. 709-724.
51. Law No. 125 of 1947.
53. For the defendant's argument, see Osaka Airport case, 797 Hanrei Jihō 40-46, 70-71.
54. Id. at 70.
55. Id.
56. Id.
57. Id.
sovereign immunity and governmental tort liability. The operation of an airport is proprietary, the court reasoned, and, therefore, the State deserves only the private law protection given to potential private airport operators. The argument is not quite so simple, however, because of the principle strongly held in Japan that private citizens should be able to challenge governmental action only when they satisfy certain conditions and then only within the special restrictions of the ACLL. The operative doctrine is separation of powers, not sovereign immunity, and the language of article 44 restricting injunctive relief is not only broad but absolute: "The provisional disposition provided by the Code of Civil Procedure shall not be applied to an administrative agency disposition or other exercise of public power."

The restrictive provisions of the ACLL are commonly interpreted as narrowing the availability of injunctive relief. The effect of the court's reasoning, however, is to expand a plaintiff's remedies. If the person harmed by the agency action has administrative standing, the case will be an administrative one pursuant to the ACLL. If, however, the plaintiff is a third party, that is, without ACLL standing, he may bring a civil action to remedy any violation of his undiminished private law rights. Thus, the ACLL, at least in cases where the agency is engaged in proprietary behavior, is viewed not as decreasing a plaintiff's civil remedies, but as providing an additional administrative cause of action.

The Osaka District Court took a similar approach in 1972 in the Izumi Crematory case. Area residents demanded a civil injunction in accordance with the provisions of the City Planning Law against the construction and operation of a crematory planned by the defendant city. The defendant claimed that construction and operation of a legally approved public crematory was an exercise of public power and that article 44 of the ACLL precluded an injunction. The court distinguished the decision to build the crematory from the factual behavior involved in its construction:

The entire process in this case from the decision [to build the crematory] through its construction and operation might be reasonably interpreted as the "exercise of public power" as provided in article 3 of the ACLL. However, the process of establishing a public facility has al-
ways been divided into the decision to establish it and the factual acts taken to construct it. The latter have not been interpreted as "action constituting an exercise of public power." Furthermore, interpreting [an act] as an "exercise of public power" is based on a legal doctrine which is intended to expand judicial relief by recognizing an additional administrative cause of action. To use it to dismiss the present case, therefore, would mean irrationally turning the doctrine inside out.63

Unlike the Osaka High Court in the Airport case, however, the court placed less emphasis on the private, proprietary nature of the governmental action. Instead, the court stressed the distinction between particular elements of agency behavior that constitute the "exercise of public power" and those that are merely factual. This reasoning implies that construction and operation of any public facility, whether proprietary or not, falls within the factual category. This would open virtually all public development projects, the prime objects of environmental concern, to attack through the provisions of the civil law.

Courts have entertained requests for civil injunctive relief against public projects in several other instances.64 Many of the opinions do not mention the applicability of the ACLL, and others, specifically the Hanshin Expressway case, are based on legal theories at variance with those expressed in the excerpts above. There now seems little doubt, however, that public projects can be enjoined in civil cases even where plaintiffs would not have administrative law standing. The deci-

63. *Id.* at 81. Plaintiffs alleged potential pecuniary and physical harm from the crematory, and the court recognized them to be within the scope of Civil Code protection.

64. *See, e.g.*, Decision of Feb. 27, 1975, Kumamoto District Court, 772 Hanrei Jihō 22 (construction of a sewage treatment plant); Decision of Feb. 14, 1973, Hiroshima High Court, 693 Hanrei Jihō 27 (Yoshidachō sewage treatment plant construction case); Decision of May 19, 1972, Kagoshima District Court, 675 Hanrei Jihō 26 (enlargement of a sewage treatment plant); Decision of May 11, 1973, Kobe District Court, 702 Hanrei Jihō 18 (Hanshin Expressway construction case); Decision of Sept. 29, 1976, Tokyo District Court, 829 Hanrei Jihō 27 (Tokyo bus case); and Decision of Sept. 29, 1976, Matsuyama District Court, 832 Hanrei Jihō 24 (Matsuyama sewage case). All were public projects but were dealt with on the merits as civil actions.


66. Hanshin Expressway case, 702 Hanrei Jihō 18. The court in this case admitted that the construction of the highway constituted the exercise of public power and that article 44 would prohibit a permanent injunction against its construction. It would not, however, prohibit a provisional disposition which "does not interfere with the proper exercise of public power, such as one which corrects its exercise, which guarantees its proper exercise, or which stops its exercise for brief periods." *Id.* at 34-35. The court then allowed the construction to continue but only under court-ordered conditions. The case is discussed in Nishihara, *Hanshin Kōsoku Dōro Jiken* (The Hanshin Expressway Case), 43 JURISTO 114 (May 1974) and in Sawai, *supra* note 45. Sawai characterizes this approach as "unique." *Id.* at 140. For a discussion of the converse problem, that is, where the court allows an administrative suit attacking "factual behavior," see Decision of Sept. 8, 1976, Nagoya District Court, 834 Hanrei Jihō 43 (Nagoya urban renewal case).
sion in the Biwa case allowing the action to proceed civilly, despite the defendants’ strong opposition, adds further momentum to this trend.

To understand the full significance of this development, one must look more closely at what can be characterized as “factual behavior” under this doctrine. The plaintiffs in these cases have attacked neither the mode of construction nor the mode of proposed operation. Instead, they have concentrated on the harm that would occur if these projects were implemented. Similarly, they have not demanded changes in the manner of operation or construction; rather they have demanded a complete ban on the project’s implementation. In essence plaintiffs have attacked the administrative decision to build or operate the facility rather than the “factual” manner in which it is done. They have not been uniformly successful, of course, and sometimes the courts only grant injunctions that are limited in scope or duration. Also, confusion regarding what kind of case goes to which section of the court may work to the plaintiffs’ disadvantage. The government still makes the contention, although recently with less success, that the inevitable request for a civil injunction violates the ACLL and that the entire case should be dismissed. Not only does it take time to overcome this argument, but the state of the doctrine is not so settled that the plaintiffs can relax in the assumption that the defendant will never be successful.

Nevertheless, success in obtaining civil injunctions against governmental projects means that plaintiffs who can satisfy the strict administrative standing requirements now have the practical ability to choose whichever cause of action is most advantageous—despite the clear language of the ACLL which seems to leave no room for such “forum shopping.” In general, plaintiffs favor the civil alternative when their strongest point is the personal harm they may suffer.67 If a plaintiff can show a violation or anticipated violation of a private law right, there seems little doubt that the court will provide judicial relief without undue concern over the niceties of the ACLL.

Civil trials are generally more time consuming, however, and the plaintiffs’ alleged damages are often not within the scope of interests traditionally protected by Japanese tort law. In these circumstances, the case might more successfully be brought as an administrative action. The argument, however, will have to be closely based on the statute pursuant to which agency action has been taken. Nevertheless, environmentalists have made successful arguments in such cases that the agency’s interpretation was too narrow—that it did not consider all the factors or follow all the procedures required by statute.68

67. The following discussion of the relative advantages of one forum over another is based on several 1977 interviews by the author with plaintiffs’ attorneys involved in the Biwa case, the Osaka Airport case, and other litigation.

68. One outstanding example is the Decision of July 13, 1973, Tokyo High Court, 710
Another possible advantage of the administrative forum is the conclusiveness of the plaintiffs’ victory. In the *Izumi Crematory* case,69 for example, the project would have most likely ended if the court had ruled that the administrative decision to build the crematory violated the provisions of the City Planning Law. Instead, the court handled the case as a civil action and found that plaintiffs’ private law rights might be infringed if the crematory was built and operated as proposed. The court ordered a one-year halt in the project so that the parties could reach a compromise which protected the plaintiffs’ rights, yet recognized the city’s need for a new crematory.70 To the extent that it emboldens the judiciary to take partial action in circumstances where a clear-cut decision against the government would not be forthcoming, however, flexibility in fashioning the remedy can be advantageous to the plaintiffs as well. This flexibility is not impossible in an administrative case, but it is a great advantage to the court in a civil action not to be faced with quite as stark a confrontation with the government.71 The plaintiff who wishes to establish conclusively and quickly the illegality of an entire plan or project, therefore, is better off filing an administrative action if possible. Of course, plaintiffs lacking administrative standing, or whose standing is uncertain, will continue to attempt to avoid the ACLL altogether by framing their cases as civil actions.

Hanrei Jihō 23 (Nikkō Tarō cedar case), which held that the Minister of Construction must consider scenic and cultural values in choosing where to build or expand a road. The court enjoined the defendant from cutting down the Nikkō Tarō cedar tree, considered a “sacred” tree by many Japanese. See also, Decision of July 20, 1971, Oita District Court, 638 Hanrei Jihō 36 (Usuki cement case), holding that a land reclamation law required a form of environmental assessment; and Decision of July 23, 1968, Matsuyama District Court, 548 Hanrei Jihō 63 (Matsuyama Airport case). See text accompanying notes 121-43 infra; K. Fujikura, *et al.*, note 10 supra, sess. 9.


70. *Id.* It is not infrequent for judges in civil cases, including environmental cases, to urge the parties to settle. In fact, at the oral argument of the *Osaka Airport* case before the Supreme Court in May 1978, the presiding justice urged the parties to reach some settlement. For a justice of the Supreme Court to urge settlement at that stage of litigation is highly unusual, but lower court judges frequently do so with success. The author was not able to learn of the final resolution of the *Izumi Crematory* case. It apparently has not returned to the courts so perhaps it too has been settled. Settlements like these may be possible because of four factors: a long standing preference for informal rather than formal dispute resolution methods, a consideration of the risk of complete defeat without settlement, the cost of further litigation, and the authority of the judge, which is generally much greater in Japan than in the United States.

71. There is considerable doubt whether a court can order an affirmative administrative act, as opposed to simply declaring an act void or establishing a particular legal relationship. There is no action analogous to mandamus. *See* defendants’ arguments in the *Osaka Airport* case, 797 Hanrei Jihō at 40-46.
2. Shobunsei (Ripeness)\textsuperscript{72} and Standing in Administrative Environmental Suits

Plaintiffs commencing administrative actions face two immediate problems: whether the challenged agency behavior is judicially cognizable and whether plaintiffs are sufficiently affected individually and directly to have the legal interest required for standing. These questions are closely related since justiciability is partly dependent on whether the action directly affects the legal rights of individuals generally. The issues may be treated as distinct, however, since justiciability focuses on the nature of the agency action, while standing looks to the particular plaintiffs’ circumstances.\textsuperscript{73}

a. Shobunsei: the judicially cognizable administrative act

To understand which types of administrative acts are judicially cognizable requires analysis of the language “administrative disposition (shobun) or other exercise of public power” of article 3 of the ACLL. Whether an act is judicially cognizable normally rests on whether that act is in “the nature of a disposition” (shobunsei).\textsuperscript{74} If so, the action is judicially cognizable, and the question reduces to whether

\textsuperscript{72} Japanese courts and commentators sometimes refer to this issue as “ripeness,” having in mind the American administrative law doctrine. Whether the shobunsei doctrine is identical to the American administrative law definition of “ripeness” is debatable. Certainly more than temporal considerations are included. The effect, dismissal, is the same, however. See, e.g., Eccles v. Peoples Bank, 333 U.S. 426 (1948); Public Util. Comm’n v. United Air Lines, 346 U.S. 402 (1953). Although the ripeness doctrine has been significantly liberalized in the United States since United Airlines and Eccles, see Abbott Laboratories, Inc. v. Gardner, 387 U.S. 136 (1967), the restrictive nature of the shobunsei doctrine is best compared with these earlier cases.

Since “ripeness” is a term of art in the United States and carries with it implications that do not easily apply to the Japanese situation, the author generally uses the Japanese term shobunsei instead. Where ripeness is used, it is used with these reservations.

\textsuperscript{73} The difference in emphasis is somewhat artificial since the statutory language remains the same. Japanese scholars and courts, however, refer to the question of whether an agency action is at a stage where judicial review is appropriate as one of shobunsei or sei/ukusei (literally “ripeness”) and to the question of whether the ACLL applies as a question of whether the agency behavior is the exercise of public power.

\textsuperscript{74} Since article 3 of the ACLL appears to go beyond the narrower category of administrative disposition (shobun) to cover all exercises of public power, government attorneys arguing that a civil action should be dismissed need only establish that an exercise of public power is involved. At one time, the question was whether the disjunctive language meant that the ACLL covered “factual behavior” (jigūtsu kōdō). See text accompanying note 63 supra. The Supreme Court appears to have decided that article 3 does not cover “factual behavior,” see Decision of Oct. 29, 1964, Supreme Court, 18 Minshū 1809-11, leaving the exact nature and effect of the language ambiguous. When the case is clearly an administrative cause of action, however, discussion seems to center solely on whether the challenged agency action has reached the point of, or could ever be considered, an administrative disposition. For a discussion of this language and the problems of interpretation engendered by it, see S. Imamura, supra note 38, at 202-04; J. Tanaka, supra note 39, at 326.
the plaintiff is an appropriate person to challenge it. If not, however, the case is dismissed without further inquiry. Japanese courts frequently refer to this shobunsei requirement as a question of ripeness. 75

By American standards the definition of shobunsei is extremely narrow. The Japanese Supreme Court established the traditional and still common rule in 1955: the act must qualify as "official conduct which forms rights and duties in citizens or confirms their scope." 76 The term "citizens" refers to one or more specific individuals rather than the populace as a whole.

Under this definition, supervisory orders, permissions, approvals, or regulations among agencies or within a single agency cannot be the object of litigation because they do not directly create or form the rights and duties of citizens. 77 This type of administrative act, termed "internal behavior," is beyond judicial scrutiny. 78 Only when the agency order is actually applied to individuals' rights and duties, can the action be challenged through an administrative suit.

Furthermore, administrative acts with general effect, such as regulations, decrees, or other "actions in the form of law," are considered "general dispositions" and are not judicially cognizable unless they immediately and concretely affect a specific person's legal rights or obligations as they are promulgated and before they are carried out. 79 If the effect does not occur until implementation, the act is not an administrative disposition for the purposes of litigation. Thus, the practical effect of the shobunsei requirement is that governmental policies and plans, no matter how formal or final, are not judicially cognizable.

The Narita Shinkansen case 80 illustrates the doctrine's application in environmental law. For lack of ripeness, the Tokyo District Court dismissed a challenge to the Minister of Transportation's formal approval of the official plan of construction for the proposed extension of

75. See, e.g., Decision of Dec. 23, 1972, Tokyo District Court, 691 Hanrei Jihō 7, 12.
77. Id. See the cases collected and discussed in J. TANAKA, supra note 39, at 326; S. IMAMURA, supra note 38, at 202-24; Yamamura, supra note 39, at 229-37. The last authority is particularly helpful since it is directed specifically at how these doctrines restrict environmental litigation. For a further comparative view which may help put the Japanese doctrines in historical and comparative perspective, see generally Wada, supra note 34; Rehbinder, supra note 34.
78. See text accompanying notes 80-85 infra.
79. At first glance, this aspect of the shobunsei requirement may not appear that different from the American standing requirement that a party suffer particularized harm of an individual nature. See Flast v. Cohen, 392 U.S. 83 (1968). The Japanese requirement is in practice, however, much stricter. See text accompanying notes 81-84 infra. For discussion of a similarly restrictive requirement under Japanese standing doctrine, see text accompanying note 97 infra.
the Japanese National Railway's "bullet train" from Tokyo to Narita, the site of the controversial New Tokyo International Airport.\footnote{The Narita Shinkansen case is excerpted and discussed in Otaka, \textit{Narita Shinkansen Jiken: Kōji Jisshi Keikaku no Ninka to Kōkoku Soshō} (The Narita Shinkansen Case: The Approval of Construction Implementation Plans and Administrative Suits), 43 \textit{JURISTO} 108 (May 1974).}

The Minister of Transportation, in accordance with the provisions of the Law for the National Operation of the New Trunk Line, had published the Ministry's formal basic plan for the Narita extension in late 1971. The Japan Railway Construction Corporation, a public corporation charged with the actual construction, then presented its Construction Implementation Plan to the Minister in accord with article 9 of the same law. He approved it two days later. The Plan included a map that designated within 200 meters where the track was to be laid. The plaintiffs, who lived within the designated corridor, alleged that the Plan's approval affected both their property rights and their personal tort rights. They argued that, first, they would most likely have to give up their land and, second, even if their land escaped actual condemnation, they would suffer severe physical and psychological harm from noise and vibration.\footnote{Narita Shinkansen case, 691 Hanrei Jihō 7.}

The Tokyo District Court found the approval of the Plan akin to a general disposition; agency action had not yet reached a stage where judicial review was possible:

> At the stage of the approval of a Construction Implementation Plan, it has not necessarily been concretely confirmed who will in the future become an interested party when the Plan is executed. In that sense, a Construction Implementation Plan and its official approval must be considered as abstract in nature. In other words, that approval is unlike a concrete disposition directed at a specified individual. Furthermore, there is no provision that requires its publication, and it itself has no effect whatsoever on citizens' rights and duties.\footnote{\textit{Id.} at 12.}

The court also stated that those plaintiffs whose land would eventually be taken for the railroad could challenge the administrative disposition designating their land for expropriation. This opportunity, according to the court, would be "entirely adequate" for legal redress.\footnote{\textit{Id.}} The court made no mention of recourse for those plaintiffs whose land would not be formally taken but whose lives would be severely disrupted by the operation of the new line.

The court added that the Minister's approval could be viewed as "internal behavior" directed at the Construction Corporation authorizing it to proceed according to the Plan. For this reason, too, the Plan did not affect citizens' rights and duties and therefore the action lacked...
ripeness.85

The practical effect of the shobunsei doctrine in the environmental area is to postpone judicial scrutiny until the policy is implemented rather than to make it available at the planning stage when the review would be most effective.86 During planning, the bureaucrats involved would be more receptive to changes in the plan, since they would have less personal or institutional stake in pursuing the unamended plan to completion. Also, opposition of contractors and other developmental interests to changes in a plan may not be as determined before bids have been let, contracts have been formed, or construction has begun. Once construction has begun, the scales are heavily weighted in favor of completion of the work, at least in a modified form, regardless of the legality of the plan’s adoption or the fairness of its formulation. The ACLL encourages, if not mandates, this fait accompli by prohibiting injunctive relief in administrative cases if there is “fear that there will be a serious influence on the public welfare,” regardless of the illegality of the activity to be enjoined.87 Diffuse interests of area residents or the general public are more likely to be slighted when countered by claims of job elimination, accumulation of interest on financing during delay, and reliance on contractual rights.

Belated judicial scrutiny of plan approvals would be a lesser problem if citizens had greater input during formulation of the plans. Unfortunately, the environmental decisionmaking process in Japan is virtually closed to interested citizens.88 Informal activities directed toward influencing administrative behavior, therefore, are also extremely difficult.

85. Id.
The approval in this case can be viewed not only as the defendant’s endorsement of the . . . fundamental provisions concerning the construction of the Narita Line, but also as authorization given to the Japan Railway Construction Corporation to proceed with construction based on the Plan. It is therefore internal behavior directed at the above Corporation and cannot be said to be a concrete disposition directed at any private citizen or to have any influence whatsoever on citizens’ rights or duties. As a legal case, therefore, it lacks the ripeness necessary for a controversy. Id. (emphasis added).


87. ACLL, Law No. 139 of 1962, art. 25 (3).

88. Of course, it is not closed to well-organized and powerful interest groups, particularly representatives of the business community. See 1 INT’L. ENVTL. REP. 331-32 (Oct. 10, 1978); 2 INT’L. ENVTL. REP. 467-68 (Jan. 10, 1979), discussing the Environment Agency’s attempt to draft a general environmental impact assessment law suitable to industry. For a comparison of the relative openness of German administrative decisionmaking in environmental law, see Rehbinder, supra note 34, at 476-77.
In response to administrative "insulation," environmentally concerned citizens rely on "citizen movements" and litigation based on conventional tort doctrines. Tort doctrine has limitations as well, however, so that the environmental plaintiff in Japan often finds legal action difficult under both private and public law doctrines. Before discussing private law remedies, however, let us complete our picture of the public law obstacles facing environmentalists by turning to the question of administrative standing.

b. Standing: an interest deserving legal protection

Although the Japanese law of administrative standing has been liberalized somewhat since the early 1950's, the current test remains quite restrictive. Article 9 of the ACLL confers standing on anyone having a "legal interest" in an administrative disposition, but Japanese courts and scholars have developed a doctrine that defines narrowly the class of protected interests:

Legal interests are created by provisions vesting an administrative agency with the duty of protecting some personal interest. But where an agency is to act for the general public interest, personal interests affected by the action are only reflex interests. A plaintiff with only a reflex interest does not have standing to sue.

Thus in order to have administrative law standing, a person must, as a result of agency action, suffer harm to a personal and particular interest that the agency is specially charged with protecting.

In *Sakamoto v. Japan*, the Supreme Court initially broadened

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89. H. Tanaka, *supra* note 11, at 289-92. The degree of liberalization is questionable. For a general discussion of the evolution of standing, see Kimura, *Kunitachi Hodōkyō Jiken: Torikeshi Sashō ni okeru Chikyū Jūmin no Genkōkoku Tekikaku* (The Kunitachi Pedestrian Bridge case: Area Residents' Standing in Administrative Suits), 43 JURISTO 177 (May 1974). Although not qualified to comment on the law of standing generally, the author believes lower courts have liberalized standing requirements in environmental cases. It is not clear whether the Supreme Court will follow this limited development, but the Naganuma case, 821 Hanrei Jihō 21, see note 104 *infra*, indicates that it may.

90. "Legal interest" implies that "injury in fact," as understood by American lawyers, is not enough to confer standing in Japanese courts. For environmental cases in the United States concerning standing under the Administrative Procedure Act, 5 U.S.C. § 552(6), see United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1971). "Injury in fact" is often held to be a constitutionally necessary minimum for a finding of standing. *E.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). On the other hand, injury in fact does not automatically confer standing in all cases as prudential considerations not mandated by the Constitution may influence the court to withhold the exercise of jurisdiction. See Warth v. Seldin, 422 U.S. 490 (1974). It would not be accurate to compare American prudential limitations on standing, however, to the uniformly stricter requirements of Japanese administrative law.


the doctrine of standing. In that case the plaintiff challenged a bathhouse license granted to a competitor. The district court dismissed for lack of standing finding that the Public Bathhouse Law was intended to protect only the public health and not the economic interests of competitors. The Supreme Court, however, took a broader view. Citing the indispensable nature of the facilities and the possibility that excessive numbers of competitors might lead to futile competition, economic deterioration, and eventual undesirable public health consequences, the court stated that the Act was designed also to prevent "unnecessary competition among public bathhouse proprietors and the consequent worsening of their business conditions. . . . Therefore, the business interest of existing proprietors which is protected by . . . the licensing system should be regarded not as a de facto or a reflex interest, but as a legal interest." This decision marked a widening of the standing doctrine, but it still relied on a direct and specific statutory connection between the administrative disposition and the plaintiff's harm. Although the court did not specifically deal with the issue, neighborhood residents would not have had standing under Sakamoto, even though they were part of the public whose health the statute was enacted to protect, because their legal interests were general and indirect. While risk of harm to a resident's health constitutes particularized harm of an individual nature under American standing doctrine, in Japanese administrative cases injury to an individual resident's health is distinguished from injury to an individual legal interest. Thus, Japanese law focuses on the individual nature of the legal interest rather than the individual nature of the harm.

As long as general and regional interests did not give standing, environmentalists were practically barred from the administrative forum. In the more than 15 years since Sakamoto, however, lower courts have further loosened standing requirements so that environmental concerns receive limited recognition. This development has

94. The ordinance had been issued pursuant to the Public Bathhouse Act, Law No. 139 of 1948.
95. Sakamoto v. Japan, 16 Minshū 57 (translation from H. Tanaka, supra note 11, at 289).
96. See H. Tanaka, supra note 11, at 289-92.
97. See note 79 supra.
98. Subsequent lower court decisions have liberalized this aspect of the doctrine. See text accompanying notes 100-43 infra.
99. General and regional interests might be protected only if they coincided with the interests of someone holding a specific legal right threatened by agency action, for example, a fishing right threatened by the granting of a landfill permit. Examples of fishing right cases include Usuki cement, 638 Hanrei Jihō 36, and Decision of Jan. 14, 1974, Sapporo District Court, 727 Hanrei Jihō 3. Another commonly infringed legal interest is ownership, which provided the basis for standing in the Nikkō Tarō cedar case, 710 Hanrei Jihō 23.
taken two forms, one retaining the framework of *Sakamoto*, the other effectively, if not overtly, breaking away from the reflex interest/legal interest distinction altogether.\(^\text{100}\)

The former retains the requirement that the specific statute (on which the administrative act was based) be intended to protect persons in the plaintiff’s circumstances, but loosens somewhat the specificity requirement to embrace area residents. The requirement of a more specific legal interest may occasionally produce a plaintiff with a more sharply adverse interest than that of an area resident, but it is more likely simply to preclude judicial review altogether since plaintiffs such as the bathhouse proprietor in *Sakamoto* are often unavailable. For example, the granting of a construction permit, although it might have substantially harmed area residents, would have been viewed as affecting the public generally so that no individual resident would have had standing.

In 1973 the Tokyo District Court, using similar reasoning, loosened the specificity requirement in a case involving the proposed construction of a bowling alley in a residential neighborhood.\(^\text{101}\) Residents and residential associations brought suit against the Tokyo Director of Construction for approving the building permit pursuant to the Construction Standards Act (CSA).\(^\text{102}\) The suit asked for the nullification of the permit on the ground that special procedures, required before certain entertainment facilities can be built in residential areas, had not been followed. The defendant argued that plaintiffs lacked standing and that the statutory category did not include bowling alleys. The court held for the defendant on the latter issue, but first discussed standing:

> Limiting certain types of construction so that residents’ safe and pleasant residential environment is not destroyed has the dual aim of protecting the public interest and of protecting neighborhood residents from adverse effects on the residential neighborhood caused by such construction. The living interests to be protected by the appropriate application of construction restrictions are not mere factual or reflexive interests and should be interpreted as legally protected interests.\(^\text{103}\)

Thus the court distinguished the interests of nearby residents from those of the general public and found the requisite specificity. Other cases have extended the protection of specific statutes to nearby res-

\(^{100}\) See Yamamura, *supra* note 39, at 237-52. He provides a detailed, schematic analysis of recent standing decisions as they relate to the expansion of covered interests.

\(^{101}\) Decision of Nov. 6, 1973, Tokyo District Court, 737 Hanrei Jiho 26 (Bowling Alley case).

\(^{102}\) *Kensetsu Kijun Ho*, Law No. 201 of 1950.

\(^{103}\) Bowling Alley case, 737 Hanrei Jiho at 34. The court concluded that “persons who anticipate harm to their residential neighborhood beyond a tolerable level caused by construction in violation of the above law, therefore, have a legal interest in challenging the building permit which forms the basis of the illegal construction.” *Id.*
dents,\textsuperscript{104} and it is likely that this approach will become the rule, if it has not already, in cases involving a threat to a neighborhood's quality of life.

The rule in the \textit{Bowling Alley} case is adequate when the administrative action is based on a statute such as the CSA whose broad purpose is to protect "the people's life, health, and property."\textsuperscript{105} A problem arises, however, when either the statute's purposes cannot be readily construed to include environmental preservation or the plaintiff is not within the residential area concerned. The latter is especially problematic in a case like \textit{Biwa} in which the plaintiffs are from a wide geographic area.

Standing could be expanded even further so that plaintiffs such as those in the \textit{Biwa} case could proceed more often if the courts would abandon the confines of the \textit{Sakamoto} test altogether. In \textit{Sakamoto}, a statutory nexus between the administrative disposition and the plaintiff's harm gave rise to standing. But there is no apparent reason to be confined to the particular statute involved when looking for statutorily protected legal interests. Instead, standing could be allowed whenever official action infringed on an interest protected by \textit{any} legislative enactment.

The most discussed case suggesting this approach is the \textit{Kunitachi Pedestrian Bridge} case decided by the Tokyo District Court in 1973.\textsuperscript{106} The plaintiffs were local residents fighting the construction of a pedestrian bridge over the neighborhood's major thoroughfare and the accompanying elimination of ground level crossings. They alleged that the bridge was constructed in violation of the Act Concerning Emer-

\textsuperscript{104} Another case, Decision of Sept. 27, 1972, Tokyo High Court, 680 Hanrei Jiho 19 (Mitsubishi nuclear power plant case) (excerpted in 43 \textit{JURISTO} 174 (May 1974)), granted standing to area residents to challenge the grant of a building permit for a nuclear facility under the CSA. The court reasoned that the possibility of nuclear disaster brought the plaintiffs within the scope of protection afforded by the CSA. More recently, the Matsuyama District Court allowed standing in the factually similar Decision of Apr. 25, 1978, Matsuyama District Court, 891 Hanrei Jiho 38 (Ikata nuclear plant case). \textit{See also} Japan Times, Apr. 26, 1978, at 1, 2. Another example is the Decision of Aug. 5, 1976, Sapporo High Court, 821 Hanrei Jiho 21, (Naganuma case), commented on by Haley, 9 \textit{LAW IN JAPAN} 153 (1976). This case is well-known because it challenged the constitutionality of the Japanese Self-Defense forces. In order to permit construction of an Air Self-Defense Force missile base, the Minister of Agriculture and Forestry cancelled the protective designation of a portion of a national forest. The Sapporo High Court recognized that the interest of nearby residents in preserving the watershed was sufficiently concrete and individual to qualify them as ACLL plaintiffs. The court went on, however, to note that the government had built new conservation facilities and that this new construction extinguished the plaintiffs' interest in the original watershed and, with it, their ACLL standing to challenge the cancellation.

\textsuperscript{105} CSA, Law No. 201 of 1950, art. 1.

\textsuperscript{106} Decision of May 31, 1973, Tokyo District Court, 704 Hanrei Jiho 31 (Kunitachi Pedestrian Bridge case). The case is discussed in Kimura, \textit{Kunitachi Hodojyo Jiken}, 43 \textit{JURISTO} 177 (May 1974).
AFTER MINAMATA

Plaintiffs claimed a legal interest in using the ground level crosswalks that were eliminated by the bridge, and they claimed that their "environmental right" was infringed because the bridge ruined the scenic beauty of the area and increased traffic speed, air pollution, and accidents.108

The court dismissed for lack of standing, but its language in dealing with the environmental right claim has aroused considerable academic speculation:109

The maintenance of the living environment which surrounds man—clean air and water, sunlight, tranquility—is an absolute necessity. When it is damaged beyond a certain limit and human life and health are endangered, man's interest in not having that living environment damaged beyond a tolerable level may be an interest deserving legal protection. Even so, when the effect on the living environment does not reach that level, the person's interest in its preservation does not constitute an ACLL article 9 "legal interest."110

The court found that the level of damage to the environment had not exceeded the limit of tolerance, and therefore that the plaintiffs lacked standing.111

Significantly, the court discussed administrative standing in terms of the interests protected by the tort provisions of the Civil Code. The various phrases used — "a tolerable level," "human life and health," and "living environment" — are part of the lexicon used by courts in civil cases in determining whether the plaintiff's environmental interests are protected.112 Use of this language may indicate the court's belief that any harm covered by tort law and resulting from official action confers administrative standing.113 Although this would loosen the standing requirement substantially, limitations in the coverage of tort doctrine itself would still limit standing to residents of the affected area, an extremely important limitation in environmental litigation.114

Although the Kunitachi Pedestrian Bridge case still marks the frontier of administrative standing in environmental law, a 1978 Supreme Court case involving consumer protection has thrown into question the recently relaxed interpretations of lower courts. The case, known as the Juice case,115 was an administrative action brought by a group of

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110. Kunitachi Pedestrian Bridge case, 704 Hanrei Jihô at 34.
111. Id. at 35.
112. See text accompanying notes 173-89 infra.
113. Scholars and lawyers differ greatly in their interpretation of Kunitachi. See K. Fujikura, et al., supra note 10, sess. 9.
114. See text accompanying notes 173-89 infra.
housewives to challenge the Fair Trade Commission’s approval of labeling standards for the fruit juice industry. The court concluded that the consumers’ interest protected by the Fair Labeling Law was “an abstract, general interest held equally by all citizens,” and that, therefore, the housewives’ interest constituted no more than a “factual or reflex interest produced as a result of the Law’s purpose of protecting the public interest.” As such, it did not constitute the individual and direct interest required for administrative standing.

It is too early to assess precisely the implications of the Juice case for environmental plaintiffs, but it seems that the Kunitachi approach at present has little chance of Supreme Court approval. The Juice case seems in accord with previous Supreme Court standing decisions demanding that the statute grant plaintiff a particularized interest. As a result, many, if not most, environmental cases will continue to be brought as civil tort actions unless the plaintiffs can demonstrate an interest that brings them clearly within the narrow scope of traditional administrative standing doctrines. Where environmental plaintiffs have been granted standing and the case is justiciable, however, they have won substantial procedural safeguards through administrative litigation which is considered in the next section.

B. Environmental Planning on the Administrative Side: Statutory Interpretation

Should an administrative plaintiff satisfy the requirements of shobu sei ("ripeness") and standing, courts consider the defendant’s conduct a major factor in determining the legality of the agency’s action. In environmental cases this means inquiry into the procedural adequacy of the defendant’s decision to conduct or continue the challenged activity. In particular, courts consider the adequacy of the defendant’s consultation with the local residents and consideration of possible pollution. As often phrased by plaintiffs, the questions become, respectively, whether the developer has followed “democratic procedures” and whether there has been an environmental assessment.

The courts in administrative cases have drawn these procedural

117. Juice case, 880 Hanrei Jihō at 5.
118. Id.
119. In fact the author is unaware of any subsequent lower court decisions that follow the Kunitachi reasoning despite the considerable discussion of its implications in academic journals.
120. See, e.g., Decision of Nov. 28, 1975, Supreme Court, 29 Minshū 1592 (Novo Industri case), commented on by Haley, 9 Law in Japan 155 (1976).
121. The requirement of procedural fairness applies, albeit on different theoretical grounds, to both administrative and civil cases.
requirements from a variety of sources, including what may be termed the due process clause of the Japanese Constitution. In general, however, it has not been necessary to rely on constitutional arguments because of the large number of statutes that now contain specific requirements that agencies hold public hearings and give some consideration to environmental problems. Even when the pertinent statute lacks an explicit requirement, courts in administrative cases have not been reluctant to interpret the statute as implicitly embodying substantial procedural safeguards.

Perhaps the case best known for relying upon a vaguely worded statutory provision to impose special procedural requirements is the Nikkō Tarō cedar case decided by the Tokyo High Court in 1973. The case involved a challenge to the Minister of Construction's approval of a plan to widen a road in the area of Nikkō National Park. The road was flanked on one side by the Shinkyō Bridge, an officially designated important cultural structure, and on the other side by the Nikkō Tarō cedar tree, a 600 year old Japanese cedar treasured for its scenic beauty and spiritual importance. The plan to widen the road entailed cutting down the Tarō cedar and a dozen similar trees. The Toshogu Shrine, a legally recognized religious entity which owned the land on which the trees stood, strenuously objected to the trees' de-

122. There is no general statutory requirement for either private or public developers to consider the environmental effects of their actions or to consult with local residents. See text accompanying notes 17-26 supra.

123. *Kenpo* (Constitution) art. 31 (Japan) (Japanese S.Ct. trans.): "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."

The Matsuyama Airport case, Decision of June 23, 1968, Matsuyama District Court, 548 Hanrei Jihō 63, 65, discussed and partially translated in K. Fujikura, et al., supra note 10, sess. 10, is the leading case applying article 31 to environmental cases. The court held that holders of fishing rights, which the court specifically characterized as property rights, were entitled under article 31 to an opportunity to present their views prior to the granting of a permit for a landfill that, if implemented, would extinguish their fishing rights. The case is significant because the court established a minimum due process requirement in cases where a plaintiff's legal right to engage in an activity is at stake. Its significance to environmental cases, however, is questionable. The protection granted was carefully qualified, and perhaps more importantly, there is now little need to refer to article 31 for procedural protection because many statutes, including the Public Surface Waters Reclamation Law (*Kōyūsuimen Umetate Hō*), Law No. 57 of 1921, which was involved in the Matsuyama Airport case, have been amended to include requirements for public hearings and some consideration of environmental problems.


struction and brought an action to oppose the expropriation of its land. The Land Expropriation Law,\textsuperscript{126} which requires that expropriation contribute to the "appropriate and rational utilization of the land,"\textsuperscript{127} provided the legal basis for the challenge.

The court found that the Minister had a duty to consider not only the economic costs and benefits of the plan, but also its environmental and cultural consequences.\textsuperscript{128} After detailing the historical and cultural value of the trees and their importance to the beauty of the whole region, the court stated:

To satisfy the requirement that the use of the land be appropriate and rational, it is not enough for the Minister of Construction simply to say that the plan has public value because it increases the traffic capacities of National Roads 119 and 120. He must also find that this plan is absolutely necessary. In other words, he must find that this plan must be implemented even at the sacrifice of the scenic, historical, and cultural value of the area and in spite of accompanying environmental deterioration and destruction.\textsuperscript{129}

The court held that even if some accommodation of additional traffic were necessary, the defendant must be satisfied that no other plan could accomplish the desired objective at less cost. It concluded that the Minister had abused his discretion by "significantly underestimating" the cultural value of the area and the importance of its preservation.\textsuperscript{130}

\textsuperscript{126} Tochi Shiyō Hō, Law No. 219 of 1951.
\textsuperscript{127} Id. Art. 1 provides:

The purpose of this law is to provide rules concerning the expropriation or use of land necessary for projects in the public interest; the conditions, procedures, effect, and compensation relevant thereto; to harmonize the promotion of the public interest and private property; and thereby to contribute to an appropriate and rational utilization of the land. (emphasis added).

The italicized phrase is repeated in art. 20 (3) as one of the requirements for issuance of a permit by the prefectural governor.

\textsuperscript{128} Nikkō Tarei cedar case, 710 Hanrei Jiho at 36: "The preservation of the environment and of the [special qualities of this] area should be given the utmost consideration by the administrative agencies involved because these are factors which provide the people with a healthy and culturally satisfying life."

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 37. The court appeared to rank the factors that the defendant Minister should consider in determining whether the plan is in the public interest and contributes to appropriate and rational land use. The court's opinion does not make absolutely clear whether the defendant had considered environmental and cultural factors at all, but the court's language appears to indicate that he had given the wrong relative weight to the factors. The court found that the defendant exaggerated some factors while underestimating the importance of environmental and cultural ones, which the court stressed required the greatest weight. Id. at 35. If this interpretation of the court's opinion is correct, the decision would sharply reduce the Minister's discretion.

The language appears to go beyond the "rational basis" test of American courts under which a court will not evaluate the weight to be given various factors as long as the agency has adequately examined all points of view. See K. Davis, Administrative Law §§ 30.04-.05 (3d ed. 1972). Indeed, the necessity requirement is roughly analogous to American strict
Another administrative case, the *Usuki cement* case of 1971,131 involved fishing rights and the approval of a landfill for a cement factory under the Public Surface Waters Land Reclamation Act.132 The Act allows the granting of a landfill permit only if the "benefit arising from the reclamation would far exceed the injury therefrom to third parties holding a right to use the water."133 The court, stating that the statute should be strictly interpreted, held that an environmental assessment was necessary:

When a private company applies for a permit, it is not enough to compare the economic benefit expected from the reclaimed land and the factories' production with the economic loss of the holders of rights to use the public water. An examination must be made of the existence, degree, and extent of adverse effects of the construction of factories upon the life and environment of residents in the area.134

The court noted that the prefectural governor granting the permit had made only a narrow economic analysis emphasizing the profitability of and opportunity for employment at the proposed cement factory. He had neglected the indirect costs caused by other factors such as pollution. The permit was therefore invalidated.135

The *Nikkō Tarō cedar* and *Usuki cement* cases are evidence that the administrative cause of action remains a useful tool for environmentalists under some circumstances. Those circumstances, however, remain extremely limited. Although lower courts have significantly loosened the standing requirement for residents of a neighborhood directly affected by an administrative project, it seems unlikely that the law will soon develop further. Even when plaintiffs have standing, the *shobunsei* requirement eliminates most environmental challenges to governmental action. As long as the courts avoid attacking this issue, they can not make administrative law doctrines substantially more useful.136 Instead, they have maintained rigid rules of administrative standing and ripeness while allowing plaintiffs to avoid the impact of the ACLL altogether. In a sense this has resulted in a new form of administrative action by allowing cases against public entities to be


133. *Id.* art. 4(3)(2).
135. *Id.*
136. Interpreting statutes to require an environmental assessment, while effective in helping environmental plaintiffs, does not affect the underlying doctrines of standing or *shobunsei*. 
brought under the guise of private law tort actions.\textsuperscript{137}

III
ENVIRONMENTAL SUITS AS CIVIL ACTIONS
—THE SCOPE OF PROTECTED INTERESTS

While administrative doctrines often prevent effective review of governmental activity, civil suits provide an alternative avenue for challenging administrative actions. Courts have developed this alternative by expanding the scope of interests protected under tort law.

Judicial inventiveness is, of course, a time-honored resolution to problems presented by technical legal rules, and the process described in this section might profitably be compared with similar phenomena elsewhere, such as the evolution of nuisance doctrine in nineteenth-century America.\textsuperscript{138} The liberalizing developments in Japanese environmental law have occurred almost exclusively in private law doctrine rather than in administrative law. Part of the explanation is found in the history of recourse to civil forums to challenge governmental actions in Japan.\textsuperscript{139} Present reliance on civil tort actions continues a prewar pattern of avoiding the administrative forum, which prior to the war constituted a distinct court system highly biased in favor of the government.\textsuperscript{140} Also, postwar academic treatment of administrative law reform has given private attorneys little reason for optimism. Scholarly interpretation of the ACLL has remained remarkably conservative,\textsuperscript{141} much more so than can be explained by its European origins.

A second reason for the concentration of environmental reforms within tort law is the pattern of environmental litigation over the last decade. Plaintiffs' early victories in the highly publicized big four cases were private law tort actions seeking compensation from private companies. As the defendants shifted from private corporations to public entities pursuing government projects, the nature of harm and presentation of proof shifted as well, from dramatic instances of severe personal injury to predictions of possible pollution and potential personal injury. The result is that the earlier, easier, and more appealing cases were virtually all tort suits, while the later cases, more likely to be

\textsuperscript{137} Perhaps it would be more accurate to say that the courts here are adapting or extending a prewar practice rather than creating a new one. Prof. Wada, supra note 34, at 35-38, has shown that public entities were susceptible to civil tort suits under the prewar system. It is unlikely, however, that such susceptibility went beyond clearly "factual or proprietary" behavior by administrative bodies to reach what were in essence administrative decisions.


\textsuperscript{139} See note 34 supra for a brief account of this history and its effect.

\textsuperscript{140} Wada, supra note 34, at 3, 7-8.

\textsuperscript{141} See note 34 supra. The leading treatise on administrative law, J. Tanaka, supra note 39, would strike American readers as restrictive and anachronistic.
brought as administrative actions, were more difficult and, hence, less often successful. The natural consequence has been to buttress the lawyers' predisposition toward tort actions.

Despite the success of environmental plaintiffs in the past in civil tort actions, the extension of private law tort doctrine to cover broader environmental concerns remains a central question. This section considers whether judicial protection can be extended to "pure" environmental concerns rather than remain limited to human health and physical injury.\textsuperscript{142}

\section*{A. Development of the Doctrinal Framework\textsuperscript{143}}

Simply stated, there are three elements of tort liability in Japan: the subjective element or defendant's intent or negligence; the objective element or the illegality (\textit{ihösei}) of the defendant's conduct, which is determined by weighing its social value against the legal protection afforded the right or interest infringed; and proof of legal causation.\textsuperscript{144} This discussion focuses on the second element, since the historically narrow scope of protected interests is the major obstacle in environmental litigation.

The relevant provisions of the Civil Code have remained unchanged since the Code's promulgation in 1898 [Japanese S. Ct. trans.]:

\textbf{Art. 709}: Anyone who intentionally or negligently infringes upon another's right shall be liable for compensation for damage caused thereby.

\textbf{Art. 710}: Regardless of whether the harm is to the other person's body, freedom or honor or to his pecuniary rights, the person liable under the previous article shall be liable for compensation for non-pecuniary losses as well.\textsuperscript{145} Article 709 was interpreted initially to require infringement of a clearly delineated legal right, either the "personal right" ("\textit{jinkakaken}") of article 710 or pecuniary rights such as ownership or possession.\textsuperscript{146} This

\textsuperscript{142} Even in administrative cases based on specific statutes such as the Construction Standards Act, Law No. 201 of 1950, the court is likely to delimit the protection afforded by the statute by reference to articles 709-710 of the Civil Code. It will equate "health," "living environment," or similar broad statutory language with the protection given by tort law. An example of such treatment is the Bowling Alley case, 737 Hanrei Jihö 26, where the CSA, the purpose of which is to protect the "people's life, health, and property," was interpreted in tort terms.

\textsuperscript{143} I am indebted to Professors Koichirō Fujikura and Yoshinobu Tai of Doshisha University Law Faculty for several discussions about Japanese tort doctrine that enabled me to understand the evolution of the law since the 1920's. Any errors that remain in this section, however, are my own.

\textsuperscript{144} See the Osaka High Court's treatment of illegality in the Osaka Airport case, 797 Hanrei Jihö 67-70.

\textsuperscript{145} Law No. 89 of 1896, arts. 709-710.

\textsuperscript{146} Article 710 not only establishes that compensation for non-pecuniary as well as pecuniary losses will be available, but also establishes a legal right in addition to the other
interpretation severely limited the range of commercial and personal interests protected by article 709. Its effect was to favor individual freedom of action over protection of legitimate business entitlements not explicitly protected by other Code articles. The situation was remedied in 1925 by the Great Court of Judicature in the University Baths case, which expanded article 709 to cover "legally protected interests" as well as statutorily delineated legal rights.

Although perhaps desirable because of the varied social conditions in which the Civil Code must operate, the University Baths case ended the bright line test for tort liability. Statutory construction no longer determines whether the alleged harm was to a "right." Instead, it is necessary to determine in each case whether the particular interest infringed is deserving of legal protection. Subsequent development of doctrine can be fairly described as a continuing search for a set of workable criteria for making that determination. The formula which has evolved centers on the concept of illegality (ihōsei), first introduced by Professor Hiroshi Suekawa and since developed and elaborated by scholars and courts. The characterization of the defendant's conduct as illegal has become a universally accepted element of tort liability along with proof of negligence and causation.

The test for illegality involves balancing the value of the defendant's conduct against the protection that should be accorded the plaintiff's interest. Thus, there will be no liability if the social value of defendant's conduct overshadows the degree of concern for the infringed interest. At one extreme, criminal conduct has negative social utility and almost ensures a finding of illegality, whatever the nature of rights in the Civil Code. This right, called the jinkakuken or personal right, is important to environmental litigants and is based on the phrase "body, freedom or honor" in article 710.

147. The Great Court of Judicature (Taishin'in, also Daishin'in, sometimes translated as the Great Court of Cassation) was the rough equivalent of the present Supreme Court except that it had no jurisdiction over administrative cases, which were heard by entirely separate administrative courts. See H. Tanaka, supra note 11, at 53-54.

148. Decision of Nov. 28, 1925, 4 Taishin'in Minji Hanreishi 670 (University Baths case).

149. A former tenant and proprieter of the "University Baths" bathhouse brought suit against his landlord who had, at the expiration of the lease, rented the premises to a third party and allowed the continued use of the "University Baths" name. The Great Court of Judicature held that it was not necessary to determine whether there was a Civil Code "right" protecting long established commercial names because all that was needed for a tort cause of action was an infringed "interest". Id. Abstract environmental interests remained unrecognized, however.


151. A leading treatise on Japanese tort law is I. Katō, Fuhōkō (1957). For the development of tort doctrine as it relates specifically to the environment, see I. Katō, Kōgai Hō no Seisei to Tenkai (The Creation and Development of Pollution Law) (1968).
the infringed interest. At the other end is conduct with a high social value such as the operation of a public airport. To find the defendant's conduct illegal, the infringed interest must be highly deserving of legal protection. Interests accorded a high degree of legal protection traditionally begin with "real rights," the most common of which is ownership, including the ownership of fishing rights. Pecuniary interests such as contract obligations are less protected and the personal rights of article 710 are the least protected. To determine whether a defendant's behavior can be characterized as illegal, therefore, a court must, implicitly if not explicitly, determine the social importance of the challenged activity and weigh it against the quality of the plaintiff's infringed interest. For example, in the archetypal personal injury case, an automobile accident, there is no social value in the defendant's activity, and the illegality of the conduct is assumed. When the case is similar to an American nuisance action, however, the defendant can often argue that the high social value of his activity should outweigh the harm to the plaintiff.

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152. Behavior which violates criminal statutes such as defamation, art. 230 of the Criminal Code, Law No. 45 of 1907, or fraud, art. 246 of the Criminal Code, has the strongest illegal nature (ichōse). In such situations, infringement of interests deserving any protection at all establishes this element of liability. T. Taniguchi & F. Obo, MINPO GAISETSU (Outline of Civil Law) 251. Criminality may also bear heavily on the subjective element of intent or negligence. The effect of this doctrine is similar to the "negligence per se" doctrine of American tort law. W. Prosser, THE LAW OF TORTS 200-01 (4th ed. 1977).

153. Thus, socially desirable enterprises might be viewed as enjoying a certain degree of immunity from liability regardless of negligence and causation.

154. "Real Rights" (Bukken) are covered in Civil Code, Law No. 89 of 1896, book II, arts. 175-398, and are often translated as in rem ownership rights. They are not limited to real property ownership and include ownership of intangibles as well.

155. Fishing rights are established by the Fishery Law (Gyogyō Hō), Law No. 267 of 1949, arts. 6-51. Because a fishing right is a "legal right" established by a specific statute and running to a specific individual (in most cases the fishermen's cooperative, see the Cooperative Fishery Union Law (Suisangyo Kyōdō Kumiai Hō), Law No. 242 of 1948), its infringement has also enabled fishermen to gain administrative standing in environmental litigation concerning public landfills or other activities that affect fishing grounds. See, e.g., the Usuki cement case, 638 Hanrei Jiho 36.

156. In personam rights are covered generally in book III, "Obligations" (Saiken) of the Civil Code, Law No. 89 of 1896, and contract rights, more specifically, are covered by chapter II, arts. 521-696, of book III. A statutory provision, however, is not necessary for an interest to be accorded legal protection. See note 149 and accompanying text supra.

157. Although in discussions of the question of illegality the personal right is considered as a single concept, its scope is extremely broad and in practice some aspects of the right, such as protection from physical harm, receive more protection than others. T. Taniguchi & F. Obo, supra note 152, at 249-51.

158. The questions of negligence and causation remain.

159. See, e.g., the Osaka Airport case, 797 Hanrei Jiho 36, or the Hanshin Expressway case, 709 Hanrei Jiho 134. In both cases the government argued strongly that, even assuming harm to the plaintiffs, the public value (kōkyōse) of the infringing behavior should insulate it from liability. The argument was made in two stages: first, the public value should negate illegality and therefore liability entirely; and second, assuming illegality, the public value should prevent injunctive relief. See defendant's arguments in the Osaka Air-
The courts developed the prevailing doctrine in pollution litigation against this basic theoretical background. This doctrine employs the "tolerable limits theory," or juningendoron, to refine the question of the extent to which interests protected by articles 709 and 710 will affect illegality and to define the rights individuals have in regard to their environment. Under the juningendoron, the keystone of the determination of illegality is the basic tort balancing test discussed above, with the proviso that if the plaintiff's harm exceeds tolerable limits, the defendant's activity will be found illegal whatever its social value.

Although it was intended to widen liability in a pollution case, the juningendoron has recently been widely criticized by scholars and lawyers for putting too much emphasis on the requirement that the plaintiff endure a certain level of harm before judicial relief is definitely available. The doctrine's application is said to sanction a certain level of pollution by denying illegality when the plaintiff's harm is within tolerable limits, and its critics claim the doctrine predisposes courts to allow the burden of industrialization to fall on the residents of heavily polluted areas. More important, they also point out that the theory does not broaden the scope of protected interests beyond those previously covered by the personal rights of article 710, i.e., bodily integrity, freedom, and reputation. In environmental litigation this doctrine puts great emphasis on the definition of health embodied in the personal right of article 710.

To overcome these shortcomings, environmentalists have urged judicial relief to be limited to damages, is in effect an agreement by the defendant to internalize the necessary costs imposed by his operation. Proceeding with the activity once damages are paid might thus be justified on economic cost/benefit grounds. While an explicit economic approach to the issuance of injunctions is well established in the United States, see Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970), Japanese courts have not yet begun to grapple explicitly with economics, although such considerations are implicit when courts consider the public value of an institution such as an airport. See Osaka Airport case, 797 Hanrei Jiho at 44.

The juningendoron is most closely associated with Professor Ichirô Katô. For a defense and explanation of that doctrine in relation to the idea of a constitutional environmental right, see Katô, Kankyôken no Gaien o Mezuite (On the Concept of an Environmental Right) in Minpôgaku no Gendaiteki Kadaigai (Contemporary Problems in Civil Law) 317 (I. Katô and S. Kuruse eds. 1972). For a comparison with American nuisance doctrine, see Miller, Let the Sunshine In: A Comparison of Japanese and American Solar Rights, 1 Harv. Env't L. Rev. 578, 585 n.62 (1976).

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162. Id.

163. See, e.g., Osaka Bengoshikai Kankyôken Kenkyûkai (Osaka Bar Association Environmental Right Research Group), Kankyôken (The Environmental Right) (1973).

164. Id.

165. Although it may seem unlikely that this theory protects anything beyond pollution diseases such as mercury poisoning or industrial asthma, see Dreams, supra note 10, at 51-77, 102-32, the courts have begun to widen the definition of health to cover areas beyond the bodily integrity of the plaintiff. See text accompanying notes 173-89 infra.
dicial recognition of an environmental right (kankyōken) inherent in articles 13 and 25 of the Japanese Constitution.\(^{166}\) The environmental right would at once extend tort protection to the natural environment.\(^{167}\) Furthermore, supporters argue that this right would eliminate the need for balancing by establishing the illegality of the defendant's conduct whenever it leads to environmental deterioration.\(^{168}\)

Although the environmental right concept appeals to much of the Japanese public\(^{169}\) and a segment of the practicing bar,\(^{170}\) the juningendoron remains the prevailing theory. Moreover, the proponents of an environmental right face considerable doctrinal and practical problems in establishing their theory. As yet no court has forthrightly

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166. Kenpō (Constitution) art. 13 and art. 25 (Japan) provide [Japanese S.Ct trans.]:
Art. 13: All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.
Art. 25: (1) All people shall have the right to maintain the minimum standards of wholesome and cultured living.
(2) In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

167. No proof of infringement of the plaintiff's bodily integrity or damage to the plaintiff's health would be required. It should be noted that the environmental right remains homocentric, i.e., the right belongs to human beings, not nature itself. See, e.g., Stone, Should Trees Have Standing?—Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972).

168. The environmental right would eliminate the juningendoron in pollution cases. Although its supporters, see note 163 supra, contend that it would thus eliminate balancing completely, Professor Katō, a leading academic critic of the environmental right, has made the interesting argument that balancing might be reintroduced even under the environmental right. Balancing would be necessary, he contends, because the absolutist nature of the right would lead to its unjustified or inequitable use by persons who would exaggerate environmental dangers. This would force the courts to rely on the "abuse of right" doctrine to prevent injustice. To determine whether the exercise of the environmental right was justified in any given case, the courts would have to balance the environmental interests of the plaintiffs against the damage to the defendant, and perhaps society, if an injunction were granted. Katō, supra note 160, at 326. For a discussion of the abuse of right doctrine, see Sono & Fujioka, The Role of Abuse of Right Doctrine in Japan, 35 La. L. Rev. 1037 (1975).

169. For a discussion of the social and political force of the environmental right issue, see McKean, supra note 11; Enloe, supra note 11; Upham, supra note 11. The enthusiasm for environmental protection may have declined since the early 1970's, but considerable support is still shown by the continuing vitality of the environmental movement, including the ease with which organizers can produce over 1,000 named plaintiffs in cases like Biwa. Mainichi Daily News, Mar. 27, 1976, at 3. See also Environmentalists Force Government to Drop Plan for Oil Storage Depot, 1 Int'l. Env'tl. Rep. 374-75 (Nov. 10, 1978); Japan Times, Feb. 21, 1978, at 10, Jan. 7, 1978, at 2.

170. In the Kansai area (Kyoto, Osaka, and Kobe), the leading organized groups of environmental attorneys are the Pollution Countermeasures Committees of the various bar associations. They systematically analyze and criticize local governments' environmental policies, see note 19 supra, as does the Environmental Law Committee of the Japan Federation of Bar Associations (JFBA). See JFBA, ENVIRONMENTAL PROTECTION AND THE ROLE FOR LAWYERS: ACTIVITIES OF THE JFBA AGAINST ENVIRONMENTAL POLLUTION IN JAPAN (1975).
recognized the environmental right, while several have rejected it.\textsuperscript{171} Even those courts which seem sympathetic to the environmental movement couch their opinions in terms of the *juningendōron* or make the theoretical underpinnings sufficiently vague that it is difficult to claim the decision as a precedent for the environmental right.\textsuperscript{172} Although tort doctrine in this area is evolving, the law still requires not only proof of harm to the plaintiff's health but also a showing that such harm falls outside the bounds of the everyday inconvenience members of society can be expected to endure.

### B. The Doctrine Applied: Neighborhood Preservation

The personal right of article 710, which forms the basis of the typical pollution case, is the broadest and least delineated of the three categories of interests protected under tort doctrine. Because death and serious physical injury are securely within the definition of health, establishing the illegality of defendants' conduct in the first generation of pollution suits did not present a serious problem despite the high social value of the defendants' industrial activity.\textsuperscript{173} As the claimed harm changes from clearcut physical injury to claims associated with damage to psychological and social well being, however, the plaintiffs' position becomes more tenuous. Since the courts are unwilling to go beyond the protection of human health, at least explicitly, plaintiffs' lawyers characterize broad environmental concerns as health problems. Their success in doing so has not been consistent, but over the last decade courts have significantly widened the definition of health, with the *Lake Biwa* case at the leading edge.

Perhaps the best known expansion of the health criterion has been in cases considering rights to sunshine.\textsuperscript{174} These cases deal with property owners' suits to enjoin neighboring owners' construction of high-rise buildings that would block the plaintiffs' sunshine for a significant period of the day. In this category is the only Supreme Court case considering health interests, *Mitamura v. Suzuki*, which held that a certain amount of daily sunshine is essential to human health.\textsuperscript{175} Subsequent decisions have noted the social and cultural importance of sunshine to

\textsuperscript{171} E.g., the Kunitachi Pedestrian Bridge case, 704 Hanrei Jihō 31.

\textsuperscript{172} E.g., the Hanshin expressway case, 702 Hanrei Jihō 18.

\textsuperscript{173} See Taniguchi, *supra* note 11. Certain interests embraced by the personal right, including protection from physical harm, overcome the high social value of the defendants' activity. See note 157 *supra*.


\textsuperscript{175} Decision of June 27, 1972, Supreme Court, 26 Minshū 1067, 1068 (Mitamura v. Suzuki). (The *Osaka Airport* case, discussed in text accompanying note 48 *supra*, was pending in the Supreme Court at this writing.) *Mitamura* is also known for its treatment of the abuse of right doctrine, see note 167 *supra*, but the determination of the plaintiffs' protected interests was based on tort doctrine. Subsequent right to sunshine cases have also been
the Japanese and the psychological feeling of physical oppression (*ap-paku-kan*) that plaintiffs would suffer if they were to live in the shadow of a high rise.\textsuperscript{176} A recent Tokyo District Court has even held that a minimum amount of sunshine for one's garden is necessary for the "healthy and comfortable life" that the courts in the sunshine cases generally have said is the plaintiffs' due.\textsuperscript{177}

The sunshine cases are quite far from the mainstream of current environmental litigation. They are between private litigants, the prospective loss of sunlight is easily quantifiable, property rights as well as personal rights are involved, and there is little problem proving causation. Most important, however, is the low social value of the defendant's behavior. Unlike a factory, which may employ hundreds of people, or a public facility such as the Osaka Airport, the defendant's interest in building a high rise is strictly one of private profit—putting the land to the highest economic use.\textsuperscript{178} In some cases, the defendant's position was further weakened by a violation of the Construction Standards Act or local building ordinances.\textsuperscript{179}

Although these cases differ factually from cases raising broad environmental issues, the courts' reasoning is important, specifically their recognition of a judicially protected minimum living environment. The Supreme Court in *Mitamura v. Suzuki*, for example, characterized the plaintiff's interest as follows:

The [free passage of] sunlight and air surrounding one's residence is a life interest indispensable to leading a comfortable and healthy life. As such, they deserve legal protection even if they must traverse the airspace of another. It is reasonable, therefore, to recognize a tort cause of action for compensation when the plaintiff's air and sunlight have been obstructed by behavior of the defendant which constitutes abuse of right.\textsuperscript{180}

The court tied the minimum environmental standards to human health based on tort doctrines. *See, e.g.*, Decision of Feb. 28, 1977, Tokyo District Court, 859 Hanrei Jihō 54 (Irino case).

\textsuperscript{176} *See, e.g.*, Decision of Sept. 30, 1974, Sapporo District Court, 759 Hanrei Jihō 77, cited in Miller, *supra* note 160, at 586.

\textsuperscript{177} Decision of Feb. 28, 1977, Tokyo District Court, 859 Hanrei Jihō 54 (Irino case).

\textsuperscript{178} Although under some circumstances achieving the highest possible use of urban land may be in the public interest, the courts in these cases have been rather disdainful of an owner's injury of a neighbor's land solely for personal gain. They have not carefully weighed the eventual social consequences of enjoining defendant's activity, allowing it to continue but awarding damages, or denying liability. It is arguable, for example, that preventing high-rise residences in downtown Tokyo contributes to urban sprawl and eventually sacrifices the well-being of many commuters for the convenience of a few downtown landowners. As yet, Japanese courts have chosen not to engage in speculation along these lines.

\textsuperscript{179} This was the situation, for example, in *Mitamura v. Suzuki*, 26 Minshū 1067.

\textsuperscript{180} *Id.*
but its definition of human health appears to include significant psychological considerations.

The Osaka High Court applied the concept of a minimum living environment and considered psychological factors in the Osaka Airport case where the defendant's activity had a high social value. Moreover, although the case was allowed to proceed as a tort action, the defendant was the State. The damage alleged was mainly caused by aircraft noise and included buzzing in the ears, loss of hearing, and headaches. This physical damage alone would probably have sufficed for a ruling in favor of plaintiffs, but the court nevertheless discussed the general psychological condition of the residents of the afflicted area. It noted the disruption of daily life, the effect on children's study habits, destruction of family conversations, loss of sleep, and the constant stress of living with the fear that one of the arriving or departing planes would crash. The opinion thus recognized the interdependence of physical and psychological well-being. It also emphasized the destruction of the living environment in the plaintiffs' neighborhoods rather than the objective certifiable harm to each plaintiff. The case is helpful to environmentalists for having extended some of the Mitamura reasoning to a quasi-public law context and for clearly demonstrating that the courts can be sensitive to the psychological dimensions of environmental problems.

Some lower court cases have gone even further in protecting psychological values. One example is a 1973 decision by the Osaka District Court that enjoined the Kintetsu Buffaloes, a professional baseball team, from constructing light towers for night games. The plaintiffs, residents of the surrounding area, sought a civil injunction on the ground that naitaa kōgai or night game pollution would disrupt their residential environment. The court found that night games would result in traffic delays, increased exhaust fumes, and parking problems. Automobile traffic, the public address system, and the crowds themselves would produce noise before, after, and during the games. Because the neighborhood was quiet and admirably suited as a residential area, the noise would be beyond the level of tolerance required by the juningendoron. The private character of the defendant probably tilted this balancing or ihōsei determination in plaintiffs' favor. The defendants had received a permit

181. Decision of Nov. 27, 1975, Osaka High Court, 797 Hanrei Jihō 36, 52, 61. The case and the applicability of the ACLL has been discussed earlier. See text accompanying notes 48-54 supra.
182. 797 Hanrei Jihō at 52-53.
183. Decision of Oct. 13, 1973, Osaka District Court, 717 Hanrei Jihō 23. At the time, the Kintetsu team played elsewhere, but it was their plan to make this field their home base once construction was completed and night games were possible.
184. Id. See text accompanying note 160-61 supra.
185. See text accompanying notes 150-59 supra. The defendants had received a permit
interest protected by the injunction was "the tranquility of a serene residential neighborhood." 186

A common thread running through these environmental tort cases is the reliance on residential neighborhood preservation as the interest most deserving of protection. 187 Neighborhood preservation, however, is not synonymous with environmental protection, and the expansion of tort doctrine to protect other than narrowly defined human health interests will have limited effect unless environmentalists who are not residents of the particular area can challenge development projects and policies. 188

The problem is essentially the same in both administrative and civil cases. Although the issue is standing in the former and protected to construct light towers to allow night games. The Construction Standards Act, Law No. 201 of 1950, arts. 6 (1)(1), 48 (3), requires a special permit for such construction in a residential area. In granting the permit, the administrative agency (in this case Osaka Prefecture) must find either that "there is no fear that the project will damage the residential environment" or that the project is "necessary to the public interest" Id. art. 48(3). The permit for the towers was granted, presumably on the first ground. Although formally brought against the team, this case can be viewed as another example of a civil challenge to an administrative permit. It appears that the permit was granted on condition that the defendant "adequately consult" the neighbors about the construction, and defendant's failure to do so was cited by the court as an additional ground for its decision. 717 Hanrei Jihô at 26-28.

186. 717 Hanrei Jihô at 28. Many recent cases have similarly granted legal protection to a living environment meeting certain quality of life criteria and have taken into consideration psychological values. For example, in the Hanshin Expressway case, 702 Hanrei Jihô 18, see note 64 supra, the court imposed restrictions on the construction of a super-highway to protect environmental interests of residents in their neighborhoods. These interests, founded in the residents' article 710 personal rights, were held to deserve legal protection against unreasonable encroachment and included rights to sunlight, the free flow of clean air, quiet, view, privacy, and freedom from a sense of oppression (appakukan). Id. at 29-30. The Izumi Crematory case, 663 Hanrei Jihô 80, noted previously in connection with the application of the ACLL, see text accompanying notes 62-63 supra, is also noteworthy in this context since the court discussed the anxiety that the plaintiffs would feel if the crematory was built near their homes. Id. at 81.

187. See note 186 supra. There have been other district and high court cases dealing with the construction of small public facilities such as sewage treatment plants that by their nature threaten the quality of the surrounding residential neighborhoods. Not all of these decisions have resolved the balancing test in favor of the plaintiffs, but all have recognized that the plaintiffs' residential environment is a judicially cognizable interest within the scope of their personal rights.

188. One might assume that the problem is not very significant since it would be simple to find at least one resident who was willing to serve as plaintiff. Apparently this is not the case in Japan for a variety of reasons. Development projects are often in rural areas, and nearby villages are likely to have been well compensated ("bought off" in the words of environmentalists) by the government for any damage. This appears to have been true in the Biwa case. At least, there are no plaintiffs who live in the immediate area of construction. In Biwa, fishing rights might also have been used to gain administrative standing, but no fishing cooperative was willing to act as name plaintiff. Interview by the author with K. Tsujida, plaintiff in the Biwa case (June 1977). Once a particular village has agreed to support a development project, it is very difficult in the Japanese social context for an individual to act independently. The situation may be similar in urban areas. See Upham, supra note 11, at 588-600.
interests in the latter, courts in both areas are grappling with the questions of who is sufficiently affected—usually by governmental action—and what types of harm are sufficiently cognizable to bring the case before the court. The parallel expansion of administrative standing and the scope of protected interests under tort law to embrace neighborhood or residential protection should therefore not be surprising.189

C. Environmental Planning in Civil Cases: Tort Duty of Care

As in the administrative area, courts deciding civil cases have developed a duty to assess the environmental impact of any proposed development. Courts deciding administrative cases have generally derived minimum duties of environmental planning by interpreting the statute underlying the administrative action. Hence they have been limited by the specific statutory language. In civil actions, the courts have been less circumscribed. Relying on the more general duty of care established within tort doctrines, they have sometimes imposed elaborate and detailed requirements on project planners and developers to conduct environmental impact assessments and to consult with affected citizens about their activities.190

A significant step in the development of an environmental assessment requirement as part of the duty of care came in the well-known Yokkaichi case.191 Plaintiffs, residents of a fishing village across a river from defendants’ six petrochemical plants, sought compensation for suffering from pollution-induced asthma. The court, focusing closely on defendants’ decision to locate the plants in a heavily populated area, found the defendants negligent. After pointing out the high likelihood of pollution in the petrochemical industry regardless of careful operation, the court held that the defendants could have mitigated adverse consequences by choosing the site only after thorough consideration and in light of possible consequences for neighboring residents:

The choice should be made on the basis of studies of factors such as the nature and amount of emissions, the direction and distance of residences from the site, and atmospheric conditions, including the speed and direction of wind. According to [evidence and testimony], the defendants were negligent in their site selection since they failed to study the possible effects of their operations on neighboring residents’ health.192

189. Section IV discusses whether the door will be opened further.
190. In recent years many planners and developers have been public bodies. For a discussion of civil suits attacking public decisions and activities, see text accompanying notes 44-71 supra.
191. Decision of July 24, 1972, Tsu District Court, 672 Hanrei Jihō 30. This case is one of the so called “big four” pollution cases. See note 11 and accompanying text supra.
192. 672 Hanrei Jihō at 99. Translation by the author available in K. Fujikura, et al., supra note 10, sess. 4. Political pressure may have contributed to the decision. See Upham,
A less celebrated, but more typical example of the environmental assessment duty under tort law is found in a 1975 Kumamoto District Court decision enjoining the construction of a sewage plant by the city of Ushibuka.\textsuperscript{193} Plaintiffs were local residents and fishermen who alleged that operation of the plant in the proposed location would cause water pollution along the shoreline. Plaintiffs also alleged that pollution would threaten the fisheries and that use of polluted sea water to wash farm products would threaten their health.

The court acknowledged the high social value of the proposed facility, but stated that the duty of care owed to the surrounding residents included an obligation to choose the least environmentally harmful site. Environmental surveys and analyses and consultations with residents were in order:

At the very least, the defendant should have made an expert survey of the tidal direction and speed in the vicinity of the contemplated site and have forecast the dispersal and stagnation of the discharged water. The defendant, moreover, should have undertaken an ecological investigation of the effect of waste water on the fish, clams, and sea weed living in this area and explained to local residents the possibility of harm from the construction of the facility. The defendant should have evaluated the results and determined whether the predicted harm would exceed that which would be incurred if the present method of waste disposal were continued. If the defendant was then convinced that there was no alternative to construction of the proposed plant, it should then have determined compensation for the particular injuries anticipated and discussed these and other measures with the local residents.\textsuperscript{194}

The court regarded defendant's failure to take these steps as evidence of its "incompetence" and granted an injunction despite the significant distress it would cause the city.\textsuperscript{195}

Even though courts, under both civil and administrative doctrines, have established a firm, if not always explicitly acknowledged, duty on the part of public and private developers to take certain precautions to protect the environment, case law has not clearly defined the duty. Although uncertainty may work to plaintiffs' advantage and is preferable to a weak environmental assessment law such as the one now proposed by the Environment Agency,\textsuperscript{196} a series of recent cases indicates that

\textsuperscript{193} Decision of Feb. 27, 1975, Kumamoto District Court, 772 Hanrei Jihō 22 (Ushibuka case). The defendant apparently did not raise the defense that the ACLL applied, either because shobunsei or ripeness was clear since land had already been expropriated and construction was about to begin, or because of political reasons.
\textsuperscript{194} Id. at 27. Translation from K. Fujikura, et al., supra note 10, sess. 12.
\textsuperscript{195} Ushibuka case, 772 Hanrei Jihō at 27.
\textsuperscript{196} See note 26 and accompanying text supra. The American lawyer may marvel at the
the courts may be losing their zeal for defending environmental interests. In 1977, for example, the Tokyo High Court dismissed an appeal from a denial of an injunction against the construction of a garbage disposal plant despite the fact that the defendant began an environmental assessment only at the urging of the trial court after litigation had begun.\textsuperscript{197} The actions of the District Court in this case and in the \textit{Izumi Crematory} case, where the court granted only a one-year injunction for the parties to reach a settlement, are examples of a judicial inclination to avoid direct and unconditional injunctions against governmental activity if substantial economic loss would result or if the public need for the challenged facility or activity is high.\textsuperscript{198} As long as the procedural requirements remain unarticulated, environmental plaintiffs will remain susceptible to judicial compromises which effectively accept governmental \textit{faits accomplis}.\textsuperscript{199}

\section*{IV
ENVIRONMENTAL PRESERVATION
AND THE BIWA CASE}

The development of civil and administrative doctrines enabling individuals to challenge official acts threatening their quality of life is of considerable significance to students of the Japanese legal process. The \textit{Biwa} case provides a good vehicle for examining the effect these developments may have in the area of environmental protection.

The goal of the \textit{Biwa} plaintiffs is the preservation of Lake Biwa. Furthermore, it is hoped that a halt to the Comprehensive Development Project will lead to an eventual reversal of the worsening pollution in the southern portion of the lake.\textsuperscript{200} Plaintiffs, all residents of the Kinki area,\textsuperscript{201} wish to preserve the lake because of its recreational and cultural value. They are not directly economically or physically dependent on the lake and would be hard pressed to allege any economic harm from the environmental degradation of the lake. Scattered throughout the Kinki area, they are not in a position to claim they are defending their "living environment" or neighborhood character, at

\textsuperscript{197} Decision of Apr. 27, 1977, Tokyo High Court, 853 Hanrei Jiho 46.
\textsuperscript{198} See text accompanying notes 69-70 supra.
\textsuperscript{199} With a clearly delineated statutory duty of prior assessment, the legal basis for an injunction may be stronger. Additionally, determinations that developers have complied would be much easier in both civil and administrative cases.
\textsuperscript{200} See note 6 and accompanying text supra.
\textsuperscript{201} Although Biwa is a part of the Kinki area, frequently the plaintiffs are not from the affected area. See note 188 supra.
least not as the courts have previously applied these concepts. Since plaintiffs’ interests fall outside the bounds of present Japanese environmental law doctrine, their lawyers’ task was to devise a strategy for convincing the court to break new ground.

The first tactical decision was whether to proceed with a civil or an administrative suit. The administrative approach may have appeared advantageous since the statute on which the Project was based, the Special Measures Law for the Comprehensive Development of Lake Biwa,\(^2\) includes provisions clearly requiring the developers to “preserve the natural environment of Lake Biwa and restore already polluted water.”\(^3\) The duty of environmental assessment, therefore, seemed clear, and plaintiffs knew they could show that defendants had given virtually no consideration to environmental problems.\(^4\) Personal injury need not be shown in an administrative case, eliminating severe causation problems, saving money and, more importantly, saving time. If the plaintiffs could show a failure to abide by the statute, the construction could be stopped—assuming the court would enjoin such a mammoth project.

Unfortunately, the plaintiffs lack the individual *legal* interest necessary for administrative standing.\(^5\) and the action, because of the status of the Project as a comprehensive plan, lacks *shobunsei* or ripeness.\(^6\) A finding of standing would have required an unusually broad interpretation of the Special Measures Law, extending protection to all residents of Kinki without being characterized as protecting a “reflex” or general interest of the public. This interpretation, although perhaps not impossible, was very unlikely. The *shobunsei* problem, however, would have been insurmountable since the requirement that the administrative act create legal rights or duties in specific individuals virtually immunizes regional development plans against attack through administrative law.

Since plaintiffs could not pursue the quicker and easier administrative route, they attempted to convince a civil court that it should go beyond the traditional doctrines of tort law. The lawyers, realizing that the case represented a new stage in environmental litigation,\(^7\) felt it

\(^2\) Biwako Sōgōkaihatsu Tokubetsu Sochi Hō, Law No. 64 of 1972.
\(^3\) Id.
\(^4\) See note 5 *supra*. In this sense the case looks easier for plaintiffs than either the Nikkō Tarō cedar case, see text accompanying notes 128-30 *supra*, or the Usuki cement case. See text accompanying notes 130-35 *supra*.
\(^5\) See text accompanying notes 89-120 *supra*. The harm alleged is difficult to characterize as infringement of plaintiffs’ individual *legal* interests that are intended to be protected by the statute.
\(^6\) See text accompanying notes 73-89 *supra*.
\(^7\) The following description of the lawyers’ mental processes is drawn from the author’s discussions with them and attendance at several working meetings during 1977.
was perfectly suited for the application of the environmental right theory (kankyōken). Since the plaintiffs were motivated by environmental concerns rather than physical or economic interests, proof of potential health hazards as required by traditional tort theories, if possible at all, would be extremely difficult and time consuming. The government's conduct, flagrantly neglectful of environmental values, might convince the court that a new theory was warranted in this case. The lawyers stressed the environmental right theory in the complaint, and the extrajudicial movement organized by the plaintiffs themselves portrayed the case as attempting to vindicate environmental rights.

A change in strategy soon became necessary since the chief judge indicated, both formally and informally, that the court was not interested in developing judicial doctrine. This reaction was not unanticipated, and the lawyers were able to fall back on conventional tort allegations included in the complaint. The court's attitude was nonetheless a considerable blow to the plaintiffs' hopes since it eliminated any chance of a quick and inexpensive victory. They would now have to vindicate their environmental concerns by showing infringement of their article 710 personal rights, that is, by presenting the development plan as affecting their health or living environment. It seemed unlikely that the neighborhood preservation doctrine would be helpful, however, since the interest recognized in that doctrine refers to a particular, discrete residential area bordering on a proposed development project. The problem was to characterize plaintiffs' interests so that they would come within a broad interpretation of the health element of the personal right.

The plaintiffs attacked the problem by trying to establish a connection between the planned construction and dangers to the quality of the drinking water that the lake provides to downstream residents. A necessary step, however, is to connect the planned construction to increased pollution, which engenders monumental problems of proof of causation. To show increased pollution, plaintiffs have relied primarily on three arguments. First, they argue that the proposed treatment plant will be technologically inadequate to deal with increasing amounts of heavy metals and other toxic substances that will be discharged from the growing number of industrial plants located on the southern rim of

208. See notes 166–68 and accompanying text supra.
209. This movement (undō) included demonstrations in the parking lot of the courthouse before hearings, organized bike rides around Lake Biwa, and distribution of written materials describing the purpose of the suit. Although modeled after the movements which accompanied the "big four" pollution cases, see note 11 and accompanying text supra, the Biwa movements had not by 1977 gained much momentum compared to those earlier movements.
210. See text accompanying notes 2–4 supra for a description of the planned development.
the lake and from the additional industry called for by the Project. Second, they argue that the landfill associated with the construction of the treatment plant and the ring road would isolate significant portions of the lake and thereby drastically impede natural purification processes in those areas. Third, they argue that the 1.5 meter drop in water level would reduce the self-purification capacity of the lake both by decreasing total water volume and by destroying substantial animal and plant habitats.211

If the plaintiffs can tie the Project to increased pollution they will then need to prove a threat to their personal rights. Here they present two arguments. First, they argue there would be a health hazard in the long-term accumulation of toxic substances, for example, heavy metals and PCB's. Second, plaintiffs argue that the knowledge of drinking heavily polluted water would be a source of justifiable anxiety even if there was insufficient evidence to establish with legal certainty the existence of a health hazard.212

From mid-1976, when the suit was filed, to late 1977, plaintiffs' lawyers drafted and submitted detailed briefs explaining the scientific probability of the first argument and the legal reasonableness of the second. Meanwhile the defendants stressed another major preliminary issue—that article 44 of the ACLL applied to immunize the Project from civil injunctions.213 Defendants filed several briefs explaining the government's actions as the exercise of public power but they chose not to respond substantively to the plaintiffs' scientific arguments, presumably hoping that the court would reject them as too speculative. In December 1977, the court announced that the plaintiffs could begin to present evidence to substantiate the claims made in their briefs. This ruling implied a rejection of defendants' ACLL argument and acceptance of the theoretical basis of the plaintiffs' personal right arguments.214

This was a great victory for the Biwa plaintiffs. They had desired to establish a judicial precedent requiring defendants to conduct an environmental assessment and to consult with interested citizens concerning issues that go beyond the neighborhood preservation cases. The initial filing of the action forced defendants to conduct an environmental assessment, although belated and of debatable thoroughness. Moreover, defendants' answer came close to admitting a legal obligation to

211. Plaintiffs' complaint, supra note 1, at 17-32.
212. Id. at 32.
213. But see text accompanying note 57 supra.
214. There is no published opinion or interlocutory decree stating the court's decision to allow the case to proceed as a civil action. The chief judge merely informed the parties in open court that he was ready to proceed with the plaintiffs' evidence. It is, therefore, impossible to know the reasoning of the court's decision.
conduct an assessment by stating that the defendants "do not deny the appropriateness of an environmental assessment whenever there is about to be an artificial change in the natural environment caused by a development project or the like." 215

Second, to the extent that the government must explain and justify its actions in a public forum, the plaintiffs also have been partially successful in achieving their goal of consultation. 216 The trial may force the government to reveal the results of its scientific and engineering surveys. Because of the lack of pretrial discovery and the closed nature of the Japanese administrative process, the government has been able to avoid public disclosure of almost all scientific or engineering data concerning its plans. 217 Now the defendants must either counter the plaintiffs' evidence or risk defeat. Defendants might still remain silent, however, calculating that the plaintiffs will be unable to establish a high enough probability of danger to human health to convince the court that an injunction is appropriate. In light of the court's initial acceptance of the plaintiffs' offer of scientific proof, however, this response seems unwise and therefore unlikely.

V
PROSPECTS FOR THE FUTURE

Although courts often are persuaded to review developmental projects to ensure that environmental values have received some consideration and that "democratic procedures" have been followed, and will in extreme cases grant injunctive relief, the legal basis of the courts' power and the nature of the legal standards to be applied are unclear. Environmentalists claim that the power stems from the citizens' environmental rights guaranteed by articles 13 and 25 of the Japanese Constitution and that the standard applied should be absolute protection of the environment. The government admits the wisdom of assessment and consultation, but claims that the legal or administrative duty is beyond judicial scrutiny. Its fallback position in a civil action is to stress the public nature and value (kōkyōsei) of the enterprise and the gravity of an injunction against a project undertaken in the general public interest. The government strongly pressed this approach in oral and written argument before the Supreme Court in May 1978, in its appeal of

215. Defendants' answer at 21. They also claimed adequate surveys had already been taken. Id. at 8, 21.
216. The defendants also claimed that the approval of the Project by the prefectural assembly and the mayors of affected cities and towns guaranteed that the residents' views were adequately reflected in the completed plan. Id. at 18, 21, 22.
217. The defendants denied any duty to make the results public or to get the permission of interested residents before construction. Id. at 21.
the Osaka Airport case.218

It therefore appears that stress on a project’s public nature and value will continue to be the government’s main strategy. The courts and many scholars, meanwhile, have generally favored the familiar doctrines—the health-related personal right or jinkakuken, and the “tolerable limits” test or the juningendoron. Their application and scope, however, now extend far beyond the problems for which tort doctrine was originally developed. Although the courts have clearly rejected the government’s administrative law arguments in applying tort doctrines, they remain sensitive to the public nature argument and are reluctant to enjoin a project that is portrayed as necessary to the general public interest. Additionally, courts are under increasing pressure to give precedence to economic development in the face of the current recession.

This lack of consensus results not only in doubt as to the staying power of the courts,219 but also in uncertainty as to precisely the legal requirements for administrative agencies undertaking development projects. It is not clear whether assessments must cover the natural environment or whether the government’s legal obligation ends with consideration of effects on the narrowly defined “living environment” as it is used in the antipollution legislation.220 Even if pure environmental cases are eventually successful and citizens’ concerns for ecological damage are given legal protection, the assessment and consultation procedures to be followed are exceedingly vague. If the government continues to view its duty of ensuring “democratic procedures” as limited to holding meetings explaining the project to local residents well after fundamental decisions have been made, little will have been accomplished.

It is difficult to see how courts, through civil injunctions, can assure environmental groups the opportunity to participate in the administrative process at the planning stage. These groups have the interest and resources to provide a necessary and effective check to planning errors in projects such as the Lake Biwa development or the New Tokyo International Airport at Narita.221 But even if the conventional

219. See text accompanying notes 197-99 supra.
220. See text accompanying note 23 supra.
221. The question is not whether a new airport should be built, but rather how it should be built. Accommodating competing interests effectively and efficiently requires consultation with affected individuals, consideration of environmental consequences, and careful planning. Not including these factors may result in situations such as those surrounding the construction of the New Tokyo International Airport at Narita. Not only did the airport itself open years behind schedule and after construction was completed, but the Japanese National Railways has apparently given up its plan to build a Shinkansen (Super-express or “bullet train”) line from Tokyo to Narita because of the opposition of residents along the
doctrines are stretched to embrace cases like Biwa, the time and expense involved in proving an infringement of the personal right will make judicial review unlikely in any but the easiest and best publicized cases. This would provide little incentive for public agencies to allow substantial citizen participation. Nor is it clear that cases like Biwa will be won. With the avoidance of unmitigated disasters like Minamata and Yokkaichi, public attention is no longer so easily focused on the environment, especially in a time of economic trouble leading to foreign and domestic demands for accelerated economic growth. These trends worry Japanese environmentalists who rely on the importance of extrajudicial publicity and pressure in achieving judicial success, particularly when government or big business is involved.\footnote{222}{Discussions with environmentalists and their lawyers in 1977 indicated that both groups still feel widespread citizen support is quite helpful in winning environmental litigation. See note 209 \textit{supra}.}

All parties would prefer clear rules to uncertainty about the environmental considerations to be included in governmental planning and the form of public participation. The obvious way to end the uncertainty is through legislation.\footnote{223}{Plaintiffs have tried in both civil and administrative cases to convince a court to make legally enforceable the 1972 Cabinet Understanding which extolled but did not legislate the virtues of environmental planning, see note 16 \textit{supra}, but no court has yet done so explicitly. One court explicitly rejected the plaintiffs’ attempt to make the Cabinet Understanding enforceable. Decision of Apr. 27, 1977, Tokyo High Court, 853 Hanrei Jiho 46 (construction of a garbage disposal plant). The understanding, even if enforceable, would provide little more in the way of guidance than that provided by the general duty of care. Broadly worded, it requires only a survey of possible impacts and “appropriate” measures to minimize them. See note 16 \textit{supra}. No procedures or criteria are provided. The result is confusion and uncertainty on all sides as to the procedures and content of environmental assessments and citizen consultation.}

The courts might yet devise workable, systematic procedures. It would certainly be possible for the Japanese Supreme Court to survey the doctrinal confusion and decide that clarification is essential. It could use a particular case, perhaps the \textit{Osaka Airport} case now pending before it, to dispel the doctrinal uncertainties in both the admin-
trative and civil law fields. It is unlikely that the Court will do so, however. The Japanese Supreme Court has yet to be criticized for being activist, and in fact has generally avoided even the appearance of judicial involvement in social and political questions. Hesitation is especially likely in environmental law since the creation of uniform standards would substantially intrude into the daily operation of governmental agencies.225

Perhaps this is the way it should be in a legal culture so deeply imbued with the importance of administrative independence.226 It may well be wiser for the Japanese Supreme Court to remain silent on many of the disputed issues and to allow further incremental development by the district and high courts. Caution also allows the legislative process time to work. Unless one agrees with the environmental right theory of constitutional law, the correct judicial course is not doctrinally clear; thus judicial improvisation along the lines explored in this Article is likely to continue. In the meantime, it is to be hoped that the courts will continue to check at least the extreme cases of official action that ignore adverse environmental impacts.

CONCLUSION

The Japanese legal system must grapple with the environmental hazards faced by all industrialized nations. If the Japanese response seems incomplete and tentative in comparison with the highly articulated standards developed by American courts under NEPA,227 it must be remembered that Japanese courts are working with very little statutory authority and within a legal culture that only grudgingly admits the propriety of judicial review of administrative action. Furthermore, the judicial doctrines are still evolving. It may be that environmentalists' worst fears will be realized, and the response of the Japanese courts will be ineffective. Nonetheless, the achievements of the Japanese judiciary and environmental lawyers to date cannot be slighted, given the obstacles they face. Against continuing hostility from the central government and without the support of nationally organized, well-financed groups such as exist in the United States, the lawyers and courts have succeeded in building a body of case law that provides at least minimal procedural and substantive protection for environmental values. Courts can be called upon by ordinary citizens in most cases to prevent

225. The Supreme Court's reluctance to meet these issues directly is forcefully demonstrated by its suggestion at oral argument in the Osaka Airport appeal that the parties settle the case, despite the 2½ years that passed since the high court decision.
226. For a discussion of the importance placed on administrative independence by early Japanese political bodies, see Wada, supra note 34, at 1-25. For a general discussion of the Japanese legal culture, see H. Tanaka, supra note 11, at 269-352.
gross negligence in governmental planning that adversely affects the environment. The willingness among many Japanese citizens to push the courts further should be of considerable interest both to environmentalists and to students of the legal process.